



SEARCH AND SURVEILLANCE POWERS





SEARCH AND SURVEILLANCE POWERS

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

The Commissioners are:

Right Honourable Sir Geoffrey Palmer – *President*

Dr Warren Young – *Deputy President*

Helen Aikman QC

Professor John Burrows QC

The General Manager of the Law Commission is Brigid Corcoran

The office of the Law Commission is at Level 19, HP Tower, Featherston St, Wellington.

Postal address: PO Box 2590, Wellington 6001, New Zealand

Document Exchange Number: sp 23534

Telephone: (04) 473-3453, Facsimile: (04) 914-4760

Email: com@lawcom.govt.nz

Internet: www.lawcom.govt.nz

National Library of New Zealand Cataloguing-in-Publication Data

New Zealand. Law Commission.

Search and surveillance powers.

(New Zealand Law Commission report, 0113-2334 ; 97)

ISBN 978-1-877316-34-0

1. Searches and seizures—New Zealand. 2. Remote sensing
—New Zealand. 3. Electronics in criminal investigation—New Zealand.

I. Title. II. Series: New Zealand. Law Commission.

Report ; 97.

345.930522—dc 22

Report/Law Commission, Wellington, 2007

ISSN 0113-2334 ISBN 978-1-877316-34-0

This report may be cited as: NZLC R97

This report is also available on the Internet at the Law Commission's website: www.lawcom.govt.nz



Search and surveillance powers

CONTENTS

Letter of transmittal.....	13
FOREWORD	14
ACKNOWLEDGEMENTS	17
TERMS OF REFERENCE.....	19
SUMMARY	20
Chapter 1 – Introduction.....	20
Chapter 2 – Values underpinning search and surveillance powers.....	20
Chapter 3 – Common issues	21
Chapter 4 – Applying for and issuing search warrants	22
Chapter 5 – Warrantless powers of entry, search and seizure.....	22
Chapter 6 – Executing search powers.....	23
Chapter 7 – Computer searches	23
Chapter 8 – Search of persons.....	24
Chapter 9 – Search of vehicles	25
Chapter 10 – Production and monitoring powers	25
Chapter 11 – Interception and surveillance	25
Chapter 12 – Privileged and confidential material.....	26
Chapter 13 – Post-execution procedures	27
Chapter 14 – Remedies and immunities.....	27
Chapter 15 – Reporting on the exercise of search and surveillance powers.....	28
Chapter 16 – Implementation	28
CHAPTER 1.....	30
Introduction.....	30
The growth of search powers.....	30
The nature of the problem.....	31
Scope of report	32
Discussion paper.....	32
Approach taken in report.....	33
Our report.....	34
CHAPTER 2.....	36
Values underpinning search and surveillance powers.....	36
Introduction	36
Human rights values and law enforcement values	37
Overview	37
Human rights values.....	37
Introduction	37
Privacy.....	38
Personal integrity.....	40
Property rights	40
Rule of law	41
Law enforcement values.....	41

Effectiveness	42
Simplicity	42
Certainty.....	42
Responsive to different operational circumstances	43
Human rights consistency.....	43
Reasonable expectations of privacy	43
Purpose of reasonable expectations of privacy enquiry	44
Reasonable expectations of privacy: what it covers and how it is assessed.....	44
Challenges created by the reasonable expectations of privacy concept.....	46
Challenges.....	46
The solution	47
Conclusion	47
What law enforcement activities should our search and surveillance regime cover?	48
Presumptive requirements to achieve consistency with reasonable expectations of privacy?	48
Warrant.....	49
Warrant be validly issued	50
Warrant issued by a neutral officer.....	50
Warrant issued with reasonable grounds for belief of offending	51
Discretion to decline to issue warrant	51
Execution of warrant	52
Conclusion.....	52
Departing from presumptive requirements: justified limits.....	53
CHAPTER 3	56
Common issues	56
Introduction	56
Threshold for the use of search and surveillance powers	56
Power to seize evidence	59
Other approaches.....	60
Seizure of relevant things	60
Material of substantial value.....	61
Pros and cons of a broader approach	61
Proposed new test.....	62
Additional issues considered	63
Intangible material.....	63
Exculpatory material	63
Seizure of forensic material	64
Adequacy of section 198 to deal with the seizure of forensic material.....	65
Adequacy of section 198 to deal with the seizure of samples.....	66
Options for reform.....	67
Consent.....	69
Current New Zealand law.....	69
Problems with the current approach	69
Threshold	70
Pre-conditions of a valid consent.....	71
Risks and benefits	73
Scope of above proposals	73
Who may give consent?	74
Lawfulness of a search conducted relying on consent given by someone without actual authority	75
Age at which a person has authority to consent.....	76
Scope of consent.....	77
Implied licence to enter private property	78
Plain view.....	80
Current New Zealand law.....	80
Material relevant to offence that is subject of warrant.....	80
Material relevant to unrelated offence	81
Search and Search Warrants Committee Report	82
Victorian Parliament Law Reform Committee	82
The meaning of plain view	82
Submissions on Preliminary Paper 50.....	83

Offending to which plain view rule applies	84
Bringing evidence into plain view	84
Application to vehicles and people	84
Analogy with surveillance powers	85
Application of the plain view doctrine to regulatory inspections or where an item is sighted by an enforcement officer with no jurisdiction.....	86
Items seen during regulatory/compliance inspections	86
Items seen while exercising a stop power under the Land Transport Act	86
Items seen while exercising specific enforcement powers	87
Notification	88
Application of chapter 6 (execution of search powers) to items found in plain view.....	88
CHAPTER 4.....	90
Applying for and issuing search warrants	90
Introduction	90
Scope of search warrants.....	90
Offence threshold for issuing warrants.....	90
Things for which a warrant may be issued.....	93
<i>New Zealand legislation – different approaches</i>	<i>93</i>
<i>Simplifying warrants – seizing evidential material</i>	<i>94</i>
Future offences	94
What may be searched.....	95
Search warrant applications.....	97
Who may apply	97
<i>Applications by private investigators</i>	<i>97</i>
<i>Supervising the application process.....</i>	<i>99</i>
<i>Restrictions on the rank and level of an applicant for a warrant</i>	<i>99</i>
Manner of application	100
<i>Applications on oath</i>	<i>101</i>
<i>Electronic applications</i>	<i>101</i>
<i>Oral applications</i>	<i>102</i>
<i>Personal appearance</i>	<i>103</i>
<i>Obtaining the warrant prior to execution</i>	<i>104</i>
Content of application	106
Previous applications.....	107
Retaining applications.....	109
Issuing warrants.....	111
Who may issue a search warrant.....	111
<i>People other than judges issuing warrants.....</i>	<i>113</i>
<i>Issue of warrants only by authorised officers.....</i>	<i>114</i>
<i>Availability of issuing officers</i>	<i>117</i>
<i>Authorisations by commissioned officers of police.....</i>	<i>117</i>
Anticipatory search warrants	118
Discretion to issue warrants	119
Contents of search warrants	120
Particularity	120
Form of warrant	120
Duration of warrants.....	121
Imposing conditions	122
More than one execution	123
When a warrant may be deemed to be executed	124
<i>Renewing warrants</i>	<i>125</i>
Defects in warrant application or search warrant.....	126
Defects in applications	126
Defects in warrants	127
Effect of s 204 Summary Proceedings Act 1957.....	127
CHAPTER 5.....	130
Warrantless powers of entry, search and seizure.....	130
Introduction	130

The rationale for warrantless powers.....	130
Scope of powers to enter, search and seize without warrant.....	131
Power to enter places in order to arrest	132
Entry to execute an arrest warrant	132
Entry to arrest without warrant	133
<i>Problems with section 317(1)</i>	133
<i>Rationales for entry: flight risk and evidence protection</i>	133
<i>Where the offender remains on the premises</i>	134
Arrest of persons who are “unlawfully at large”	135
Powers to search places incidental to arrest.....	136
Current New Zealand law	136
Search incidental to arrest for evidential material of the instant crime.....	137
Evidential material as opposed to other items	138
Pre-requisite for a search: reasonable belief that there is evidential material in the place	138
What places may be searched?.....	138
<i>Option 1: immediate environs of arrest</i>	139
<i>Option 2: the House of Lords’ approach in Rottman</i>	140
<i>Option 3: as for option 2, but including places from which the arrested person has fled</i>	140
<i>Option 4: any place within the arrested person’s possession or control</i>	140
<i>Option 5: any place where there is undue risk that delay will cause loss of evidential material</i>	141
Exigent circumstances	141
Current New Zealand law	141
A provision of broader scope than crime prevention	142
The degree of injury, loss or damage.....	143
“Reasonable grounds to suspect”	144
Police action post-entry	144
Non-police action: common law preserved	146
Entry, search and seizure for specified offences or to preserve evidence.....	146
Current New Zealand law	146
Retaining existing statutory powers.....	146
Controlled delivery of drugs.....	148
Evidence of other serious offending.....	149
Road safety powers of entry	150
Powers of entry and search of non-police enforcement officers	151
Scope of non-police warrantless search powers.....	152
Principles governing exercise.....	152
CHAPTER 6.....	156
Executing search powers	156
Introduction	156
Manner of execution.....	156
Who may execute entry, search and seizure powers.....	156
Responsibilities arising from search.....	158
Prior announcement.....	158
When prior announcement may be dispensed with.....	159
Use of force	159
<i>When forcible entry may occur</i>	159
<i>Degree of force that may be used</i>	160
Time of execution.....	161
Conduct of search	163
Search in absence of occupier	164
Covert searches	165
Assistance in the exercise of search powers	167
<i>Use of assistants</i>	167
<i>Responsibility for assistants</i>	168
<i>Powers of assistants</i>	169
<i>Use of equipment</i>	171
<i>Voluntary assistance</i>	172
<i>Compelled assistance</i>	173
Powers to take photographs, video recordings or other images.....	174

Powers to take copies or extracts of documents	175
Removing items for examination	176
Securing the scene.....	178
<i>Securing a crime scene while a warrant is obtained</i>	179
<i>Securing a search scene</i>	181
<i>Advice to people affected</i>	182
<i>Detaining people at search scenes</i>	182
<i>Detention and the use of force</i>	183
Providing information concerning the search.....	184
Information provided before and during the search.....	184
Information as to anything seized	185
Other information to be provided with inventory.....	187
Information to be provided where no occupier at place searched	187
<i>Who is an occupier for notification purposes?</i>	188
<i>Notification to a person other than an occupier</i>	189
Dispensations from the notification requirement	190
CHAPTER 7	194
Computer searches	194
Introduction	194
Parameters of this chapter	194
Summary of recommendations	195
Whether a different search regime is required for intangible material	197
<i>Australia: ancillary powers with additional threshold</i>	199
Law enforcement access to and copying of intangible material	200
Current New Zealand law	200
Option for reform	201
Computer search methods	201
<i>Previewing</i>	202
<i>Forensic copying</i>	203
<i>Relative merits of different search methods</i>	203
Current New Zealand law	204
Options for reform.....	206
Specificity	208
Specificity of the warrant	208
Specificity of the search.....	210
Options for reform.....	210
Seizures beyond the scope of the search power: proposed operation of the plain view doctrine	213
Remote access.....	215
Current New Zealand law	215
Options for reform.....	216
<i>Scenario A: Remote execution of the computer search</i>	217
<i>Scenario B: Remote access to data from a computer found on the search premises.</i>	218
<i>Scenario C: Access to remotely stored data in the absence of a dedicated computer</i>	220
<i>Scenario D: Remote accessing of stored private communications as a parallel power to the interception warrant regime</i>	221
<i>Scenario E: Warrantless powers to search remotely in exceptional circumstances</i>	222
The privacy implications of remote searches.....	223
Extraterritorial issues.....	224
Measures to enable access	229
Requiring assistance	229
Circumventing security	231
Securing computer equipment	232
Information about the search.....	232
Remote access: post-search information	232
Procedures for managing seized material.....	233
Returning and disposing of items removed and copies generated for examination	233
Retaining forensic copies	234
Law enforcement custody of retained material	235

CHAPTER 8	238
Search of persons	238
Introduction	238
The meaning of “the person” for the purposes of this chapter	239
Circumstances in which search of the person may occur for general law enforcement purposes	239
Consent	240
Where the person is in a private place or vehicle that is being searched	240
Options for reform	240
Search for dangerous items	242
Power to search for specified purposes and in specified places	243
Possession of potentially harmful items	244
Possession of items related to border control	245
Extension to other items that may not be possessed	246
Stolen goods in transit	247
Evidential material relating to serious offences	248
Where person leaves search location before search conducted or completed	249
Search following arrest	250
Personal search incidental to arrest	250
<i>The common law</i>	250
<i>Step 1: An initial frisk search</i>	252
<i>Step 2: A more thorough search</i>	253
Search at police lock-up	254
<i>Search by members of the police other than constables</i>	255
Power to search following detention	256
Search of the person for identifying marks	257
Searches of persons by non-police agencies	258
Border Control	259
Endangerment to life	260
Powers to search persons incidental to a search power for places or vehicles	260
Search for dangerous items	261
Where the person leaves the search scene and is subsequently found elsewhere	261
Search incidental to arrest	262
Power to search following detention	262
Manner of execution	263
Method of search	263
<i>Use of devices or aids</i>	263
<i>Strip searches</i>	263
<i>Internal body searches</i>	263
Advice to the person being searched	264
Using assistants	265
Detaining people who are being searched	266
Search of the person for DNA material	267
CHAPTER 9	270
Search of vehicles	270
Introduction	270
Current law and the problems with it	271
Definition of vehicle	272
Power to search with warrant	272
Power to search without warrant	273
General approach	273
Exigent circumstances	273
Evidence of serious offending	274
Unlawfully possessed items	275
Stolen and dishonestly obtained property	275
Power to search vehicles incidental to arrest	276
Authority to search vehicle found at a place other than the location where the vehicle is stopped or found	278
Searches of vehicles by non-police agencies	279

Certain police powers to be extended to non-police enforcement officers.....	279
Additional vehicle search powers for non-police enforcement officers	279
<i>Border protection</i>	280
<i>Protection of animals from harm or exploitation</i>	280
<i>Fisheries Act 1996 power</i>	280
Stopping vehicles to search.....	281
Police powers	281
Power of non-police enforcement officers to stop vehicles	283
Power to stop vehicles to arrest	284
Road blocks	286
Moving a vehicle to another location to search.....	286
Entry of premises to search vehicles.....	287
Inventory searches	288
CHAPTER 10.....	290
Production and monitoring powers	290
Introduction	290
Production powers.....	291
Production Orders	291
<i>New Zealand</i>	291
<i>United Kingdom</i>	292
<i>Australia</i>	293
<i>Canada</i>	293
The rationale for production orders.....	294
Production orders for criminal investigations	295
<i>Privilege against self-incrimination</i>	297
Production orders and proceeds of crime investigations	298
Production notices for criminal investigations	299
<i>New Zealand</i>	299
<i>United Kingdom</i>	300
<i>Australia</i>	300
<i>Justification for production notice power</i>	301
Production notices for proceeds of crime investigations.....	303
Monitoring orders.....	304
Existing statutory regimes.....	304
<i>New Zealand</i>	304
<i>United Kingdom</i>	305
<i>Australia</i>	305
<i>Canada</i>	305
The rationale for monitoring orders.....	305
<i>Monitoring orders and surveillance device warrants</i>	306
Monitoring order powers for proceeds of crime investigations.....	306
Monitoring order powers for general crime investigations.....	307
<i>Issues for reform</i>	308
CHAPTER 11.....	312
Interception and surveillance	312
Introduction	312
Current general approach to the regulation of non-trespassory surveillance	313
Common law	313
Statute.....	314
<i>General search warrant regime not applicable</i>	314
<i>Interception of private communications</i>	314
<i>Visual surveillance</i>	316
<i>Tracking surveillance</i>	317
Bill of Rights case law.....	318
<i>Video surveillance</i>	318
<i>Audio surveillance</i>	319
<i>Other forms of non-trespassory surveillance</i>	319
<i>Conclusion</i>	319

Should non-trespassory surveillance be the subject of statutory regulation?	320
Non-trespassory surveillance implicates reasonable expectations of privacy.....	320
Status quo creates unnecessary uncertainty and fails to respect human rights and law enforcement values ...	320
Court of Appeal preference for statutory regulation.....	321
Existing statutory regimes have operated satisfactorily	321
Surveillance regimes exist in overseas jurisdictions.....	322
<i>Australia</i>	322
<i>United States</i>	323
<i>United Kingdom</i>	323
<i>Canada</i>	324
<i>Ireland</i>	324
<i>Conclusion</i>	324
Moving from the status quo: issues.....	325
Should regulation of non-trespassory surveillance apply only to law enforcement officers and should it involve the use of the criminal law?	325
Criminalisation with a law enforcement exception	325
Law enforcement regulatory regime.....	326
Conclusion	327
Surveillance device regime	327
Coverage	328
Activities not requiring warrant authorisation	330
Warrant preference	331
Range of offences.....	331
The agencies to which the regime should be available.....	332
Prerequisites to issuing a warrant	333
Specifying the target of surveillance.....	334
Anticipatory use of surveillance device warrant.....	335
Ongoing judicial supervision	336
Maximum life of surveillance warrant.....	336
Who may issue surveillance device warrant.....	337
Authority conferred by surveillance device warrant	337
Use of surveillance devices in emergency situations.....	338
Notice of surveillance	341
A residual regime for other forms of otherwise unregulated surveillance?	343
Canadian Criminal Code, section 487.01: analysis and critique.....	343
<i>Section 487.01</i>	343
<i>Advantages</i>	344
<i>Flaws</i>	344
Discussion and recommendations	345
<i>The elements of the proposed regime</i>	346
CHAPTER 12	352
Privileged and confidential material.....	352
Introduction	352
Legal privilege	354
Background	354
<i>Description of legal privilege</i>	354
Codifying legal privilege	355
<i>Dishonest purpose/ crime exceptions</i>	356
Application of legal privilege when enforcement powers are exercised	357
<i>Current common law protection of legal privilege in the execution of search warrants</i>	358
<i>Problems with the status quo</i>	359
Option for reform	361
Jurisdictional review of privilege procedures	362
<i>Section 198A Summary Proceedings Act 1957</i>	362
<i>Particularising privilege claims</i>	362
<i>New Zealand protocol relating to claims of parliamentary privilege</i>	363
<i>Australian protocol relating to claims of legal professional privilege</i>	364
<i>Canada</i>	365
<i>United Kingdom</i>	365

<i>United States</i>	366
<i>Civil procedure rules</i>	367
Content of recommended statutory procedures.....	368
<i>Aims</i>	368
<i>Key elements of the recommended procedures</i>	368
Restriction on issuing warrants for privileged material.....	369
Searches of confidential client material held by lawyers vs other searches	369
Securing search material	372
Independent supervision of the search	374
Particularisation of privilege claim.....	376
<i>Privilege claims in relation to plain view material</i>	376
Computer searches.....	377
Role of legal profession in protection of legal privilege.....	380
Limitations on using privileged material.....	381
Surveillance.....	381
Section 198A Summary Proceedings Act 1957	383
Religious and medical privileges	383
Confidentiality.....	384
Confidential material generally.....	384
Matters of state	386
Confidential journalistic sources	387
Protecting third party confidentiality and privacy	390
Production orders	391
CHAPTER 13.....	396
Post-execution procedures	396
Introduction	396
Access to seized items that are retained.....	396
Current law	396
Retention, return or disposal of seized material	399
Current law	399
Problems with the current law	400
Retention, return or disposal of property prior to conviction.....	401
<i>Overseas legislation</i>	401
<i>Proposed approach to legislation on retention and disposition</i>	402
<i>Retention for evidential or investigative purposes</i>	403
<i>Return where photograph or copy would be sufficient</i>	403
<i>Return where retention is no longer required</i>	404
<i>Retention where charges laid</i>	404
<i>Retention where charges not laid</i>	404
<i>Application to court by person with an interest for the return of seized property</i>	406
<i>Competing or unsubstantiated claims</i>	407
Retention, return or disposal after criminal proceedings	409
<i>Forfeiture orders</i>	409
<i>Other disposition where forfeiture not ordered</i>	410
Items that may not be lawfully possessed	411
Perishable goods and seized items of no value.....	412
Unclaimed seized items	413
Relief from forfeiture	413
Suspending forfeiture orders	413
Retention of copy by enforcement agency	414
Access to warrant applications or reports	415
CHAPTER 14.....	418
Remedies and immunities.....	418
Introduction	418
Remedies for unlawful conduct: The current position.....	418
Criminal law.....	419
Monetary compensation.....	419
Exclusion of evidence.....	419
Injunction or declaration or order for return	420

Accident compensation	420
Remedies: recommendations	420
General approach.....	421
Repeal of section 312M Crimes Act 1961 and section 25 Misuse of Drugs Amendment Act 1978	421
Use of criminal law to vindicate privacy?	422
Immunities: the current position	423
Immunities: recommendations.....	426
Justices of the Peace.....	426
Enforcement officers	427
People who assist enforcement officers.....	429
The Crown	429
CHAPTER 15	432
Reporting on the exercise of search and surveillance powers	432
Introduction	432
Policy objectives.....	433
Current law and practice	434
Reporting to the head of the enforcement agency	434
Reporting to the issuing officer.....	434
Reporting to Parliament	435
Options for reform	435
Internal reporting within the enforcement agency	436
Reporting to the issuing officer.....	439
<i>Recommended scope of the reporting requirement in New Zealand</i>	441
Reporting to Parliament.....	443
Other external scrutiny.....	446
CHAPTER 16	450
Implementation	450
Police search powers	450
Surveillance powers of enforcement officers	451
Monitoring and production powers.....	451
Generic provisions governing the exercise of search and surveillance powers	452
Amendments to statutes containing specific search regimes	453
Other matters	453
APPENDIX	456
Glossary of terms.....	456
RECOMMENDATIONS	462
Chapter 3	462
Chapter 4	464
Chapter 5	467
Chapter 6	469
Chapter 7	473
Chapter 8	475
Chapter 9	479
Chapter 10	481
Chapter 11	482
Chapter 12	485
Chapter 13	489
Chapter 14	491
Chapter 15	492
INDEX	496
Legislation referred to	496
New Zealand	496
Commonwealth	499
United Kingdom	499
Australia.....	499
Canada	500

29 June 2007

The Hon Mark Burton
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

Dear Minister

NZLC R97 – SEARCH AND SURVEILLANCE POWERS

I am pleased to submit to you Law Commission Report 97, *Search and Surveillance Powers*, which we submit under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Geoffrey Palmer', with a horizontal line underneath.

Geoffrey Palmer
President

Foreword

The reference from government that has led to this report arose from a growing perception that the law relating to search and seizure is outdated. In particular, the core police powers are contained in statutes that are between 40 and 50 years old. These powers have been supplemented by a wide range of other specific statutory provisions, governing both police and non-police agencies. They are spread across dozens of statutes and have been developed in a piecemeal fashion over a long period of time.

The present state of the law is, quite simply, a mess. There is significant variation in the tests laid down for the exercise of search powers that stem from the accident of their legislative history. Sometimes, too, non-police agencies, for no apparent reason, have wider powers than the police to investigate the offences for which they are responsible.

Legislation frequently does not tell law enforcement officers what coercive powers they have or how they are to exercise them. Far too much is therefore left to their individual discretion and judgement. Courts are left to determine the legality and reasonableness of their actions after the event, usually in the context of challenges to the admissibility of evidence in subsequent criminal proceedings. This unnecessarily occupies valuable court time in resolving the disputes that inevitably arise.

In a liberal democratic society, where the exercise of coercive powers by the state should be subject to clear and principled controls, the present situation is manifestly unsatisfactory. Reform is urgently needed to provide a greater measure of coherence, consistency and certainty.

At the beginning, the Law Commission set out to achieve a rationalisation of the statute book: to repeal unnecessary powers; to ensure proper alignment between those that are needed; and to address some issues relating to the exercise of powers about which the statute book is silent. That was to a large extent the focus of our Preliminary Paper No. 50 published in April 2002.

It quickly became apparent to the Commission that its initial approach would not cure the problem. The law has not kept pace with technology or with changing trends in crime. As a result, it does not provide law enforcement agencies with the powers necessary to deal with organised criminal activity that has become increasingly sophisticated and makes increasing use of modern technological aids.

In particular, the law relating to search and seizure is still framed as if most information is held in hard copy. Recognition of the existence, let alone the prevalence, of electronic information is partial and inadequate, and sometimes



prevents law enforcement agencies from obtaining the evidence that they need to prosecute and convict offenders. A search and seizure regime that clearly provides for information held on computer networks to be accessed and preserved in a form that can be used in court is long overdue.

By the same token, while it is understandable that the law governing the use of technological aids such as interception and tracking devices has developed slowly and cautiously, the limited circumstances in which such devices can be used by enforcement agencies, and the detailed and cumbersome regimes governing them, can no longer be justified. They need to be made simpler and more flexible and be extended to all agencies with search warrant powers.

The failure of the law to keep pace with modern technology has in some areas prevented law enforcement agencies from having the full range of powers that they should have. However, it has in other areas allowed agencies to use technology in a completely unregulated way, so that the law has failed to provide adequate protection for the rights of individual citizens.

In particular, unless a trespass is involved, the use of visual surveillance devices by law enforcement officers to monitor the activities of individual citizens is effectively uncontrolled. This cannot be tolerated in a free and democratic society. A surveillance device warrant regime is needed in order to ensure a proper balance between the imperatives of law enforcement and the rights of individual citizens.

The Law Commission has set out to bring order, certainty, clarity and consistency to the sprawling mass of statutory powers of search and surveillance scattered throughout the statute book. We have also addressed the glaring gaps where the law has failed to keep up with changes in modern society.

The Commission recommends that all of the general law relating to search and surveillance be brought together in a single generic statute, so that everyone will know where to find it.

This project has been a massive challenge for the Law Commission. The report that has resulted from it is the most substantial that the Commission has produced. It has 300 recommendations. Some of the measures are likely to prove controversial and to require close parliamentary scrutiny. But we are confident that our proposals provide search and surveillance powers that are appropriate to the needs of law enforcement agencies in the 21st century. They also ensure adequate safeguards, in the face of new technologies, to protect cherished rights and freedoms in a liberal democracy. Our proposals should greatly enhance certainty and provide clear rules on the exercise of search and surveillance powers for law enforcement purposes.

We have benefited immensely from the input we have received from a large number of agencies and individuals. We have particularly appreciated the constructive way in which the Ministry of Justice and all law enforcement

agencies and others have engaged in discussions, and the detailed feedback that they have provided to us on successive drafts. As a result of that engagement, we are confident that we have produced recommendations that have a large measure of consensus across the government sector.

The Commissioner responsible for this report is Dr Warren Young. Neville Trendle, a consultant to the Commission, has also played an invaluable role in overseeing the project and drafting a number of chapters. The report owes much to his experience and expertise. Research and much of the writing has been undertaken by Bruce Williams, Joanna Hayward and Claire Browning. Dr Andrew Butler also made an invaluable contribution, accepting responsibility for the drafting of the Values chapter (chapter 2), the Interception and Surveillance chapter (chapter 11) and the Remedies and Immunities chapter (chapter 14).

Early research was done by Michael Josling and Rachael James, and subsequently more substantive early draft chapters by Alexander Schumacher.

A handwritten signature in dark ink, appearing to read 'Geoffrey Palmer', with a horizontal line underneath.

Geoffrey Palmer
President



Acknowledgements

We are grateful for the contributions of a significant number of people and organisations with whom we consulted over a lengthy period during the preparation of this report. The officials in the government agencies with whom we consulted are too numerous to mention by name, but this report has benefited greatly from their consideration and input.

We thank our peer reviewers Neil Cameron, formerly Senior Lecturer, Faculty of Law, Victoria University of Wellington and Scott Optican, Associate Professor, Faculty of Law, University of Auckland for their very helpful comments and suggestions. We also thank Donna Buckingham, Senior Lecturer, Faculty of Law, University of Otago for her work in analysing the submissions on our Preliminary Paper and for her many useful comments on our draft chapters.

We thank the following for their comments or submissions during our consultation and at other times during the preparation of this report:

Ministry of Justice
New Zealand Police
New Zealand Customs Service
Department of Conservation
Ministry of Economic Development
Department of Internal Affairs
Ministry of Fisheries
Ministry of Agriculture and Forestry
Commerce Commission
Ministry of Transport
Department of Labour
Crown Law
Inland Revenue Department
Office of the Privacy Commissioner
Serious Fraud Office
Criminal Practice Committee
The Rt Hon Chief Justice Dame Sian Elias, Supreme Court of New Zealand
The Hon Justice Tony Randerson, Chief High Court Judge
His Honour Chief District Court Judge Russell Johnson
His Honour Judge TM Abbott, Christchurch District Court
His Honour Judge David Harvey, Manukau District Court

Royal Federation of New Zealand Justices' Associations (Inc)

New Zealand Law Society Criminal Law Committee

Professor John Hine, Professor of Computer Science, Victoria University of Wellington

Raymond Donnelly & Co, Christchurch

Meredith Connell & Co, Auckland

New Zealand Institute of Private Investigators

We also acknowledge those who made submissions in response to the Commission's Discussion Paper (*Entry, Search and Seizure* NZLC PP 50, Wellington, 2002).

Finally, we thank Helen Beaglehole, who edited the penultimate version of this report and made an invaluable contribution in improving the report's clarity and consistency.



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.

Summary

- 1 The recommendations made in this report have been consolidated at the back of the publication for ease of reference. This summary provides a brief outline of each chapter and the flavour of the recommendations that are made. Particular attention is given to those recommendations that mark a significant departure from existing statutory or common law, or cover new ground.

CHAPTER 1 – INTRODUCTION

- 2 Search and surveillance powers are indispensable evidence-gathering tools for law enforcement agencies. Over time there has been substantial growth in the number of statutory search powers, and whereas they were once mainly exercised by police officers, now enforcement officers from a wide range of agencies have extensive search powers. This has given rise to a number of problems. In particular, existing legislation is often incomplete and inconsistent, and its effect uncertain; it has not kept pace with changes in technology; and gaps in the legislation that are properly matters for statute have been left for the courts to fill. A consequence of this piecemeal development is that often existing legislation does not adequately provide for law enforcement needs, nor does it provide sufficient procedural protections that are consistent with the New Zealand Bill of Rights Act 1990. In short, a proper statutory framework for search and surveillance powers and how they are exercised by enforcement officers needs attention as a matter of priority.
- 3 The report is concerned with law enforcement search and surveillance powers; that is, those powers that require the enforcement officer to reach a threshold of belief or suspicion as to the commission of an offence before they can be exercised. In contrast, search or inspection powers that are enacted to secure regulatory compliance, and intended to be exercised in an environment where regulated activity is undertaken, and do not depend on the existence of a threshold before they are exercised, are not addressed.

CHAPTER 2 – VALUES UNDERPINNING SEARCH AND SURVEILLANCE POWERS

- 4 In considering the nature and scope of search and surveillance powers, two sets of complementary values need to be taken into account: human rights values and law enforcement values. The human rights values are the protection of privacy (both trespassory interferences and interferences with reasonable expectations of privacy); the protection of personal integrity, including bodily integrity; the protection of property rights; and the maintenance of the rule of law (which requires searches to be conducted only when authorised by the law, and search powers to be exercised only when necessary).
- 5 The law enforcement values reflect the public interest in the detection and prosecution of crime. They include the principles of effectiveness (fitness for purpose); simplicity (search powers should be devoid of unnecessary complexity and simply expressed); certainty (enforcement officers should be able to exercise



the powers with confidence); responsiveness (powers need to be able to meet the exigencies that arise from different operational circumstances); and the need for consistency with human rights (enforcement agencies exist ultimately to protect rather than to control the community).

- 6 The concept of reasonable expectations of privacy is developed as the mechanism for determining the way in which the human rights and law enforcement values are reconciled. Due in part to its evolving nature, trying to define the concept itself is likely to be a fruitless task. However, describing its boundaries – those activities that implicate reasonable expectations of privacy and equally those that do not – helps to identify the law enforcement activities that should be regulated. Drawing on international jurisprudence and human rights norms, it is possible to list a number of requirements that need to be met before the availability and use of a search power satisfy the reasonableness test. Those requirements guide the discussion of the nature and scope of law enforcement search and surveillance powers dealt with in the chapters that follow.

CHAPTER 3 – COMMON ISSUES

- 7 Several issues relating to the scope and content of search and surveillance powers, and how they are exercised, commonly arise and five of these are dealt with at the outset. Two of these proposals are essentially clarifying and codifying existing law and ensuring consistency in legislative approach.
- 8 First, the threshold that should be met before search and surveillance powers can be exercised by an enforcement officer is presently expressed in different ways, including reasonable grounds to believe and reasonable grounds to suspect. The recommended prerequisite for the exercise of law enforcement powers is reasonable grounds to believe – a threshold that should be departed from only in exceptional cases.
- 9 Secondly, the various statutory formulations of what should be the subject of search and seizure powers are reviewed and the adoption of the term “evidential material” is proposed to cover both evidence that would be admissible in court and other items that are of significant relevance to the investigation of the offence.
- 10 Two proposals significantly modify the current law. First, based on an analysis of the elements of a valid consent search, recommendations are made as to the advice that an enforcement officer should be required to give to the subject of a consent search for the search to be lawful. Consent should only be sought for one of the purposes specified in statute and the person concerned should be told of the reason for the request and that he or she may refuse consent.
- 11 Recommendations are also made for the consolidation of “plain view” seizure – that is, the authority of police officers (and other enforcement officers) exercising a search power in respect of one offence to seize evidential material relating to another offence discovered in the course of the search. Police officers should be able to seize such evidence.

- 12 Codification of the common law concept of implied licence for an enforcement officer to enter private land is considered. However, the problems of defining it in meaningful terms and in a way that would properly reflect the myriad of day-to-day situations where it arises, mean that such a proposal is not practicable.

CHAPTER 4 –
APPLYING
FOR AND
ISSUING
SEARCH
WARRANTS

- 13 This chapter addresses the scope and content of search warrants and the process governing the application for and issue of a warrant. It also includes a consideration of the offences for which warrants should be available and the type of things that should be able to be searched for under a warrant.
- 14 The recommendations in this chapter mainly reflect current law and practice. Many are drawn from existing statutory provisions and from operational best practice, but in several areas they break new ground. Two propose greater flexibility in the application process by recommending first, that applications for a warrant should be able to be made electronically; and secondly, that the issuing officer should be able to dispense with the requirement for personal appearance by the applicant. A third recommendation proposes that where it is not practicable for the enforcement officer to possess the original warrant at the time of execution, a facsimile of the warrant or a copy made under the direction of the issuing officer may be executed.
- 15 A number of the recommendations that are made in this chapter are intended to enhance the quality of applications and improve the application procedure. At present, the law permits non-judicial officers who need not be appropriately qualified or trained to issue warrants. To strengthen this part of the process, recommendations are made for warrants to be issued only by judges and by other specially appointed and authorised issuing officers (including Justices of the Peace and Registrars) who undertake training for that purpose.

CHAPTER 5 –
WARRANTLESS
POWERS OF
ENTRY, SEARCH
AND SEIZURE

- 16 The principle that searches by law enforcement officers must first be authorised by an independent officer acting judicially should be departed from only in exceptional cases. This chapter outlines five areas where warrantless powers for police officers to enter and search places are justified as exceptional: to arrest someone; to search places incidental to arrest; to deal with emergencies (where an offence has been committed or a situation has arisen where there is a risk to life or safety); to investigate certain offences; and, in some circumstances, to preserve evidential material relating to the most serious of offences.
- 17 The recommendations made in this chapter include proposals for the modification of existing statutory powers, the codification of the power to search a place incidental to arrest, and the creation of a new power for the police to enter and search for evidential material relating to the most serious offences in certain circumstances.
- 18 The principles that should govern the exercise of the warrantless powers of non-police enforcement officers to search places are also considered. As with police powers, they should be available only in exceptional cases where there is an overriding public interest in the granting of such a power. The public interests that justify police warrantless searches should also apply to the search powers of non-police enforcement officers. In addition, there are several other specific public interests that may justify the existence of a warrantless search power. These include the protection of New Zealand's borders, the prevention of serious

damage to the economy or to an industry that is significant to New Zealand's economy, compliance with international obligations, the protection of animals from serious or immediate injury or exploitation, and the prevention of serious damage to the environment.

CHAPTER 6 – EXECUTING SEARCH POWERS

- 19 This chapter is concerned with how search powers should be exercised. In particular, it outlines an enforcement officer's powers and obligations that arise during the search. As with chapter 4, the recommendations made in this chapter generally reflect current law and best practice and clarify some areas that are presently uncertain.
- 20 Important areas where existing law requires clarification include the assistance available to an enforcement officer executing a search power, such as the role and powers of people assisting an enforcement officer at a search scene, and the authority of an enforcement officer to remove an item from the scene for examination or processing elsewhere when it is not practicable to determine whether it should be seized at the place searched.
- 21 New provisions are proposed to empower an enforcement officer to secure a crime scene while a warrant is being obtained and to give reasonable directions to people at the scene to enable a search to be carried out effectively. It is also proposed that enforcement officers exercising a statutory power to search premises should be able to detain people present in order to determine whether anyone is connected with the object of the search.
- 22 The obligations of an enforcement officer to provide information to a person affected by the exercise of a search power immediately before and in the course of the search are enlarged. These include a requirement to provide an inventory of any property removed, with the back of the inventory form containing information about the rights of the person concerned. Where the occupier of a place is not present when a search power is exercised, the enforcement officer should be required to leave or provide notice that the search has taken place. A judge may postpone or dispense with that requirement where giving notice would prejudice ongoing or subsequent investigations or endanger the safety of any person.

CHAPTER 7 – COMPUTER SEARCHES

- 23 Enforcement agencies need effective powers to access and search devices that store intangible evidential material and to retrieve or copy that material. Though some statutes deal with aspects of an enforcement officer's access to intangible data, overall the statutory framework has not kept pace with changes in technology. As a result there are large gaps in the law. The recommendations made in this chapter do not propose the enactment of a separate code to deal with these issues; rather they are based on the premise that the search powers and procedures relating to tangible items should generally apply to intangible evidential material with such modifications that may be necessary.
- 24 For example, the power to copy material should provide for the forensic copying (cloning) of the hard drive of a storage device containing the information, and the use of force provisions should be adapted to provide for access to data held in a storage device. A specific provision is proposed to ensure that once the examination of a forensic copy of data made under the authority of a search power is completed, the copy should be destroyed unless there is a proper basis for its retention. Recommendations are also made to extend the application of the present statutory

requirement for a person to assist an enforcement officer to gain access to data held in or accessible from the place that is being searched.

- 25 One of the most difficult areas dealt with in the report is the remote searching of computers and, in particular, the proper scope of an enforcement officer's power to access data that is held remotely from the place where the search power is being exercised. The power to execute computer searches remotely is not recommended as a general law enforcement tool; nor is it recommended where it involves remotely accessing stored private communications as a parallel power to the interception warrant regime. However, recommendations are made for search warrants to authorise enforcement officers to conduct remote searches in two situations: first, to access network computer data where it is accessible from a computer found at the place being searched; and secondly, where there is no identifiable physical location where the data is stored (such as internet data storage facilities). Recommendations are also made to permit cross-border searches in these two situations where it involves publicly available data, or where it is specifically authorised by a warrant.

CHAPTER 8 – SEARCH OF PERSONS

- 26 Searches of the person are generally regarded as more intrusive than searches of an office or a house. Thus, the justification for law enforcement powers to search the person should be stronger than for other searches. This chapter examines existing search powers of both police and other enforcement officers and recommends clarification or change in a number of instances and the repeal of one statutory police power (section 224 of the Crimes Act 1961).
- 27 The present authority to search a person upon arrest and following detention in police custody is derived from a mix of statute and common law. This has produced overlap and uncertainty, and codification (including the authority to conduct a protective frisk search) is proposed.
- 28 Recommendations are also made to extend to police officers the existing powers of customs officers to search a person who is at, or who arrives at, a place that is being searched pursuant to a search power in two situations: first, where there are reasonable grounds to believe he or she is in possession of evidential material that is the object of the search, and secondly, when there are reasonable grounds to suspect that he or she is in possession of a dangerous item that poses a threat to safety and immediate action is necessary to alleviate the threat.
- 29 Two new search powers are recommended for police officers. First, it is proposed that a police officer should have the power to search a person in a public place if the officer has reasonable grounds to believe that he or she is in possession of evidential material relating to an offence punishable by 14 years' imprisonment or more. Secondly, it is recommended that where a police officer decides to exercise a power to search a person in any place or vehicle, and that person leaves before the search is completed, he or she may be searched when subsequently apprehended, provided that the police officer is in fresh pursuit and the officer has reasonable grounds to believe the person is still in possession of the evidential material.
- 30 The second of these recommendations, and also the power to search a person following his or her arrest, should also apply to non-police enforcement officers who exercise arrest powers.

CHAPTER 9 – SEARCH OF VEHICLES

- 31 Existing powers to search vehicles are in some respects unclear or inconsistent. This has led to a significant number of vehicle search cases coming before the courts. This chapter is largely concerned with clarification of the law so that the powers and procedures for searching a vehicle should generally correspond with those for searching a place. Accordingly, a number of recommendations in this chapter align vehicle search powers with those applying to places.
- 32 The mobility of vehicles and the fact that they are commonly used on public roads, however, justify some additional warrantless powers that are not available in respect of places – for example the power under section 225 of the Crimes Act 1961 to search vehicles without warrant for stolen property. The retention of this power (with modification) and the power to search vehicles for offensive weapons is recommended. Similarly, recommendations are made for the existing statutory authority of the police to stop vehicles for the purposes of search or arrest and the authority to establish road blocks to be retained.
- 33 The obligations of non-police enforcement officers following the exercise of a statutory power to stop a vehicle are inadequately provided for in some statutes and recommendations are made to bring them into line with those that apply to police officers.

CHAPTER 10 – PRODUCTION AND MONITORING POWERS

- 34 A production order requires the person or institution to whom it is directed to provide specified information to an enforcement officer. It is issued by an independent person acting judicially. Currently in New Zealand, there is only one statute that provides for the issue of production orders for law enforcement purposes. However, a production order is often more suitable than a search warrant for evidence-gathering purposes and the enactment of a regime enabling enforcement officers to apply for production orders in respect of those offences for which they can apply for a search warrant is proposed. The retention of production orders for proceeds of crime investigations is also recommended.
- 35 The issue of production notices by an officer of the enforcement agency responsible for the investigation is not recommended. This would require a departure from the principle that the exercise of coercive powers for law enforcement purposes should first be authorised by an independent person acting judicially. No such departure is justified in circumstances where a production power would be appropriate.
- 36 Monitoring orders require the person to whom they are directed to provide an enforcement officer with existing and future information derived from the activities of or transactions made by a specified individual. As such they can be used to secure evidential material that could only be obtained by the issuing of multiple search warrants. Their availability is recommended as an additional law enforcement investigative tool for those offences for which a search warrant could be issued. Monitoring orders for proceeds of crime investigations should continue to be available for financial information, but in respect of offences punishable by five years' imprisonment or more, rather than just drug offences.

CHAPTER 11 – INTERCEPTION AND SURVEILLANCE

- 37 The recommendations made in this chapter fundamentally change the law relating to the use of surveillance devices by the police and other enforcement agencies. At present, the only activities that are subject to regulation are the interception of communications by the police and the use tracking devices by police and customs officers; the use of interception and tracking devices except pursuant to that

regulation exposes the user to criminal or civil liability. However, the use of a device for other forms of surveillance, such as visual surveillance, is not regulated and no offence is committed when it is undertaken. This is unsatisfactory on four counts. There is considerable uncertainty for the police as to the lawful boundaries of unregulated surveillance activities; there is no guidance to meet the legitimate investigative needs of other enforcement agencies; the distinction between law enforcement surveillance that is regulated and that which is not, is hard to justify; and the protection of the human rights values involved in surveillance by state agencies is largely dependent on the few cases that come before the courts.

- 38 The central recommendation in this chapter is that the present interception and tracking device regimes should be replaced by a generic surveillance device warrant regime governing all forms of surveillance (including audio, tracking and visual) for law enforcement purposes. The use of surveillance devices in specified situations that do not amount to an intrusion on reasonable expectations of privacy would not be subject to regulation. Where reasonable expectations of privacy are implicated, a surveillance device warrant would be required. The key elements of the proposed framework are broadly in line with those that apply to search powers. The surveillance device warrant regime would apply to any enforcement agency that has a search warrant power and a warrant could be applied for to obtain evidential material in respect of any offence for which a search warrant could be issued.
- 39 So far as visual surveillance is concerned, the regime would apply to enforcement officers who observe private activity by means of a visual surveillance device. This would require a warrant to be obtained where the observation is of any activity occurring in a private building, or in the curtilage of a private building where the observation extends beyond certain prescribed timeframes, in circumstances where any of the parties to the activity ought to have a reasonable expectation of privacy.
- 40 Where a warrant would otherwise be required, the use of a surveillance device without warrant by an enforcement officer for up to 48 hours is recommended in certain urgent or emergency situations where obtaining a warrant is impractical.
- 41 To provide for surveillance devices other than those used to hear, observe or track, a residual warrant procedure is proposed. This would provide for the judicially authorised use of a surveillance device for law enforcement activities that interfere with reasonable expectations of privacy, but which are not otherwise provided for (for example, surveillance by the use of a device that senses smell).
- 42 The proposals made in this chapter mark a substantial change in the approach to the use of surveillance devices by law enforcement agencies. Accordingly, the recommendation is made that the enacting legislation contain a provision for a mandatory review of the surveillance device warrant regime after 5 years.

CHAPTER 12 – PRIVILEGED AND CONFIDENTIAL MATERIAL

- 43 This chapter is concerned with the manner in which and the extent to which privileged and confidential material covered by the Evidence Act 2006 should be protected from disclosure when search and surveillance powers are being exercised.
- 44 Codification of the procedure to be followed where the exercise of search and surveillance powers involves or could involve material that is subject to legal privilege (the three statutory areas of lawyer-client privilege, litigation privilege and privilege for settlement negotiations or mediation) is recommended. Where a

claim of legal privilege arises, the recommendations are directed to facilitating the making of a claim, securing and isolating the material concerned, and ensuring it is not examined for law enforcement purposes until the claim is resolved.

- 45 Recommendations are made for the codification of a similar procedure where privileged communications with ministers of religion, medical practitioners, or registered clinical psychologists are or may be implicated by the exercise of a search or surveillance power. Similar procedures are also proposed in respect of material identifying journalistic sources that attracts qualified protection under the Evidence Act 2006. However, no special procedure is proposed where material that may attract protection under the Evidence Act as confidential information or as a matter of state is or may be accessed in the course of the exercise of a search or surveillance power.

CHAPTER 13 – POST- EXECUTION PROCEDURES

- 46 The recommendations in this chapter deal with three particular areas where a search power has been exercised and evidential material has been seized. The first relates to an owner's or occupier's access to seized items that are to be retained by the enforcement officer. Before a prosecution is commenced, access with the agreement of the relevant enforcement agency is proposed, with the parties free to seek a court direction where agreement cannot be reached. After a charge has been laid, the rules relating to criminal disclosure should govern access.
- 47 Secondly, recommendations are made enabling enforcement agencies to retain a seized item for investigative or evidential purposes for an initial period, and for a person claiming to be entitled to possession to apply to the court for the return of the item at any time. Proposals relating to the retention, return and disposition of seized items generally follow the approach taken in the present law and practice, though greater opportunity is provided for particular issues to be dealt with by the court on the application of either the enforcement officer or a person claiming to be entitled to possession.
- 48 Thirdly, it is proposed that access to a search warrant application and to any reports prepared by an enforcement officer dealing with the exercise of a search power should continue to be governed by existing procedures under the Official Information Act 1982 and the rules relating to prosecution disclosure.

CHAPTER 14 – REMEDIES AND IMMUNITIES

- 49 This chapter makes recommendations as to the remedies that should be available for a breach of rights occurring during the exercise of search or surveillance powers, and also the protections and immunities that should be available for those who authorise the use of search powers and those who exercise or assist in exercising them.
- 50 The existing common law and Bill of Rights Act remedies that are presently available when an enforcement officer is found to have exercised search or surveillance powers unlawfully, or in breach of a person's privacy rights, provide a robust framework for vindicating rights. These remedies should continue to be developed by the courts and codification is not recommended. However, in order to strengthen the sanctions for a breach of confidentiality, a proposal is made for the creation of an offence for an enforcement officer who acquires information through the exercise of a search or surveillance power to disclose that information otherwise than in the performance of his or her duty.
- 51 Some features of the present immunity provisions for enforcement and judicial officers require change. For enforcement officers there are variations in the form

of protection and what actions are protected. To restore certainty and consistency, the enactment of a single provision is proposed to provide immunity where an enforcement officer has acted reasonably and in good faith. Recommendations are made to extend the existing immunity provisions for judges to other warrant issuing officers, and to provide statutory protection for those who, in good faith, assist enforcement officers in the exercise of search and surveillance powers, or the analysis or examination of seized items.

- 52 The final recommendation in this chapter is directed to clarifying the immunity of the Crown and proposes that it should reflect the immunity of the officer whose actions are in question.

CHAPTER 15 – REPORTING ON THE EXERCISE OF SEARCH AND SURVEILLANCE POWERS

- 53 The requirement to report details of the exercise of search and surveillance powers is an important accountability mechanism for both enforcement officers and the law enforcement agency itself. Recommendations are made in this chapter to strengthen present internal procedures and external reporting requirements.
- 54 Internal reporting on the exercise of all warrantless law enforcement powers is proposed (with some specified exemptions). Aggregate reporting to parliament of details of the exercise of warrantless search powers (with similar exemptions), and of the exercise of both warranted and warrantless surveillance powers is proposed.
- 55 A recommendation is also made for an enforcement officer to provide a warrant issuing officer with feedback on the outcome of the execution of the warrant, at the issuing officer's request.

CHAPTER 16 – IMPLEMENTA- TION

- 56 The final chapter outlines a proposed statutory framework for implementing the recommendations made in the report. The enactment of a single statute consisting of four parts containing search and surveillance powers and the procedures governing their exercise is proposed.
- 57 The first part would draw together all police search powers including those presently contained in a number of enactments. The search powers of other enforcement officers would remain in their specific statutes. The second part would establish the surveillance device regime containing the powers relating to the law enforcement use of surveillance devices. This part would also consolidate existing surveillance powers relating to the interception of communications and the use of tracking devices. The third part would contain the provisions relating to the proposed monitoring and production powers of enforcement officers. The fourth part would provide the procedural framework and consolidate the provisions governing the exercise of search and surveillance powers by all enforcement officers. It would include a number of related powers that may be exercised by enforcement officers in the course of exercising a search power. This part would also contain post-execution procedures, the reporting requirements and the protections and immunities that apply to enforcement officers exercising search and surveillance powers.
- 58 It is proposed that the generic statute should apply to existing law enforcement powers unless they are specifically exempted. Though the legislation would not apply to regulatory inspection and search powers as defined, the procedural framework proposed in the fourth part could be considered for adoption by regulatory agencies as well.

Chapter 1

INTRODUCTION



Chapter 1

Introduction

THE GROWTH OF SEARCH POWERS

- 1.1 Search and surveillance powers are an indispensable evidence-gathering tool for the police and other enforcement agencies. They provide the authority to secure evidential material that is often crucial to the trial and conviction of offenders.
- 1.2 Powers of entry, search and seizure have been part of the armoury of law enforcement officers since the establishment of modern police forces in the 19th century. However, over the last few decades four features have emerged to transform the extent to which they are used and the way that they are exercised.
- 1.3 First, the number of agencies with an operational law enforcement role has multiplied. Whereas search powers used to be available only to police officers, numerous state agencies now exercise similar powers. Sometimes they are more extensive than search powers vested in police officers for the investigation of crime.
- 1.4 The second feature, which is largely a consequence of the first, is that the number of discrete statutory search regimes has also dramatically expanded.
- 1.5 Thirdly, law enforcement search powers are in some cases intermingled with regulatory and inspection powers. Routine powers of inspection, used to ensure compliance with a regulatory regime and requiring no threshold to be met before they are exercised, sometimes sit alongside law enforcement powers which have a prerequisite of belief or suspicion that an offence has been committed before they can be exercised. This can result in what is essentially the same power being enacted for both purposes, sometimes in the same provision.¹
- 1.6 Finally, technological advances have added a further dimension by providing enforcement officers with new or better ways to obtain evidential material. This has not only introduced new forms of law enforcement activity that require their own regulation, but it has also significantly increased the potential for intrusion into the lives of citizens that would have been unimaginable even fifty years ago. In this area in particular, it is important that the law is kept up to date.
- 1.7 Thus, in relatively recent times there has been a significant increase in the number and type of search powers and in the agencies exercising them. That has meant that in the course of examining the areas dealt with in this report, a crucial consideration has been the need to keep in balance both the law enforcement need for effective search and seizure powers and the need to ensure

1 See, for example, Fisheries Act 1996, s 199.



that the values that are critical to a free and democratic society are not undermined and that individual rights are adequately protected.

THE NATURE OF
THE PROBLEM

- 1.8 At present, several dozen statutes provide search powers under warrant or without warrant that may be exercised by enforcement officers for investigative purposes. There are an even greater number of enactments containing a power of search for regulatory purposes. The result is a disparate array of powers and procedures that have been added to over time on an ad hoc basis. Search powers are often hard to find and sometimes difficult to understand, and the legislation governing the way in which they are exercised varies significantly, often with no obvious reason for the difference.
- 1.9 There are also a number of specific problems that require consideration. First, there are inconsistencies in important aspects of search powers and how they are exercised. For example, the threshold to be met before a law enforcement officer may exercise a power is expressed in different ways, sometimes for no apparent reason; and the obligations of enforcement officers in exercising search powers are dealt with comprehensively in some search regimes and barely mentioned in others.
- 1.10 Secondly, not all search powers and procedures are found in legislation. Some powers and responsibilities have been developed by the courts to fill gaps in statutes. For example, the power of a police officer to search a person as an incident of arrest is derived from the common law, as is the general requirement for an enforcement officer to announce his or her presence to an occupier before entering premises to exercise a search power.
- 1.11 Thirdly, existing legislation does not always meet law enforcement needs, nor does it provide important protections to people who may be the subject of the exercise of search powers. For example, a police officer has no statutory power to secure a crime scene. On the other hand, there is no general requirement for enforcement officers to advise the occupier of premises who is absent at the time of a search, that a search power has been exercised.
- 1.12 Fourthly, there is uncertainty as to the nature or extent of some existing search and seizure powers. For example, the extent of an enforcement officer's power to copy items that are the object of the search is unclear, as is the authority to perform tests on seized items.
- 1.13 Fifthly, the law governing search and seizure has not kept pace with changes in technology. For example, there are no provisions dealing generally with the search for and seizure of intangible material. This leads to difficulties both for enforcement officers and for people who are the subject of a search when the evidential material sought is held on a computer or other device.
- 1.14 Sixthly, legislation governing the use of surveillance by law enforcement agencies has been piecemeal. Some forms of surveillance, such as the use of tracking and interception devices, have been the subject of specific legislation. For others, such as the use of video cameras, there is a complete absence of legislative

guidance, with resulting uncertainty for law enforcement officers as to the extent to which such devices may be used. Again, it has fallen to the courts to provide this guidance, usually in the unsatisfactory context of a challenge to the admissibility of the evidence derived from the use of the surveillance equipment on the basis that it constituted an unreasonable search under section 21 of the New Zealand Bill of Rights Act 1990.

- 1.15 There have also been numerous expressions of judicial dissatisfaction with the status quo. Some of these comments have related to matters that are not dealt with in legislation – for example, the seizure by a police officer of evidential material relating to an offence that is not covered by the search power the officer is exercising at the time. There have also been numerous instances of judicial criticism directed at the standard of applications for warrants completed by police officers, due in part to the absence of a coherent statutory framework that provides guidance to enforcement officers.
- 1.16 Finally, many existing search powers were enacted before the Bill of Rights Act. Though the exercise of those powers has since been subject to the Bill of Rights Act, the statutory powers themselves need to be reconsidered in light of that Act and the jurisprudence that has been developed since it was enacted.

SCOPE OF REPORT

Discussion paper

- 1.17 In a discussion paper published in 2002,² we considered the search and inspection powers of non-police enforcement agencies as well as those of the police. We nominally classified non-police enforcement powers into those that appeared to be powers of routine administrative inspection and those where an offence was suspected, and tentatively proposed certain fundamental rules to govern how they should be exercised. We identified a number of powers under a range of Acts and regulations, mainly of an administrative nature, that warranted repeal. We also discussed specific features of police powers that appeared to merit particular attention and sought comment on a number of specific proposals. Finally we considered the effect of the Bill of Rights Act and in particular the apparent uncertainty of the language of section 21 dealing with “unreasonable” search or seizure. We invited comment on the proposal that as part of the reform of search and seizure law, section 21 should be modified to substitute a test of unlawfulness for unreasonableness.
- 1.18 A number of submissions were received commenting on the specific issues identified in the discussion paper and we have been able to draw on those in the preparation of this report. The Legislation Advisory Committee, however, advocated a more expansive approach to the terms of reference. It suggested the Commission develop a comprehensive code which would apply to both police and non-police enforcement officers, arguing that such an approach would enable the search and seizure powers of police officers currently spread over several statutes to be integrated coherently into a single enactment.
- 1.19 Though it considerably enlarged the scope of the project, the approach proposed by the Legislation Advisory Committee had obvious attraction. The challenge was accepted.

2 New Zealand Law Commission, *Search and Seizure* (NZLC PP50, Wellington, 2002).

Approach taken in report

- 1.20 The terms of reference have focused our inquiry on search powers exercised by law enforcement agencies. We are therefore concerned with the regulation of coercive state powers and in particular, the circumstances in which it is legitimate for the state to intrude on personal privacy. The broader protection of personal privacy in respect of the actions of people other than enforcement officers is only discussed to the extent that it is relevant to the way in which state power is regulated.
- 1.21 Law enforcement search powers – that is, those powers that arise where an enforcement officer has reached a threshold of belief (or suspicion) that an offence has been disclosed – are exercised not just by police officers, but also by numerous other enforcement officers including customs and fishery officers, officers appointed to enforce aspects of conservation legislation, gaming inspectors and investigators from the Serious Fraud Office. Accordingly, while we have comprehensively considered police search powers, we have also considered those of a wide range of other enforcement officers.
- 1.22 In contrast, we do not discuss regulatory search or inspection powers – that is, powers that may be exercised without any prerequisite of suspicion or belief that an offence has been or is being committed. Regulatory powers of search, inspection or examination apply in a particular setting and they are justified by reference to the environment in which the regulated activity is occurring. By the same token, we are not concerned with powers that are usually exercised in a non-law enforcement context, but which occasionally may be used in the course of an investigation of an offence. Hence, we do not discuss particular powers such as those under the Tax Administration Act 1994, the Fair Trading Act 1986 and the Commerce Act 1986 that are primarily directed to achieving different objectives.
- 1.23 We do not consider a number of specific legislative regimes which contain search powers that have been enacted for purposes closely related to law enforcement. Thus, we do not consider the powers of the New Zealand Security Intelligence Service (enacted for intelligence-gathering purposes),³ those of the defence forces (primarily concerned with military discipline),⁴ and those that have been enacted to maintain the security of particular institutions such as the courts and prisons.⁵ Nor do we give detailed consideration to search powers contained in existing statutory codes designed to operate within a self-contained policy framework. For example, we do not consider search powers relating to obtaining DNA blood and buccal samples from people,⁶ or the powers associated with forfeiture provisions in codes enacted to facilitate the forfeiture of property obtained or derived from a breach of legislation enacted for other specific purposes.⁷
- 1.24 The fact that these matters have not been considered in this report does not mean that they are not deserving of examination. Rather the scope of our work has had to be determined, to some degree, by considerations of pragmatism: the need for a manageable and coherent framework for search and surveillance powers within the confines of a single report.

3 New Zealand Security Intelligence Service Act 1969.

4 Armed Forces Discipline Act 1971.

5 Courts Security Act 1999; Corrections Act 2004.

6 Criminal Investigations (Bodily Samples) Act 1995.

7 Fisheries Act 1996, Part 14; Customs and Excise Act 1996, ss 255-255E.

- 1.25 In particular, we would not wish the exclusion of regulatory powers from the ambit of this report to be taken as meaning that they are satisfactory in their current form. Many contain the same anomalies and gaps we have identified in existing law enforcement powers. Indeed, as we have noted in chapter 16, it may well be that a very large part of the code we propose to govern the use of search and surveillance powers could be applied, with little modification, to regulatory and inspection powers.

OUR REPORT

- 1.26 We begin in chapter 2 by identifying and discussing those values which we believe should underpin law enforcement search and surveillance powers. They consist of a set of human rights values and a set of law enforcement values that should be reflected in the statutory regime we propose.
- 1.27 Before dealing with particular aspects of search and surveillance powers, we consider in chapter 3 a number of issues that arise with the exercise of search and surveillance powers for law enforcement purposes generally. These issues include the threshold that should be met before the power can be exercised, what may be seized and the obtaining of consent to a search.
- 1.28 The balance of the report approaches the problems with the present law in three ways. First, we consider the way in which searches are authorised and executed, and how enforcement officers are held to account for their use. Chapters 4, 6, 10, 12, 13, 14 and 15 are principally concerned with these matters. Secondly, in chapters 5, 8 and 9 we review the substantive search powers of police and other enforcement officers in respect of people, places and vehicles. Thirdly, we propose a number of new law enforcement powers and procedures to deal with developments in modern technology. Chapter 7 (dealing with computer searches) and chapter 11 (dealing with the law enforcement use of surveillance devices) outline our proposals for substantive change in these areas.
- 1.29 Finally, in chapter 16 we outline the way in which we propose that our recommendations ought to be given effect. Most importantly, we signal the need for a generic statute to draw together the various search and surveillance powers and procedures that are presently sprinkled through a plethora of existing legislation.

Chapter 2

VALUES UNDERPINNING SEARCH AND SURVEILLANCE POWERS



Chapter 2

Values underpinning search and surveillance powers

- INTRODUCTION** 2.1 The purposes of this chapter are threefold. First, it outlines the high-level values that have informed our thinking on this project. Broadly, we have identified a set of human rights values and law enforcement values that we believe a search and surveillance regime ought to seek to reflect.
- 2.2 Secondly, we introduce the concept of reasonable expectations of privacy. This concept has been used in New Zealand and overseas to reconcile human rights and law enforcement values. It is used to identify:
- the type of law enforcement activities that ought to be regulated by a comprehensive search and surveillance regime; and
 - the regulatory scheme that presumptively should apply to any search and surveillance powers. We discuss the uncertainty that is sometimes said to accompany the concept of reasonable expectations of privacy and the challenges that this uncertainty can pose. In our view, the solution to the uncertainty that the concept of reasonable expectations of privacy creates is the enactment of clear, consistent, values-based statutory rules that regulate those law enforcement activities that are accepted as implicating reasonable expectations of privacy.
- 2.3 Thirdly, against this background, we outline the type of law enforcement activities that ought ordinarily to be regulated by a statutory search and surveillance regime and how those activities ought to be presumptively regulated (subject to modification when circumstances reasonably require).
- 2.4 This report deals with all types of search and surveillance powers for law enforcement purposes. Elsewhere in the report we have used the specific term that describes the type of power being exercised. In this chapter however, for the sake of simplicity we use “search powers” as a general term that encompasses search, seizure, interception and surveillance (including tracking).
- 2.5 Finally we emphasise that our discussion of privacy (and the more particular concept of reasonable expectations of privacy) in this chapter and subsequent



chapters is undertaken in the specific context of the regulation of law enforcement powers. Wider (and potentially more difficult) notions of privacy arise where claims of privacy are made by one citizen against another. These wider notions are likely to be the subject of the Commission’s Privacy project – nothing in this report should be regarded as determinative of the Commission’s likely approach to privacy for the purposes of that project.

HUMAN
RIGHTS VALUES
AND LAW
ENFORCEMENT
VALUES

Overview

- 2.6 In broad outline there are two sets of values that arise in the context of authorising and regulating search powers: human rights values and law enforcement values. In the sections that follow we discuss these two sets of values in more detail. At this early stage, however, there are a couple of important general points to be made.
- 2.7 First, many people see these two sets of values as competing with one another. In this view, the task of courts, legislatures and policy makers is to balance each against the other. In our view, while there is a balance to be struck, there is also a good degree of complementarity between the two sets of values, particularly in a strong democratic state such as New Zealand. Search powers that encroach too far on human rights values are unlikely to gain legislative or community support. Similarly, investigative powers that are too tightly controlled and that prevent law enforcement officers from doing their job effectively will bring human rights norms into disrepute.
- 2.8 Secondly, as with all generally stated models, the purpose of exploring the two sets of values is to assist analysis, but not to dictate the correct answer in every case. Nonetheless, a principled, values-based approach to search powers is the best way to achieve consistent protection of human rights, yet promote effective law enforcement.

HUMAN
RIGHTS VALUES

Introduction

- 2.9 The granting and exercise of search powers have traditionally been approached with a measure of caution and niggardliness, both by the legislature and by the courts.¹ Parliamentarians and judges have been sensitive to the impact that wider law enforcement powers can have on the standard of civil liberties enjoyed in New Zealand. The police and other law enforcement agencies are, after all, meant to be of the people for the people. In a democratic country such as New Zealand, search powers should not be conferred on law enforcement officers in such a way that the community feels it is living in a police state. A review of legislation, such as the interception provisions² and the bodily samples scheme,³ indicates a preference for incremental extension of search powers: an initially

1 See, for example, Sir Thaddeus McCarthy “The Role of the Police in the Administration of Justice” in R Clark (ed) *Essays on Criminal Law in New Zealand; a series of lectures delivered at the Victoria University of Wellington* (Sweet & Maxwell, Wellington, 1971).
2 Crimes Act 1961, Part 11A.
3 Criminal Investigations (Bodily Samples) Act 1995.

CH 1
CH 2
CH 3
CH 4
CH 5
CH 6
CH 7
CH 8
CH 9
CH 10
CH 11
CH 12
CH 13
CH 14
CH 15
CH 16

tightly focussed regime with many restrictions being superseded by a wider availability of the power(s) as greater experience of the regime is gained and public acceptance grows.

- 2.10 In New Zealand today the traditional civil liberties model has come to be expressed through a range of human rights measures, so that we now talk about the implications for human rights values where there are proposals to extend law enforcement investigative powers. The principal expression of human rights values in this field in New Zealand is section 21 of the Bill of Rights Act. It guarantees the right of everyone “to be secure from unreasonable search or seizure, whether of the person, property, or correspondence, or otherwise”. Through section 3 of the Act, section 21 applies to legislation, policy, courts, and, importantly, law enforcement officials.⁴ At the international level, New Zealand has committed itself to ensure that no one is subjected to “arbitrary or unlawful interference with his privacy, family, home or correspondence, ...”⁵ and to ensure that everyone has the “right to the protection of the law against such interference or attacks.”⁶
- 2.11 Against this background, in our view the principal relevant human rights values, which operate when the regulation of search powers is in issue, are:⁷
- the protection of privacy (including, but extending beyond, the protection of privacy within and of property);
 - the protection of personal integrity;
 - the protection of property rights; and
 - the maintenance of the rule of law.

We consider each of these particular values in turn.

Privacy

- 2.12 The key human rights value implicated by search and surveillance powers is the right to privacy. As modern living arrangements and rapidly developing technologies make encroachment on privacy all the more easy, citizens have come to value, and demand better protection for, the right to privacy.
- 2.13 Privacy of course is a protean concept. Few people are against personal privacy. But once we start to define what we mean by privacy, disagreements emerge. Much of the debate is driven by disputes about how much privacy from other citizens one is (or should be) entitled to.
- 2.14 However, as against the state more generally and law enforcement officers in particular, there is a greater measure of agreement. Broadly speaking, while some

4 The New Zealand Bill of Rights Act 1990, s 3 reads:
 “3. Application – This Bill of Rights applies only to acts done –
 (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
 (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.”

5 International Covenant on Civil and Political Rights, art 17.1.

6 International Covenant on Civil and Political Rights, art 17.2.

7 In *R v Jefferies* [1994] 1 NZLR 290, 302 (CA), Richardson J observed that the New Zealand Bill of Rights Act, s 21 “reflects an amalgam of values: property, personal freedom, privacy and dignity.” See, to the same effect, *R v Grayson* [1997] 1 NZLR 399, 406-407 (CA). In some cases other rights/values can also be implicated. Where, for example, a search of a media organisation is carried out, freedom of expression may also be implicated: see *TVNZ v Attorney-General* [1995] 2 NZLR 641, 647-648 (CA).

people have equated, and continue to equate, privacy with concepts of trespassory interference with property rights or bodily integrity, modern thinking regards privacy *at least in so far as law enforcement activities are concerned* as including trespassory interferences but extending well beyond such interferences to include all law enforcement interferences with reasonable expectations of privacy.⁸

- 2.15 That this wider notion of privacy is the one that needs to be respected in New Zealand is clear. First, in the commentary to the draft article 19 of the White Paper on the Bill of Rights (in all material respects in the same terms as section 21 of the Bill of Rights Act) it was noted that the purpose of the concluding phrase to article 19 (“whether of the person, property, or correspondence or otherwise”) was to ensure that the protection against unreasonable search and seizure applied “not only to acts of physical trespass *but to any circumstances where state intrusion on an individual’s privacy* in this way is unjustified”.⁹ The commentary explicitly noted that article 19 “should extend not only to the interception of mail, for example, but also to the electronic interception of private conversations, and *other forms of surveillance*”.¹⁰
- 2.16 Secondly, the terms of article 17.1 of the International Covenant on Civil and Political Rights, which section 21 of the Bill of Rights Act incorporates to a significant extent (though not completely), reflect a privacy root. In its General Comment on article, the Human Rights Committee has indicated that article 17.1 applies to searches of the person or the home, interception of correspondence and “surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations”.¹¹
- 2.17 Thirdly, New Zealand case law has acknowledged the privacy rationale. In its first case on section 21 of the Bill of Rights Act, several members of the Court of Appeal explicitly acknowledged privacy as the underlying concept informing the interpretation and application of the provision.¹² Later in *R v Grayson*, where a single judgment of the Court of Appeal attempted to distil the law on section 21 of the Bill of Rights Act (at least in so far as trespassory interferences with property were concerned), the court again repeatedly acknowledged that privacy

8 This is the approach adopted under s 8 of the Canadian Charter of Rights and Freedoms (*R v Duarte* [1990] 1 SCR 30 (SCC) and *R v Wong* [1990] 3 SCR 36 (SCC)), the Fourth Amendment to the US Constitution (*Katz v United States* (1967) 389 US 347), art 8 of the European Convention on Human Rights (*Malone v United Kingdom* (1985) 7 EHRR 14 (ECtHR)), and under the South African Bill of Rights (*Bernstein v Bester* 1996 (2) SA 751, para 75 (SACC)). It is also the approach adopted in numerous Law Reform Commission reports prepared overseas including the Irish Law Reform Commission (*Privacy: Surveillance and the Interception of Communications* (LRC 57-1998, Dublin, 1998) ch 1); the New South Wales Law Reform Commission (*Surveillance: An Interim Report* (R 98, Sydney, 2001)); and the Australian Law Reform Commission (*Privacy* (R 22, Canberra, 1983)). While we discuss the implications of the modern approach later, it may be helpful to discuss some examples here. Take, for example, the use of long lens cameras erected on property A to view activity on property B. Under the traditional approach this activity would not implicate privacy because no trespassory interference with property rights or bodily integrity is involved. However, the broader, more modern view is that the use of such equipment by law enforcement agencies does implicate “reasonable expectations of privacy” and must therefore meet relevant human rights standards in order to be lawful. Similarly, listening devices attached to property that does not belong to the person whose conversation is being bugged interfere with reasonable expectations of privacy and would be regulated by human rights norms, even though no trespassory interference has occurred (*Katz* above).

9 “A Bill of Rights for New Zealand: A White Paper” [1984-85] 1 AJHR 6A, para 10.152 (emphasis added).

10 White Paper, above n 9, para 10.152 (emphasis added).

11 United Nations Human Rights Committee, General Comment No 16, 1983, para 8.

12 See, for example, *R v Jeffries*, above n 7, 297 Cooke P, 301, 310 Richardson J, 327 Thomas J.

values underlie the provisions of the section.¹³ While there are some cases in which the court has suggested that the application of section 21 of the Bill of Rights Act outside the traditional field of trespass law is still open, more recent cases acknowledge that the section does have the wider scope.

- 2.18 Finally, the practice of successive Attorneys-General when performing their pre-legislative Bill of Rights scrutiny under section 7 of the Bill of Rights Act has been to regard section 21 of the Act as concerned with trespassory and non-trespassory interferences with privacy alike.¹⁴

Personal integrity

- 2.19 In a number of instances, the exercise of search powers will not only intrude on privacy, but will also involve interferences with core aspects of bodily integrity and with freedom to be without restraint. For example, many powers to search people can only be exercised if the subject of the search has first been detained. To the extent that these detention powers are part and parcel of a statutory regime, they too must respect human rights norms directed at personal integrity.
- 2.20 Similarly, certain search powers will involve measures that will intrude on bodily integrity. Body cavity searches, blood tests and so on are good examples. These sorts of searches clearly implicate privacy, since the right to go about one's business unhindered and the right to be unmolested in one's body are core aspects of privacy.¹⁵ But because they involve restrictions on someone's movement and the use of their body to obtain incriminating evidence, such measures raise other concerns as well, such as respect for bodily integrity and the right not to incriminate oneself. To the extent that they implicate them, search powers will have to respect these other human rights values.

Property rights

- 2.21 Where interferences with privacy encroach on a person's property rights (be they real or personal), values additional to purely privacy interests are implicated. The enjoyment of property rights is an important aspect of New Zealand's liberal democracy. Their protection from interference has been an important role of the state. The right to property is not generally protected by the Bill of Rights Act. The right to property was deliberately omitted from the Act and attempts to include it have so far been unsuccessful.¹⁶ However, section 21 of the Bill of Rights Act explicitly refers to property as something that cannot be unreasonably searched or seized. Consistent with this explicit reference, the courts have held that in so far as law enforcement activities are concerned, property is a protected value under section 21.¹⁷

13 *R v Grayson*, above n 7, 407. See also *R v Fraser* [1997] 2 NZLR 442, 449 (CA).

14 See, for example, Report of the Attorney-General under section 7 of the New Zealand Bill of Rights Act 1990 on the Sentencing and Parole Reform Bill 2001, para 17.

15 See, for example, *R v Faasipa* (1995) 2 HRNZ 50, 55 (CA); *R v Shaheed* [2002] 2 NZLR 377 (CA); *R v SAB* [2003] 2 SCR 678 (SCC).

16 See A Butler & P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) paras 2.10.2-2.10.3.

17 See generally, A Butler & P Butler, above n 16, paras 18.7.1-18.7.19.

Rule of law

- 2.22 A further human rights value in issue is the rule of law. There are two broad dimensions to this. First, search and seizure should only take place if a law provides a basis for it. In its General Comment on article 17 of the International Covenant on Civil and Political Rights, the Human Rights Committee captured this idea thus:¹⁸

The term “unlawful” means that no interference can take place *except in cases envisaged by the law*. Interference authorized by States can only take place *on the basis of law* ...

- 2.23 Secondly, search powers should be regulated in such a manner as will best ensure that they are only exercised where they are genuinely required to be deployed. In turn this requires that such powers should:

- be expressed in objective, rather than subjective, terms;
- be clearly expressed so that a citizen who is being subjected to a search or seizure and the law enforcement officer undertaking it can both understand whether there is in fact authority to undertake the search or seizure and what it is that the law enforcement officers are entitled to search for and seize;
- be subject to judicial supervision, preferably in advance of the powers being exercised;
- only be exercisable reasonably.

The overall aim of these measures is to prevent unreasonable searches and seizures occurring in the first place and ensuring that both before and after intrusive search and seizure powers are exercised they are subject to a transparent and accountable form of public review.

LAW ENFORCEMENT VALUES

- 2.24 Human rights norms as indicated above are central in determining the appropriateness of proposals for the granting of search powers. But sight must never be lost of the fact that human rights instruments only protect citizens against “unreasonable” search or seizure (to use the language of section 21 of the Bill of Rights Act) or “arbitrary or unlawful interference” with privacy (to use the language of article 17.1 of the International Covenant on Civil and Political Rights). In turn, these provisions recognise that search and seizure is often necessary in order to facilitate the functioning of the state and to protect the rights of others. In *R v Jefferies*, several members of the Court of Appeal stated that privacy was not an absolute right, with Thomas J observing that “Privacy must at times and on occasions yield to the wider interests of the community, most significantly in the present context, the public interest in the detection and prosecution of crime”.¹⁹
- 2.25 The Human Rights Committee has observed that the protection of privacy under article 17 is “necessarily relative”.²⁰ Article 8 of the European Convention on Human Rights is explicit on this point. While article 8(1) protects everyone’s right to respect for his or her private and family life, home and correspondence, article 8(2) explicitly contemplates that public authorities may need to interfere

¹⁸ Human Rights Committee, above n 11, para 3 (emphasis added).

¹⁹ *R v Jefferies*, above n 7, 319 Thomas J. See also 302-303 Richardson J.

²⁰ Human Rights Committee, above n 11, para 7.

with the exercise of this right on a number of grounds, including “in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

2.26 Law enforcement values are not often explicitly articulated or acknowledged in the modern human rights culture, but they are legitimate and have often informed debate on search powers.²¹ In our view the principal relevant law enforcement values are:

- effectiveness;
- simplicity;
- certainty;
- responsiveness to different types of operational circumstances (for example, time pressure, or resistance from person being searched);
- human rights consistency.

Effectiveness

2.27 The principle of effectiveness is a most important law enforcement value. Search powers should be sufficient to ensure that they can be effectively deployed. Where powers are granted in an overly restrictive fashion they are likely to frustrate law enforcement officers. In turn frustration may encourage a number of negative reactions. Some officers may ignore the silly restrictions and thereby contribute to a culture where legal regulation of search powers is regarded with contempt or disdain. Others may refrain from enforcing the substantive legal proscription, since detecting and investigating a breach of it is too cumbersome.

Simplicity

2.28 The second law enforcement value, which in some respects is closely related to the principle of effectiveness, is that search powers should be conceived and expressed simply. Unnecessary complexity in the formulation and regulation of such powers is likely to cause enforcement officers to misunderstand them and to mis-state their powers when challenged. In turn, this can lead to officers undertaking illegal searches and seizures (which is in no-one’s interests, except perhaps those of a criminal accused who is seeking to have illegally obtained evidence excluded at trial) despite their best efforts to act lawfully. In turn, complexity is likely to frustrate enforcement officers.

Certainty

2.29 Closely related to simplicity is certainty. To the greatest extent possible, laws creating and regulating search powers should provide certainty to enforcement officers. Certainty ensures that enforcement officers can do their job with confidence. Like complexity, uncertainty can breed risk-aversity in some officers and risk-taking behaviour in others. Furthermore, uncertainty creates a greater likelihood that the exercise of powers will be challenged in court proceedings, with the

21 *R v Grayson*, above n 7, 406 and 407.

diversion of resources (both financial and personnel) that entails.²² The principle of certainty suggests that, as far as possible, search powers should be expressed in explicit and objective terms; tests that require enforcement officers to make subjective judgements are likely to be applied loosely and inconsistently, with the attendant harm to human rights and the likelihood of court challenge.

Responsive to different operational circumstances

- 2.30 The operational circumstances in which enforcement officers interact with the public and the way in which individual members of the public respond to enforcement officers differ substantially. Regimes dealing with search powers need to recognise and accommodate this reality. Two examples may assist understanding. In most cases in New Zealand, police officers will simply need to assert their authority and it will be possible to proceed to exercise search powers (so long as the prerequisites to their exercise are met). However, there are relatively infrequent, but still not rare, situations in which police officers need to exercise investigative powers under considerable time pressures, or under threat to personal safety or the safety of others. Search powers need to be written in a manner that recognises these varying circumstances, and that preserves the ability of police officers to act lawfully in all circumstances where they are called upon to act.²³ Equally, search powers need to recognise that some enforcement officers will be treated with more resistance by the public than others and may therefore need to have investigative powers that allow them to assert their authority and engage in appropriate and effective law enforcement activity. Also the operational resources and fields in which some officers work need to be taken into account. Fishery officers, for example, need to exercise their powers in remote areas and often without back-up.

Human rights consistency

- 2.31 Finally, while our account of law enforcement values has concentrated thus far on accessing and acquiring evidential material, it must also be recalled that enforcement officers have a vital interest in framing their powers in a manner that can, overall, be categorised as human rights consistent. That is because our law enforcement agencies are there to protect us, not to control us. The New Zealand Police is a community police force; it needs community support in order to perform its role. The same is true of other law enforcement officers. If given untrammelled powers, there is a danger that law enforcement agencies will be perceived to be part of a police state apparatus, no matter how scrupulous and fair they are in actually using their powers.

REASONABLE EXPECTATIONS OF PRIVACY

- 2.32 In New Zealand and overseas, the key concept that is used to accommodate human rights values and law enforcement values is reasonable expectations of privacy. The concept has been accepted by the Court of Appeal as underlying

22 To be clear, the Commission is not saying that challenging exercises of search and seizure powers is inherently undesirable – after all court challenges are important for maintaining public accountability. Rather, the Commission regards it as undesirable to have uncertain search and seizure laws on the statute book that lead to challenges that could be avoided if the search and seizure were more clearly regulated.

23 See, for example, *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA) where aspects of an Armed Offenders Squad call out were held to be illegal, though were held not to be unreasonable for the purposes of the Bill of Rights Act, s 21, because the Squad's task could not be effectively performed without those steps.

section 21 of the Bill of Rights Act. In this part, we discuss the concept reasonable expectations of privacy under a number of headings. First, we discuss the purposes that the concept serves. Secondly, we briefly discuss the scope of privacy that the concept embraces. Thirdly, we consider the uncertainty that the concept can create for law enforcement officers and citizens alike. Fourthly, we discuss the extent to which the concept has informed the proposals that we outline in this report and the means that we believe will reduce to an acceptable level the uncertainty that the concept of unreasonable expectations of privacy gives rise to. In the next part of this chapter, we discuss general minimum requirements and restrictions that the Commission believes reasonable expectations of privacy presumptively place on search powers and the sorts of situations where departure from those requirements can be acceptable.

Purpose of reasonable expectations of privacy enquiry

- 2.33 In the jurisdictions where the concept is used, the reasonable expectations of privacy enquiry has two purposes. First, and primarily, it is used as a filter. It determines whether particular law enforcement conduct requires to be assessed by human rights standards at all. Broadly speaking, in determining whether reasonable expectations of privacy are implicated, courts look at the nature of the law enforcement activity in issue, the way in which the activity is regulated by law and the extent to which the activity can be regarded as intruding on human rights values. Where the conduct does not interfere with those values, there is no need for the reasonableness of the activity to be assessed further.
- 2.34 Secondly, if it is decided that the conduct in issue does need to meet human rights standards, the reasonable expectations enquiry structures the analysis that is required. This analysis focuses on the nature and importance of the interests at stake and the reasonableness of the particular intrusion on the “expectations of privacy” that are involved when set against applicable law enforcement values.

Reasonable expectations of privacy: what it covers and how it is assessed

- 2.35 The concept of reasonable expectations of privacy is designed to shift focus from purely trespassory interferences with privacy to all forms of law enforcement that interfere with privacy (broadly defined), regardless of how or where the interference is effected.
- 2.36 In line with this approach, the Supreme Court of Canada has held that for the purposes of section 8 of the Canadian Charter (which is similar to section 21 of the Bill of Rights Act) the concept of reasonable expectations of privacy embraces the “right of the individual to determine when, how and to what extent he or she will release personal information”.²⁴ In *R v Dyment*, the Supreme Court indicated that there were, in fact, several “spheres of privacy” protected by section 8 of the Charter, including “spatial, personal and informational” spheres.²⁵ These spheres cover personal privacy, personal integrity and property interests. The practice of overseas jurisdictions, including the United Nations Human Rights Committee and the European Court of Human Rights, corresponds with the Canadian approach.

²⁴ *R v Duarte*, above n 8.

²⁵ *R v Dyment* [1988] 2 SCR 417, 428 (SCC). This tripartite division of spheres of privacy drew on the report of the Canadian Task Force on *Privacy and Computers* (Information Canada, Ottawa, 1972).

- 2.37 In New Zealand, the courts have not yet had to expound on the breadth of the net cast by section 21 of the Bill of Rights Act. It is likely, however, that New Zealand courts would follow the Canadian and international approach. This would be in line with the intent of the drafters of the White Paper on the Bill of Rights and the practice of successive Attorneys-General (see paragraphs 2.15 and 2.18 above).
- 2.38 Overseas courts have found it to be impossible to lay down a comprehensive list of general categories and to determine whether a reasonable expectation of privacy exists in respect of each. Rather, overseas experience suggests that assessment has to be made by reference to a range of factors.
- 2.39 The essence of the inquiry has been well captured by Professor Richard Wilkins who has suggested, in analysing United States case law on the meaning of search for the purposes of the Fourth Amendment, that three factors are key:
- the place where the activity being investigated occurs (namely the place where the observed activity occurs, not the place from which it is observed);
 - the nature and degree of intrusiveness involved in the surveillance activity itself;
 - the object or goal of the surveillance (namely what it is that the surveillance activity will reveal).²⁶
- 2.40 Of course, over time, fact patterns can be expected to develop into a series of “rules” that provide an element of certainty, both as to which activities need to be regulated by statute (in order to achieve compliance with the basic human rights value of the rule of law) and also as to what restrictions and requirements should accompany particular statutory search powers that the legislature chooses to confer on law enforcement agencies.
- 2.41 A further important point that emerges from overseas case law on reasonable expectations of privacy is that whether it is reasonable for there to be an expectation of privacy should be determined by reference to objective community standards in like circumstances, not the subjective expectations of the person before the court. The application of the objective standard provides two advantages. On the one hand, it means that the court concentrates on the rights of ordinary citizens to be secure from law enforcement intrusion; were the court to concentrate on the individuals before it (often people charged with murder, serious assaults, drug-dealing, or other serious crime) there is a chance that it would apply a hindsight ends-justify-the-means assessment of privacy focussed on the evidence that the search or seizure revealed, rather than focussing on the big picture of privacy protection. On the other hand, the objective standard ensures that people who have an overly refined sense of privacy do not dictate what level of privacy protection is reasonable.
- 2.42 In what circumstances would citizens expect to enjoy privacy as against law enforcement officers? Examples of activities that have been held to interfere with reasonable expectations of privacy include intercepting a telephone conversation; video surveillance; and the electronic tracking of a vehicle. Overseas, examples of activity that have been held in some jurisdictions not to amount to interferences with privacy include third party voluntary disclosure of information; using

26 R Wilkins “Defining the ‘Reasonable Expectation of Privacy’: An Emerging Tripartite Analysis” (1987) 40 Vand L Rev 1077.

infra-red technology to monitor heat loss from a house; and rummaging through rubbish bags. Different judicial systems, too, have taken different views as to whether a particular law enforcement activity does or does not interfere with privacy.²⁷

Challenges created by the reasonable expectations of privacy concept

Challenges

- 2.43 An implication of adopting the reasonable expectation of privacy concept is that it potentially covers a wide range of investigative techniques not considered to amount to search or seizure if a trespassory analysis were applied. More than that, however, the shift can create uncertainty. That is because the concept focuses on all intrusions on privacy, rather than on the much more limited, but much more easily defined, concept of trespass.²⁸
- 2.44 The problem of uncertainty especially arises where the concept of reasonable expectation of privacy is a general standard to be applied by the courts when assessing whether law enforcement activity in a particular case constitutes a search. Indeed, it is noteworthy that the Court of Appeal has found the concept so sufficiently challenging that it regularly determines cases under section 21 of the Bill of Rights Act without deciding whether impugned law enforcement activity amounts to a search and seizure, preferring instead to consider the later question of reasonableness of the particular activity first.
- 2.45 Uncertainty about the reasonable expectation of privacy concept is a significant concern both for law enforcement and for the protection of civil liberties.²⁹ Enforcement officers need to know in advance what investigative techniques implicate reasonable expectations of privacy. The shift of focus from physical to privacy intrusion poses the difficulty for enforcement officers of attempting to predict in advance what kinds of investigative methods will constitute a search or seizure. Uncertainty could result in resource-consuming litigation and/or result in law enforcement declining to use new methods or new technology. At the same time, the inherent uncertainty of the reasonable expectation of privacy concept can compromise civil liberties protections. For the protection of individual rights to be maximised, breaches of these rights must be prevented rather than being vindicated only after they have been violated.³⁰ This is inherent in the notion of being *secure* against unreasonable searches and seizures. An ex-post facto assessment of the lawfulness of law enforcement action, conducted outside any statutory regulatory framework, means that the prophylactic purposes of section 21 of the Bill of Rights Act are not met.

27 In *R v Duarte*, above n 8, the Supreme Court of Canada held that participant recording of a private conversation without the consent of the other party was a search and seizure, whereas the United States Supreme Court in *Lopez v United States* (1963) 373 US 427 determined that it was not. Conversely the United States Supreme Court determined that the warrantless use of forward-looking infra-red (FLIR) technology was an unreasonable search in *Kyllo v United States* (2001) 533 US 27, whereas the Supreme Court of Canada in *R v Tessling* [2004] 3 SCR 432 (SCC), held that it was not.

28 Indeed, some overseas critics have suggested that the concept is “much too vague to be administered on the streets”: A Amsterdam “Perspectives on the Fourth Amendment” (1974) 58 Minn L Rev 349, 404.

29 Overseas experience suggests that, to some extent, the claim of uncertainty can be exaggerated. After all, a body of jurisprudence is likely be created over time, setting out general indications as to what is and what is not reasonable conduct. This jurisprudence, in turn, will then reduce uncertainty by providing guidance directly or by analogy.

30 See, for example, *Hunter v Southam Inc* [1984] 2 SCR 145, 160 (SCC) Dickson J.

The solution

- 2.46 There is therefore much benefit to be had for both law enforcement and human rights reasons in articulating as clearly as possible the boundaries of reasonable expectations of privacy and the limits that those expectations place on law enforcement activity. In our view, uncertainty can be significantly reduced if the concept is used to formulate statutory rules that regulate how search powers should be exercised. General but comprehensive rules in the traditional trespassory fields have worked well and given substantial certainty to enforcement officers and citizens alike. In our view, the benefit of the certainty that statutory rules provide can be extended to non-trespassory interferences with reasonable expectations of privacy. Indeed, on close examination the basic protections that are provided against unreasonable trespassory interferences with privacy are capable of being applied to non-trespassory forms of privacy interference.
- 2.47 Accordingly, where activities that are likely to be regarded as implicating reasonable expectations of privacy can be identified and readily defined, then both human rights values and law enforcement values strongly suggest that a statutory regime should be framed to regulate these activities. Equally, where activities do *not* implicate reasonable expectations of privacy, then certainty suggests that there is real value in a law explicitly stating that those activities are not regulated by a regime dealing with search powers because they do not need to be.
- 2.48 At the same time, it would be inappropriate for us to propose an all encompassing definition or enumeration of what activities would constitute interferences with reasonable expectations of privacy. There are two principal reasons. First, as noted above, overseas courts that have been grappling with the concept for many decades now have failed to devise an exhaustive definition or list of activities. That suggests that it would be foolhardy for us to go down that path. Secondly, one of the reasons that overseas courts have been unsuccessful in their efforts is that community expectations of privacy have evolved as technology has evolved. New technologies pose new challenges to the community's view of privacy; it is hard to predict in advance how technology will evolve and how the community will react. In addition, new types of threat to community security can lead to legitimate (and illegitimate) demands for broader law enforcement powers and may require innovative forms of surveillance.

Conclusion

- 2.49 In our view, the challenge posed by the protean quality of the reasonable expectation of privacy concept is best met by a three-pronged response. First, those activities that case law or practice clearly show to implicate reasonable expectations of privacy should be identified and regulated by clear statutory rules. To the greatest extent possible those rules should seek to treat different forms of search and surveillance activity in as uniform a manner as possible, based on principle and respect for human rights and law enforcement values. That will lead to consistency of protection and greater likelihood of compliance. In broad outline, the activities that we propose should be regulated by clear statutory rules are applications for and the issue of search warrants, executing search powers, warrantless powers of entry, search and seizure, searching people, searching vehicles, computer searches, surveillance and post-search procedures. Secondly, to deal with those activities that we do not yet know of

(because the technology has not yet been created) and those marginal cases where there is uncertainty as to whether reasonable expectations of privacy are implicated, we propose a residual regime under which enforcement officers can seek authorisation from a judge to conduct the activity in issue. Third, our proposals will not render section 21 of the Bill of Rights Act redundant. Rather, section 21 will remain as an important statement of general principle that will guide the interpretation and application of the search and seizure provisions that we propose, just as it is currently. However, by expanding the range of search and seizure measures that are specifically regulated by detailed statutory provisions, our proposals will also guide the integration of reasonableness under section 21 in a number of contexts and ensure more complete protection of reasonable expectations of privacy.

WHAT LAW
ENFORCEMENT
ACTIVITIES
SHOULD OUR
SEARCH AND
SURVEILLANCE
REGIME COVER?

- 2.50 It would generally be accepted that traditional forms of law enforcement activity that involve trespassory interference with expectations of privacy in a person's body, property or correspondence require regulation. A physical search of the person, for instance, has been held to be "a restraint in freedom and an affront to human dignity".³¹ In this context a physical search includes not only the compulsory taking of fingerprints, or bodily samples such as blood, but also a pat down of a person's outer clothing by an enforcement officer to ensure they are not carrying a weapon. Similarly a physical search or seizure of property involves an interference with the engagement of real or personal property. This includes entry onto land, premises or a vehicle owned by the person affected by the search or gaining access to their personal property located elsewhere, but in circumstances in which they might reasonably expect privacy, such as in a locker or office. Moreover, a trespassory interference with a person's expectation of privacy in their correspondence involves not only the seizure of personal papers, but also the gaining of access to their emails held on a computer.
- 2.51 Conversely, there are certain law enforcement activities that can be readily identified as unlikely to unreasonably limit reasonable expectations of privacy. Examples include a search of the person or property with the informed consent of a person entitled to give it; taking a photograph of someone in a public place, or soliciting information about the actions of a suspect from a third party willing to give it. In our proposals we recommend that where it is possible to identify law enforcement activities that either do not limit reasonable expectations of privacy at all, or which place reasonable limits on them, then they should be identified as such.

Presumptive requirements to achieve consistency with reasonable expectations of privacy?

- 2.52 Overseas jurisprudence and international human rights norms indicate that a law enforcement activity that amounts to a search or seizure is presumptively unreasonable if it fails to meet any of the following requirements, namely that:³²

³¹ *R v Jeffries*, above n 7, 300 Richardson J.

³² A similar approach is evident in Canada: see *Hunter v Southam*, above n 30. Where we differ from *Hunter* is that the six requirements we have set out apply in *all* cases where a search or seizure for Bill of Rights Act purposes is involved; any departure from these standards should be justified by reference to the standards set out in the New Zealand Bill of Rights Act 1990, s 5 and *not* by manipulation of the reasonable expectation of privacy test itself.

- it is conducted pursuant to a warrant;
- the warrant has been validly issued;
- the warrant is issued by a neutral officer (that is, someone who is capable of acting judicially, although he or she need not be a judge);
- the warrant can only issue where there are reasonable grounds for both the applicant and the issuing officer to believe that:
 - an offence has occurred, or is occurring;
 - evidence of wrongdoing is likely to be found/taken through the search or seizure and/or offending can be prevented;
 and the items to be searched for/seized and the location at which/means by which they are to be searched for/seized are stated with particularity;
- the warrant can, in the discretion of the issuing officer, be refused (even where the normal prerequisites are satisfied) and/or may be made the subject of conditions (such as conditions as to who may search/seize, when search/seizure can occur, etc) or, as a minimum, is capable of being read as not authorising unreasonable execution in the circumstances of a particular case;
- the actual search or seizure itself is executed:
 - in accordance with the warrant (subject to any reasonable compliance provisions and de minimis/technical exceptions);
 - reasonably in all the circumstances.

2.53 The first, third, fourth and fifth items above are of particular relevance when *laws* that authorise search or seizure are at issue (that is, they are the focus when proposed search and seizure powers are being vetted for consistency with the Bill of Rights Act; or when search and seizure powers are being interpreted by the courts), while all six items are relevant when a particular search or seizure is under the microscope.

2.54 We turn to examine each of these six requirements in turn.

Warrant

2.55 The requirement to obtain a warrant is designed to ensure that the decision to undertake a search or seizure is not left in the hands of the party who conducts it. There are a number of compelling reasons for this.

- It is an essential component of the checks and balances that should exist in a system operating according to the rule of law. While the state through its agents may be expected to act in good faith when exercising coercive powers against individual citizens, that cannot be guaranteed and should not be assumed; it is fundamental to the protection of individual liberty that the need for the exercise of the power should be demonstrated to the satisfaction of an independent officer and authorised by that officer before the exercise of the power rather than justified afterwards with the benefit of hindsight.
- It introduces its own disciplines and constraints into the routine procedures and activities of law enforcement agencies. Even if applications for warrants and orders are almost always approved, the fact that they have to be justified to an independent person is likely to mitigate any risk of abuses or excesses of power.
- It acts as some protection for the agencies themselves against claims of civil

or criminal liability. It gives their actions the imprimatur of a judicial order and may to some degree pre-empt the filing of court proceedings by those under investigation who would otherwise seek either to prevent the exercise of the power or to obtain damages for that exercise. In other words, the requirement for a court order acts as a protection not only to the suspect, but also to the agency.

- It promotes the protective objective of section 21 of the Bill of Rights Act.

Warrant be validly issued

- 2.56 This second requirement simply emphasises that it is not sufficient that there be a piece of paper. Rather the warrant must have been properly issued, in accordance with the relevant law. That is not to say that a statute cannot (as many statutory provisions do) excuse minor non-compliance with technical aspects of the warrant requirements.³³ However, substantial compliance with the statutory requirements is absolutely essential in any search regime that aims to effectively control the exercise of law enforcement powers.

Warrant issued by a neutral officer

- 2.57 The third requirement is designed to ensure that the decision as to whether a warrant should be issued is made by an independent person capable of acting judicially.
- 2.58 As regards independence, the starting position must be that the issuer should not have anything at stake other than determining whether the public interest to be served by authorising the search or seizure is sufficient to overcome the right of the subject (and affected third parties (if any)) to have his or her reasonable expectations of privacy protected.
- 2.59 The neutral officer requirement is not violated just because the person granted authority to issue the warrant is not a professional judge. All that is required is that the person be neutral and be able to be seen as acting judicially. However, the issue of a warrant by a member of the executive to another member of the executive would give rise to genuine doubts about the neutrality and independence of mind of the issuer.³⁴ Reposing such authority in a member of the executive does occur overseas (and is sometimes permissible in New Zealand). It is not necessarily always inconsistent with privacy values. However, in a New Zealand context any departure from the general rule that a warrant be authorised by a neutral third party would require justification under section 5 of the Bill of Rights Act and is likely to be allowed only where national security concerns, or urgency, are in issue.
- 2.60 As regards the requirement that the warrant issuer be capable of acting judicially, it has long been New Zealand law that a person issuing a warrant is undertaking a judicial task and must personally be satisfied that the basis for issuing the warrant has been established by the person seeking it. It is not necessary that the warrant issuer be a professional judge. However, as we discuss in chapter 4, in our view there are dangers in reposing judicial functions in people whose main daily activities are administrative in nature.

³³ See, for example, Summary Proceedings Act 1957, s 204.

³⁴ See *Hunter v Southam Inc*, above n 30 (warrant issued to Director of Combines Investigation Branch by a member of parent organisation, the Restrictive Trade Practices Commission, held to be contrary to s 8 of the Canadian Charter of Rights & Freedoms).

Warrant issued with reasonable grounds for belief of offending

2.61 The fourth requirement is that a warrant should only be issued in the following circumstances.

- There are reasonable grounds to believe³⁵ that an offence has been, is being, or is about to be committed.
- There are reasonable grounds to believe that evidence of wrongdoing is likely to be found or particular offending will be brought to an end.
- In the case of evidence gathering, the items to be located and seized are stated with sufficient particularity.

The reasonable grounds requirement reflects the view that it is only where each of these three has been met that the public interest will, generally speaking, be sufficiently strong to prevail over the citizen's right to be free from search or seizure. Moreover, the requirement for specificity or particularity ensures that both the person executing the warrant, and the person whose premises are being searched, know with a fair degree of certainty if and why the enforcement officers are allowed onto the premises and what it is that they are allowed to do and to seize (and, conversely what they are *not* allowed to do or seize).³⁶ Indeed, at common law, warrants that purported to authorise officials to enter premises and conduct a general search were (unless permitted by statute) considered invalid and entry pursuant to them constituted a trespass.³⁷ Particularity allows the subject of the search to resist unlawful search or seizure and to obtain legal advice about the permissible limits of the search or seizure.³⁸

Discretion to decline to issue warrant

2.62 Fifthly, the requirement that the law vest discretion in a neutral officer to decline to issue a warrant or to add conditions to a warrant ensures that an individualised assessment of the particular application is always made and that the warrant can be tailored to achieve a fair balance between the state's interests on the one hand and the individual citizen's rights on the other. Many statutes authorise a warranted search or seizure to be executed through the application of force *if necessary*. Those last two words are very important. In the Commission's view it is entirely compatible with section 21 of the Bill of Rights Act for both a statute dealing with search powers and a warrant issued under it to provide a *power* to use force where the circumstances justify it;³⁹ it would not, however, be appropriate for a statute to say that all searches shall be conducted with the application of force. Similarly, a power to execute a warrant at any time of the day or night is not inconsistent with section 21 of the Act, as long as execution during the early morning or late at night is not mandatory.⁴⁰

35 The meaning of reasonable grounds to believe, and the reason why it should be adopted as the dominant threshold, are discussed in chapter 3, paras 3.2-3.12.

36 See to similar effect *TranzRail v Wellington District Court* [2002] 3 NZLR 780, 793 (CA); *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728, 736 and 749 (CA).

37 See, for example, *Leach v Money* (1765) 19 State Tr 1001.

38 *Auckland Medical Aid Trust v Taylor*, above n 36, 737 McCarthy J, 749 McMullin J.

39 This issue is discussed further in chapter 6, paras 6.15-6.22.

40 This issue is discussed further in chapter 6, paras 6.23-6.31.

Execution of warrant

- 2.63 As for the sixth and last requirement, four points should be made. First, the terms of the warrant under which the search has been conducted must be complied with – failure to comply with the authority under which the search was purportedly conducted must strongly tell against reasonableness. Secondly, nonetheless, strict compliance is not necessary. A technical non-compliance with the warrant itself (or the preconditions to obtaining one) does not render the search or seizure unreasonable – that would be to prefer form over substance – an approach inappropriate for human rights and inconsistent with the time pressures under which law enforcement and judicial officers operate.⁴¹ In determining technicality the role of the particular requirement should be assessed for its importance to the statutory scheme and the upholding of privacy interests.⁴² Thirdly, the manner of execution is necessarily expressed in very general terms. This is entirely appropriate as the issuing officer is unlikely to know the conditions under which the warrant will need to be executed – for example, whether the occupants will resist entry; whether the occupants will be present at the premises; whether the subject of the search will co-operate with the searchers; and whether they will facilitate seizure. How the warrant will be executed, then, is something that can only be assessed (in most cases) by the person executing it at the time of execution. Accordingly, whether the measures used to execute the search or seizure were reasonable is something which can only be determined against the particular circumstances as they were believed to be at the time of execution. Fourthly, reasonable execution is an inherent restriction imposed by a warrant:⁴³ “[A] search that is carried out unreasonably exceeds the authority conferred by the warrant”.⁴⁴

Conclusion

- 2.64 These six requirements, in our view, ensure compliance with human rights norms. In particular, the requirement that a warrant is, presumptively, a necessary precondition to undertaking a search is essential to the checks and balances that are necessary in a system that operates according to the rule of law. As we note above, though enforcement officers may be expected to exercise search powers in good faith, it should not be assumed. It is fundamental to the protection of individual privacy and liberty that the exercise of such a power is authorised by an independent person who has been satisfied by the enforcement officer that it is necessary to do so in the circumstances.
- 2.65 Moreover, the requirement for particularity and an individualised focus is consistent with a human rights perspective which insists that before any coercive state power is exercised against a citizen, the state turns its mind to whether the power truly needs to be exercised. On this, the Human Rights Committee has observed, in respect of article 17 of the International Covenant on Civil and Political Rights that:⁴⁵

41 To the same effect see *R v Sanders* [1994] 3 NZLR 450 (CA); *R v Walker* (9 December 2003) CA409/03.

42 *R v Sanders*, above n 41.

43 *Crowley v Murphy* (1981) 34 ALR 496, 502, 505, 510, 525 (FCA).

44 *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, 694 (CA) Hardie Boys J.

45 Human Rights Committee, above n 11, para 8.

...relevant legislation must specify in detail the precise circumstances in which ... interferences [with privacy] may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis.

- 2.66 At the same time, in our view, once these six requirements are respected in substance by a search powers regime, there is no reason why there should be inconsistency as to how these requirements are given effect. For example, under current New Zealand law, District Court registrars can authorise a police search of a domestic dwelling (section 198 of the Summary Proceedings Act 1957), yet only a High Court judge can authorise an interception warrant. We are not convinced that the nature of the intrusion involved in telephone tapping is so much more invasive than a physical search of one's home as to require High Court sanction. Similarly, we are not convinced that it is sensible for it to be a precondition to issuing an interception warrant that police show that other investigative means have been unsuccessful, yet no such requirement applies to a physical search of a dwelling. After all, should children be present on the target premises, or should the warrant be executed at night, a physical search can be more frightening than an unknown interception of communications.

Departing from presumptive requirements: justified limits

- 2.67 The six requirements discussed above are those that the Commission considers to be presumptively required in order to achieve consistency with the Bill of Rights Act. However, the courts have consistently stated that no rights are absolute and that all rights can be subject to reasonable limits. Section 21 of the Bill of Rights Act is no exception. Law enforcement officers are empowered under numerous statutory provisions to conduct warrantless searches and seizures (though usually only in exigent circumstances); some statutory provisions only require reasonable suspicion of offending, as opposed to the higher test of reasonable belief; some regulatory statutes permit broad seizure of documents and other evidence, even for law enforcement purposes. Section 5 of the Bill of Rights Act explicitly acknowledges that reasonable limits can be placed on rights and freedoms guaranteed by the Bill of Rights, including section 21.⁴⁶
- 2.68 In determining the reasonableness of legislation and/or an act of intrusion on an individual's expectation of privacy, a range of factors are usually considered including:
- the significance of the values underlying the Bill of Rights Act in the particular case or context;
 - the importance in the public interest of the intrusion on the particular right;
 - the effectiveness of the intrusion in protecting the interests put forward to justify those limits sought to be placed on the right in the particular case;
 - the proportionality of the intrusion.

⁴⁶ The Commission acknowledges that some commentators hold that there is no room for the view that reasonable limits can be placed on s 21 of the Bill of Rights Act and that all assessments of reasonableness of search and seizure should take place under s 21 of the Bill of Rights Act itself: P Rishworth et al, *The New Zealand Bill of Rights* (OUP, 2003), p 174. The Commission prefers the two-stage process, however, on the basis that it allows for better and more transparent assessment of legislative proposals concerning search and seizure.

- 2.69 In turn, assessment of proportionality where section 21 is infringed requires consideration of the type of intrusion (for example, there is a difference between being asked to produce something and being subjected to a forcible entry and search); the nature of the privacy interest being infringed (for example, a search of a vehicle on a public road is likely to be less offensive to privacy values than, say, a body cavity search, or a search of one's residence); the reason for the infringement (including the use to which the information discovered through the search can be put); and so on. In later chapters, where we consider departures from the six presumptive requirements identified at paragraph 2.52 above, we assess those departures conscious of these broad factors.

Chapter 3

COMMON ISSUES



Chapter 3

Common issues

INTRODUCTION 3.1 In the chapters that follow we discuss the issues that arise with different types or aspects of search and surveillance powers. However, several issues are common to most such powers and they can be conveniently dealt with at the outset. Accordingly, in this chapter we deal with five recurring generic topics:

- the threshold that should be met before these law enforcement powers may be exercised;
- what material, or evidence may be the subject of search and seizure;
- what is meant by the term consent to the use of law enforcement powers;
- whether the common law implied licence to enter private land as it applies to enforcement officers should be codified;
- the seizure of material not expressly authorised by the search power, but which is in plain view of the enforcement officer exercising the power.

THRESHOLD FOR THE USE OF SEARCH AND SURVEILLANCE POWERS

3.2 In current statutory provisions relating to search and seizure, two thresholds are commonly used.¹ The first requires that there be “reasonable grounds to believe”,² while the second requires that there be “good cause” or “reasonable cause to suspect.”³ The terms provide the standard that is usually required to be met in two respects: first, to establish the link between the items sought and the place to be searched; and secondly, to establish the link between the object of the search and the offence. The reasonable grounds to believe threshold is more often preferred, but the two standards appear to be used interchangeably. Indeed, there are instances where the threshold adopted seems to be a muddled combination of the two.⁴

3.3 Both thresholds require that the grounds for action be assessed on the basis of an objective standard; that is, the grounds upon which the enforcement officer has applied

1 There are some variations, for example, Insolvency Act 2006, s 150 (reason to believe); Antarctic Marine Living Resources Act 1981, s 9 and Marine Mammals Protection Act 1978, s 13 (reason to believe or suspect).

2 Agricultural Compounds and Veterinary Medicines Act 1997, s 69; Animal Welfare Act 1999, s 131; Biosecurity Act 1993, s 111; Commerce Act 1986, s 98A; Extradition Act 1999, s 83; Films, Videos, and Publications Classification Act 1993, s 109; Fair Trading Act 1986, s 47; Financial Transactions Reporting Act 1996, s 44; Fisheries Act 1996, s 199; Gambling Act 2003, s 340; Motor Vehicle Sales Act 2003, s 130; Resource Management Act 1991, s 334; Sale of Liquor Act 1989, s 177; Summary Proceedings Act 1957, s 198(1); Trade in Endangered Species Act 1989, ss 37, 38.

3 Arms Act 1983, s 60; Corrections Act 2004, s 99(3); Criminal Investigations (Bodily Samples) Act 1995, s 16; Customs and Excise Act 1996, s 149B; Misuse of Drugs Amendment Act 1978, s 13EA.

4 See, for example, Marine Mammals Protection Act 1978, s 13(1); Misuse of Drugs Act 1975, s 18(1); Wildlife Act 1953, s 39(1)(d).



for a warrant or has exercised a warrantless power must be determined by reference to whether a reasonable person, with “the experience and training” of an enforcement officer rather than an uninformed bystander⁵ could have reached the same conclusion, in terms of both the facts and the inferences to be drawn from those facts.⁶

- 3.4 Neither threshold requires that the grounds for action be based upon what the enforcement officer directly knows. He or she is entitled to take into account and act on credible information placed before him by others, including information that would not be legally admissible.⁷
- 3.5 Beyond this, however, the distinction between the two standards has not generally been made clear. The courts have tended to focus on the issue of reasonableness rather than defining the boundary between the thresholds in explicit terms. To the extent they have done so, they have expressed the difference in negative terms (for example, what does not amount to belief) rather than in positive terms.
- 3.6 The clearest exposition of the difference can be found in *R v Sanders*, where Fisher J, after referring to earlier decisions drawing a distinction between belief and suspicion, noted: ⁸

Even suspicion probably goes beyond mere recognition that something is possible to the point that, while final judgment must be suspended pending proof, the proposition in question is regarded as inherently likely.

He then contrasted that with belief, which required that “there must be the view that the state of affairs in question *actually exists*.”⁹

- 3.7 However, it is arguable that this draws too rigid a distinction, and places the threshold for belief at too high a level. Inherent likelihood may not be problematic as the standard for suspicion, depending upon the view taken as to the degree of likelihood implied. However, the proposition that belief requires a view that the state of affairs definitely exists would seem to go too far, and if applied literally, would frequently preclude exercising a law enforcement power that is designed precisely for the purpose of finding out whether the state of affairs exists.
- 3.8 In fact, we think that the distinction is better expressed in terms of degrees of likelihood. That is, a belief requires something akin to a high or substantial likelihood, while suspicion may require no more than medium or moderate likelihood. This cannot be expressed in precise terms; there is no particular percentage threshold beyond which a suspicion is converted into a belief. However, it is nonetheless a distinction with real meaning.

⁵ *R v Ritchie* (26 November 2004) HC WHA CRI-2004-029-63 Harrison J.

⁶ *R v Sanders* [1994] 3 NZLR 450, 462 (CA) Fisher J; *R v Pineaha* (2001) 19 CRNZ 149 (CA); *Police v Anderson* [1972] NZLR 233 (CA); *Duffy v Attorney-General* (1985) 1 CRNZ 599.

⁷ *Shaaban Bin Hussien v Chong Fook Kam* [1970] AC 942; [1969] 3 All ER 1626 (PC); *Hill v Attorney-General* (1990) 6 CRNZ 219, 221 (CA) Richardson J; *Police v Cooper* [1975] 1 NZLR 216 (CA).

⁸ *R v Sanders*, above n 6, 461 Fisher J.

⁹ *R v Sanders*, above n 6, 461 Fisher J (emphasis added).

- 3.9 Looked at in this light, we are inclined to the view that, given the intrusiveness and impact of search and surveillance powers, reasonable belief should remain the threshold. We have reached that conclusion for three reasons:
- A change to reasonable suspicion would run the risk of encouraging judicial officers to reduce the requirement for search to an unacceptably low level. While there may be no problem with a reasonable suspicion test that requires inherent likelihood or an apprehension with some evidential basis, the courts have sometimes referred to reasonable suspicion, somewhat disparagingly, as “mere suspicion or surmise”.¹⁰ If this message was to be taken from a legislative change, it would have undesirable consequences.
 - There is no evidence that the reasonable belief standard leads to any particular problems as it is currently applied. Perhaps one reason for this is that in practice it is extremely difficult for a court to use the belief/suspicion boundary to invalidate a search when evidence has actually been discovered. In other words, if reasonable grounds existed, an enforcement officer, upon discovering evidence, is likely to be able to present a convincing enough case to validate the search, whatever the standard. The fruits of the search have established the likelihood; the question of validity will in almost all cases turn simply on the question of reasonableness.
 - There should be a distinction between ordinary searches and those that need to be taken in emergency situations, where a lesser threshold is appropriate. If suspicion were the threshold adopted in ordinary cases, no such distinction would be possible.
- 3.10 A standard statutory threshold for the exercise of ordinary search and seizure powers is highly desirable. We conclude that the appropriate criterion should be “reasonable grounds to believe”.¹¹ That test should be departed from only where there is a compelling reason to do so. Current provisions where the lower threshold can be justified and should be retained include:
- search powers in respect of possession of firearms offences under the Arms Act 1983;
 - search powers in respect of border-related offences under the Customs and Excise Act 1996.

Thus, a lower threshold can be justified in respect of items that may cause immediate and serious harm,¹² and for border searches where only a brief opportunity exists to search for dutiable, uncustomed, prohibited, or forfeited goods.¹³

- 3.11 We observe that the threshold for arrest in the Crimes Act 1961¹⁴ is good cause to suspect that the person has committed a breach of the peace or any offence

10 *P F Sugrue Ltd v Attorney-General* [2004] 1 NZLR 207, 227 (CA); *Frost v Police* [1996] 2 NZLR 716, 721; *R v Laugalis* (1993) 10 CRNZ 350, 355 (CA).

11 This standard was also recommended by the Law Reform Commission of Canada *Search and Seizure* (R24, Ottawa, 1984) 16; and the Victorian Parliament Law Reform Committee *Warrant Powers and Procedures: Final Report* (No 170 of Session 2003-2005, Melbourne, 2005) 113. The “reasonable grounds to suspect” threshold has been favoured by the Philips Commission: Royal Commission on Criminal Procedure *Report* (Cmnd 8092, HMSO, London, 1982) para 5.4; the Gibbs Committee: Australian Attorney-General’s Department *Review of Commonwealth Criminal Law* (Fourth Interim Report, AGPS, Canberra, 1990) para 38.50; and the Queensland Criminal Justice Commission *Report on a Review of Police Powers in Queensland – Volume II: Entry, Search and Seizure* (Brisbane, 1993) para 8.2.

12 For example, see Arms Act 1983, ss 60-61.

13 For example, see Customs and Excise Act 1996, s 149B.

14 Crimes Act 1961, s 315(2)(b).

punishable by imprisonment. This does present something of an anomaly, as arrest is a greater imposition on individual liberty than a search of a person's property. While this issue is outside the scope of this report, there may be merit in reconsidering the threshold required before an arrest may take place.

- 3.12 Finally, it should be noted that the statutory language accompanying the two thresholds tends to vary, with some enactments requiring that there be a belief or suspicion that evidence¹⁵ “is” present, and others requiring that there be a belief or suspicion that evidence “may be” present. Some provisions contain both.¹⁶ While the choice may largely be a matter of preference that is unlikely to affect the interpretation given to it, “is” sits more comfortably with the expression “reasonable grounds to believe” and should be adopted.

RECOMMENDATION

- 3.1 There should be a standard statutory threshold for the exercise of general law enforcement powers of search. That threshold should be reasonable grounds to believe that an offence has been, is being, or is about to be committed, and that evidential material is in the place to be searched. That test should be departed from only where there is a compelling case to do so. Current provisions where the lower threshold can be justified and should be retained include sections 60 to 61 of the Arms Act 1983 and search powers relating to border control offences under the Customs and Excise Act 1996.

POWER TO SEIZE EVIDENCE

- 3.13 Section 198(1) of the Summary Proceedings Act 1957 provides for different categories of things that may be the subject of a search warrant. In chapter 4 we recommend adopting a single category governing the subject of a search warrant.¹⁷ Currently the most common form of warrant is that issued under section 198(1)(b) to secure evidence. In such a case the judicial officer can issue a warrant only if satisfied that there are reasonable grounds to believe that:
- there has been the commission of an offence punishable by imprisonment;
 - there are things present at or in a stated location;
 - things to be found there will be evidence as to the commission of the offence.¹⁸
- 3.14 In *R v Sanders*, Fisher J elaborated on what constitutes evidence for purposes of section 198:¹⁹
- ... a thing will constitute evidence of the commission of an offence if its form or existence would directly or indirectly make one or more of the factual elements of the offence itself more likely.
- 3.15 In respect of the equivalent Queensland provision then in force, the High Court of Australia opined that an object will afford evidence as to the commission of an offence if it will:²⁰

15 In the next section of this chapter we discuss replacing the current evidence test.

16 Animal Products Act 1999, s 94(1)(c); Biosecurity Act 1993, s 111(1)(b); Motor Vehicle Sales Act 2003, s 130(1)(c).

17 Chapter 4, recommendation 4.4.

18 *R v Sanders*, above n 6, 460 Fisher J.

19 *R v Sanders*, above n 6, 461 Fisher J.

20 *George v Rockett* (1990) 170 CLR 104, 120 (HCA). This definition has been applied in Australia on numerous occasions, see Stephen Donaghue “Searching questions: the validity of search warrants under Pt 1AA of the Crimes Act 1914” (1999) 23 Crim LJ 8, 13, n 45.

... assist directly or indirectly in disclosing that an offence has been committed or in establishing or revealing the details of the offence, the circumstances in which it was committed, the identity of the person or persons who committed it or any other information material to the investigation of those matters.

- 3.16 In respect of the scope of the equivalent Canadian provision, the Supreme Court of Canada commented:²¹

On a plain reading, the phrase “evidence with respect to the commission of an offence” is a broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence. The natural and ordinary meaning of this phrase is that anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of the warrant.

- 3.17 While a number of other search warrant regimes adopt a similar test to section 198 of the Summary Proceedings Act 1957 for what may be seized under search warrant,²² other approaches have been taken under other New Zealand statutes and under the Police and Criminal Evidence Act 1984 (UK). We have therefore considered whether it is preferable to retain the section 198 test or adopt an alternative approach to the power to seize.

Other approaches

Seizure of relevant things

- 3.18 A number of New Zealand search warrant regimes adopt a broader test, based on relevance.²³
- 3.19 For example, section 9(2)(b) of the Serious Fraud Office Act 1990 permits a warrant to be issued where subsection (1) is fulfilled and:

There are reasonable grounds to believe that there may be, at the place specified in the application, any documents or other thing that may be relevant to an investigation or may be evidence of any offence involving serious or complex fraud.

Section 13(1)(d) of the Serious Fraud Office Act 1990 permits the person executing the warrant:

To search for and remove any documents or other thing that the person executing the warrant believes on reasonable grounds may be relevant to the investigation or may be evidence of any offence involving serious or complex fraud.

- 3.20 The test for what may be subject to search and seizure is thus either material “relevant to the investigation” or “evidence of any offence involving serious or complex fraud”. Judicial interpretations of evidence suggest that the phrase

21 *CanadianOxy Chemicals Ltd v Canada (Attorney-General)* [1999] 1 SCR 743, para 15.

22 Financial Transactions Reporting Act 1996, s 44; International War Crimes Tribunals Act 1995, s 48(1); Mutual Assistance in Criminal Matters Act 1992, s 44(1). Australian examples include Crimes Act 1914 (Cth), s 3F(1)(c); Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 49; and Crimes Act 1958 (Vic), s 465.

23 Serious Fraud Office Act 1990, s 12(1); Commerce Act 1986, s 98B; Fair Trading Act 1986, s 47A(1); Motor Vehicle Sales Act 2003, s 131; Reserve Bank of New Zealand Act 1989, s 66J.

encompasses anything that is relevant to the specific offence under investigation.²⁴ However, the use of the word “relevant” in section 13(1)(d), qualified only by reference to “investigation”, suggests a rather wider test, enabling a warrant to be obtained to search for any material relevant to an investigation, even if the nature of the offending is unknown or uncertain. The fact that the warrant may also relate to “evidence of any offence” lends weight to this view.

Material of substantial value

3.21 A search warrant may be issued under section 8 of the Police and Criminal Evidence Act 1984 (UK) if there are reasonable grounds for believing:

- (a) That a serious arrestable offence has been committed; and
- (b) That there is material on premises specified in the application which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence; and
- (c) That the material is likely to be “relevant evidence”, defined to mean anything that would be admissible in evidence at a trial for the offence.

3.22 Although the material that can potentially be seized, “material likely to be of substantial value”, is arguably broader than “evidence of the commission of an offence” under section 198 of the Summary Proceedings Act 1957, the requirement that the material be likely to be admissible evidence is an important qualifier. Not only must the material of substantial value be likely to be evidence, but it must also be likely to be admissible evidence of the offence. The overall effect is that the Police and Criminal Evidence Act provision may not be significantly broader than the section 198 test and may even be narrower.²⁵

Pros and cons of a broader approach

3.23 A broader approach to what may be seized under warrant allows greater flexibility to law enforcement in investigating criminal offending. While the benefits to law enforcement must be balanced against human rights values,²⁶ the appropriate framing of a broader approach should minimise any potential conflict with those values.

3.24 In terms of the relevance test, we think that there is a difficulty with providing that anything relevant to an investigation may be seized, in that there is a risk that this confers a potentially wide-ranging power to seize of indeterminate scope. We are concerned that the relevance test could discard some of the protection of the section 198 test and raise the spectre of a general warrant, by relaxing the nexus between the material to be seized and the specific offence. It also has the potential to widen the scope of the power too broadly, allowing the search for and seizure of items of possibly only passing or tangential interest to the investigators.

²⁴ See above, paras 3.14 to 3.16.

²⁵ See in the Australian context, *George v Rockett*, above n 20, 119, affirming that *Baker v Campbell* does not suggest that the only things for which a search warrant might be issued are things which are or will become admissible in evidence: “The power to issue a search warrant is in aid of criminal investigation as well as in aid of proof at trial, though it is necessary that the investigation should have reached the stage where reasonable grounds for the statutory suspicion and belief can be sworn to.”

²⁶ Law enforcement and human rights values are discussed in chapter 2.

- 3.25 We also note that the relevance test by itself is counter to other search warrant regimes (both under section 198 of the Summary Proceedings Act 1957 and similar provisions and Commonwealth search warrant regimes such as Australia, England and Canada) where a prerequisite for seizure is that the material constitutes evidence of the offence being committed. Nonetheless, we think that a test can be adopted that provides enforcement agencies with power to seize a potentially wider range of material and at the same time maintains the required connection between the material to be seized and the specific offence for which the warrant is sought.

Proposed new test

- 3.26 The current section 198 test requires a link between the item to be seized and an element of the offence under investigation. This has been confirmed through judicial dicta.²⁷ It provides an essential safeguard in that the warrant remains specific to the offence in question. This should be retained.
- 3.27 However, we recommend that the current test be replaced by one that requires that there be reasonable grounds to believe that evidential material will be found in the specified location. By “evidential material”, we mean evidence or any other item of significant relevance to the investigation of the specified offence. We have concluded that a test of this nature is appropriate for the following reasons:
- it better reflects the expansive judicial interpretation in this country of what constitutes evidence;
 - it would clearly include relevant exculpatory evidence (this issue will be discussed in a little more detail below);
 - it avoids any connotation that only items that are to be presented as evidence in court proceedings can be seized;
 - it would require the issuing officer to be satisfied that what is sought will be of sufficient significance to the investigation to justify coercive state powers being used in the circumstances of the case;
 - by using the threshold of “significant” relevance, it would avoid the “substantial value” test used in the Police and Criminal Evidence Act 1984 (UK), which would, in our view, impose a much higher threshold that may often be difficult to satisfy at an early stage of an investigation.
- 3.28 Warrantless powers to search for and seize evidence should be expressed in the same terms. Our proposals in chapter 5 have been framed accordingly.
- 3.29 In the remainder of this report we refer to the things that may be seized pursuant to a search power as evidential material.

RECOMMENDATION

- 3.2 The term evidential material should be used to describe the items that may be the subject of a search power. “Evidential material” should be defined as evidence or any other item of significant relevance to the investigation of the specified offence.

²⁷ See, for example, *R v Sanders*, above n 6, 469 Fisher J.

Additional issues considered

3.30 We have considered the following issues:

- whether the test needs to be clarified so that it operates effectively with respect to intangible evidence such as computer data;
- whether the test allows for exculpatory evidence to be seized;
- whether the test allows for items that potentially may yield evidential forensic material to be seized.

Intangible material

3.31 In chapter 7 we discuss issues raised by existing legislation with respect to computer searches. We note that the current search and seizure regime, subject to some piecemeal amendments, has largely been designed with tangible items in mind. The result has been a degree of uncertainty about how it applies to intangible items.

3.32 In chapter 7 we recommend a number of amendments designed to clarify and expand how the search and seizure regime applies to intangible items. In the context of the test for what may be seized, we think that it would also be helpful to clarify that evidential material includes both tangible and intangible items.

3.33 The Australian provision defines evidential material to include “a thing in electronic form”.²⁸ We recommend that the clarification be somewhat broader than electronic material; future developments in technology will produce potential intangible evidential material in different forms such as electromagnetic, organic, chemical or optical.

3.34 We recommend that items that may be the subject of a search should expressly include intangible items.

RECOMMENDATION

3.3 Evidential material should expressly include intangible items.

Exculpatory material

3.35 According to Black’s Law Dictionary, evidence is:

... something that tends to prove or disprove the existence of an alleged fact.... Evidence is the demonstration of a fact; it signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on one side or on the other. In legal acceptance, the term “evidence” includes all means by which any alleged matter of fact, the truth of which is submitted to investigation is established or disproved.

3.36 The term evidence, of itself, would therefore include both inculpatory evidence (tending to prove a suspect’s involvement) and exculpatory evidence (tending to disprove the suspect’s involvement). But as used in section 198, the term “evidence” is limited by the phrase “as to the commission of any such offence”. This suggests that the provision is intended to cover only

²⁸ Crimes Act 1914 (Cth), s 3C(1).

inculpatory evidence. Fisher J's explanation of the term in *R v Sanders*²⁹ could be employed to argue that exculpatory evidence is also evidence of the commission of the offence in that a reduction in the likelihood that one suspect is involved in the offence may increase the strength of the case against another. However, we think that this strains both the interpretation of the current provision and Fisher J's explanation.

- 3.37 The Australian and Canadian dicta are somewhat broader. Nevertheless, despite the broad description of the provision by the High Court of Australia in *George v Rockett*, the Court proceeded to determine that material that is exculpatory does not fall within the provision unless the material also has a bearing on an element of the offence:³⁰

Things which tend to show merely that no offence was committed are not things which will afford evidence as to the commission of an offence. But things may have a dual character, tending at once to establish an element of an offence and tending to exculpate one or more persons from criminal liability. Things which afford evidence of an element of an offence and which also tend to exculpate a person from criminal liability may nonetheless be things which "will ... afford evidence as to the commission of any offence."

... Had it appeared that there were no reasonable grounds for believing that those documents or any of them would afford anything more than exculpatory evidence, the warrant would have had to be set aside ...

- 3.38 We conclude that, based on the current wording of section 198 of the Summary Proceedings Act 1957 and judicial interpretations of the provision and comparable foreign provisions, section 198(1)(b) does not currently extend to permit the seizure of material that is solely exculpatory.
- 3.39 However, our recommendation that items of significant relevance to the investigation of an offence may be the subject of a search, will allow a search not only for inculpatory evidence (the traditional scope of search powers) but also exculpatory material. Material that has the effect of eliminating a suspect, notwithstanding other evidence pointing to their possible involvement in the specified offence, will clearly be highly relevant to the investigation.

Seizure of forensic material

- 3.40 For the purposes of this section we use the term forensic material to describe an item that requires scientific analysis or testing to determine whether it contains or is evidential material.
- 3.41 A search warrant issued under section 198(1)(b) of the Summary Proceedings Act 1957 is:³¹

... frequently used to obtain "things" such as clothing, which may bear stains or other forensic evidence from a crime scene. Thereby an identity link between the offence and the suspect may be forged.

29 *R v Sanders*, above n 6, 461 Fisher J.

30 *George v Rockett*, above n 20, 120-121.

31 *R v T* (1999) 17 CRNZ 63, 70. See, for example, *R v C* (19 February 2001) CA 381/00.

As well as evidential material for identification purposes, forensic material may produce evidence relating to a victim of the offence, the instrument of the offending (e.g. ballistics) or the type of offending (e.g. drug residue).

3.42 In relation to evidential material for identification purposes, forensic material taken from a crime scene may provide a direct link between the suspect and the commission of the offence. But the link between the forensic material and the offence may be less direct where police seek to obtain a sample of genetic material for analysis and comparison with other samples.

3.43 We have considered:

- whether section 198(1)(b) is adequate to cover seizures of forensic material;
- whether section 198(1)(b) is adequate to cover the seizure of samples.

Adequacy of section 198 to deal with the seizure of forensic material

3.44 A search for forensic material is somewhat different from a search for ordinary items, given that scientific analysis is necessary to determine whether evidential material is present. A search for forensic material involves:

- identifying where the material probably is;
- searching for and seizing items that may contain the material sought;
- subjecting seized items to scientific examination.

It is the scientific examination that establishes the presence of evidential material relating to the commission of the offence, rather than the search and visual identification by an enforcement officer.

3.45 The problem is that while the object of the search is forensic material, the test for seizure is framed around the item carrying that material. This creates a mismatch between the object of the search and the seizure power. A further mismatch is created by the fact that the seizure is dependant on the categorisation of an item as “evidence” (or, as we prefer, “evidential material”). But in the case of forensic material, this categorisation cannot occur until the scientific examination takes place post-seizure.

3.46 Despite the courts’ accommodation of the seizure of forensic material (see, for example, *R v T* and *R v C*, discussed below), the current wording of section 198(1)(b) of the Summary Proceedings Act 1958 is problematic, in that it requires reasonable grounds to believe that an item will be evidence of an offence before it may be seized. In cases where, without subsequent testing, the evidential material is invisible or difficult to detect or identify as significantly relevant, it is hard to see how the person executing the warrant can, without additional information, fulfil the test set to allow the item to be seized. In the words of Panckhurst J in *R v T*, the things seized were “a *possible* source of material.”³² Arguably the section 198 test is too high to allow an enforcement officer to seize material for forensic testing.

³² *R v T*, above n 31, 70.

Adequacy of section 198 to deal with the seizure of samples

- 3.47 Forensic samples can provide circumstantial evidence – for example, indirect evidence of identity in the case of DNA samples, or evidence linking a person to the geographical area in which the crime was committed, or other elements of the offence. But there is an issue as to whether samples are in themselves evidential material that may be seized under section 198 of the Summary Proceedings Act 1957.
- 3.48 Two New Zealand cases illustrate the issue. In *R v T*, under search warrant, the police seized a toothbrush and razor that contained bodily substances that were analysed to yield a DNA profile. Panckhurst J stated the issue in the following terms:³³

... I mention a point which initially troubled me with reference to the wording of s 198(1)(b). The “thing” must be reasonably believed to be “evidence as to the commission of any ... offence,” here, rape. The subject matter of this warrant, being clothing or personal items which might contain bodily fluid or hair samples of the suspect, could not per se constitute evidence of the commission of an offence. Such things were rather a potential source of bodily material from which a DNA result could be obtained. Section 198(1)(b) is frequently used to obtain “things” such as clothing, which may bear stains or other forensic evidence from a crime scene. Thereby an identity link between the offence and the suspect may be forged. But here, the process was a step further removed. The things belonging to the accused could not scientifically, or otherwise, be directly related to the commission of the offence. Rather, the things were a possible source of material from which a genetic imprint could be obtained. Thus the search was for a sample, rather than evidence of the kind customarily encountered under the subsection. This caused me to pause.

- 3.49 He then resolved the issue for the purposes of the case by reference to Fisher J’s explanation of section 198(1)(b) in *R v Sanders*:³⁴

The factual element in issue is who had sexual connection with the complainant. A sample of bodily fluid or hair from the accused will, albeit indirectly through scientific evaluation, constitute evidence highly relevant to that issue and therefore to the commission of the offence itself.

- 3.50 In *R v C*,³⁵ police executed a search warrant at Mt Eden Prison where the accused was awaiting trial and seized a pair of underpants worn by the accused. These were found to contain semen staining that afforded a DNA profile strongly supporting the rape complaint against the accused. After referring to the dicta of Fisher J in *R v Sanders*,³⁶ the Court of Appeal found that there was no logical basis for holding that the underpants were not capable of being evidence of the offence.
- 3.51 In both *R v C* and *R v T*, the courts upheld the seizure of an item containing sample forensic material, even though that material was indirect, rather than direct, evidence of the commission of the offence.

33 *R v T*, above n 31, 70.

34 *R v T*, above n 31, 70.

35 *R v C*, above n 31.

36 *R v Sanders*, above n 6.

- 3.52 We consider that allowing samples to be seized under section 198 of the Summary Proceedings Act 1957 is a considerable stretch of both the language of the provision and the dicta of Fisher J in *R v Sanders*. A sample that provides a genetic profile may provide circumstantial evidence of identity, but to produce evidence of the commission of an offence, the genetic profile must be compared with other forensic material. Given the relevant human rights values, particularly privacy, we doubt that section 198 is adequate to authorise the seizure of samples for genetic analysis, even under our proposed significant relevance test. Judicial authority can be relied on, but we think that an express legislative authorisation is preferable.

Options for reform

- 3.53 We have considered whether any other formulations of the test for seizure provide a more satisfactory basis for the seizure of material for forensic analysis.
- 3.54 We have already rejected the general adoption of a reasonable suspicion test instead of a reasonable belief test. While such a test would set the threshold of probability at a lower level and therefore provide somewhat more flexibility, it would arguably still not go far enough, since it would still require some degree of likelihood that the seized material would yield evidence.
- 3.55 We have identified two remaining options for reform:
- clarifying that an item of significant relevance to the investigation of the offence includes anything that may prove to be of significant relevance following scientific examination;
 - introducing a specific power to seize forensic material.
- 3.56 There are overseas precedents for the first model. For example, under section 69 of the Police Powers and Responsibilities Act 2000 (Qld), a search warrant may be issued if there are reasonable grounds for suspecting evidence of the commission of an offence is at the place or likely to be taken to the place within the next 72 hours. The term “evidence of the commission of an offence” includes a thing that will, itself or by or on scientific examination, provide evidence of the commission of an offence or suspected offence.³⁷
- 3.57 This definition is helpful in authorising the seizure of items that provide evidence following scientific examination. However, there are some difficulties with adopting the Queensland approach in the New Zealand context. Queensland has adopted the reasonable grounds to suspect threshold that we do not favour. Further, the Queensland provision still requires a reasonable suspicion that the item *will* provide evidence following scientific examination. This is problematic in the context of forensic material where it is unknown whether the item will provide evidence until it has been tested.
- 3.58 We therefore prefer the second option – a specific power both to seize items that may contain forensic material of significant relevance to the investigation of the offence, and to undertake subsequent forensic testing of those items. Such a power would overcome the limitations of the current test on the seizure of forensic material, while retaining appropriate restrictions on seizure.

³⁷ Police Powers and Responsibilities Act 2000 (Qld), Schedule 6.

- 3.59 The advantage of a specific provision along these lines is that the test is tailored to the particular situation where it is necessary to seize items for forensic testing, a scenario that, as outlined above, differs from the usual search and seizure scenario. The reasonable grounds to believe test continues to apply, but does not require the problematic inquiry into whether a specific item is evidential material; rather, the inquiry is whether there are reasonable grounds to believe that a specific item may, following analysis, constitute such material. Where a warrant is applied for, the basis for the applicant's belief that the object of the search may contain evidential material that upon analysis could be of significant relevance to the investigation of the offence should be articulated in a way that enables the items to be seized to be described in the warrant as specifically as possible. There would be no authority to seize an item that could not reasonably be expected to carry or contain such material.
- 3.60 To accommodate the seizure of genetic samples, we recommend including the phrase "(whether by itself or together with other material)" that is used in the Police and Criminal Evidence Act 1984 (UK).³⁸ This should clarify that a sample of material such as genetic material need not provide evidential material on its own, as long as it can contribute to the formation of such material.
- 3.61 On balance, we consider that this tailored approach is the preferred option. The test that we recommend be provided in substitution for section 198 of the Summary Proceedings Act 1957 should be expanded to cover the seizure of forensic material, including genetic samples. The specific provision would apply to searches of premises, vehicles and persons, both under search warrant and in the exercise of warrantless powers. In both contexts the person seizing the item would have to have reasonable grounds to believe that the item may, on scientific examination, constitute evidential material (whether by itself or together with other material).

RECOMMENDATION

- 3.4 A specific power to seize forensic material should be introduced. This should provide that, where there are reasonable grounds to believe that there is material somewhere on the place, person or vehicle that is the subject of the search (and, in the case of a search warrant, that material is described in the warrant as the object of the search), the enforcement officer should be able to seize any item that he or she believes on reasonable grounds may contain material that could, when examined scientifically, be significantly relevant to the investigation of the specified offence (whether by itself or together with other material). This power should apply to both warrant and warrantless searches.

³⁸ Police and Criminal Evidence Act 1984 (UK), s 8(1)(b).

CONSENT

- 3.62 Law enforcement activity, including entry, search, seizure, copying and surveillance, may be lawfully undertaken with valid consent. Such consent will allow the act to be performed whether or not a power exists.

Current New Zealand law

- 3.63 A lawful search may be undertaken when the consent is:
- voluntary;³⁹
 - informed;⁴⁰
 - not obtained by deception or misrepresentation;⁴¹
 - given by a person with actual authority.⁴²
- 3.64 There is no obligation for the consent to be express,⁴³ or for explicit advice to be given of the right to refuse consent.⁴⁴ Whether a valid consent has been given is a matter of fact determined by the circumstances of the case.⁴⁵

Problems with the current approach

- 3.65 The circumstances in which searches with consent can be undertaken are not restricted. This gives rise to the potential for such searches to be undertaken randomly or indiscriminately. That potential is exacerbated by the difficulties in determining whether any particular consent is voluntary and informed, given the power and information imbalance and the pressure on members of the public to comply with an enforcement officer's request. Moreover, even if consent is voluntary and informed, the resulting search is still inherently coercive and intrusive and may be undertaken as an instrument of harassment or on the basis of unjustified discrimination. The absence of restrictions on consent searches is thus unsatisfactory.
- 3.66 For this reason, some overseas jurisdictions have attempted to stipulate a threshold for undertaking a consensual search or to require that a number of preconditions be met before there can be valid consent.

39 See, for example, *R v Anderson* (1997) 4 HRNZ 165 (CA); *Lord v Police* (1998) 5 HRNZ 92.

40 See, for example, *R v T Burns (No 10)* (2 August 2000) HC AK T 991986 Chambers J; *R v Oldham* (1994) 11 CRNZ 658 Holland J.

41 While clearly a factor that will determine whether the consent is voluntary or informed, a number of cases have been decided on the basis of the person giving consent being misled as to the true nature of the search or consequences. See, for example, *R v Hjelmstrom* (2003) 20 CRNZ 208 (CA) where the accused's apparent co-operation nonetheless resulted in a search being held both unlawful and unreasonable because of the police's false representation that a warrant would be obtained if consent was not forthcoming when no basis existed for the issue of a warrant; *R v Pearce* (31 October 1996) HC PMN T 12/96 Heron J.

42 Whilst clearly any person, including the police (or other law enforcement agency) executing a search is entitled to rely on another's apparent authority, a trespass will be committed if the person giving permission has no actual authority: see *Blenheim Borough and Wairau River Board v British Pavements (Canterbury) Ltd* [1940] NZLR 564. If police are negligent as to whether the person giving permission has actual authority, this could influence the court's decision as to whether the entry and any subsequent search are unlawful and unreasonable.

43 See, for example, *R v Allen* (19 December 1996) CA 88/94.

44 See, for example, *R v Dohrman* (25 June 1993) CA 367/92; *R v Allen*, above n 43.

45 See *R v Bradley* (1997) 15 CRNZ 363, 369 (CA) Thomas J; and *Lord v Police*, above n 39, 96-97.

Threshold

- 3.67 Canadian courts have focused on a threshold before a valid consent search can be undertaken. They have held that, even in cases of valid consent for a search of a person, the request cannot be made without reasonable and probable grounds that the suspect is committing or has committed an offence. Suspicion alone may render the search unreasonable under section 8 of the Canadian Charter of Rights and Freedoms.⁴⁶
- 3.68 In the United Kingdom, the Police and Criminal Evidence Act 1984, Code A, paragraph 1.5 provides that an “officer must not search a person, even with his or her consent, where no power to search is applicable”.⁴⁷
- 3.69 We do not support the approach taken in either jurisdiction. In our view the Canadian approach is too restrictive. Even requiring reasonable suspicion would be too high a threshold, since that suspicion would need to attach to the person, vehicle or place being searched; in many cases a search of that sort may be justified not because of any individual suspicion but because the person, vehicle or premises has more generally come within the ambit of a criminal investigation.
- 3.70 Requiring such a high threshold, as in Canada, before a person may be asked to submit to a consent search would, we believe, prevent searches that most members of the community would regard as sensible police practice – for example, a request to search a farmer’s barn after a child has gone missing in the area, or a request to search the contents of the backpack of someone behaving suspiciously at 2 o’clock in the morning in a neighbourhood where there has been a spate of recent burglaries.
- 3.71 The United Kingdom approach is even more problematic: the right to refuse to consent to a search would become meaningless if the consequence were that the search would be undertaken anyway, pursuant to a statutory power. While we acknowledge that it is good practice to undertake *any* search cooperatively and non-coercively, there is little point in limiting the situations where consent may be sought to those cases where there is a power to search. The very essence of consent requires that the person giving it has an option. It is largely meaningless if the consequence of refusal is that the search will be compulsorily undertaken.
- 3.72 Nevertheless, we think that on balance it is undesirable that consensual searches be open-ended and unrestricted. Enforcement officers should have to consider whether there is good reason for a consensual search for particular defined purposes before asking permission to undertake it.
- 3.73 There are a number of reasons for which a consensual search may be undertaken that are essential for routine policing and which can be regarded as core to the law enforcement function: investigating criminal activity; crime prevention; protecting life or property; or preventing injury. Beyond that, however, a number of Acts authorise searches for a range of activities that do not necessarily fall within those grounds. Examples include border searches under the Customs and

46 *R v Stevens* (1983) 7 CCC (3d) 260 (NSCA).

47 This is subject to one exemption, in relation to searching people entering sports grounds or other premises where consent is given as a condition of entry.

Excise Act 1996⁴⁸ or under the Biosecurity Act 1993.⁴⁹ Accordingly, we recommend that, in addition to the core law enforcement purposes, a consent search may also be undertaken where a statutory power of search would exist if the appropriate threshold of suspicion or belief were met.

- 3.74 Accordingly, consent to a search should be sought only for the purposes of:
- crime prevention;
 - protection of life or property or prevention of injury;
 - investigation of possible criminal activity;
 - any purpose for which a statutory power of search would exist if the appropriate threshold of suspicion or belief were met.

Pre-conditions of a valid consent

- 3.75 In 1983 the Law Reform Commission of Canada, in a discussion paper on police powers of search and seizure,⁵⁰ proposed including a provision in the Canadian Criminal Code formalising the requirements for a valid consent search. The proposal included an obligation for a peace officer to inform the person whose consent was sought in writing that he or she had a right to refuse consent and to withdraw it at any time. In its final report the Commission recommended that consent could be given orally or in writing but the existence of such a document should be prima facie proof of consent.⁵¹
- 3.76 In the United Kingdom the Police and Criminal Evidence Act 1984, Code B paragraph 5, lists a number of requirements for a valid consent search of premises:
- if practicable, the consent is to be given in writing;
 - the officer in charge must make any necessary enquiries to be satisfied the person is entitled to give consent;
 - the officer in charge must state the purpose of the proposed search and its extent (and the information must be as specific as possible including as to the parts of the premises to be searched);
 - the person concerned must be clearly informed that they are not obliged to consent and anything seized may be produced in evidence;
 - if the person is not suspected of an offence the officer must state this;
 - no search may continue if consent is withdrawn before the search is completed.
- 3.77 On the face of it, preconditions of the nature suggested by the Law Reform Commission of Canada or required by the Police and Criminal Evidence Act Code for search of premises have some attraction. They have potential to reduce room for argument about whether consent was actually given and to ensure consent is fully informed.

48 See, for example, Customs and Excise Act 1996, s 149B for dutiable, uncustomed, prohibited or forfeited goods, or s 149BA for dangerous items.

49 See, for example, Biosecurity Act 1993, s 108 in relation to uncleared risk goods or unauthorised goods.

50 Law Reform Commission of Canada *Police Powers – Search and Seizure in Criminal Law Enforcement* (WP 30, Ottawa, 1983) 159.

51 *Search and Seizure*, above n 11, 33.

- 3.78 However, we note that the Search and Search Warrants Committee⁵² concluded that the need for written consent would be impracticable in many cases and that the process could be something of a “meaningless ritual”. That Committee noted that the critical issue is whether consent is voluntary and that the Canadian Law Reform Commission proposal would not make it any easier for a judge to decide this. The Committee concluded that the common law provides as much protection as can realistically be expected.
- 3.79 We agree with the Search and Search Warrants Committee that requiring written consent would often be impracticable and unduly cumbersome. We note that the Canadian Law Reform Commission’s proposals on consent searches have not been enacted in the Canadian Criminal Code.
- 3.80 We have also reached the view that detailed pre-conditions, with an elaborate set of requirements to be met before undertaking any consent search, are simply incompatible with the realities of law enforcement and would risk bringing police and other enforcement officers into disrepute. For example, the need for written consent would be quite unrealistic where a group of drunken people are leaving the scene of a brawl involving weapons, and no independent suspicion exists as to whether any of those persons are carrying weapons. Further, in a situation where police are going from house to house searching for a missing toddler, when they do not know whether any criminal conduct has occurred and speed is of the essence, the need for an elaborate set of preconditions in seeking a householder’s consent, such as exist under the Police and Criminal Evidence Act Code, is unnecessary formalism.
- 3.81 Nevertheless, given the potential for members of the public to feel a degree of coercion when requested by a member of the police or another enforcement officer to submit to a search, and the privacy values at stake, they should be advised of the reason for the request and of their right to refuse.
- 3.82 Telling someone why the enforcement officer is seeking his or her consent to a search is no doubt reflected in current practice in many instances. Such advice is an important step in seeking consent to search for two reasons: first, providing the member of the public with the reason for the request will often promote a co-operative response; secondly, articulating the reason that prompted the request dispels any complaint of arbitrariness.
- 3.83 Advice that a person does not have to consent to a search is a critical element of free and informed consent and to achieving a balance of the values expressed in chapter 2. As one commentator observed:⁵³

The current position – that there is no duty on the police to inform us of our right to refuse our consent to a “voluntary” search – is weighted too heavily against the privacy and liberty rights of individuals.

A requirement that the enforcement officer tell the subject that he or she has a choice is, in our view, essential to assuring that consent is freely given. Accordingly, we conclude that an enforcement officer should be required to tell the subject that he or she has the right to refuse consent.

52 Search and Search Warrants Committee *Search and Search Warrants: Final Report* (Wellington, 1988) 38.
 53 David Mead “Informed Consent to Police Searches in England and Wales – A Critical (Re-) Appraisal in the Light of the Human Rights Act” [2002] Crim LR 791, 803.

Risks and benefits

- 3.84 There are risks associated with the approach we suggest. The potential for legal challenge to the validity of a consent search and the admissibility of evidence could be increased as a result of questions being raised about whether the officer had good reason to initiate the consent search and whether the advice that the person is entitled to refuse was given as required.
- 3.85 Arguably too, our approach formalises and places a structure around conducting consensual searches for many day-to-day enforcement activities where routine interaction with members of the public does not currently create difficulty. We accept also that an enforcement officer's reasons for seeking to undertake a consent search may sometimes be based on intuition derived from experience and thus difficult to convey to the person concerned. We would expect, however, that invariably it will be possible for the officer to identify at least some of the factors that contributed to that intuition and advise the subject of these.
- 3.86 We acknowledge that for some people providing the reason for seeking their consent would simply create an opportunity to dispute that such basis exists. In addition, this further requirement may lead to arguments as to whether the reason was given and to a claim that the search was unlawful.
- 3.87 As the potential for legal challenge already exists in cases of disputed consent, any increased clarification about why a consensual search is being conducted and notification of the right to refuse should assist in ensuring that the search is conducted reasonably in accordance with section 21 of the Bill of Rights Act. Moreover, the greater clarification our proposals will achieve may result in fewer legal challenges if people know that they have been advised properly.
- 3.88 The benefits we see in our approach are that it will require a member of police (or other enforcement officer) to evaluate the need for the search and it will provide a measure of protection against challenges to how the consent was obtained. For the person whose permission is sought there are obvious benefits in being told why the request has been made and being explicitly told that he or she need not consent. Giving such advice may mean more people will co-operate; it may thus avoid arrests for obstructive behaviour; and it will, to some extent, address the information imbalance that would otherwise exist in such circumstances. This must benefit police-community relationships.
- 3.89 We therefore recommend that before any consent search is undertaken the enforcement officer must consider whether there is good reason to conduct a consensual search for a specified purpose and advise the person of that reason and that he or she has the right to refuse.

Scope of above proposals

- 3.90 The proposals with respect to consent searches are not intended to apply to members of the public or to all state agents. The limitation on the exercise of consent searches should be confined only to agencies that have been conferred with a search power by statute or regulation, since the fact that the agency has such a power (even if it is not able to be exercised in the particular instance) introduces a potential element of coercion into the request for the search.

3.91 Even with regard to state agencies that do have a power of search, their officers may conduct certain activities that should fall outside the ambit of the above requirements. Those activities include:

- searches conducted as a condition of entry to designated areas where administration of a facility or personal safety issues are at stake;⁵⁴
- searches conducted as a condition of carriage on public transport, where public safety issues arise;⁵⁵
- searches conducted as a condition of a contractual arrangement under a ticket, such as entry to a sports ground;
- statutory powers of inspection.

In these situations no reason for the search need be given; the fact that a person wants to enter a particular place or vehicle in itself justifies seeking consent. And while it is common to advise them by way of notice that they do not have to give their consent (the consequence, if they refuse, being that they will be unable to gain entry), we see no need for a statutory requirement to give such advice. An inspection with consent, where there is a statutory power of inspection without it, should obviously be exempt.

RECOMMENDATIONS

3.5 Subject to recommendation 3.7, no search by consent should be undertaken unless:

- the search is:
 - for the purpose of preventing crime;
 - for the purpose of protecting life or property or preventing injury;
 - for the purpose of investigating criminal activity;
 - for any other purpose for which a statutory power of search would exist if the appropriate threshold of suspicion or belief were met;
- the officer advises the person whose permission is sought the reason for the request and that he or she may refuse consent.

3.6 A consent search that does not comply with these requirements should be unlawful.

3.7 Nothing in recommendations 3.5 or 3.6 applies to members of the public or the range of activities conducted by government agencies specified in paragraph 3.91.

WHO MAY GIVE CONSENT?

3.92 In general, a person who enters a property relying on consent given by someone else with no actual authority is a trespasser, even if he or she is acting in good faith and not knowing of the other's lack of authority.⁵⁶ There is a suggestion in some cases that a person may rely upon consent given by others with apparent authority,⁵⁷ but in New Zealand, that suggestion has arisen when the court has

⁵⁴ For example, under the Courts Security Act 1999 and the Corrections Act 2004.

⁵⁵ For example, under the Aviation Crimes Act 1972 and the Maritime Security Act 2004.

⁵⁶ *Blenheim Borough and Wairau River Board v British Pavements (Canterbury) Ltd*, above n 42.

⁵⁷ *R v Bradley*, above n 45, 370. In *Robson v Hallett* [1967] 2 All ER 407, 414, Diplock LJ expressed the view that a person who is inside the dwelling house has an implied authority to invite visitors to enter.

been determining the reasonableness of a search under section 21 of the Bill of Rights Act. For example, in *R v Bradley*⁵⁸ the court held, on the facts of the case, that the police were entitled to rely upon the consent of an unknown person on the premises on the basis of apparent authority, but did not draw a clear distinction between lawfulness and reasonableness. Thus, while it is clear that entry in good faith because of a reasonable belief that someone with actual authority has consented may not render the search unreasonable and that any evidential material seized is admissible in subsequent proceedings, there is no clear support for the proposition that the search is thereby rendered lawful. In our view, the better approach is that only a person with actual authority can consent.

- 3.93 There is scant New Zealand authority as to who possesses actual authority to grant consent to search property. The courts have held that joint tenants individually possess authority to grant police authority to enter⁵⁹ and that an occupier is entitled to give consent to search an entire premises where the accused is a boarder and not a tenant.⁶⁰
- 3.94 On the other hand, the High Court has held that a landowner has no authority to authorise entry to someone else's caravan on his or her land.⁶¹ Arguably, too, where there are several tenants (e.g. flatmates) with separate areas of the house that are their exclusive domain (bedrooms), one tenant cannot consent to a search of the domain of another.
- 3.95 Apart from these situations, the issue of actual authority will be determined on the facts of the particular case. In some circumstances it may be difficult for the enforcement officer to decide whether an occupant possesses actual authority, but we consider it would be impossible to frame a comprehensive definition in a way that would cater for the myriad of circumstances in which people might be asked to consent.
- 3.96 There are two areas, however, where it would be beneficial to provide greater legal certainty. We turn to discuss those now.

Lawfulness of a search conducted relying on consent given by someone without actual authority

- 3.97 We propose that, to avoid doubt, there should be an express provision that no search power exercised in reliance on consent is lawful unless that consent is given by a person with actual authority to do so. This is in our view no more than a statement of the correct current legal position, but due to the possible ambiguity created by decisions such as *Bradley*,⁶² clear legislative pronouncement on the point is desirable.
- 3.98 We recognise that there will occasions where it may be difficult for the enforcement officer to be sure that the person who purports to give consent has actual authority to do so. Under the Police and Criminal Evidence Act 1984 (UK) Codes of Practice,⁶³

⁵⁸ *R v Bradley*, above n 45.

⁵⁹ *Attorney-General v Hewitt* [2000] 2 NZLR 110 (HC).

⁶⁰ *R v Pluss* (25 February 1998) CA 485/97.

⁶¹ *Cunningham v Police* (1997) 4 HRNZ 240 (HC).

⁶² *R v Bradley*, above n 45.

⁶³ Code B, 5.1.

the officer must make any enquiries necessary to be satisfied that the person is in a position to give consent. Where it is intended to search property with consent, this would be the prudent course to follow in order to minimise the prospect of a search being held to be unlawful. That said, if an enforcement officer is acting on a reasonable belief that the person has actual authority to consent when that is not in fact the case, that is very unlikely to be subsequently held to be unreasonable.

RECOMMENDATION

- 3.8 A search power exercised in reliance on consent given by a person without actual authority to give that consent should be unlawful.

Age at which a person has authority to consent

- 3.99 The age at which someone has authority to give consent to enter and search premises or vehicles should, in our view, be governed principally by the factual issue as to the age at which a person is capable of being in charge of a place or exercising control over a vehicle, without the supervision of anyone else. While obviously someone's level of maturity to comprehend the nature of the consent given or the consequences of it will determine their actual authority in individual cases, we think that the law should specify an age below which nobody may provide a lawful consent.
- 3.100 In the case stated for the respondent police officers in *Robson v Hallett*,⁶⁴ it was contended that "there must be an implied authority in a son of a reasonable age, on behalf of his father, to invite a person into the house and the sergeant could not thereafter, until he was ordered out of the house, have been a trespasser". While the judgment contains no discussion as to what a "reasonable" age is, we agree with the tenor of the above submission that a person over a certain age should have authority to give consent.
- 3.101 Under section 10B of the Summary Offences Act 1981 it is an offence for a parent or guardian to leave a child under 14 without reasonable provision for supervision and care. A logical consequence of that provision is that the law considers those 14 or over capable of being in charge of premises in the absence of their parents or guardians. With regard to vehicles, the youngest age at which a person may hold a licence entitling him or her to drive is 15.⁶⁵ That is therefore the age at which they may be driving a vehicle that they own.
- 3.102 Having regard to these statutory provisions, but recognising that a uniform approach is desirable, we propose that nobody under 14 be deemed able to consent to a search of premises or other private place or, apart from the one exception indicated below, any motor vehicle.
- 3.103 The one exception to the proposal that no-one under 14 can provide a valid consent to search a vehicle is where such a person is driving (or has been seen driving) a

⁶⁴ *Robson v Hallett*, above n 57, 410.

⁶⁵ Land Transport (Driver Licensing) Rule 1999, Rule 15 specifying that a Class 1 learner licence may be obtained by a person of or over 15, and Rule 17 specifying that a Class 1 restricted licence may be obtained by a person who has held a Class 1 learner licence for at least six months.

vehicle and no one else over the specified age with actual authority is present in the vehicle. If the person, of whatever age, is exercising sufficient control over a vehicle to drive it, an enforcement officer should be entitled to request that person (subject to the limitations proposed at the beginning of this section for conducting a valid consent search) to permit a search of the vehicle.

- 3.104 As in all cases of consent search, whether the driver has actual authority to provide a valid consent will depend on the facts of the case, such as whether the driver owns the vehicle, or has his or her parent's permission to use it.
- 3.105 Any search of places or vehicles that relies on consent given by someone under that specified age will be unlawful (but not necessarily unreasonable). The enforcement officer should not be obliged to verify the age of the person giving consent, but if he or she has no actual authority the officer will be committing a trespass. If there is no reasonable basis to consider that the person is over the specified age, the search may be held by the court to be unreasonable as well as unlawful.
- 3.106 This proposal does not affect the question of whether a person over the specified age has provided a valid consent. That will be determined by a range of factors, including the person's maturity and his or her relationship with the property in question, which need to be determined in each individual case. Obviously where the driver has stolen the vehicle, he or she has no authority to use it and therefore no authority to consent to its search.
- 3.107 We do not recommend any age threshold for consent to a personal search. That is because people are in control of their own bodies and, subject to any incapacity, can therefore consent to such a search.

RECOMMENDATION

- 3.9 A person under 14 should not have the authority to consent to an enforcement officer entering any private place, searching such place, or searching a vehicle (unless someone under 14 is driving a vehicle and nobody with actual authority is present in the vehicle).

SCOPE OF CONSENT

- 3.108 A search outside the scope of a validly obtained consent will be unlawful.⁶⁶ Thus, a person who gives consent to search only a living room does not implicitly provide authority to search other rooms in the house. However, once an enforcement officer is lawfully in the premises, he or she may form a reasonable belief that justifies the entire premises being searched without warrant (for example, under the Misuse of Drugs Act) and may seize evidential material relating to other offending that comes into plain view.⁶⁷ Further, a consent entry or search may provide information capable of establishing the reasonable grounds necessary to obtain a warrant to search the place more extensively than authorised by the consent.

⁶⁶ Scott Optican in Rishworth [et al] *The New Zealand Bill of Rights* (OUP, Melbourne, 2003) 459, citing *R v Bradley* above n 45.

⁶⁷ See para 3.119 and following discussion.

IMPLIED LICENCE TO ENTER PRIVATE PROPERTY

- 3.109 For present purposes implied licence is a form of consent for another person to enter private land for any lawful business. The licence may be revoked by express words (such as a sign “visitors not allowed” on the front gate) and may be withdrawn at any time.
- 3.110 In *Robson v Hallett*,⁶⁸ where the doctrine was “either invented or articulated”,⁶⁹ the Divisional Court held that an occupier of a dwelling house with an unlocked gate gives an implied licence to members of the public, with lawful business, to enter the property, walk to the door of the house and knock, and then enquire whether they may be admitted. The licence ends at the entrance to premises;⁷⁰ and without further consent no person may lawfully enter that place in the absence of statutory warrantless or warrant powers (or under the doctrine of necessity, as it currently exists). An occupier may further consent to the visitor entering, and if that consent is subsequently withdrawn, the visitor is then permitted a reasonable time to depart.⁷¹
- 3.111 In *Halliday v Nevill*⁷² the High Court of Australia held that implied licence extends beyond mere communication in that it authorises people to enter, for instance, to recover belongings that have blown onto another’s land or to collect a child that has inadvertently wandered onto it.
- 3.112 New Zealand courts, in determining whether enforcement officers have an implied licence to enter private land, consider the nature and legitimacy of the officers’ activity and whether it is being conducted in a reasonable manner, rather than enquire about what the occupier intends to permit the officer to do.⁷³ In other words, at least in relation to law enforcement, the New Zealand courts seem to accept that the licence is *imposed* by law to enable visitors to communicate with an occupier. To this extent, implied licence is quite distinct from other forms of consent: it is presumed to exist in the absence of clear indications to the contrary and is deemed to exist without any inquiry about the occupier’s *actual* intent in cases where this cannot be established by a locked gate or other obvious prohibition on entry.
- 3.113 However, it is unclear whether enforcement officers have any greater rights in this respect than members of the public. On one view, consistent with the principle articulated in *Robson v Hallett*,⁷⁴ they do not. On another view, the implied licence has increasingly been regarded by the courts as a law enforcement tool. In *R v Bradley*⁷⁵ the Court of Appeal stated that the implied licence exists as an “exception” to the principle articulated in *Entick v Carrington*⁷⁶ about the inviolability of a person’s home and considered that it “exists to serve the public interest in the effective investigation of offences and the punishment of those responsible”.⁷⁷ Moreover, the courts have been prepared to hold that the rule exists even where police presence is clearly not welcomed by the occupier.⁷⁸

68 *Robson v Hallett*, above n 57.

69 *Howden v Ministry of Transport* [1987] 2 NZLR 747, 751 (CA) Cooke P.

70 *R v Pou* [2002] 3 NZLR 637 (CA).

71 *Robson v Hallett*, above n 57, 412-413.

72 *Halliday v Nevill* (1984) 155 CLR 1 (HCA).

73 See, for example, *Smith v Police* (1996) 14 CRNZ 480.

74 See, for example, *R v Pou*, above n 70, para 15 Randerson J; *Robson v Hallett*, above n 57.

75 *R v Bradley*, above n 45.

76 *Entick v Carrington* (1765) 19 State Tr 1029.

77 *R v Bradley*, above n 45, 368.

78 See, for example, *Attorney-General v Hewitt*, above n 59.

They have also been reluctant to hold that the implied licence has been revoked, even by explicit words⁷⁹ or conduct indicating that the occupier has no desire to be seen by or communicate with a visitor.⁸⁰

- 3.114 As a result the law is unclear. Accordingly we have considered whether codifying implied licence would be beneficial and feasible. Preliminary Paper 50⁸¹ invited comment on whether section 317(2) Crimes Act should be amended by making statutory provision for a constable's licence to enter land to communicate with an occupant. Three submissions on Preliminary Paper 50 addressed the issue of codification of the implied licence doctrine. Both the New Zealand Law Society and the Auckland Council of Civil Liberties opposed it, concerned that it could result in police powers being expanded. The New Zealand Law Society was concerned that it would encourage fishing expeditions.
- 3.115 Codification need not result in an expansion of law enforcement powers. Indeed, an objective of codification could be to limit the common law and the use of implied licence to undertake law enforcement objectives. Nonetheless, we do not recommend codification of implied licence. Aspects of the doctrine would be extremely difficult to codify (such as what constitutes a 'normal' approach to the premises)⁸² and whether the doctrine is being invoked in any particular case will depend on individual circumstances. As the Court of Appeal noted in *R v Ratima*,⁸³ "it has always remained a matter of degree as to how far and to what extent the licence authorised entry on to private property".⁸⁴
- 3.116 We have considered the possibility of incorporating a partial codification of implied licence into the proposed amendments to section 317 of the Crimes Act 1961 (discussed in chapter 5 for warrantless searches of places), on the basis that the Court of Appeal in *Bradley*⁸⁵ considered the licence to exist for the purpose of law enforcement. However, we have rejected that for the reason set out in the previous paragraph and because implied licence:
- allows only entry to property (land), not premises (which is the focus of section 317);
 - is primarily for the purpose of communicating with occupiers, rather than for arrest or preventing offending (the situations currently governed by section 317) or for situations covered by the doctrine of necessity (as proposed under our recommendations in chapter 5).

79 See, for example, *Smith v Police*, above n 73.

80 See, for example, *Attorney-General v Hewitt*, above n 59.

81 New Zealand Law Commission *Entry, Search and Seizure: A Discussion Paper* (NZLC PP50, Wellington, 2002) para 21.

82 Both *Bradley* (above n 45) and *Pou* (above n 70) are authority that the implied licence does not extend to unusual or abnormal approaches to the premises in order to communicate with an occupier. In both those cases the police clambering onto balconies to enable communication was held not to be authorised by implied licence. In *R v Moran* (25 March 2003) CA 412/02 the Court of Appeal held that in order for an implied licence to exist entry on to the property had to be for a lawful purpose. The police in *Moran* walked around the house and tried to make observations by staring through cracks in the blinds of windows. This did not accord with the normal approach referred to in *Pou* nor the requirement that entry be made a lawful purpose. In this case it was found that the officer had no intention of communicating with the occupant to secure entry, but instead were intent on conducting a warrantless search. Accordingly it was held that police were not proceeding on the basis of an implied licence.

83 *R v Ratima* (1999) 17 CRNZ 227 (CA).

84 *R v Ratima*, above n 83, para 12.

85 *R v Bradley*, above n 45, 368.

- 3.117 We note also that attempting to codify implied licence for law enforcement purposes would only deal with some situations involving police officers who often enter private property to speak with the occupier for non-enforcement reasons; for example to advise a victim the result of their inquiries or to advise the occupant of an emergency situation involving a family member. Furthermore, an attempt at even a partial codification would, we believe, have implications for the nature of the implied licence of others to enter onto private property.
- 3.118 Accordingly, we do not recommend that the concept of implied licence be legislatively defined. However, it should be made clear that nothing in our proposed legislation affects the common law concept of implied licence.

RECOMMENDATION

3.10 The concept of implied licence to enter private land should not be defined in statute but, to avoid doubt, there should be provision that nothing in the legislation affects the common law concept of implied licence.

PLAIN VIEW

- 3.119 In the course of exercising a search power an enforcement officer is not authorised to search for or seize evidential material that falls outside the scope of that power unless an independent authority exists that permits such a search or seizure.⁸⁶ It is not uncommon, however, for an enforcement officer whilst lawfully conducting a search to come across evidential material that is not included in the search power that is being exercised. The material may be relevant to either:
- the offence in respect of which the search power is being exercised – for example, where a search warrant is issued for specific items stolen in a burglary and, in the course of searching for those items, the police officer discovers other things that were stolen in the same burglary;
 - an unrelated offence – for example, where a search power in respect of controlled drugs is being exercised and evidential material relating to a burglary is discovered.
- 3.120 If evidential material that is discovered in these circumstances is seized, it is often referred to as a “plain view” seizure. While the discussion that follows is mainly directed to such seizures, it should not be overlooked that the plain view doctrine also applies to any situation when a police officer’s presence at a place is lawful, including by way of consent or under an implied licence.

Current New Zealand law

Material relevant to offence that is subject of warrant

- 3.121 Section 198(5) of the Summary Proceedings Act 1957 authorises a constable executing a warrant to seize anything referred to in subsection (1) of that section. In *R v Sanders*⁸⁷ the Court of Appeal held that the scope of this power to seize was not limited to only the items specified in the warrant, but

⁸⁶ For example, where the police enter premises under warrant to search for stolen goods and once on the premises form reasonable grounds to believe that specified drugs are present, they may conduct a warrantless search under the Misuse of Drugs Act 1975, s 18(2).

⁸⁷ *R v Sanders*, above n 6, 466 Fisher J, referring to *Rural Timber Ltd v Hughes* [1989] 3 NZLR 178, 186 (CA).

that it extended to the seizure of anything reasonably believed to be evidence of the offence to which the warrant relates.

- 3.122 The courts have therefore held that the existing provision in section 198(5) of the Summary Proceedings Act 1957 applies to plain view seizures of the first type referred to above.
- 3.123 As our recommendations later in this section allow police officers to seize items in plain view reasonably believed to be evidential material relating to *any* offence, clearly that rule should apply equally to evidential material relating to the offence for which the warrant has been issued.

Material relevant to unrelated offence

- 3.124 At present, members of the police acting under the authority of a warrant are unable to seize anything that is unrelated to the offence specified in the warrant, even when they have reasonable grounds to believe that it is evidential material relating to an offence. In *McFarlane v Sharp* the Court of Appeal said:⁸⁸

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 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.

- 3.125 In *R v Power*,⁸⁹ the police had obtained a warrant to search the appellant’s storage unit for cannabis and associated paraphernalia; they also found and seized methamphetamine, stolen property, and an assortment of firearms and ammunition which provided the evidence for further charges. The Court of Appeal said:⁹⁰

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.

- 3.126 More recently, in *R v Fountain*,⁹¹ police searching pursuant to a warrant for evidence of methamphetamine offending found quantities of expensive electrical items (televisions, cellphones, cameras, palm pilots). Half of these were seized 17 minutes before a further warrant pertaining to stolen goods was obtained; the remaining half were seized afterwards. The first seizure was held to be illegal, and unreasonable in the absence of immediate risk that the

88 *McFarlane v Sharp* [1972] NZLR 838, 844 (CA).

89 *R v Power* (1999) 17 CRNZ 662 (CA).

90 *R v Power*, above n 89, 665.

91 *R v Fountain* (10 August 2005) CA 176/05.

evidence would be lost. Nonetheless the evidence seized was held to be admissible under *R v Shaheed*.⁹²

Search and Search Warrants Committee Report

- 3.127 The Search and Search Warrants Committee⁹³ considered the relevant case law and overseas developments and rejected the restrictive *McFarlane v Sharp*⁹⁴ approach, recommending that the plain view doctrine should authorise seizure of “any other thing that [the] person sees and believes on reasonable grounds to be evidence of any offence in respect of which that person could have obtained a warrant”⁹⁵ while on the premises pursuant to a warrant.
- 3.128 For reasons that will be discussed below, we support that general approach but think it should be expanded to include any lawful warrantless presence in private places and apply to searches of vehicles and people.

Victorian Parliament Law Reform Committee

- 3.129 In its report on search powers, the Victorian Parliament’s Law Reform Committee recommended that “legislation be amended to authorise police members who are lawfully executing a search warrant to seize things that are not specified in the warrant, if they believe on reasonable grounds that such things constitute evidential material”.⁹⁶ The recommendation is limited to warrant searches, as that reflects the scope of the terms of reference.

The meaning of plain view

- 3.130 We recommend a plain view exception to the general rule that items falling outside the scope of a power to search may not be seized.
- 3.131 Our proposed “plain view” definition is based on United States Supreme Court authority. In *Coolidge v New Hampshire*,⁹⁷ the Supreme Court held that a law enforcement officer exercising a search power can seize anything outside the scope of the warrant, which comes into plain view in the course of the search, and for which there are reasonable grounds to believe is evidence of the commission of any offence. A thing is in plain view if:
- It comes into view in the course of the lawful exercise of another law enforcement power or when the officer is otherwise lawfully in the place in which the item is seen. Where a search power is being exercised, the plain view exception will operate only in relation to things seen in areas that can otherwise be lawfully searched.
 - The incriminating nature of the thing concerned must be obvious from its appearance (that is, the belief threshold must be satisfied without any need to further examine the thing).

92 *R v Shaheed* [2002] 2 NZLR 377 (CA).

93 Search and Search Warrants Committee, above n 52, 22-24.

94 *McFarlane v Sharp*, above n 88.

95 Search and Search Warrants Committee, above n 52, 22.

96 Victorian Parliament Law Reform Committee, above n 11, 205.

97 *Coolidge v New Hampshire* (1971) 403 US 443; 29 L Ed 2d 564; 91 S Ct 2022.

- 3.132 Plain view does not mean that the object must be visible to the naked eye without any investigative activity taking place to reveal it. Rather, it must be able to be discovered by the investigative activity within the boundaries of the authorised search. If the lawful authority to search (or inspect) includes the power to open a cabinet or a drawer, or the boot of a car, or to inspect the pocket of someone's jacket, and an item is seen as a result, it will be in plain view.
- 3.133 The plain view rule allows items to be seized without a search warrant when a police officer is lawfully in the place. This constitutes an exception to the warrant requirement discussed above on the values underpinning search and seizure.⁹⁸
- 3.134 However, consistent with that chapter, the plain view exception is justified because no reasonable expectation of privacy is violated by the application of the rule. There can be no reasonable privacy interest in a thing that is evidence of criminal offending and is discovered during a search that is itself being lawfully undertaken.
- 3.135 For this reason we do not propose adopting a restriction upon plain view such as that imposed by section 19(3) of the Police and Criminal Evidence Act 1984 (UK). That power limits the constable's authority, when lawfully on the premises, to seize items reasonably believed to be evidential material relating to an offence which he or she is investigating or any other offence only if that is necessary to prevent the evidence being concealed, lost, altered or destroyed.
- 3.136 In our view that latter qualification would unduly restrict legitimate law enforcement by precluding seizure of items that are obviously evidence of criminal offending, where no reasonable expectation of privacy exists.

Submissions on Preliminary Paper 50

- 3.137 Five submissions relevant to this issue were received.⁹⁹ There was no consensus on the desirability of statutory clarification of the power to seize items other than those specified in a warrant. However, the Auckland Council for Civil Liberties did support the need for a statutory provision governing the issue and thought that there was scope for extending section 489(1) of the Canadian Criminal Code (allowing seizure of items other than specified in the warrant reasonably believed to be evidence of an offence) to warrantless searches.
- 3.138 The Auckland Council for Civil Liberties did not, however, support a power that authorised seizure of items in plain view whenever an enforcement officer is lawfully on any premises (as permitted by section 19 of the Police and Criminal Evidence Act 1984 (UK)). As the Council points out, that would allow seizure by police who are present under an implied licence or who have been invited to enter for a purpose other than a search.
- 3.139 We find this submission unpersuasive on this latter point, especially given that the Council acknowledged that there would be "an air of unreality, sufficient to bring the law into disrepute" if the law precluded seizure of important items of evidence outside the specific search power, and gave the example of an axe used for a murder being found when executing a search warrant for stolen goods.

⁹⁸ Chapter 2, paras 2.52 to 2.55.

⁹⁹ From the Auckland Council for Civil Liberties, the New Zealand Law Society, New Zealand Police, the Police Association and the Peace Foundation.

Given that the same murder weapon could be discovered when on the property under an implied licence or by a consent given by the occupier for an unrelated purpose, we consider the law would equally be brought into disrepute if there were no power to seize in those circumstances. Indeed an argument could be made that the scope of the power to seize should be wider when an enforcement officer is lawfully in the place with non-coercive authority than when there under a limited authority that compels the owner or occupier to submit to a search for a specific purpose.

Offending to which plain view rule applies

- 3.140 We recommend that the police have the power to seize any item believed to be evidential material relating to *any* offence. While it is true that police powers under warrant are limited to searching for material relating to imprisonable offences, items may come into plain view in a number of circumstances, such as upon search incidental to arrest or where the officer is on land under an implied licence, where the scope of the search or lawful presence is not limited to investigating imprisonable offences. Further, it would unduly restrict legitimate law enforcement to prohibit police from seizing items clearly being evidence of non-imprisonable offences. We note that United Kingdom and Canadian legislation¹⁰⁰ governing plain view seizures place no restriction on the type of offence of which the item is believed to provide evidence.

Bringing evidence into plain view

- 3.141 Our plain view recommendation relates only to the seizure of evidential material relating to offending *that is seen in the course of other lawful activities*. Legislation to implement this recommendation should explicitly state that it does not confer any additional search or entry power; if such powers need to be exercised to fully investigate or to effect the seizure, a warrant will need to be obtained (unless a relevant warrantless power exists, such as section 18(2) of the Misuse of Drugs Act 1975).
- 3.142 This means that if the officer is lawfully in, for instance, a dwelling house or a shop and sees an item in plain view, he or she can seize it. However, the officer cannot enter the premises if he or she sees the item from a public place. For example, if a police officer sees a cannabis plant on the windowsill of the house, we are not proposing that he or she should be able to enter for the purpose of seizure unless a warrant is obtained, consent is obtained, or what is seen provides some other basis for warrantless entry.¹⁰¹

Application to vehicles and people

- 3.143 The principles set out above are equally applicable to vehicles or people. If an enforcement officer is conducting a lawful search of a vehicle or a person for one purpose and finds an item reasonably believed to be evidential material in relation to a different offence, he or she should be able to seize it.

100 Police and Criminal Evidence Act 1984 (UK), s 19; Criminal Code RSC 1985 c C-46 (Can), s 489.

101 Misuse of Drugs Act 1975, s 18(2).

- 3.144 However, vehicles and people do give rise to a discrete issue. An enforcement officer may observe an item reasonably believed to be evidential material in a vehicle or with someone in a public place, by simply glancing through the window of a vehicle parked on the street or by observing a person on a footpath. The officer clearly has lawful authority to be in the place where he or she sees the item, as anybody is entitled to walk along a footpath.
- 3.145 The question then arises whether enforcement officers should have the power to forcibly enter a vehicle in a public place to seize an item reasonably believed to be evidential material without any other lawful basis to stop or search the vehicle.
- 3.146 In our view, they should not. As we believe that plain view should not confer a discrete power of entry or search, the mere inadvertent sighting of evidential material in a vehicle where no power to stop, enter or search the vehicle exists will preclude entry to the vehicle to seize that item.
- 3.147 This should not unduly restrict police from seizing unlawful items seen in vehicles or with persons in public places. Our proposals continue to provide express warrantless powers to search for firearms, offensive weapons and drugs in public places,¹⁰² which are likely to constitute the overwhelming majority of illegal items sighted in public. In addition we have also recommended retaining the warrantless power in section 225 of the Crimes Act 1961 to search vehicles for stolen property.¹⁰³

Analogy with surveillance powers

- 3.148 The plain view recommendation is analogous with existing interception powers. The cross-over provisions of the Crimes and Misuse of Drugs Acts provide that evidence of offending against one Act, intercepted under a warrant issued under the other Act, is admissible provided it is one of the specified offences for which a warrant could have been issued under the first Act.¹⁰⁴ This is the electronic equivalent of plain view.

RECOMMENDATION

- 3.11 The law relating to “plain view” seizures should be codified to provide that a police officer may seize anything that:
- he or she has reasonable grounds to believe is evidential material;
 - comes into view while the officer is lawfully exercising a search power or is otherwise lawfully in the place or vehicle in which the thing is observed, even if the seizure of the item is not authorised by the terms of any search power that is being exercised.

¹⁰² Arms Act 1983, ss 60-61; Crimes Act 1961, s 202B; Misuse of Drugs Act 1975, s 18(2).

¹⁰³ Chapter 9, recommendation 9.6.

¹⁰⁴ Crimes Act 1961, s 312N; Misuse of Drugs Amendment Act 1978, s 26.

APPLICATION
OF THE PLAIN
VIEW DOCTRINE
TO REGULATORY
INSPECTIONS
OR WHERE
AN ITEM IS
SIGHTED BY AN
ENFORCEMENT
OFFICER
WITH NO
JURISDICTION

3.149 Officers conducting regulatory inspections under a myriad of powers can discover evidential material relating to an offence that has nothing to do with the regulated activity. Similarly, fishery officers, inspectors of publications or a range of other non-police enforcement officers exercising law enforcement search powers can discover evidential material relating to an offence over which they have no jurisdiction.

3.150 In these cases the issue is whether the officer should be able to seize the item seen and, if not, what procedures should be followed.

Items seen during regulatory/compliance inspections

3.151 Except as indicated below, no-one exercising a power of inspection should be authorised to seize any item that they believe to be evidential material relating to any offence. Inspection officers do not have the training or expertise to assess whether any particular item is such evidential material, particularly if the offence only occurs if the item is possessed in particular circumstances.¹⁰⁵ Inspection officers will generally not have adequate training to form the necessary reasonable belief as to the status of an item falling outside their sphere of expertise.

3.152 Other obvious risks arise for inspection officers. Those include the potential for a situation to escalate to threatened or actual violence if they attempt to seize items that the owner considers he or she lawfully possesses and is something clearly outside the area of expertise or authority under which the inspection officer is operating. Such officers may not be trained to deal with these situations and will generally have no power of arrest.

3.153 The one situation where an officer should be able to seize items reasonably believed to be evidential material relating to an offence is where he or she is also authorised to undertake law enforcement duties. Examples include fishery officers, inspectors of publications, and inspectors under the Animal Welfare Act 1999. All these officers have warrantless powers to enter to inspect or examine to enable them to administer the Acts in question. In addition, all have the power to enter and search, usually with warrant, where there are reasonable grounds to believe an offence is being committed under the relevant Act.

3.154 Officers exercising an inspection power under a particular enactment should be able to seize items they reasonably believe to be evidential material relating to an offence against that Act. The item in question will fall within the officer's sphere of expertise and, given such officers also have enforcement capability, it is to be assumed that they will be trained to deal with any confrontation that may arise when exercising powers of search and seizure for law enforcement purposes.

Items seen while exercising a stop power under the Land Transport Act

3.155 A vehicle may be lawfully stopped under section 114 of the Land Transport Act 1998 to obtain the driver's particulars or to complete the exercise of a power conferred on an enforcement officer under that Act. The completion of some of those powers may require lawful entry to the vehicle; some may not.

¹⁰⁵ For example, possession of a restricted weapon without authority or permission, under the Arms Act 1983, s 50.

- 3.156 If exercising any lawful power under the Act does not necessitate entering a vehicle, no authority to seize under plain view exists. That authority is dependent on lawful presence in the place where the seizure occurs; to authorise a plain view seizure solely on the basis of the lawful exercise of a stop power under this section or any other vehicle stop power when there is no power to enter or search would, in effect, be no different from allowing entry to and seizure from a parked car where an officer observes an incriminating item whilst walking along a footpath.
- 3.157 The facts of any particular case will determine whether a enforcement officer is lawfully in a vehicle, having exercised a stop power. The lawfulness of the officer's presence in the vehicle will determine whether evidential material has been seized lawfully in reliance on the plain view rule, when no other authority exists to seize the item.

Items seen while exercising specific enforcement powers

- 3.158 The issue here is the ability of specialist enforcement officers to seize evidential material relating to criminal offending outside their statutory jurisdiction. For example, should a fishery officer or an endangered species officer exercising a law enforcement power of search be authorised to seize drugs or firearms?
- 3.159 For essentially the same reasons as indicated in the discussion of inspection powers above, we do not consider that they should be empowered to do so. The adverse consequences in seizing an item thought to be illegal when in fact it is lawfully possessed are obvious. Enforcement officers with specialist expertise or statutory jurisdiction in only a specific area of the law will generally have insufficient knowledge to make an informed assessment that, in the circumstances, an item is evidential material relating to a criminal offence of a completely different nature to that with which they generally deal. Where they do have that expertise, discovering evidential material other than that for which the power is being exercised will largely be a matter of chance that cannot be captured by a statutory test. Accordingly, with one exception, no such power is recommended.
- 3.160 The exception concerns the seizure by a customs officer of objectionable publications (as defined in the Films, Videos and Publications Classification Act 1993) that he or she discovers in plain view in the course of lawfully exercising a customs search power. We understand that it is not always possible for customs officers to determine at the time whether the publication has been imported or exported and thus subject to their search powers, or whether its possession is an offence under the Films, Videos, and Publications Classification Act 1993 for which they do not have a seizure power. Sometimes they discover objectionable publications that are of both types. As the expertise that is required is the same whether or not the publication falls within their search powers, we recommend that customs officers should be able to seize any item that they reasonably believe to be an objectionable publication that comes into plain view in the course of a lawful search.
- 3.161 Generally police are deemed to be specialist enforcement officers under specific legislation governing discrete areas of law enforcement and have the same powers to conduct searches for evidence of criminal offending as those other

enforcement officers.¹⁰⁶ We therefore see no reason to impose any restriction on the police as to the kind of evidential material that may be seized in reliance on the exercise of the plain view rule.

Notification

- 3.162 In any case where a person is lawfully inspecting for regulatory/compliance purposes or searching for law enforcement purposes and sees an item that may be evidential material of a type of offence in respect of which he or she has no power to inspect or search, there should be no authority to seize.
- 3.163 In such a case the person should let the police know that the item exists and where they saw it. The police will then have to determine how best to deal with the situation. The information provided may establish grounds to obtain a search warrant or may, in some circumstances, provide a basis for warrantless search.

APPLICATION OF CHAPTER 6 (EXECUTION OF SEARCH POWERS) TO ITEMS FOUND IN PLAIN VIEW

- 3.164 The chapter 6 recommendations on notifying items seized under search powers will apply to things seized in reliance on plain view.

RECOMMENDATIONS

- 3.12 Subject to recommendation 3.13, no person exercising an inspection or law enforcement power (other than a member of the police) should be permitted to seize any item seen in plain view and reasonably believed to be evidential material relating to *any* criminal offence unless he or she has statutory jurisdiction in respect of that offence.
- 3.13 A customs officer who is lawfully exercising a power of search should be able to seize any item that he or she finds in plain view and reasonably believes to be an objectionable publication (in terms of the Films, Videos, and Publications Classification Act 1993) whether or not it is a prohibited import or a prohibited export.

¹⁰⁶ See, for example, Films, Videos, and Publications Classification Act 1993, s 103(3); Fisheries Act 1996, s 196(2)(b); Animal Welfare Act 1999, s 2(1).

Chapter 4

APPLYING FOR AND ISSUING SEARCH WARRANTS



Chapter 4

Applying for and issuing search warrants

INTRODUCTION 4.1 This chapter is concerned with the procedure for issuing search warrants and the content of the warrant. Existing regimes in New Zealand have widely varying provisions dealing with the application for and issue of search warrants. The recommendations made in this chapter are intended to rationalise those requirements and provide a standard framework for all regimes.

SCOPE OF SEARCH WARRANTS

4.2 To reflect the importance placed on the values of privacy and freedom discussed in chapter 2, any intrusion authorised by a search warrant should be reserved for those instances where the public interest outweighs personal privacy interests. Where a search is justified, there should be robust procedures in place for issuing the warrant. This requires a consideration of two preliminary issues: the circumstances in which an intrusion by way of search warrant is justified; and what the warrant may authorise enforcement officers to search for and seize.

Offence threshold for issuing warrants

4.3 In general, search warrants may only be issued in respect of acts or omissions that constitute an offence. Under the Summary Proceedings Act 1957 and some other enactments, such offences are limited to offences punishable by imprisonment.¹ However, most regimes do not have a specified penalty threshold and a warrant may be issued in respect of any offence, or a specified offence against the relevant enactment.² Some regimes also permit a search warrant to be issued for offences against regulations made under the relevant Act.³

1 Summary Proceedings Act 1957, s 198(1); Biosecurity Act 1993, s 111(1); Mutual Assistance in Criminal Matters Act 1992, s 44(1); Proceeds of Crime Act 1991, s 30(1); Resource Management Act 1991, s 334(1); Serious Fraud Office Act 1990, ss 6(2) and 10(2).

2 Films, Videos, and Publications Classification Act 1993, ss 109 and 109A; Gambling Act 2003, s 340(3); Motor Vehicle Sales Act 2003, s 130(1)(a); Sale of Liquor Act 1989, s 177(1); Trade in Endangered Species Act 1989, s 38(2).

3 Animal Welfare Act 1999, s 131(1)(a); Boxing and Wrestling Act 1981, s 9; Customs and Excise Act 1996, s 167(1)(a)(i); Financial Transactions Reporting Act 1996, s 44(a); Marine Mammals Protection Act 1978, s 14(1)(a); Radiocommunications Act 1989, s 120(3); Wildlife Act 1953, s 39(1)(f).



- 4.4 In a number of existing search warrant regimes, a warrant may be issued in respect of offences that carry a maximum penalty of a fine only.⁴ The range of offences is very wide and there is no obvious substantive feature or penalty level that would serve as a benchmark to determine when intrusion by way of search warrant is justified.
- 4.5 The only available reference point for determining whether it is appropriate for a search warrant power to be included in legislation is provided in the guidelines issued by the Legislation Advisory Committee.⁵ These provide that a power of entry onto private property should be conferred by an enactment only “if it is essential to achieve a purpose of the Act concerned”.⁶ If construed literally, in the sense of being absolutely indispensable or necessary, the “essential” test would be unduly restrictive. In its context, however, we take it to mean that the power is necessary in the public interest for achieving the purposes of the legislation.
- 4.6 We have considered whether that guidance sufficiently reflects the balance between the law enforcement values and human rights values discussed in chapter 2 and have concluded that the Legislation Advisory Committee’s current guidelines should be revised by making explicit reference to the seriousness of the offence. Two considerations in particular have prompted that conclusion. First, a number of existing statutes provide for a search power for all offences on an across-the-board basis; the search power is available without any distinction being made between serious offences and minor breaches.⁷ Secondly, in terms of our discussion of law enforcement values in chapter 2,⁸ it is important that search powers are framed in a manner that is human rights consistent. Thus, as well as meeting a law enforcement need, search powers should also have regard for privacy considerations – not every offence under an Act necessarily involves conduct of sufficient blameworthiness to justify the potential intrusiveness of a search power.
- 4.7 The fact that an offence carries a penalty of imprisonment will usually be a reliable indicator that it is sufficiently serious to justify the availability of the search warrant power. A similar threshold is required before a police officer has a power of arrest⁹ and a conviction for an imprisonable offence is most likely to carry a higher level of opprobrium than for other offences. A search warrant should therefore always be able to be obtained for an offence carrying imprisonment as a penalty.
- 4.8 At the other end of the spectrum, search warrant powers should not usually be available if the offence falls into either of two categories: infringement offences and

4 Agricultural Compounds and Veterinary Medicines Act 1997, s 55(1); Animal Welfare Act 1999, ss 36, 54, 157; Boxing and Wrestling Act 1981, s 7; Films, Videos, and Publications Classification Act 1993, ss 123, 127(1), 129(1); Gambling Act 2003, ss 15, 16, 19(1)(a)(b); Motor Vehicle Sales Act 2003, ss 117, 118; Radiocommunications Act 1989, s 128.

5 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Ministry of Justice, Wellington, 2001).

6 Legislation Advisory Committee, above n 5, 14.2.3.

7 See, for example, the enactments listed in footnotes 2 and 3.

8 Chapter 2, para 2.26.

9 Crimes Act 1961, s 315.

breaches of regulations. With respect to infringement offences, such breaches constitute the lowest tier of offending and do not carry the penalty of conviction.¹⁰ Accordingly, as a class, infringement offences cannot be of sufficient seriousness to reach the threshold justifying a law enforcement intrusion by way of search warrant.¹¹ For similar reasons, conduct proscribed by delegated legislation should generally be excluded from the ambit of a search warrant regime. Offences contained in regulations or rules are mostly confined to breaches of standards or operating rules carrying lower levels of fine. There may be room for departing from this principle where, for example, regulations are required in emergency circumstances, but such a departure would be justifiable in exceptional cases only.

- 4.9 We also agree with the Legislation Advisory Committee¹² that, given the significance of the power of search or seizure, the authority to create it should not be delegated by Parliament. Consistently with that principle, the offences for which a search power is available should be determined by Parliament rather than by the Executive in regulations.
- 4.10 Beyond this we doubt whether it is possible or desirable to provide any precise definition of the categories of non-imprisonable offences for which search warrants should be available. There are currently many non-imprisonable offences in respect of which warrants may be obtained,¹³ covering a wide variety of circumstances and law enforcement needs, and we are satisfied that a number of these warrant powers should be retained. Nevertheless, we think that there would be some value in developing a list of factors that ought to be taken into account in determining whether new warrant powers for non-imprisonable offences should be created. We therefore recommend that the Legislation Advisory Committee should consider including such a list in its *Guidelines*.

RECOMMENDATIONS

- 4.1 Search powers should be available only where they are necessary in the public interest for achieving the purposes of the legislation.
- 4.2 The Legislation Advisory Committee's *Guidelines on Process and Content of Legislation* should be revised so as to make explicit that:
- search warrants should generally be available for offences punishable by imprisonment;
 - search warrants should not generally be available for infringement offences or for offences that are prescribed by regulation or other delegated legislation.
- 4.3 The Legislation Advisory Committee should consider including in its *Guidelines* a list of factors that should be taken into account in determining whether new search warrant powers for non-imprisonable offences ought to be created.

10 Summary Proceedings Act 1957, s 78A(1).

11 Some infringement offences also carry a maximum penalty of imprisonment: see, for example, the Resource Management Act 1991, ss 338(1) and 339(1). The Commission has recommended that infringement offences should never result in imprisonment: New Zealand Law Commission *The Infringement System: A Framework for Reform* (NZLC SP16, Wellington, 2005) 15. In the exceptional case where an infringement offence remains punishable by imprisonment, a search warrant should be obtainable.

12 Legislation Advisory Committee, above n 5, 10.1.2.

13 See enactments in n 4.

Things for which a warrant may be issued

- 4.11 In general terms a search warrant has traditionally been used to secure four different categories of information or things:¹⁴
- the fruits of criminal offending, including things directly traceable to the crime, such as stolen property, and those indirectly linked to the crime, such as the proceeds from the sale of the stolen property;
 - the object of the offence, where the possession of the thing is an offence, for example, possession of a controlled drug;
 - evidence of the commission of an offence, for example, entries in a set of accounts as evidence of fraud;
 - the instruments by which an offence has been committed, for example, a pipe used to consume a controlled drug.
- 4.12 This classification of things that may be the subject of a search warrant appears to be largely attributable to historical development.¹⁵ Current regimes are principally focused on giving an enforcement officer sufficient power to secure information or things for evidentiary purposes when investigating a suspected offence, though they may also facilitate controlling what has been seized for the purposes of victim restitution,¹⁶ or for forfeiting to the state.¹⁷ In some regimes a search warrant may also be issued for other specific purposes.¹⁸

New Zealand legislation – different approaches

- 4.13 The Summary Proceedings Act provision relating to the issue of a search warrant for investigating criminal offences punishable by imprisonment describes the items that may be searched for and seized as:¹⁹
- any thing upon or in respect of which any offence punishable by imprisonment has been or is suspected of having been committed; or
 - any thing which there is reasonable ground to believe will be evidence as to the commission of any such offence; or
 - any thing which there is reasonable ground to believe is intended to be used for the purpose of committing any such offence.
- 4.14 These three paragraphs cover the four categories of information or thing referred to above. Several other search warrant provisions follow a similar pattern.²⁰ Some

14 The Law Reform Commission of Canada included things that may compromise the safety of enforcement officers as a potential fifth category, but concluded that the protective rationale for search and seizure overlapped with other classifications. They therefore did not regard it as requiring a separate classification: see Law Reform Commission of Canada *Police Powers – Search and Seizure in Criminal Law Enforcement* (WP 30, Ottawa, 1983) 143-145.

15 Law Reform Commission of Canada, above n 14, 144-155.

16 See, for example, Crimes Act 1961, s 404(1); Summary Proceedings Act 1957, s 199(3).

17 Proceeds of Crime Act 1991, s 30.

18 See, for example, Agricultural Compounds and Veterinary Medicines Act 1997, s 69(1)(b) (abandoned agricultural compounds); Animal Products Act 1999, s 94(1)(d) (contaminated shellfish); Animal Welfare Act 1999, s 131(1)(d) (prevention of animal suffering); Biosecurity Act 1993, s 114 (inspector may also take action to eradicate a pest or prevent it spreading); Civil Defence Emergency Management Act 2002, s 78(2) (member of police may search for information to prevent or limit the extent of an emergency).

19 Summary Proceedings Act 1957, s 198 (1).

20 Animal Products Act 1999, s 94(1); Biosecurity Act 1993, s 111(1); Films, Videos, and Publications Classification Act 1993, s 109; Motor Vehicle Sales Act 2003, s 130(1); Resource Management Act 1991, s 334(1); Trade in Endangered Species Act 1989, s 38(2).

adopt a different formulation to reflect the specific purpose of the legislation such as animal welfare,²¹ goods subject to customs,²² gambling,²³ or the sale of liquor.²⁴

Simplifying warrants – seizing evidential material

- 4.15 There is considerable overlap between the existing categories of information or thing presently contained in section 198(1)(a), (b) and (c) of the Summary Proceedings Act 1957 and other similar regimes. These categories could be simplified by being refined to a single category that reflects the essential nature and purpose of a search warrant as an evidence-gathering tool.
- 4.16 In chapter 3, we discussed various approaches to the description of what may be seized and concluded that the term “evidential material” should be preferred to the word “evidence”.²⁵ Items constituting evidential material (or forensic material)²⁶ should be able to be seized where there are reasonable grounds for believing that a specified offence has been, is being, or is about to be committed. Redefining what may be seized along these lines should provide the basis for a standard approach to be taken in all search warrant regimes.
- 4.17 Where the fruits, objects and instruments of an offence are not also evidence of the offence, they are more appropriately the subject of other specific regimes rather than a standard search warrant. For example, where it is sought to seize the instruments of an offence to forfeit them, such as a car used to convey controlled drugs by a drug dealer, a proceeds of crime warrant should be used.²⁷ Similarly, where it is necessary to seize money obtained as a result of the offence for non-evidentiary purposes, such as the proceeds of the sale of stolen property or controlled drugs, the proceeds of crime regime should apply.

Future offences

- 4.18 Section 198(1)(b) of the Summary Proceedings Act 1957 enables a warrant to be issued to search for any thing that “will be” evidence of an offence. The use of the future tense is ambiguous: it may simply reflect the fact that the objects being looked for will not become evidence until proceedings are issued in the future; or it may instead suggest that a warrant may be issued even when an offence has not yet been committed – for example, to look for details of a future drug dealing transaction, or for plans of a future bank robbery.
- 4.19 If section 198(1)(b) is ambiguous as to its ambit, section 198(1)(c) is not. It plainly extends to instruments that are intended to be used for a future offence.
- 4.20 We note that the Search and Search Warrants Committee proposed retaining section 198(1)(c), on the basis that it is intended not to obtain evidence but to prevent crime and is thus a valuable power that should be preserved.²⁸ We do not agree,

21 Animal Welfare Act 1999, s 131(1).

22 Customs and Excise Act 1996, s 167(1)(a) and (c).

23 Gambling Act 2003, s 340(3).

24 Sale of Liquor Act 1989, s 177.

25 Chapter 3, paras 3.13-3.29. We also recommended that the term should include intangible items: see recommendation 3.3.

26 See chapter 3, recommendation 3.4.

27 Proceeds of Crime Act 1991, s 30.

28 Search and Search Warrants Committee *Search and Search Warrants: Final Report* (Wellington, 1998) 19.

as we believe the focus of the search warrant power should be evidence-gathering rather than crime prevention. In any event, we have provided for warrantless entry onto premises for crime prevention purposes where there is a serious threat to person or property,²⁹ and do not think that entry for preventive purposes, beyond the narrow circumstances covered by those recommendations, is justified.

- 4.21 That said, we see good reason for specifically providing authority for a search warrant to be issued for offences about to be committed. Not all planning or preparing to commit an offence will amount to an attempt or a conspiracy. If law enforcement agencies are unable to obtain a search warrant in cases where information gives rise to the reasonable belief that an offence is about to be committed, valuable evidential material could be lost. Covert evidence-gathering where an offence is about to be committed may allow appropriate law enforcement action to be taken at a later time. Indeed, this is the very basis upon which many interception or tracking device warrants are currently obtained. For example, interception or tracking devices may obtain evidential material relating to importing or selling drugs, even though the offences have not been committed when the warrants are obtained and executed. In our view, it is appropriate that search warrants be available on the same basis.

RECOMMENDATIONS

- 4.4 The categories of thing that may be the subject of a search warrant issued under section 198 of the Summary Proceedings Act 1957 should be replaced by a single category covering any item that is evidential material relating to a specified offence for which there are reasonable grounds for believing has been, is being, or is about to be committed. Other evidence-gathering powers should be similarly framed.
- 4.5 Where the fruits, objects or instruments of an offence are sought for non-evidentiary purposes, a process other than a generic search warrant should be used.

What may be searched

- 4.22 An assortment of formulations is used in existing search warrant regimes to describe what may be searched. The Summary Proceedings Act 1957 and several other enactments prescribe what may be searched in some detail.³⁰ Conversely, some enactments simply refer to “place”,³¹ and others adopt expressions such as “place or vehicle”,³² or “premises or conveyance”,³³ though the most commonly used formulation is “place or thing”.³⁴

29 See chapter 5, paras 5.43-5.61.

30 Summary Proceedings Act 1957, s 198(1): “building, aircraft, ship, carriage, vehicle, box, receptacle, premises, or place”. See also Animal Welfare Act 1999, s 131(1); Misuse of Drugs Act 1975, s 18(1); Marine Mammals Protection Act 1978, s 14(1); Radiocommunications Act 1989, s 121(1).

31 Biosecurity Act 1993, s 111(1); Commerce Act 1986, s 98A; Fair Trading Act 1986, s 47(1); Serious Fraud Office Act 1990, s 10(1).

32 Resource Management Act 1991, s 334(1).

33 Sale of Liquor Act 1989, s 177(1).

34 Customs and Excise Act 1996, s 167(1); Extradition Act 1999, s 83(2); Films, Videos, and Publications Classification Act 1993, ss 109(1) and 109A(1); Financial Transactions Reporting Act 1996, s 44; Gambling Act 2003, s 340(1); International War Crimes Tribunal Act 1995, s 48(1); Motor Vehicle Sales Act 2003, s 130(1); Proceeds of Crime Act 1991, s 30(1).

- 4.23 The Police and Criminal Evidence Act 1994 (UK) provides for search warrants to be issued to search “premises”,³⁵ an approach that is also taken in New South Wales³⁶ and the Australian Commonwealth legislation,³⁷ both of which define the term to include vehicles and places.³⁸ Queensland legislation authorises the issue of warrants to search a “place”, but defines the term to include premises and vehicles.³⁹ Canada and Victoria have adopted a more expansive expression and a warrant may be issued to search a “building, receptacle or place”.⁴⁰
- 4.24 The expression “place or thing” seems to adequately describe what may be searched in most situations. Its use in more recent legislation in preference to the prescriptive approach in section 198 of the Summary Proceedings Act 1957 seems to mark a change in drafting style, rather than substance. We note the Search and Search Warrants Committee favoured such a change, describing the existing provision as “cumbersome”.⁴¹ We agree.
- 4.25 The reference to “thing” is to provide for searches of specified objects, such as a box or container, where there are reasonable grounds to believe the evidence may be found. A warrant to search a place should therefore provide sufficient authority for the enforcement officer to search any receptacle, item or vehicle found at the place if the object of the search may be there.
- 4.26 Under existing legislation, a search warrant cannot be issued to authorise searching a person.⁴² We outline the reasons for that approach in chapter 8, but do not recommend that the search warrant power should be extended to authorise the search of a person.

RECOMMENDATIONS

- 4.6 A search warrant should authorise the search of any specified place, vehicle or thing for the object of the search.
- 4.7 A search warrant authorising the search of a place should be sufficient authority for the enforcement officer to search any vehicle or other thing at that place if the object of the search may be in the vehicle or thing.

35 Police and Criminal Evidence Act 1984 (UK), s 8. The word “premises” is defined in s 23 as including places and vehicles.

36 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 47.

37 Crimes Act 1914 (Cth), s 3E(1).

38 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 3; Crimes Act 1914 (Cth), s 3C.

39 Police Powers and Responsibilities Act 2000 (Qld), s 3, Schedule 6.

40 Criminal Code RSC 1985 c C-46, s 487(1); Crimes Act 1958 (Vic), s 465(1).

41 Search and Search Warrants Committee, above n 28, 18.

42 In some circumstances a person who is at a place that is being searched pursuant to a warrant may also be searched: see, for example, Misuse of Drugs Act 1975, s 18(1); Customs and Excise Act 1996, s 168(3). A warrant may be issued to search for a person: see, for example, Children, Young Persons, and Their Families Act 1989, s 40.

Who may apply

- 4.27 Though some regimes specify who may apply for a search warrant,⁴³ and a few permit applications to be made only by a commissioned officer of police,⁴⁴ most legislation, including the Summary Proceedings Act 1957, is silent as to who may apply. Thus, under most regimes any person may apply for a search warrant. Though this has long been the position,⁴⁵ applications from persons other than enforcement officers are relatively uncommon.
- 4.28 In the consultation draft of this chapter, we provisionally concluded that warrant applications should be made only by a police officer⁴⁶ or other authorised enforcement officer. As the issue of a search warrant marks a significant step in the investigation process, we considered that an application should be made only by a trained enforcement officer. The officer would be personally responsible for the accuracy of the information that he or she provided to the issuing officer.

Applications by private investigators

- 4.29 The only applications for search warrants that have been made by people other than authorised enforcement officers that we are aware of are those that have been made by private investigators.⁴⁷ The New Zealand Institute of Professional Investigators made submissions in support of the retention of its members' ability to apply for search warrants. The Institute accepted that private investigators should not have the statutory authority to execute warrants, but for a number of reasons it submitted that the status quo should be retained:
- it assists the police by saving time with the warrant application process and avoiding duplication of effort;
 - private investigators have the knowledge, skills and experience to prepare applications to the required standard;
 - the warrant application is prepared by the person with the best knowledge of the case and the evidence sought;
 - any delay in obtaining a warrant is avoided lessening the risk of evidence being lost.

43 Animal Welfare Act 1999, s 131; Biosecurity Act 1993, s 110; Gambling Act 2003, s 340; Serious Fraud Office Act 1990, ss 6, 10.

44 Crimes Act 1961, s 312CA(2); Proceeds of Crimes Act 1991, s 30(2); International War Crimes Tribunal Act 1995, s 48. Serious Fraud Office Act 1990, ss 6(1) and 10(1) provide for search warrant applications only by the Director of the Serious Fraud Office.

45 Under the Justices of the Peace Act 1866, s 121, a Justice of the Peace (JP) could issue a warrant where he or she was satisfied that a "credible witness" had reasonable grounds to suspect that a person had possession of property that was stolen or dishonestly obtained.

46 The applicant will usually be a sworn member of the police. The Commissioner of Police may authorise any non-sworn member of the police to carry out certain powers, functions or duties of a sworn member under Police Act 1958, s 6(2). This could include the power to apply for a search warrant. See also chapter 6, para 6.57 with respect to the execution of search powers by non-sworn members of the police.

47 Private investigators licensed under the Private Investigators and Security Guards Act 1974, s 26.

- 4.30 A relatively small number of private investigators had made applications,⁴⁸ but in many instances they did so with either the knowledge of, or at the suggestion of, the police. The investigations invariably involved dishonesty offences. The Institute identified the following risks as likely to arise if private investigators could no longer apply for search warrants: an increase in the workload of the police; protracted investigations; more dissatisfied complainants; more unsolved crime; and a loss of opportunities to recover stolen property.
- 4.31 From our discussions with the police, we understand there have not been problems in practice with private investigators handing over to a police officer all the information obtained by the investigator together with the search warrant. The police complete the inquiries and then decide whether or not to prosecute.
- 4.32 The inconsistency in the present law whereby anyone may apply for a search warrant in respect of many offences (including the most serious), but for others only an enforcement officer may apply, is unsatisfactory. There appears to be no basis in principle for a different approach to different offences. With the police and other agencies having well developed (and in the case of some enforcement agencies, very specific) investigative responsibilities, it is anachronistic to allow a private individual, whose motives may not reflect the public interest, to apply for a search warrant.⁴⁹ We conclude that as a general principle they should no longer be permitted to do so.
- 4.33 We have considered whether an exception should be made in respect of warrant applications by licensed private investigators. First, their position should be contrasted with that of general members of the public; they are individually licensed as “fit and proper” persons to carry out investigations for reward; they are generally well qualified and experienced for that role and the Commission has no evidence that they are not performing it competently. Further, there are often efficiencies to be gained in private investigators inquiring into suspected offences where, for whatever reason, inquiries are not initiated or undertaken by the police.
- 4.34 Obtaining a warrant is, however, a significant step in an investigation as it results in the state exercising an intrusive and coercive power. Whilst there can be no objection in principle to private investigators being engaged to carry out inquiries into suspected offences, we do not believe that should extend to applying for search warrants for three reasons.
- The efficiencies gained from a warrant being obtained by a private investigator instead of a police officer will often be marginal. In each case the police officer who executes the warrant will need to become fully conversant with all the relevant material as well as being personally satisfied as to the grounds on which the warrant was sought.
 - The decision as to whether a warrant is required, or is an appropriate investigative step in the particular case, is removed from the police who have the ultimate responsibility for investigating the offence, executing the warrant

48 Five of the nineteen respondents to a survey undertaken by the Institute had made between one and six applications, with one respondent reporting two or three applications each year: submission of the New Zealand Institute of Professional Investigators Inc *Search Warrants and Private Investigators* (Wellington, 2006) para 3.7.

49 The role of the Justice of the Peace with respect to the investigation of crime at the time of the Justices of the Peace Act 1866 has also changed with the establishment and organisation of law enforcement agencies and no longer provides a relevant starting point for the issue of search warrants.

and deciding whether a prosecution is to be commenced. Once a warrant is obtained, a police officer is required to execute it.⁵⁰

- Because of the intrusiveness that is occasioned by executing a warrant, the decision to apply for one should be vested only in a state enforcement officer who is publicly accountable and whose decision is subject to supervisory review.

4.35 We do not believe it can or should be left to the issuing officer to determine whether, in the case of a private applicant (including a private investigator), the issue of a warrant is a necessary investigative step and in the public interest. An issuing officer is simply not in a position to make such an assessment.

4.36 Our conclusion that there should be no statutory exception to permit licensed private investigators to apply for search warrants does not, of course, mean that they should not continue investigating suspected offences. It will always be open to the investigator to provide the police with an affidavit or a statement setting out the grounds on which an application for a search warrant could be based. It would then be for the police officer to determine, after considering any other information supplied or available to the officer, whether such a step should be taken and, if so, to apply for the warrant.

4.37 We recommend that only a police officer or an enforcement officer authorised by the Chief Executive of the relevant agency should be permitted to apply for a search warrant.

Supervising the application process

4.38 Most enforcement agencies have arrangements in place for the supervisory review of warrant applications before they are presented to the issuing officer. To enhance the process for obtaining warrants, we think that it is essential that a supervisor should thoroughly scrutinise every application. Such a requirement provides the opportunity for the supervisor to ensure that:

- given the nature of the intrusion, it is an appropriate step in the circumstances to seek a search warrant;
- the information supporting the application is complete, relevant and accurate;
- there is a sufficient foundation in the application to meet the statutory threshold.

4.39 The supervisory review of applications accords with current best practice, but it is of such importance that it should be a formal part of operating procedures for all enforcement agencies. Thus, we recommend that every law enforcement agency whose officers have the statutory authority to apply for a warrant should have administrative instructions in place ensuring that any warrant application be reviewed and approved by a supervisor before being made to the issuing officer.

Restrictions on the rank and level of an applicant for a warrant

4.40 For some warrants there are statutory limitations as to who may make application. For example, only a commissioned police officer may apply for warrants authorising the interception of private communications.⁵¹

⁵⁰ Police Act 1958, s 38.

⁵¹ Crimes Act 1961, ss 312B, 312CA; Misuse of Drugs Amendment Act 1978, ss 14(1), 15A. See also above n 44.

- 4.41 Provided that there are robust supervisory arrangements governing the application process in place in enforcement agencies, as we recommend, there appears to be no good reason to impose any restriction on the rank or level of the police officer or authorised enforcement officer who may apply. Often the grounds on which the application is made will be within the personal knowledge of an individual officer. It is preferable that this officer applies as, regardless of rank, he or she will be in the best position to furnish the issuing officer with any additional information if it is required.

RECOMMENDATIONS

- 4.8 An application for a warrant should be made only by a member of the police or an enforcement officer authorised to make the application.
- 4.9 Each enforcement agency should have administrative instructions in place to ensure that all warrant applications are reviewed and approved by a supervisor before being made to the issuing officer.
- 4.10 There should be no statutory requirement for applications for a search warrant to be made by an enforcement officer of a certain rank or level.

Manner of application

- 4.42 Section 198 of the Summary Proceedings Act 1957 contemplates that a warrant application will normally be made in writing on oath. However, subsection (6) does permit a judicial officer, where it seems appropriate for him or her to do so, to issue a search warrant following an oral application made on oath. In that event the grounds of the application must be recorded in writing.
- 4.43 Where an oral application is made, it needs to be accompanied or followed by the applicant's personal appearance before the issuing judicial officer, so that the application can be made on oath. Where the application is made in writing, there is no explicit requirement that it be accompanied or followed by the applicant's personal appearance, but we understand that this invariably occurs. Hence, while there is nothing in the statute itself that precludes written applications from being made in electronic form, the fact that there is a personal appearance before the issuing judicial officer removes most of the advantages that may arise from doing so; applications are consequently almost always made by way of a standard form in hard copy.
- 4.44 Other search warrant provisions provide simply that the application should be made in writing on oath, and thus do not permit oral applications.
- 4.45 There are five issues arising from this description of current practice:
- whether applications should be made on oath;
 - whether explicit provision for electronic applications (by email, for example) should be made;
 - whether oral applications (in person or by telephone) should continue to be permitted;
 - whether the personal appearance of the applicant before the issuing officer

should always be required, and if not, the circumstances in which it may be dispensed with;

- whether, in the event that an oral or electronic application without personal appearance is made, a copy of the warrant signed by the issuing officer should be in the physical possession of the enforcement officer before the warrant is executed.

Applications on oath

4.46 Currently all warrant applications must be made under oath. This requires that before the application is considered, the applicant take the oath or affirmation and sign the application in front of either a person qualified to administer oaths or the issuing officer. This process:

- emphasises to the applicant the solemnity of the occasion, and thereby encourages him or her to ensure the veracity of the information provided;
- creates the potential for criminal liability if the applicant is found to have provided information that he or she knew to be false or misleading.

4.47 However, having the issuing officer take the oath or affirmation is not necessary to achieve these purposes. A specific statement at the end of the application confirming the applicant's belief in the truth and accuracy of its contents and acknowledging the consequences of knowingly making a false statement would be sufficient to reinforce the applicant's personal responsibility for its probity. Such a requirement operates satisfactorily with respect to written statements of witnesses admitted in evidence at a preliminary hearing, with the statute containing its own sanction for making a false statement.⁵²

4.48 Though there are existing provisions that may provide a criminal sanction for making a false application that is not made on oath,⁵³ we consider there should be a similar specific offence for making a statement in an application for a warrant that would amount to perjury if it were made in judicial proceedings. Such an offence would underscore the importance of being accurate in applications as well as the seriousness of departing from accepted standards of veracity.

4.49 In *Delivering Justice for All* we noted the theoretical nature of the protection provided by the taking of the oath or affirmation of the person laying an information and recommended it be discontinued.⁵⁴ In the case of search warrant applications, there is similarly no reason to think that the integrity of the search warrant process will be compromised by removing the requirement that applications be made on oath and we recommend accordingly.

Electronic applications

4.50 Currently, search warrant regimes require that warrants must be applied for in writing by an enforcement officer who personally appears before the issuing

⁵² Summary Proceedings Act 1957, s 173A.

⁵³ For example, making a false statement (Crimes Act 1961, s 111 – three years imprisonment), or wilfully attempting to pervert the course of justice (Crimes Act 1961, s 117(e) – seven years imprisonment). The perjury provisions of the Crimes Act 1961, s 108 do not apply as they are confined to a person who gives evidence in a judicial proceeding.

⁵⁴ New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 144.

officer. In the Commission's view, this provides an appropriate model that should continue to be followed wherever practicable.

- 4.51 There seems to be no reason in principle, however, why electronic applications should not be permitted if the requirement for the oath is dispensed with. Technology such as facsimile machines and email provide a means by which a written application can be transmitted to an issuing officer without the applicant being present. If, as we recommend below, the applicant's personal appearance before the issuing officer is not always to be required, there would be positive advantages in electronic applications. They would enable warrant applications to be made from remote locations as an alternative to applications by telephone, thus leading to a more accurate written record of the grounds upon which the application is being made. Even if personal appearance was not dispensed with, submitting a written application in electronic form would enable the issuing officer to read and consider the application and supporting material before the applicant arrived.

Oral applications

- 4.52 A written application is clearly preferable to an oral application. It ensures that the grounds upon which the application is being made are properly recorded. As the Court of Appeal observed in *R v Thompson*:⁵⁵

The recording of the grounds on which the search warrant was sought thus serves four purposes. It requires those considering seeking search warrants to focus on and weigh the particular information they can present in support of the application. It requires issuing officers to direct their minds to particular grounds in determining the application. Thus, it imposes a properly disciplined approach both on police officers preparing written applications or making oral applications and on judicial officers considering applications and noting the grounds of any oral application which they grant. As well, it allows for the citizen affected by the execution of the search warrant to see the stated basis for its issue. And it provides a measure of public accountability if that record is then available for public inspection.

However, circumstances can arise where the need for a written application may compromise the effectiveness of the search. A typical example is where the enforcement officer requires a warrant to undertake an urgent search to locate evidential material relating to an offence. In such circumstances, the officer may not have ready access to equipment that would allow a written application to be sent electronically, and may find that the time taken to prepare and convey a written application would result in the evidential material being destroyed or removed. For this type of situation we believe that section 198(6) of the Summary Proceedings Act 1957 permitting oral applications to be made should be preserved and extended to all warrant applications.

- 4.53 We have considered whether there should be some statutory restriction on making oral applications – for example, so that they can only be made where there are reasonable grounds to believe that the delay resulting from making a written application would compromise the integrity of the evidence being sought. However, while written applications are to be preferred to oral applications, we think that a statutory provision to that effect would open up

⁵⁵ *R v Thompson* [2001] 1 NZLR 129, para 41 (CA) Richardson P.

unnecessary challenges to the validity of warrants on procedural grounds alone. It is sufficient to leave it to issuing officers to determine whether the form in which the application is being made is appropriate and provides them with the substantive information that they need to determine whether the warrant ought to be issued.

- 4.54 The existing provision in section 198(6) that, in the event of an oral application, the issuing officer is to make a note in writing of the grounds of the application should, of course, be maintained.

Personal appearance

- 4.55 In both Australia and Canada there are provisions permitting warrant applications to be made without the need for a personal appearance before the issuing officer:

- *Australia*: only in an “urgent case; or if the delay that would occur if an application were made in person would frustrate the effective execution of the warrant” (Crimes Act 1914 (Cth), section 3R(1)).
- *Canada*: only where “it would be impracticable to appear personally before a justice to make the application” (Criminal Code RSC 1985, C-46, s 487.1(1)).

- 4.56 One reason for dispensing with personal appearance in Australia and Canada has been the geographical size of each jurisdiction and the spread of issuing officers. While that is a less significant consideration in New Zealand, it is nevertheless a factor that has been drawn to our attention by a number of enforcement agencies (such as the Department of Conservation) who often work in remote locations without ready access to an issuing officer.

- 4.57 It may be argued that warrant applications made without personal appearance will make it difficult for the issuing officer to assess the applicant’s veracity through observing his or her demeanour. However, we doubt that veracity can be readily assessed through the demeanour of the applicant, and we agree with the Law Reform Commission of Canada that it is more readily determined through the quality of the application and the consistency of the grounds that the applicant puts forward.⁵⁶

- 4.58 We also note that a provision allowing personal appearance to be dispensed with may well protect the human rights values that we discussed in chapter 2, since it provides an enforcement officer with the opportunity, in cases of urgency, to have a search sanctioned by a neutral person, rather than exercising a warrantless power if that is available.

- 4.59 We therefore recommend that the issuing officer to whom a warrant application is made may dispense with the applicant’s personal appearance where the issuing officer is satisfied first, that the delay that would be caused by requiring a personal appearance will compromise the effectiveness of the search; and secondly, that the merits of the warrant application can be adequately determined on this basis.

⁵⁶ Law Reform Commission of Canada, above n 14, 205.

- 4.60 Where an oral application is made for a warrant, it is important that the grounds for the application are recorded either contemporaneously, or as soon as practicable after the issuing officer has determined whether or not the application should be approved. Section 198(6) of the Summary Proceedings Act 1957 currently requires that the issuing officer compile such a record and we have recommended above that a provision to this effect be retained.

Obtaining the warrant prior to execution

- 4.61 Where a search warrant has been issued, it is important that the enforcement officer is able to show it to the occupier of the place searched to remove any doubt as to the authority for and scope of the search. However, where the applicant does not personally appear before the issuing judicial officer, it may not be practicable to physically obtain and execute the original of the search warrant. The Australian and Canadian procedures address this by providing that if the judicial officer is unable to give the applicant the warrant, and (in Canada) is unable to transmit a copy of the warrant by a means of telecommunication that produces writing:
- the judicial officer is to complete the search warrant and to inform the applicant of the terms of the warrant;
 - the applicant must create two copies of the search warrant following the prescribed form, which must state the name of the judge or authorised officer, and the time, date and place of issuance.⁵⁷
- 4.62 It is conceivable that difficulties could arise if the executing officer were to present a warrant that he or she had prepared without the issuing officer's signature. The occupier of the place to be searched might not be convinced that the officer had lawful authority to enter and search in such circumstances. This might increase the risk that the officer's attempts to execute the warrant would be resisted and that force would need to be used.
- 4.63 On the other hand, requiring the applicant to obtain the original of the warrant may, in some circumstances, unduly delay its execution resulting in the loss of evidential material. Alternatively, the officer might have to exercise a warrantless power, if available.
- 4.64 If it is not practicable for the enforcement officer to execute the original of the warrant, but the issuing officer is able to transmit a copy, the facsimile should be able to be used instead.⁵⁸ Where neither option is practicable, the procedure followed in Australia and Canada could usefully be adopted. The issuing officer should read the conditions of the warrant he or she has approved to the enforcement officer who should make a copy. The applicant should then be directed to endorse the issuing officer's name at the foot of the warrant, making it clear that it is a copy of an original.
- 4.65 The emergency warrant procedure under section 171 of the Customs and Excise Act 1996 authorises the issuing officer to grant a customs officer an emergency warrant either orally or in writing. The warrant is valid for six hours. Rather than producing the warrant itself, the customs officer exercising the power is required to produce a note of the particulars of the application to the occupant

⁵⁷ Crimes Act 1914 (Cth), ss 3R(5) and (6); Criminal Code RSC 1985 c C-46, ss 487.1(6)(a) and (b).

⁵⁸ Some New Zealand enactments already permit the execution of facsimile copies of warrants: Care of Children Act 2004, s 76; Children, Young Persons, and Their Families Act 1989, s 445B.

of the place searched. We understand that emergency warrants are occasionally applied for where customs officers are engaged in an operation involving the controlled delivery of drugs and there is insufficient time for the standard search warrant procedure to be completed.

- 4.66 The procedure we have outlined above provides for the issue of a search warrant in circumstances of urgency. In particular, provision is made for the case where it is not practicable for the applicant enforcement officer to uplift and execute the original of the warrant. Separately, we have recommended that where the circumstances of a controlled delivery operation do not allow a warrant to be obtained, the existing search power in section 12A of the Misuse of Drugs Amendment Act 1978 should be extended to authorise the warrantless search of premises and vehicles by a customs officer if the statutory basis for the search exists.⁵⁹
- 4.67 We are of the view that these proposals provide an appropriate framework for the urgent use of search powers by a customs officer and, if enacted, there would no longer be a requirement for the emergency warrant procedure. Accordingly, we recommend the repeal of section 171 of the Customs and Excise Act 1996.

RECOMMENDATIONS

- 4.11 Warrant applications should not be verified by oath or affirmation, but by a short statement confirming the truth and accuracy of their contents. Specific provision should be made for a criminal sanction for knowingly making a false application.
- 4.12 Warrant applications should usually be made in writing and require the applicant's personal appearance before the issuing officer.
- 4.13 A written application should be able to be transmitted electronically to the issuing officer.
- 4.14 An issuing officer should be able to dispense with the requirement for a personal appearance and may receive an oral application, where he or she is satisfied that:
- the delay that would be caused by requiring a personal appearance would compromise the effectiveness of the search;
 - the merits of the warrant application can be adequately determined on this basis.
- 4.15 Where an oral application for a warrant is made, the issuing officer should record the grounds for the application as soon as practicable.
- 4.16 Where it is not practicable for an enforcement officer to be in possession of the original search warrant at the time of execution, a facsimile or other electronic copy of the warrant transmitted by the issuing officer, or a copy that is made by an enforcement officer at the direction of the issuing officer and endorsed to that effect, may be executed.
- 4.17 Section 171 of the Customs and Excise Act 1996 should be repealed.

⁵⁹ Chapter 5, recommendation 5.12.

Content of application

- 4.68 Currently, warrant regimes give little guidance on the required content of applications, other than that implicit in the matters on which the issuing officer must be satisfied in order to approve a warrant.
- 4.69 The courts have identified those principles that govern the contents of warrant applications. The applicant is obliged to be candid: he or she must present the full picture, including any information that could undermine the application. All factors that could reasonably be regarded as relevant should be referred to.⁶⁰ The applicant's knowledge, the source from where it was derived, and the items to be searched for must be set out in "reasonable, not immoderate, detail".⁶¹ The detail must enable the issuing officer to make a soundly based assessment as to whether there are reasonable grounds to believe that in a particular place there are particular things relevant to the proof of a particular offence.
- 4.70 The Court of Appeal has expressed concern at the number of cases where warrants have been issued on the basis of applications that did not contain sufficient information. In *R v Burns* Tipping J noted:⁶²

This is yet another case involving an issue about the adequacy of information supplied in support of an application for a search warrant. The amount of time and money that has been spent in recent times on litigating such issues, sometimes as far as this Court, is a matter of concern. More careful work by those preparing such applications would pay large dividends in saving later expense, delay and engagement of the judicial system. Previous pleas from this Court for greater care to be taken in this area and for the supply of all relevant information, including information touching on the reliability of informants, appear as yet not to have borne fruit. Failure to take appropriate care and supply such information may lead to unfortunate consequences.

Though a standard police form for warrant applications has been in use for some time, shortcomings such as a lack of precision, and the inclusion of conclusory material amounting to no more than mere assertions, still occur.⁶³

- 4.71 The risk of insufficient information being provided is inherent in the application process. Warrant applications are heard *ex parte* and *in camera*.⁶⁴ Accordingly, there may be less scrutiny than typically accompanies a proceeding where both parties are represented. Reliance is placed on the applicant to provide sufficient relevant information to justify the issue of the warrant, and on the issuing officer to identify any deficiencies and to request that further details be provided. To reduce this risk, clear guidelines as to the content of warrant applications are required.

60 *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780, paras 21-22 (CA); *R v McColl* (1999) 17 CRNZ 136, para 20 (CA).

61 *Langley v R* (10 September 1996) CA 292/96, 8-9.

62 *R v Burns (Darryl)* [2002] 1 NZLR 204; (2001) 19 CRNZ 280, para 17 (CA). See also *R v Williams* [2007] NZCA 52, paras 208 and 223-225, *R v Sanders* [1994] 3 NZLR 450 (CA), 454, where the applications and warrants had features of clumsiness, inaccuracy and irrelevance.

63 *R v Fountain* (10 August 2005) CA 176/05, para 25; *R v Savelio*, (5 August 2005) CA 234/96.

64 While this is contrary to the need for judicial acts to be done in open court, the issuing of a search warrant *in camera* is justified by the very nature of the proceedings: *Attorney-General of Nova Scotia v MacIntyre* (1982) 132 DLR 385 (SCC).

4.72 We consider that warrant applications should contain in such detail as is reasonable in the circumstances:⁶⁵

- the name of the applicant;
- the enactment under which the application is made;
- the description of the purported offence and the relevant enactment;
- the facts relied on to show there are reasonable grounds for believing that the offence has been, is being, or is about to be committed;
- the address or other description of the place or thing proposed to be searched;
- the basis for the applicant's belief that the evidential material is in the place or thing;
- a description of the item or items believed to be in or on the place or thing proposed to be searched that would be evidential material;
- the period for which the warrant is sought;
- if multiple executions are sought, the grounds on which more than one execution is believed to be necessary.

4.73 As it is the issuing officer who must determine whether the legal basis for approving a search warrant exists, he or she should be entitled to request further information. This is consistent with the officer's role "to consider the application judicially and in substance acting for that purpose as a judicial officer".⁶⁶ An inquisitive issuing officer is necessary for the warrant application process to act as an effective safeguard.⁶⁷

4.74 Prescribing the form of warrant application in regulations will enhance the process. It will provide clear and practical guidance on the content of the application and may lead to better information being provided to the issuing officer. A prescribed application form should also facilitate the issuing officer's consideration of the information presented.

RECOMMENDATION

4.18 Warrant applications should be in a form prescribed by regulations and should cover the information set out in paragraph 4.72.

Previous applications

4.75 Several search warrant regimes require that the applicant disclose details of any previous applications to search the same place that he or she, having made reasonable inquiries, is aware of, and the results of any such application or

65 In *R v Williams*, above n 62, para 224, the Court of Appeal summarised the information that should be contained in a warrant application. The headings below provide a framework for that information. We do not regard the inclusion of an informant's name and address as being necessary: see para 224(h). It is, however, important that when information from an informant is relied upon the application discloses sufficient details to allow the issuing officer to make an assessment of the informant's credibility and the reliability of the information.

66 *Simpson v Attorney-General* [1994] 3 NZLR 667, 674 (CA) Cooke P.

67 *R v Briggs* [1995] 1 NZLR 196, 198 (CA) Hardie Boys J, noting that the issuing of a warrant is "no rubber stamp process; the duty is a judicial one".

applications.⁶⁸ The issuing officer is not, however, obliged to reject an application on the basis that a previous application has been declined.

- 4.76 A requirement to disclose in warrant applications whether any other applications have been made in respect of the same place or thing, and the results of any such application, may assist in avoiding abuses of process. Overseas, there have been reported instances of alleged harassment where multiple search warrants have been obtained for the same place in relation to the same or a similar matter over a short period of time. The existence of such a requirement may also prevent forum shopping. Otherwise, if an issuing officer rejects an application on the basis that the grounds have not been made out, the same application may be made to another issuing officer in the hope that it will succeed.
- 4.77 Information that previous applications have been made, and the results of any such application, may be relevant to the issuing officer deciding whether to exercise his or her discretion to issue a warrant. If a previous application had been declined, the issuing officer may be more reluctant to issue a warrant in the absence of new information. Where a previous warrant had been issued and executed, the issuing officer may want to consider whether another warrant would be unreasonably intrusive.
- 4.78 Multiple applications may be justified in some cases. An enforcement officer may become aware of new facts that could justify a warrant being issued after an application had been rejected; or an issuing officer may decline an application for technical reasons or because it lacks clarity, rather than because he or she does not consider that a warrant is justified. We therefore do not recommend that multiple applications should be prohibited.
- 4.79 However, we do recommend that the applicant should be obliged to make reasonable inquiries as to whether previous applications have been made by his or her enforcement agency to search the same place or thing in respect of the same or a similar matter within three months of the current application. We also recommend that the applicant should have to disclose any such applications of which he or she is aware, and the results of them. Where a previous application was not granted, we would expect it to be possible in most cases for the applicant to outline either the reason why the warrant had not been issued, or the change in circumstances that support the further application.
- 4.80 We have considered whether this obligation should extend to applications made by other enforcement agencies, so that, for example, police would be required to make reasonable inquiries as to applications made by customs over the same or a similar matter, and vice versa. However, the number of cases in which applications will be made by more than one enforcement agency in respect of the same investigation are exceedingly small, and we therefore do not believe that the significant resources that would be required to make inquiries of all other relevant agencies can be justified.
- 4.81 We have also considered and rejected a requirement that the applicant disclose any prior applications for warrants in respect of property owned by the same

68 Serious Fraud Office Act 1990, s 14; Antarctica (Environmental Protection) Act 1994, s 42(2); Biosecurity Act 1993, s 111(2); Maritime Transport Act 1994, s 455(2).

person. As warrants are issued against property rather than persons, we consider that the extra record keeping (requiring both location and suspect-based data) necessary to comply with such a disclosure regime would not be justified by the marginal additional privacy safeguards for individuals.

RECOMMENDATION

4.19 An applicant should be required to disclose in the warrant application, after having made reasonable inquiries, details of any warrant application made by his or her enforcement agency to search the same place or thing in respect of the same or a similar matter in the previous three months, and the results of any such application.

Retaining applications

- 4.82 There are currently no statutory requirements with respect to retaining warrant applications and any supporting documents. In practice, we understand that, if it is decided to prosecute, a copy of a search warrant application is held on the relevant investigation file and also on the file that is sent to the prosecutor. In addition, all applications made to a judge or registrar are retained by the court for at least 12 months and all warrant applications made to justices of the peace (JPs) are forwarded to the local court registry for similar retention.⁶⁹ No separate court file is created.
- 4.83 It is important that a search warrant application is available if the occupier of the place searched wishes to know the basis upon which the warrant was issued, or if the validity of the warrant is challenged. At present, access to the documentation relating to a search warrant is obtained by making a request to the enforcement agency concerned pursuant to the Official Information Act 1982, or if a prosecution has resulted, by way of the prosecutor's pre-trial disclosure obligations.⁷⁰
- 4.84 In our report *Access to Court Records*⁷¹ we raised the issue of whether search warrant applications and supporting documents should be treated as part of court records. We noted there are no statutory provisions permitting general access to papers relating to the issue of search warrants through the courts, in contrast to the position in Canada where search warrant applications are held by the court and accessible as part of the court's record.⁷² Clearly, responsibility for retaining and providing access to search warrant documentation should be clarified. We discuss the question of access to search warrant applications in chapter 13,⁷³ but address the question of retention here.
- 4.85 The retention of documentation is presently viewed as part of the investigative process relating to the issue and execution of the warrant, with the responsibility

69 Ministry of Justice and the Royal Federation of New Zealand Justices' Associations (Inc) *Manual for New Zealand Justices of the Peace* (Wellington, 2002) 33.

70 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA); *Police v Nimmo* (1999) 3 NZLR 343; *R v McNicol* (1994) 12 CRNZ 668 (CA).

71 New Zealand Law Commission *Access to Court Records* (NZLC R93, Wellington, 2006) 74-75.

72 *Attorney-General of Nova Scotia v MacIntyre*, above n 64.

73 Chapter 13, paras 13.75-13.77.

for retaining and providing access to search warrant applications resting with the enforcement agency applying for the warrant.

- 4.86 We have considered whether the primary responsibility for collecting and retaining papers associated with the issue of search warrants should vest in the court registry rather than the enforcement agency concerned,⁷⁴ but have concluded it should not for a number of reasons:
- The issue or refusal of a search warrant occurs independently of any court proceedings. The warrant is not a court process, but an investigative tool that derives its authority from the fact that it was issued by an independent person acting judicially. Its only relevance to court proceedings is if a prosecution is commenced and the evidence seized is tendered as part of the case.
 - Retention of search warrant documentation by the court is not necessary to facilitate access by an affected person; the process around search and notification places obligations on the enforcement agency to inform an affected party about matters connected with the search. This is supplemented by the post-execution processes discussed in chapter 13.
 - There is value in having a single point of access for all information relating to the application, issue and execution of a search warrant. There seems to be little point in requiring a person with an interest in the papers relating to the issue of a search warrant to go to the court, whereas for all other matters relating to that warrant the enforcement officer or agency serves as the point of contact.
 - The additional resources required for the court registry to create and maintain specific files for each warrant application would be significant and largely duplicate records held by the enforcement agency. Unless all requests for access to the papers were required to be dealt with by the court along the lines of the existing procedure for interception warrant applications,⁷⁵ such duplication would not serve a useful purpose; it is difficult to see any substantive benefit to be gained by placing this additional responsibility on the court in respect of every warrant application.
 - The court does not have to retain the papers to enable third party access. The relevant enforcement agency is obliged under the Official Information Act 1982 to respond to requests for such information.
- 4.87 The present administrative procedure by which the court registry acts simply as a repository for copies of papers associated with the issue of search warrants⁷⁶ serves a useful function in two respects. First, it assures the existence of the papers in the event they are not otherwise available. Secondly, it enables the authenticity to be checked in the event of challenge. Though this is essentially a backup function, we see value in its retention and in giving statutory recognition to the practice.
- 4.88 Although we consider that the primary responsibility for retaining warrant documentation should rest with the applicant enforcement agency, there should be a statutory requirement that the *original* of each warrant application is to be forwarded to or retained by the court registrar who would ensure its safe custody and ready availability should it be required for any court proceedings. Further, in the case of oral (including telephoned) applications for a warrant, the original

74 This responsibility could be similar to that of the registrar with respect to interception warrant applications: see Misuse of Drugs Amendment Act 1978, s 20; Crimes Act 1961, s 312H.

75 Misuse of Drugs Amendment Act and Crimes Act 1978, s 20; Crimes Act 1961, s 312H.

76 See *R v Thompson*, above n 55, para 14, where the practice is referred to.

of the written record of the grounds for the application, as compiled by the issuing officer, should be forwarded to or be retained by the court.

4.89 Accordingly, we recommend that the procedures for retaining warrant applications be codified along the following lines:

- the original of the application (including the record compiled by the issuing officer in respect of an oral application) should be forwarded to or retained by the registrar in secure custody;
- each enforcement agency that exercises a warrant power should be under an obligation to retain a copy of all papers associated with the application, issue and execution of the warrant.

4.90 We see no need for the registrar to retain original applications beyond the period they are presently held, which we understand is no more than two years, unless the application becomes part of any proceedings. In that case its retention will be subject to the rules relating to the retention of court files.

4.91 It would be unduly onerous to require enforcement officers to retain the relevant documents indefinitely. We therefore recommend that the obligation to retain warrant applications and any supporting documents should continue:

- until the completion, including the expiry of any appeal period, of proceedings where the validity of the warrant may be relevant;
- in any other case, until the documents relating to the search are transferred or destroyed in terms of the Public Records Act 2005.

4.92 This recommendation will also require the retention of any previous applications disclosed in terms of recommendation 4.19 for the same period.

RECOMMENDATIONS

4.20 The original of any warrant application (or in the case of an oral application the record made by the issuing officer) should be retained by the court registrar in secure custody.

4.21 The applicant should be required to retain the original warrant and a copy of the application and all documents that were tendered in support:

- where a warrant is issued and executed, until the completion of proceedings where the validity of the warrant may be relevant;
- in any other case, until the documents relating to the search are required to be transferred or destroyed in terms of the Public Records Act 2005.

ISSUING WARRANTS

Who may issue a search warrant

4.93 Most search warrant regimes permit warrants to be issued by any District Court judge, JP, community magistrate⁷⁷ or registrar of a District Court (who is not a

⁷⁷ Community magistrates are judicial officers appointed under the District Courts Act 1947, s 11A. They are generally lay persons and for the purposes of this report, no distinction is made between Community magistrates and JPs.

member of the police).⁷⁸ In contrast, a few enactments provide that search warrants can be issued by only District Court judges,⁷⁹ only High Court judges,⁸⁰ or only District Court and High Court judges.⁸¹

- 4.94 The role of the issuing officer is to stand between the police or the enforcement agency and the citizen by determining whether the application justifies the intrusion on privacy the enforcement officer wishes to make. This requires more than a “perfunctory scanning of the right formal phrases, perceived but not considered, and followed by an inevitable signature”.⁸² The Court of Appeal has stated that:⁸³

the issue of search warrants should not be regarded as a pro forma exercise. Thought must be brought to bear both by those applying for and by those granting warrants. The matter is not complicated when the terms of s 198 are properly analysed and understood.

- 4.95 In another case, the role of the issuing officer was described by the Court of Appeal in the following terms:⁸⁴

It is for the judicial officer, and the judicial officer alone, to decide what conclusions should be drawn from the evidence as to primary facts provided by or on behalf of the applicant. Only the judicial officer has to decide whether that evidence provides reasonable ground for belief with respect to the ultimate issues.

- 4.96 In carrying out their role, issuing officers may also be called on to consider legal issues and assess facts of some depth and complexity. Because of these requirements, search warrants should be issued only by those persons who:

- are independent and impartial;
- have sufficient training to understand the legal requirements for a validly issued warrant;
- have the skills to scrutinise applications with sufficient rigour and to balance competing law enforcement interests and civil liberty values;
- attract community confidence and respect that they can competently and impartially discharge their duties.

- 4.97 While High Court and District Court judges satisfy the above criteria, it would be unrealistic to recommend that only they should be able to issue search warrants. There is clearly a need for others to bear some of the responsibility. This requires a consideration of the extent to which people other than judges should issue warrants and the conditions under which warrants should be issued by lay judicial officers.

78 Summary Proceedings Act 1957, s 198(1); Biosecurity Act 1993, s 111(1); Commerce Act 1986, s 98A(2); Customs and Excise Act 1996, s 167(1); Gambling Act 2003, s 340(2); Hazardous Substances and New Organisms Act 1996, s 119(1); Prostitution Reform Act 2003, s 30(1); Ozone Layer Protection Act 1996, s 23(1); Radiocommunications Act 1989, s 120(3); Resource Management Act 1991, s 334(1); Sale of Liquor Act 1989, s 177(1); Trade in Endangered Species Act 1989, s 38(2); Wine Act 2003, s 65(1).

79 Mutual Assistance in Criminal Matters Act 1992, s 44(1); Proceeds of Crime Act 1991, s 30(1); International Crimes and International Criminal Court Act 2000, s 102(1).

80 International War Crimes Tribunals Act 1995, ss 2 and 48(1).

81 Serious Fraud Office Act 1990, ss 2, 6(2) and 10(2).

82 *Parker v Churchill* (1985) 9 FCR 316, 322.

83 *R v Burns (Darryl)*, above n 62, para 18 Tipping J.

84 *R v Sanders*, above n 62, 460 Fisher J.

People other than judges issuing warrants

4.98 Most search warrants are issued by JPs and District Court registrars and deputy registrars. Registrars, apart from registrars who are also constables, have been authorised to issue search warrants since 1957.⁸⁵ Previously, only JPs had that authority.⁸⁶ A recent survey by the New Zealand Police indicates that at least three-quarters of search warrant applications are presently made to District Court registrars and deputy registrars.⁸⁷

4.99 The formal substantive and other requirements for a valid search warrant call for the issuing officer to be satisfied about a number of matters.⁸⁸ An important consideration with respect to people other than judges issuing warrants is the assurance that they possess the knowledge and experience that is required for that function. There are, however, indications that the levels of knowledge, understanding and judgement required are not being consistently applied, particularly by deputy registrars.

4.100 It is clear from a number of decisions of courts at all levels that it is not uncommon for applications that do not meet the statutory criteria to result in the issue of search warrants. Whilst those decisions highlight weaknesses in the application process on the part of police applicants, as the Court of Appeal has emphasised, the issuing officer has an equal part to play.⁸⁹ On numerous occasions the courts have found shortcomings in the material contained in warrant applications or in the form of the warrant signed by the issuing officer.⁹⁰

4.101 Criticism of the quality of search warrant applications and the level of scrutiny by issuing officers was also reflected in the comments made to the Commission by both members of the legal profession and the judiciary during our consultation. Those comments highlighted the significant amount of court time and resources required for hearing and resolving challenges to the validity of search warrants issued on the basis of inadequately prepared applications, a point reiterated by the Court of Appeal recently:⁹¹

Had the application been properly drafted, the dispute about the search warrant, which has now engaged the attention of both the High Court and this court and delayed the trial, would never have happened. Half an hour's extra effort by the police officer would have avoided the evidential challenge and might have led to early guilty pleas.

85 Summary Proceedings Act 1957, s 198(1). The phrase "not being a constable" invariably accompanies the term "Registrar" as in some isolated areas the registrar may be a constable.

86 Under the Crimes Act 1908, s 365(1), and the Justices of the Peace Act 1927, ss 276-279, only JPs could issue search warrants.

87 New Zealand Police *A Short Study on the Search Warrant Application Process* (Wellington, 2006) 4.

88 The main requirements are summarised in *R v Sanders*, above n 62, 460-463 Fisher J.

89 *R v Burns (Darryl)*, above n 62, 208; *R v Baptista* (2005) 21 CRNZ 479 (CA), para 21; *R v Wineera* (2004) 21 CRNZ 410 (CA), para 14.

90 See, for example, reference to the features of "clumsiness, inaccuracy and irrelevance" in the applications and warrants in *R v Sanders*, above n 62, 454; to the "disturbing slipshod" form of warrant in *R v Briggs*, above n 67, 200; an application with "numerous deficiencies" in *R v Collings* [2005] DCR 714 (HC), para 48; also *R v Baptista*, above n 89; *R v Karalus* (2005) 21 CRNZ 728 (CA); *R v Poelman* (2004) 21 CRNZ 69 (CA); *R v Savelio*, n 63; *R v Pineaha* (2001) 19 CRNZ 149, 151; *Police v McMurdo* [2004] DCR 135; *R v Wilson* [2004] DCR 236; *R v Kahika* (31 July 1997) CA 200/97.

91 *R v Williams* (2 June 2006) CA 35/06, para 19.

- 4.102 We have earlier referred to the critical need for the standard of search warrant applications to be substantially improved and recommended steps that should be taken to that end.⁹² It is equally important to enhance the quality of oversight by officers issuing search warrants. To achieve that we recommend improvements in three areas: first, that warrants should only be issued by specially authorised officers; secondly, that issuing officers should be better trained; and thirdly, that the pool of issuing officers should be enlarged.

Issue of warrants only by authorised officers

REGISTRARS AND DEPUTY REGISTRARS

- 4.103 The statutory authority to issue search warrants that is vested in District Court registrars also extends to deputy registrars.⁹³ Thus, every deputy registrar is, by reason of his or her appointment, authorised to issue search warrants. We understand that in practice not all deputy registrars carry out that function, but existing legislation empowers them to do so.
- 4.104 Whilst registrars and deputy registrars may exercise the jurisdiction and powers of the court when authorised to do so by legislation,⁹⁴ they are the principal administrative officer of the court and not judicial officers.⁹⁵ In the Commission's view, combining administrative duties with the exercise of a judicial function in issuing warrants is unsatisfactory in two respects. First, whilst we understand that deputy registrars who issue search warrants are trained for that role, in many instances their level of knowledge and experience does not effectively equip them to carry out a judicial function, as the various decisions on the validity of search warrants illustrate. Secondly, registrars and deputy registrars are invariably fully occupied with the day-to-day court administration; to impose on them an additional and demanding duty that requires them to act judicially is to tax the knowledge and skills of even the most experienced court officers.
- 4.105 We accept that these difficulties do not arise in respect of all registrars and deputy registrars. The problem seems to us to arise because all deputy registrars have warrant-issuing authority without regard for levels of personal competence for the role and whether their other duties permit them the time to properly consider applications.
- 4.106 There is a further issue in vesting administrative officers of the court with a judicial function. As employees of the Ministry of Justice they are, like enforcement officers, part of the executive arm of government. While they may neutrally and independently consider search warrant applications in the sense that they are not a rubber stamp and can and do refuse some applications,⁹⁶ combining a judicial role with their day-to-day administrative activities is at best an undesirable mix. The independent element in judicial decision-making lies in the complete detachment of the person making the decision from the parties. Where the one and only party who is seeking a decision is also a member of the executive arm of government, the perception of detachment is difficult to sustain.

⁹² See above, paras 4.38-4.39 and 4.68-4.74.

⁹³ District Courts Act 1947, s 14(3).

⁹⁴ See District Courts Act 1947, s 40.

⁹⁵ District Courts Act 1947, ss 12-13.

⁹⁶ In a survey of search warrant applications made by police officers in Wellington in August 2005, registrars declined seven per cent: New Zealand Police, above n 87, 3.

- 4.107 We therefore consider that not every registrar and deputy registrar should, simply by virtue of their appointment to that office, have the authority to issue search warrants. Only those officers who are adequately trained, who have a sufficient level of skill and experience and who are in a position to be able to detach themselves from their other duties to bring an independent judicial consideration to each search warrant application, should be appointed to that role. Accordingly, like the Search and Search Warrants Committee, we conclude that only an authorised registrar or deputy registrar should have the authority to issue a warrant.⁹⁷

JUSTICES OF THE PEACE

- 4.108 The issuing of search warrants has long been one of the judicial functions of JPs.⁹⁸ The statutory authority to issue search warrants in New Zealand is vested in every justice of the peace, but in practice only those justices who have undergone specific training sponsored by the Royal Federation of New Zealand Justices' Associations undertake the task.
- 4.109 While records of the number of warrants issued by JPs are not kept, a survey conducted in 2005 in the Auckland metropolitan area reported that in a 12-month period, 91 Justices issued just over 1,000 warrants.⁹⁹
- 4.110 The ability of lay persons, such as JPs, to provide the rigorous oversight required for the issue of search warrants has been the subject of review overseas.¹⁰⁰ In each case, emphasis has generally been placed on the need for appropriate levels of training to adequately equip them for the task.¹⁰¹
- 4.111 In the course of consultation, some practitioners expressed the view that there was a need to ensure that all JPs who issued warrants had and retained the necessary attributes for that role. Cases were referred to where, like deputy registrars, individual JPs were perceived as not having exercised their warrant issuing responsibilities in accordance with the statutory criteria.
- 4.112 The starting point for quality assurance on the part of JPs who issue search warrants is that, like registrars and deputy registrars, their suitability for the task should be individually assessed. Accordingly, we consider that not all JPs should continue to have the statutory authority to issue search warrants; only those who have undergone an appropriate level of training and who possess sufficient knowledge and experience should be specially appointed to that role.
- 4.113 We have been assured by the Royal Federation of the commitment of JPs to the task and to improving the knowledge and understanding of those JPs who have the responsibility for issuing warrants. In that regard we note that the recently enacted Justices of the Peace Amendment Act 2007 provides a framework for

⁹⁷ Search and Search Warrants Committee, above n 28, 15.

⁹⁸ See Justices of the Peace Act 1866, s 121.

⁹⁹ Auckland Justices of the Peace Association (Inc) *Report on a Survey of Search Warrant Trained JPs Conducted in January and February 2005* (Auckland, 2005).

¹⁰⁰ See Criminal Justice Commission *Report on a Review of Police Powers in Queensland – Volume II: Entry, Search and Seizure* (Brisbane, 1993) 351-358; Victorian Parliament Law Reform Committee *Warrant Powers and Procedures: Final Report* (No 170 of Session 2003-2005, Melbourne, 2005) 94-103; Law Reform Commission of Canada, above n 14, 83-89.

¹⁰¹ Criminal Justice Commission, above n 100, 358; Victorian Parliament Law Reform Committee, above n 100, 97.

delivering and assuring higher levels of competence in the discharge of judicial functions by JPs.¹⁰² We see that framework as central to the appointment and ongoing training of JPs who issue warrants.

- 4.114 Accordingly, we agree with the recommendation of the Search and Search Warrants Committee that only an authorised Justice of the Peace should have the responsibility for issuing warrants.¹⁰³

TRAINING ISSUING OFFICERS

- 4.115 We have referred above to the need for both registrars and JPs who issue search warrants to be appropriately trained for that role. This should be an essential prerequisite before warrant issuing officers can be appointed and it could include the completion of a specific training module through a tertiary institution. There is also a need for ongoing training. The Royal Federation of New Zealand Justices' Associations has indicated their willingness to provide that training.

ENLARGING THE POOL OF ISSUING OFFICERS

- 4.116 In the course of our consultation it was suggested that, with the reduction in the number of existing issuing officers that will inevitably result from our recommendations, people other than JPs who possess the necessary knowledge, skills and experience should be specially appointed to issue warrants.
- 4.117 This suggestion was widely supported and in our view it has considerable merit. It would result in the availability of a specialist pool of issuing officers who, through their understanding and experience would be able to effectively scrutinise warrant applications and thus provide a valuable supplement to the professional judiciary and others who presently have that responsibility.
- 4.118 The proposals we make in this report will impose significantly greater demands on issuing officers as there will be substantial changes to the present legislative framework to reflect the importance to be attached to both the privacy values and law enforcement values discussed in chapter 2. There will also be a wider range of factors relating to the application process and the execution of the warrant for issuing officers to consider. For example, they will be called on to consider applications for multiple executions and applications made orally or by way of telecommunications; there will be an increasing need for conditions to be attached to the execution of search warrants; and there is an increasing number of enactments providing for the issue of search warrants.
- 4.119 The proposal envisages the appointment of suitably skilled people (including retired lawyers) who would provide their services on a voluntary basis. Their training could be undertaken by the Royal Federation of New Zealand Justices' Associations along the lines of the training and support provided by the Federation for Visiting Justices appointed under the Corrections Act 2004.

102 Justices of the Peace Act 1957, ss 3(2) and 3B as inserted by the Justices of the Peace Amendment Act 2007, s 2.

103 Search and Search Warrants Committee, above n 28, 19. The term "duly authorised Justice" is presently adopted in some statutes, though there is no authorisation procedure prescribed: see Local Government Act 2002, s 165; Maritime Transport Act 1994, s 455; Resource Management Act 1991, s 334.

- 4.120 The Commission believes that this proposal offers a viable and valuable way of enhancing the warrant issuing process and providing an adequate geographical spread of suitably qualified persons to handle warrant applications on a 24-hour-a-day basis. We recommend it be adopted.

APPOINTMENT FOR FIXED TERMS

- 4.121 At present, all warrant issuing officers retain that responsibility for as long as they continue to hold office. To ensure that they periodically update their knowledge and continue to demonstrate the high levels of competence required for that role, we recommend that the appointment of all authorised JPs, registrars and deputy registrars and other appointees be for a fixed term. Renewal of the appointment should be possible, but not automatic. It should be dependent on the appointee's availability, his or her completion of ongoing training requirements and proven competence in the issuing of warrants.

Availability of issuing officers

- 4.122 Operationally, it is imperative that enforcement officers have ready access to issuing officers, as the window of opportunity for successfully executing a warrant is often limited. With about three-quarters of search warrants presently being issued by registrars and deputy registrars, it is evident that most applications are made during business hours. Our recommendations are likely to reduce the availability of deputy registrars and accordingly there will be a need for structured arrangements to ensure issuing officers are available at all times, including usual working hours. We make no specific suggestions as to how that should be achieved, but recommend the matter be addressed when implementing the changes we propose.

Authorisations by commissioned officers of police

- 4.123 There is one anomalous area of the law with respect to the issue of search warrants that we believe needs to be addressed. In certain emergency situations involving firearms offences¹⁰⁴ or a breach of national security,¹⁰⁵ a commissioned officer of police may issue a written order authorising a search. Neither statutory scheme uses the term "warrant", but the search powers available to a police officer acting under the authority are the same as those applying to the execution of a search warrant.
- 4.124 In the discussion of the values underpinning search and seizure powers in chapter 2, and in the discussion above, we emphasised the presumptive requirement for warrants to be issued by a neutral officer acting judicially.¹⁰⁶ The requirement does not necessarily call for warrants to be issued only by a professional judge or other judicial officer, but what is required is that the person is neutral and perceived as being capable of acting judicially.
- 4.125 So far as senior police officers are concerned, they cannot be perceived to be neutral when it comes to the exercise of police powers. Equally, as members of the principal state law enforcement agency, it is inappropriate that they act in a judicial capacity.

104 Arms Act 1983, s 61.

105 Crimes Act 1961, s 78D.

106 Chapter 2, paras 2.52 and 2.57-2.60.

Whilst their authority to issue an order in the nature of a warrant is confined to specific emergency situations, the basic underpinnings of that authority are flawed. Moreover, the policy adopted in a number of other emergency situations, where legislation provides police and other enforcement officers with warrantless powers, provides a satisfactory and workable alternative.

- 4.126 It is appropriate for the Commissioner of Police to require searches, or applications for search warrants by police officers, to be first authorised by a commissioned officer as an operational direction.¹⁰⁷ But such an authority cannot be equated to that given by a neutral and detached person acting judicially. Accordingly, we recommend that the enactments that permit a commissioned officer of police to issue an order or direction authorising a search should be repealed.¹⁰⁸ Where the search powers fit within our recommendations for warrantless powers in chapter 5, they should simply be catered for in that way; otherwise they should require a normal search warrant.

RECOMMENDATIONS

- 4.22 Only judges and people who are trained and appointed for the purpose should be authorised to issue warrants.
- 4.23 People appointed to consider warrant applications should include authorised justices of the peace, authorised registrars and deputy registrars and other appointees who have the requisite knowledge, skills and experience.
- 4.24 All issuing officers other than judges should be appointed for fixed terms that may be renewed.
- 4.25 Arrangements should be made to ensure the availability of issuing officers on a 24-hours-a-day basis.
- 4.26 Commissioned police officers should not have the statutory authority to issue a written order authorising the exercise of search powers.

Anticipatory search warrants

- 4.127 Legislation providing for the issue of search warrants generally requires the existence of reasonable grounds for belief as to the whereabouts of the thing to be seized at the present time, not the future.¹⁰⁹ That requirement would not be met if, for example, reasonable grounds presently exist for believing that the thing to be seized will be at the place to be searched at some future time. Thus, a search warrant cannot authorise the seizure of text messages that are to be sent in the future,¹¹⁰ or the seizure of drugs expected to be at a particular place in the future pursuant to a controlled delivery.¹¹¹

¹⁰⁷ Pursuant to general instructions issued under the Police Act 1958, s 30.

¹⁰⁸ For the same reason a similar recommendation has been made in Victoria in respect of a “written authority” issued by a police commissioned officer to search for stolen goods in certain circumstances: Victorian Parliament Law Reform Committee, above n 100, 101-104.

¹⁰⁹ For example, Summary Proceedings Act 1957, s 198(1) requires judicial officers issuing the warrant to be satisfied “that there is reasonable ground for believing that there *is* in any building, aircraft... any thing...”

¹¹⁰ *R v Zutt* (2001) 19 CRNZ 154 (CA), para 5.

¹¹¹ *R v Cameron* (1985) 16 CCC (3d) 240 (BCCA).

- 4.128 It seems to be unnecessarily restrictive to confine the issue of search warrants to only those things that are at the place to be searched at the time the application is made. An enforcement officer should be able to apply for a search warrant for evidential material that is not at the place to be searched at the time of application, but which there are reasonable grounds to believe will be found there in the near future.¹¹² This will avoid delay in waiting to confirm the existence of the object of the search before applying for a search warrant, with the possible risk that the evidential material will be destroyed, or moved from one place to another. In the case of intangible material, such as emails or text messages, it will facilitate the timely issue of a warrant for evidential material that may be altered or destroyed in a very short period and overcome the difficulty highlighted in *R v Zutt*.¹¹³
- 4.129 Several Australian jurisdictions have enacted provisions to authorise the issue of a search warrant where the applicant satisfies the issuing judicial officer that evidential material either is, or will be within the next 72 hours, at the premises to be searched.¹¹⁴ However, we consider this to be unduly complicated. The warrant itself will specify a time limit for execution usually within the maximum of 14 days. There seems to be no real benefit, if an anticipatory warrant is regarded as necessary, in requiring the issuing judicial officer to specify some lesser period during which evidence must come onto the place or thing to be searched.

RECOMMENDATION

- 4.27 A search warrant should be able to be issued where there are reasonable grounds to believe that the evidential material that is the object of the search will be at the place to be searched when the warrant is executed.

Discretion to issue warrants

- 4.130 All search warrant regimes provide that the issuing officer “may” issue warrants on application. This implies a discretion on the part of the issuing officer to reject an application despite the conditions for the issue of a warrant being satisfied. We have been unable to locate any New Zealand decision where the issuing officer has refused to issue a search warrant in these circumstances.
- 4.131 The Law Reform Commission of Canada suggested that the discretion could be relevant in cases where a judicial officer has doubts about the accuracy of sworn assertions. Although such doubts would not affect the apparent “reasonableness” of the grounds on the face of the information, it should entitle an issuer to refuse to grant the requested warrant.¹¹⁵ There might be cases where the issuing officer considers that the intrusiveness of a warrant is not justified given the small evidential value of the item to be searched for and the availability of other means to obtain that item or the information it may provide.

112 In *United States v Grubbs* (2006) 126 S Ct 1494, the US Supreme Court upheld the constitutionality of anticipatory warrants. The fact that evidence was not at the specified premises at the time of application was immaterial if probable cause existed that the items would be there at the time of execution.

113 *R v Zutt*, above n 110. Such evidence may now also be the subject of an interception warrant: see Crimes Amendment Act 2003, ss 18-25.

114 Crimes Act 1914 (Cth), s 3E(1); Crimes Act 1900 (ACT), s 194; Police Powers and Responsibilities Act 2000 (Qld), s 151; Search Warrants Act 1997 (Tas), s 5; Crimes Act 1958 (Vic), s 465.

115 Law Reform Commission of Canada, above n 14, 187.

- 4.132 Whilst it is likely to be extremely rare for an issuing officer to refuse to issue a warrant where the grounds justifying it have been made out, it is possible that there could be situations where the discretion would act as a valuable safeguard. We recommend the discretion be retained.

RECOMMENDATION

- 4.28 The issuing officer should retain the residual discretion not to grant a search warrant where the grounds justifying its issue have been made out.

CONTENTS OF SEARCH WARRANTS

- 4.133 Search warrants should be written in everyday language and clearly formatted. They should set out the powers of the executing enforcement officer and the obligations of those affected by the execution. This will reduce the risk of the enforcement officer acting outside the warrant's scope and more easily enable lay persons to understand the implications of the search without having to obtain legal advice.

Particularity

- 4.134 A search warrant must conform to the principle of specificity – namely, that it is issued with respect to a particular offence to search a particular place for particular items.¹¹⁶ As the Court of Appeal noted in *R v Sanders*:¹¹⁷

The things to be taken and the purpose of the taking must also be defined in the warrant with sufficient particularity that the constable can keep within the intended scope of the warrant and the owner or occupier can understand the warrant and take legal advice with respect to it.

A warrant that is excessively general or lacks sufficient specificity is invalid.¹¹⁸

- 4.135 While the scope and purpose of a search warrant should be sufficiently described so as to permit the enforcement officer executing it and the owner or occupier of the place or thing searched to understand the “metes and bounds of the search and seizure contemplated”,¹¹⁹ the level of particularity required to achieve that will depend on the circumstances of each case, but should be as detailed as possible in the circumstances.

Form of warrant

- 4.136 To meet the specificity requirement and minimise the risk of challenge to a search warrant on the basis that it is defective, the contents of the warrant should be clear and fairly describe the nature of the power that is to be exercised. Uniformity in the information contained in a search warrant is also obviously desirable. These considerations lead us to recommend that warrants should contain, in reasonable detail, the following:
- the name of the judge or issuing officer and the date of issue;
 - the enactment under which the warrant is issued;
 - the relevant offence;

¹¹⁶ *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728 (CA); *R v Coghill* [1995] 1 NZLR 675 (CA).

¹¹⁷ *R v Sanders*, above n 62, 467 Fisher J.

¹¹⁸ *R v Briggs*, above n 67, 199 Hardie Boys J; *R v Mitchell* (1993) 10 CRNZ 485, 496-498.

¹¹⁹ *Auckland Medical Aid Trust v Taylor*, above n 116, 749 McMullin J.

- that any enforcement officer authorised to do so may execute the warrant;
- that the enforcement officer may use such assistance as is reasonable in the circumstances;
- the address or description of the place or thing authorised to be searched;
- that the enforcement officer has the power to enter such place;
- the description of the item or items that may be searched for and seized;
- that the enforcement officer may use such force as is reasonable to enter and to break open or access any area within the place or thing searched, or item or thing found;
- that in the case of a search under the Misuse of Drugs Act 1975, any person found on the premises may be searched;
- that in the case of any other search, any person found on the premises may be searched if there are reasonable grounds to believe that the item being searched for is on that person;
- the period within which the warrant must be executed;
- if the warrant may be executed more than once, the number of executions permitted;
- any conditions that the judge or authorised officer considers reasonable to impose with respect to the execution of the warrant.

RECOMMENDATIONS

- 4.29 A search warrant should contain sufficient specificity and detail to enable the enforcement officer and the owner or occupier of the place or thing searched to understand the nature and scope of the search.
- 4.30 The form of the search warrant should be standard and contain the particulars set out in paragraph 4.136.

Duration of warrants

- 4.137 Search warrants issued under the Summary Proceedings Act 1957 are valid for one month from the date of issue.
- 4.138 The Search and Search Warrants Committee recommended in 1988 that search warrants should be valid for 14 days.¹²⁰ More recently enacted search warrant regimes have adopted this recommendation and provide that warrants expire within 14 days of issue.¹²¹
- 4.139 In Australia and the United Kingdom, a seven-day validity period for search warrants has been recommended¹²² and in Canada, an eight-day maximum period.¹²³

¹²⁰ Search and Search Warrants Committee, above n 28, 21.

¹²¹ See for example, Animal Welfare Act 1999, s 132(4)(d); Customs and Excise Act 1996, s 168 (1)(a)(10 working days); Gambling Act 2003, s 341(1)(d); Resource Management Act 1991, s 334(1); Sale of Liquor Act 1989, s 177(6)(a).

¹²² See Australian Attorney-General *Review of Commonwealth Criminal Law* (Fourth Interim Report, Australian Government Publishing Service, Canberra, 1990) para 39-5; Royal Commission on Criminal Procedure *Report* (Cmnd 8092, London, 1981) 36.

¹²³ Law Reform Commission of Canada, above n 14, 212.

- 4.140 Search warrants should be executed within a short time of their issue to ensure that the circumstances that justified the issue continue to pertain. The longer the period of time between the application for the warrant and its execution, the more likely that the intrusion will be undertaken in circumstances different from those that prompted the issuing officer to grant the warrant.
- 4.141 Some delay between the issue of the warrant and its execution is often inevitable. Considerable planning may be required before execution begins in order for the search to be effective or to avoid any risk of danger. Once execution has commenced, it may become apparent that the execution will consume much time. Setting the validity period too low could risk prejudicing investigative operations. Moreover, in the course of consultation, the police advised us that in some prolonged investigations, a 14-day duration would be insufficient.
- 4.142 We consider that the one month period provided by section 198(3) of the Summary Proceedings Act 1957 is too long and, in contrast, a seven-day period would be too short. The 14-day maximum proposed by the Search and Search Warrants Committee seems to us to be appropriate. Some provision is, however, necessary to meet the exceptional case. To that end we recommend that, if the applicant satisfies the issuing officer that because of the special circumstances of the offence or the investigation, a period in excess of 14 days is necessary for the execution of the warrant, the issuing officer should be able to grant a warrant that would have effect for up to 30 days. Whatever the execution period authorised by the issuing officer, it should be endorsed on the warrant.

RECOMMENDATION

- 4.31 Search warrants should be valid for 14 days from the date of issue unless the issuing officer specifies a shorter period in the warrant. Where the issuing officer is satisfied that, owing to the special circumstances of the case, a period longer than 14 days is necessary for the execution of the warrant, he or she should be able to issue a warrant that is valid for up to 30 days.

Imposing conditions

- 4.143 Some search warrant regimes expressly provide that the issuing officer granting the search warrant may “impose any reasonable conditions on the exercise of the warrant as he or she thinks fit”¹²⁴ or provide that the search warrant may be “subject to any special conditions”.¹²⁵
- 4.144 Section 198 of the Summary Proceedings Act 1957 does not authorise the judge or authorised officer to impose conditions on the execution of a search warrant. The Court of Appeal has accepted that the issuing officer may consider doing so in appropriate cases, but concluded that normally it would be better to follow the prescribed form without adding conditions.¹²⁶

¹²⁴ Prostitution Reform Act 2003, s 30(3).

¹²⁵ Financial Transactions Reporting Act 1996, s 46(1); Proceeds of Crime Act 1991, s 32(1).

¹²⁶ *Television New Zealand Ltd v Attorney-General* [1995] 2 NZLR 641, 648 (CA).

- 4.145 The ability of issuing officer to impose conditions helps to ensure that warrants are tailor-made for the specific situation. Conditions imposed may take account of any factors that would be likely to exacerbate the intrusiveness of the execution of a warrant and ensure that the search and seizure is in conformity with section 21 of the Bill of Rights Act. This is an important issue given that the Court of Appeal has held that the legality of an action does not define its reasonableness under that section.
- 4.146 We recommend that an issuing officer should be able to impose such conditions on the execution of the warrant that he or she considers reasonable. The conditions must be specified in the warrant.

RECOMMENDATION

- 4.32 Search warrants should be subject to any conditions specified in the warrant that the issuing officer considers reasonable to impose.

More than one execution

- 4.147 A search warrant is usually regarded as having been executed and its authority spent, when the entry, search and seizure authorised by the issuing officer has been achieved.¹²⁷ As we understand the practice, it is not uncommon for a police officer who has executed a search warrant to endorse it accordingly with the date of execution.
- 4.148 Search warrants under section 198 of the Summary Proceedings Act 1957 authorise more than one entry and search during the time the warrant is in force. The Search and Search Warrants Committee recommended a warrant should be used for one entry only; once a search warrant had been used to gain entry, it should not be used again for further entry or seizure.¹²⁸ Recent legislation has reflected that recommendation.¹²⁹
- 4.149 Given their intrusive and coercive nature, search warrants should usually only be executed once. There will be occasions, however, where multiple executions should be permitted. For instance, the police may need to enter a place believed to be a transit point for stolen goods more than once in order to gather evidence of the stolen goods as they arrive.¹³⁰ Similarly, where the search may extend over two or more days and the police do not wish to maintain a presence at the search scene for the whole time, the warrant may authorise more than one entry and search. It would be administratively burdensome, and could prejudice ongoing investigations, if the police were required to make multiple warrant applications.
- 4.150 Accordingly, we recommend that where the applicant satisfies the issuing officer that more than one execution of the warrant may be necessary, the issuing officer may authorise multiple executions and endorse the warrant to that effect.

¹²⁷ In the absence of a legislative indication to the contrary, a warrant is executed when the entry and search have been effected, regardless of whether the evidence sought was found and seized: see *R v Adams* [1980] 1 All ER 473 (CA).

¹²⁸ Search and Search Warrants Committee, above n 28, 21.

¹²⁹ Animal Welfare Act 1999, s 133(1)(b); Prostitution Reform Act 2003, s 32(3); Gambling Act 2003, s 342(4).

¹³⁰ As to the covert execution of search warrants, see chapter 6, paras 6.39-6.45.

When a warrant may be deemed to be executed

- 4.151 Because of the fact that more than one execution may be explicitly permitted, clarity is needed as to when a warrant is executed. We are not attracted to a definition that requires simply that there be a seizure,¹³¹ because the entry and search are of themselves intrusions and should be limited. Further, if none of the items the warrant authorises to be seized are found, this may indicate that the grounds justifying the warrant were wrong or no longer exist.
- 4.152 On the other hand, an enforcement officer may need to leave the place or thing searched in order to obtain assistance, information or equipment or to remove seized items.¹³² Alternatively, enforcement officers may find after leaving the place or thing searched that they have not removed everything that may be seized. In neither of these situations could the process of search and seizure be considered complete. It may be ongoing, punctuated by searchers leaving and re-entering the place being searched. On occasions, it may be necessary for the search to extend to days, with the place or scene being secured or guarded until the process is complete.
- 4.153 Simple objective criteria that will serve as reliable indicators that the search and seizure process has been completed are needed. One such indicator is time. Where the enforcement officer leaves the place searched and does not return for an extended period, that will in itself reflect the completion of the intrusion that was judicially authorised. We consider that four hours is a sufficient time to confirm the search and seizure process has been concluded. This does not in any way limit the length of time the enforcement officer has to carry out the search; it is simply an objective indicator that when the officer departs and does not return in four hours, the execution of the warrant has been completed.
- 4.154 A second indication is where the seizure authorised by the warrant has been completed, in that all the items specified have been taken by the enforcement officer. If all items that the warrant authorises to be seized have been surrendered, there is no justification for the enforcement officer entering the place and conducting a search. The warrant should be deemed executed once the items have been seized or surrendered.
- 4.155 In contrast, the warrant should not be deemed to have been executed where there are reasonable grounds to believe that some of the items authorised by the warrant to be seized have not thus far been located in or removed from the place. The enforcement officer should be entitled to enter and search the place in order to search for and seize these other items, provided that not more than four hours has elapsed since the officer last departed from the place.
- 4.156 The multiple execution of a search warrant will not authorise a fishing expedition. On the initial execution and every subsequent execution of the warrant the executing officer must have reasonable grounds to believe that items subject to the warrant remain in the specified search location. The return to a search location under the purported exercise of the warrant power when no such belief exists will amount to an unreasonable execution of the warrant.

131 See *Barnett and Grant v Campbell* (1902) 21 NZLR 484, 492 (CA).

132 See *R v Summers* (8 December 2004) CA 356/04, where execution on a single occasion was held to encompass more than one entry as part of a single exercise.

RECOMMENDATIONS

- 4.33 A search warrant should be executed only once, except where the issuing officer is satisfied that more than one execution is reasonably required for the purposes for which the warrant is being issued. The issuing officer should specify in the warrant that more than one execution is permitted.
- 4.34 A search warrant is executed when the enforcement officers executing the warrant:
- have seized and removed all the items specified in the warrant; or
 - leave the place and do not return within four hours.

Renewing warrants

- 4.157 As a general rule, the maximum life of a search warrant is fixed by the relevant statute; there is no provision for the warrant to be renewed or extended. A similar approach is common in overseas jurisdictions, though in New South Wales provision is made for an issuing officer to extend the authority of a search warrant before it expires.¹³³ By way of contrast, warrants authorising the interception of private communications may be renewed,¹³⁴ as can detention warrants under the Misuse of Drugs Amendment Act 1978¹³⁵ and some other search warrants issued for special purposes.¹³⁶
- 4.158 The material tendered in support of an application for a search warrant is usually based around existing information that can quickly become stale; the facts underpinning assertions made in the application may change. For that reason search warrants have a defined and relatively short life and they are usually promptly executed. If, for some reason, it is not possible for an enforcement officer to execute the warrant, the appropriate course at present is for a new search warrant to be applied for. We think that this approach is sound and should not change. If a new warrant is sought, the officer applying for it will be in a position to explain to the issuing officer why the previous warrant was not executed successfully as well as providing current information to support issuing a fresh one.
- 4.159 Accordingly, we recommend that no provision should be made for renewing search warrants. In the exceptional case, where an extension or renewal of a warrant is needed, the standard application process should provide a suitable framework for the necessary information to be provided to the issuing officer.

¹³³ Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 73A. Search warrants that may be extended under this section generally expire 72 hours after they are issued: see s 73.

¹³⁴ Crimes Act 1961, s 312F; Misuse of Drugs Amendment Act 1978, s 18.

¹³⁵ Misuse of Drugs Amendment Act 1978, s 13I.

¹³⁶ Biosecurity Act 1993, s 132 (a control warrant); Summary Proceedings Act 1957, s 200F (tracking devices); Telecommunications (Residual Provisions) Act 1987, s 10K (call data warrant); Customs and Excise Act 1996, s 38J (search and viewing warrant).

RECOMMENDATION

- 4.35 No separate provision should be made for renewing a search warrant. Where an extension or renewal is needed, an application for a fresh warrant should be made.

DEFECTS IN
WARRANT
APPLICATION
OR SEARCH
WARRANT

- 4.160 The fact that a search is carried out under the authority of a warrant issued by an independent officer acting judicially does not necessarily mean that the search itself, or the admissibility of the evidential material obtained as a result, is immune from challenge. The search and seizure may subsequently be held to be unreasonable in terms of section 21 of the Bill of Rights Act because of defects in the issuing of the warrant.
- 4.161 The challenge may be to the application, or to the content of the warrant itself. A challenge to the application is commonly based on the alleged failure of the applicant to provide sufficient information to meet the threshold of reasonable grounds to believe. A challenge to the warrant may be directed to a defect on the face of the warrant.

Defects in applications

- 4.162 A search warrant will be invalid on substantive legal grounds, and the search will be unlawful, if the application fails to provide sufficient information to meet the statutory test. Thus, a warrant issued on the basis of an application that falls short of providing the issuing officer with sufficient information that there were reasonable grounds for belief in terms of section 198(1) of the Summary Proceedings Act 1957 will be invalid.¹³⁷ Search warrants have also been held to be invalid where an assertion in an affidavit was found to be “patently untrue” and the applicant was held to have deliberately misled the issuing officer;¹³⁸ and where the application was misleading owing to its selective reliance on dated information.¹³⁹ A warrant declared invalid because the applicant failed to provide the issuing officer with enough primary material to enable the officer to be satisfied of the necessary matters, cannot be saved by providing additional information that the applicant had at the time of the application, but had not included in it.¹⁴⁰
- 4.163 In a minority of cases, defects in an application for a search warrant will not affect the validity of the warrant, for despite the shortcomings, reasonable grounds for belief in terms of section 198(1) can be discerned. Such a case may arise where a warrant is issued partly on the strength of what is subsequently determined as tainted material, but when that material is excised, the threshold can still be met.¹⁴¹ Similarly, where the application reveals features of “clumsiness, inaccuracy and irrelevance”, but in substance the statutory threshold is met, there may be a sufficient basis for a valid warrant.¹⁴²

137 *R v Kappely* [2001] 1 NZLR 7 (CA); *R v Pineaha*, above n 90; *Police v Bradford* [1993] DCR 505.

138 *Solicitor-General v Schroder* (1996) 3 HRNZ 157 (CA).

139 *R v McColl*, above n 60.

140 *R v Pineaha*, above n 90.

141 *R v Grayson and Taylor* [1997] 1 NZLR 399, 409 (CA).

142 *R v Sanders*, above n 62, 454 Cooke P and Casey J.

Defects in warrants

- 4.164 A substantive defect in a search warrant will render it invalid. A general warrant – that is, one that lacks sufficient particularity to convey to the executing officer and to the occupier of the premises where it is to be executed the extent and limit of the search – is thus invalid.¹⁴³ Similarly, a warrant that is likely to mislead as to its scope and purpose will also be invalid.¹⁴⁴
- 4.165 However, not every defect in a warrant will render it invalid. For example, the misdescription of the offence that would not mislead anyone has been held to be a “defect, irregularity, omission, or want of form” in terms of section 204 of the Summary Proceedings Act 1957 and saved by the application of that provision.¹⁴⁵ Additionally, deletions to the prescribed form of the warrant, which amounted to a misdescription of what was intended to be covered, were held not to invalidate the warrant, as no one was under any illusion as to its effect.¹⁴⁶

Effect of s 204 Summary Proceedings Act 1957

- 4.166 Shortcomings in the application for a search warrant, or in the warrant itself, may be saved by the application of section 204 of the Summary Proceedings Act 1957, which provides:

No information, complaint, summons, conviction, sentence, order, bond, warrant, or other document, and no process or proceeding shall be quashed, set aside, or held invalid by any [District Court] or by any other Court by reason only of any defect, irregularity, omission, or want of form unless the Court is satisfied that there has been a miscarriage of justice.

- 4.167 Whether a warrant attracts the protection of this section is always a question of the relative seriousness or otherwise of the error, and the consequences of any deficiency will be a matter of degree and commonsense.¹⁴⁷ Where the section applies, the warrant will be saved unless a miscarriage of justice was caused. That may arise if the defect caused significant prejudice, or where the application for the warrant was an abuse of process.¹⁴⁸
- 4.168 In practice there do not appear to have been problems for the courts in applying this section to warrant applications and search warrants. Moreover, where the defect in the application or warrant renders the warrant a nullity, the courts have been equally clear that section 204 will not save it. To reinforce that distinction and to emphasise to enforcement officers the importance of care and completeness in preparing warrant applications and search warrants, we recommend that the legislation makes it clear that section 204 will not apply to save a search warrant where:
- having regard only to the information provided in the warrant application, the threshold justifying the issuing of the warrant is not met; or

143 *Auckland Medical Aid Trust v Taylor and Others*, above n 116; *R v Mitchell*, above n 118.

144 *R v Sanders*, above n 62, 467 Fisher J.

145 *Auckland Medical Aid Trust*, above n 116; *R v Briggs*, above n 67, *R v Coghill*, above n 116.

146 *Rural Timber Ltd v Hughes* [1989] 3 NZLR 178 (CA).

147 *R v McColl*, above n 60, 143; *Rural Timber Ltd v Hughes*, above n 146; *R v Grayson and Taylor*, above n 141, 409; *R v Sanders*, above n 62, 454 Cooke P and Casey J; *R v Thompson*, above n 55, para 38.

148 *R v McColl*, above n 60, 143.

- the warrant contains a defect, irregularity, omission or want of form that is likely to mislead anyone as to its scope or purpose.
- 4.169 A declaration that a search warrant is invalid does not, by itself, necessarily mean that the execution of the warrant constituted an unreasonable search in terms of section 21 of the Bill of Rights Act.¹⁴⁹ Nevertheless, invalidity may be regarded as an indicator of unreasonableness and the statutory recognition of the boundary with section 204 will serve to underscore to applicants for search warrants, the importance of taking care in supplying the issuing officer with the necessary information.¹⁵⁰

RECOMMENDATION

4.36 A search warrant should be declared to be invalid and not capable of being saved by section 204 of the Summary Proceedings Act 1957 if:

- having regard only to the information provided in the warrant application, the threshold for issuing the warrant is not met; or
- the warrant contains a defect, irregularity, omission or want of form that is likely to mislead anyone as to its scope or purpose.

149 *R v Jefferies* [1994] 1 NZLR 290 (CA); *R v Grayson and Taylor*, above n 141, 407; *R v McColl*, above n 60, 142.

150 Thus avoiding the recurring problems that have been a matter of frustration in the courts: see the comments of the Court of Appeal in *R v Burns (Darryl)*, above n 62; and *R v Pineaha*, above n 90.

Chapter 5

WARRANTLESS POWERS OF ENTRY, SEARCH AND SEIZURE



Chapter 5

Warrantless powers of entry, search and seizure

INTRODUCTION 5.1 There are two principal exceptions to the general rule that searches by law enforcement officers may only be undertaken pursuant to the terms of a warrant issued by an independent officer acting judicially. The first is where the search subject consents to a search without a power having to be exercised – the requirements for such informed and voluntary consent are discussed in chapter 3. The second, the subject of this chapter, is where a specific statutory provision authorises a warrantless entry and search, or where such a power is recognised by the common law.

5.2 In New Zealand and in many other jurisdictions, warrantless powers for police officers to enter and search premises for law enforcement purposes in certain exceptional circumstances have long been available where the public interest in swift action outweighs the personal and privacy interests at stake. More recently, other enforcement officers have been vested with statutory warrantless search powers intended to facilitate a wide range of specific statutory responsibilities and functions being enforced.¹

5.3 In this chapter we review existing warrantless powers in statutes and common law and consider what powers ought to be available to both police (paragraphs 5.4 to 5.83) and non-police enforcement officers (paragraphs 5.84 to 5.96).

THE RATIONALE FOR WARRANTLESS POWERS 5.4

As we noted in chapter 2,² the importance of the warrant requirement is such that departures from it can be justified in only exceptional circumstances. Nevertheless, whilst the warrant process is the primary means of authorising and justifying an entry, search and seizure, many Commonwealth jurisdictions accept that in urgent circumstances, such a process may be too time-consuming and detrimental to the end result; in such situations the public interest may better be served if the police act without a warrant. Thus, in certain circumstances, police officers have statutory authority to enter a place without a warrant to

¹ See below, paras 5.84–5.96.

² Chapter 2, para 2.55.



make an arrest,³ to protect life and property,⁴ to preserve evidence,⁵ or to search for evidence of specific offences,⁶ and the common law (and in some jurisdictions, statute) has provided authority to search a place incidental to an arrest.⁷

5.5 The exceptional nature of such powers makes it essential to codify their existence and their scope. Furthermore, because the entry or search does not receive prior independent sanction, mechanisms for bolstering accountability need to be available. These are discussed below in chapter 15.

SCOPE OF
POWERS TO
ENTER, SEARCH
AND SEIZE
WITHOUT
WARRANT

5.6 In this chapter, we propose that police officers should have specific warrantless powers in respect of places. Warrantless powers in relation to people and vehicles are dealt with separately.⁸

5.7 The term “place” refers to any commercial premises, building or private dwelling, as well as the private land around them where, in the absence of consent or other authority (or the application of the concept of implied licence), entry by an enforcement officer would constitute a trespass. Although it is generally accepted that reasonable expectations of privacy are lower for some types of property than others,⁹ we do not think that the nature of the place to be searched should dictate the approach to police warrantless search powers. That is because exceptions to the warrant requirement for search powers vested in police officers are justified only in circumstances of urgency or where the obtaining of a warrant would be likely to jeopardise the objective of a search for which there is an overriding public interest. Those circumstances are just as likely to arise in relation to dwelling-houses as other types of premises, and the public interest in having a search power available is the same in each case.

5.8 We propose that police officers should have warrantless powers:

- to enter places in order to arrest;
- to search places incidental to an arrest;
- to enter places and take other necessary action in exigent circumstances (emergencies and crime prevention);
- to enter places for evidence preservation purposes or in relation to specified offences.

3 Crimes Act 1961, s 317(1); Police and Criminal Evidence Act 1984 (UK), s 17; Criminal Code RSC 1985 c C-46 (Can), s 529.3; Crimes Act 1914 (Cth), s 3ZB(2); Police Powers and Responsibilities Act 2000 (Qld), s 21; Law Enforcement Powers and Responsibilities Act 2002 (NSW), s 10.

4 Crimes Act 1961, s 317(2); Police and Criminal Evidence Act 1984 (UK), s 17(1)(e); Criminal Code RSC 1985 c C-46 (Can), s 529.3; Law Enforcement Powers and Responsibilities Act 2002 (NSW), s 9.

5 Police and Criminal Evidence Act 1984 (UK), s 19; Criminal Code RSC 1985 c C-46 (Can), s 529.3; Police Powers and Responsibilities Act 2000 (Qld), s 77; Law Enforcement Powers and Responsibilities Act 2002 (NSW), s 22.

6 Typically for drugs and firearms offences: see Misuse of Drugs Act 1975, s 18; Arms Act 1983, ss 60-61.

7 *Barnett and Grant v Campbell* (1902) 21 NZLR 484 (CA); *Dillon v O'Brien* (1887) 16 Cox CC 245; *Cloutier v Langlois* [1990] 1 SCR 158 (SCC); Police and Criminal Evidence Act 1984 (UK), s 18; Crimes Act 1914 (Cth), s 3ZG.

8 See chapter 8 for warrantless powers in respect of persons and chapter 9 in respect of vehicles.

9 See for example, *R v Grayson and Taylor* [1997] 1 NZLR 399, 407 (CA); *R v Jefferies* [1994] 1 NZLR 290, 305 (CA); *TranzRail v Commerce Commission* [2002] 3 NZLR 780, 790 (CA); *R v Williams* [2007] NZCA 52, para 113.

- 5.9 With three exceptions,¹⁰ the threshold for exercising these powers should be reasonable grounds to believe that the specified circumstances exist. This differs from the amendment suggested in Preliminary Paper 50, which (in relation to entry without warrant for the purposes of arrest) required only good cause to suspect. For a discussion of the difference between the respective thresholds, see chapter 3 above.¹¹

POWER TO ENTER PLACES IN ORDER TO ARREST

Entry to execute an arrest warrant

- 5.10 For the purpose of executing a warrant to arrest a defendant or someone who is required in court as a witness, a police officer has the statutory authority to enter onto premises at any time, by force if necessary, if he or she has “reasonable cause to believe” that the person against whom it is issued is on the premises.¹² The power to enter also applies to warrants to arrest a defendant for fines enforcement purposes issued under Part 3 of the Summary Proceedings Act 1957.¹³ A separate authority exists for warrants to arrest bail absconders.¹⁴ The police officer is not required to have the warrant in his or her possession when making the arrest.¹⁵
- 5.11 The incidental power to enter and search for the person who is the subject of an arrest warrant provided by section 22 of the Summary Proceedings Act 1957 is important in that it facilitates the execution of the warrant and the person concerned being brought before the court. We think it should be retained.
- 5.12 The New Zealand Law Society suggested that the authority to enter premises to execute the warrant should also be specified in the warrant itself.¹⁶ When the warrant is available, such a reference would serve to inform the occupier of the police officer’s authority to enter and we recommend accordingly.

RECOMMENDATION

- 5.1 For the purpose of executing a warrant to arrest, a police officer should retain the authority to enter a place to search for and arrest the person against whom the warrant is issued where the officer has reasonable grounds to believe that the person is in the place. The authority to enter should also be specified in the warrant itself.

10 The exceptions are exigent circumstances (see paras 5.43-5.61), searches under particular sections of the Arms Act (see para 5.70) and road safety entry powers (see paras 5.80-5.83).

11 Chapter 3, paras 3.2-3.12.

12 Summary Proceedings Act 1957, ss 22 and 146. Warrants for the arrest of a defendant may be issued under the Summary Proceedings Act 1957, ss 19(1)(b) and (c), 61, 65 and 66 in respect of summary hearings and ss 147 and 148 in respect of indictable proceedings. Warrants for the attendance of witnesses may be issued under ss 20(4) and 38 (summary hearings) and s 185 (indictable proceedings).

13 Warrants for the arrest of a defendant for fines enforcement purposes may be issued under the Summary Proceedings Act 1957, ss 83(2)(b), 88(2B), 88(3)(b) and 106E(3).

14 Bail Act 2000, ss 36(3) and 60(3).

15 Police Act 1958, s 38(3).

16 The existing forms for warrants to arrest prescribed by the First Schedule, Summary Proceedings Regulations 1958 do not refer to this authority.

Entry to arrest without warrant

5.13 The authority to enter a place to arrest someone without warrant pursuant to section 315 of the Crimes Act 1961 or other statutory provision¹⁷ is confined under section 317(1) of that Act as follows:

(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.

5.14 Paragraph (a) “requires the constable to actually witness, rather than just suspect, the commission of the offence and to be in fresh pursuit”.¹⁸ Under paragraph (b), the recency of the offence is immaterial; the offender’s presence in the place of commission is the only requirement.

Problems with section 317(1)

5.15 There are two reasons for recommending changes to section 317(1) as it is presently drafted:

- First, paragraph (a) implies that the rationale for entry to effect an arrest is based on the police officer’s belief that an offence has been committed and that the suspect is the right one: witnessing the offence and the recency of the chase are relevant to the strength of that belief. Its effects are simultaneously too broad and too narrow. On the one hand, it allows entry without warrant even when the person to be arrested is unaware that the police officer is in pursuit, is not deliberately attempting to evade arrest, and is unlikely to leave the place before a warrant can be obtained. On the other hand, it precludes entry when the police officer has not personally witnessed the offence, even when the person is actively fleeing from the police (and perhaps has been a fugitive from justice for some time) and may escape arrest without immediate intervention.
- Secondly, the power of entry conferred by paragraph (b) is confined to those premises where the police officer has good cause to suspect the offence was committed. Thus, if a constable enters a house in order to arrest someone whom he or she has good cause to suspect has committed a domestic violence offence there, and the person flees to a neighbour’s or relative’s house in order to evade the arrest, the police officer has no power to enter the second house to arrest the offender unless the limited “fresh pursuit” circumstances of paragraph (a) apply.

Rationales for entry: flight risk and evidence protection

5.16 In our view, one defensible rationale for the type of entry envisaged by section 317(1) is the flight risk if arrest is not effected immediately. In Preliminary Paper

¹⁷ For example, Summary Offences Act 1981, s 39.

¹⁸ *Edwards v Police* [1994] 2 NZLR 164, 168.

50 we suggested this might be achieved by adding the following paragraph to section 317(1):¹⁹

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

- 5.17 Although this proposal was supported by submitters, on reflection we do not think that it goes far enough in resolving the existing anomalies in paragraphs (a) and (b). Hot pursuit in itself does not necessarily indicate the existence of a flight risk and is not sufficient to justify a warrantless search. We have therefore concluded that the section should be redrafted.
- 5.18 The entry power needs to cater explicitly for those who are a flight risk. In addition, it should provide for the situation where a suspect who is not necessarily a flight risk will discard or destroy evidential material if he or she is not immediately arrested (for example, the alleged offender for an assault who may be about to remove blood stains from his or her clothes, or an offender who seeks to destroy incriminating documentary evidence). If the absence of a power of immediate entry would undermine the prospects of conviction (because critical evidential material will in the meantime have been concealed, destroyed or impaired), that is an equally compelling rationale for an exception to the warrant requirement; the potential loss of evidence is just as much of a threat to the ability to bring an offender to justice as the offender's flight risk.
- 5.19 Accordingly, we think that the present power of police officers to enter premises to effect an arrest without warrant under section 317(1)(a) of the Crimes Act 1961 should be replaced by a power to enter for the purpose of arresting a person where the police officer has reasonable grounds for believing the person will either flee to avoid arrest, or conceal, destroy or impair evidential material relating to the offence for which he or she is to be arrested. The existing limitation requiring the relevant offence to be one that is punishable by imprisonment should be retained. We acknowledge that in some instances the threshold we propose may be difficult for a police officer to meet and that the power may be available in only a relatively small number of cases. However, that is as it should be: a power which authorises entry by force into a dwelling-house where some of the occupants might be entirely innocent, should require a high threshold.

Where the offender remains on the premises

- 5.20 Those recommendations do not, however, provide for the situation presently dealt with by section 317(1)(b) of the Crimes Act 1961 where a person who is reasonably suspected of having committed an offence on premises remains there and there are no grounds for believing that he or she will flee to avoid arrest. Two relatively common situations give rise to the exercise of this power. First, the police may receive a call or respond to an alarm indicating an intruder is on the premises. Where the circumstances confirm the probability that a burglary has been or is being committed, the police officer can use this authority to enter the premises to apprehend the offender. Secondly, where a police officer responds to a domestic violence call involving an assault or other offence where the alleged offender is on the premises, this provision authorises the officer to enter to make the arrest.

19 New Zealand Law Commission *Entry, Search and Seizure* (NZLC PP50, Wellington, 2002) 8.

- 5.21 Retaining the power provided by section 317(1)(b) to enter and arrest a suspected offender who, having committed an offence on the premises, remains there, appears to be justified. In some cases the information available may indicate exigent circumstances that justify entry under section 317(2). More often, however, such an inference will be equivocal at best and we do not think anything is to be gained by requiring police officers to wait until those circumstances exist before entering to make an arrest. Nevertheless, in line with our recommendation as to the appropriate threshold for the exercise of such a power, we recommend the present test of good cause to suspect be replaced with a requirement for reasonable grounds to believe.²⁰ Furthermore, we consider that this authority should not be available for every arrestable offence; only those that are regarded as sufficiently serious to warrant a penalty of imprisonment.
- 5.22 Though we noted above that paragraph (b) does not provide a power of entry to a place other than the place where the offence was committed, we do not recommend that it should be extended to do so. If the whereabouts of the offender are known and there are reasonable grounds for believing he or she may flee to evade arrest, or destroy, conceal or impair evidential material, the authority to enter the second place to make an arrest is provided by the proposed section 317(1)(a). In the absence of those circumstances, the general law relating to arrest will apply.

RECOMMENDATIONS

- 5.2 Section 317(1)(a) of the Crimes Act 1961 should be repealed and replaced with a provision that authorises a police officer to enter a place to search for and arrest a person pursuant to a power to arrest without warrant for an offence punishable by imprisonment, if the police officer has reasonable grounds to believe that:
- the person is in the place; and
 - if entry is not effected immediately, either:
 - the person will flee from the place in order to evade arrest; or
 - evidential material relating to the offence for which the person is to be arrested will be destroyed, concealed or impaired.
- 5.3 Section 317(1)(b) of the Crimes Act 1961 should be amended to authorise a police officer to enter a place to arrest a person who is believed on reasonable grounds to have committed an offence punishable by imprisonment in that place.

Arrest of persons who are “unlawfully at large”

- 5.23 Police officers have specific powers to arrest without a warrant persons who are “unlawfully at large” in terms of the Corrections Act 2004 and the Parole Act 2002,²¹ and the power to “retake” special or restricted patients who escape from an institution or are absent without leave under the Mental Health (Compulsory

²⁰ Chapter 3, paras 3.2-3.12. The present “good cause to suspect” test under Crimes Act 1961, s 317(1)(b) is the same as that required for arrest under s 315(2)(b). The discussion in chapter 3 relates to powers of entry, search and seizure, but we think there is an argument that the reasonable grounds to believe standard should apply to arrests as well.

²¹ Corrections Act 2004, s 184; Parole Act 2003, s 73.

Assessment and Treatment) Act 1992.²² Additionally, the general power of arrest under section 315 of the Crimes Act 1961 affords a power to arrest people who escape from lawful custody.²³

- 5.24 There is at present no statutory power for a police officer to enter premises to arrest someone falling into any of the above categories and section 317(1) of the Crimes Act 1961 is inapplicable in most instances. However, the police are empowered by section 317A of the Crimes Act 1961 to stop a vehicle to arrest a person for whom there are reasonable grounds for suspecting is “unlawfully at large,” and a road block can be established for a similar purpose.²⁴
- 5.25 There is undoubtedly a high public interest in the arrest or retaking of people who are unlawfully at large while they are subject to the processes of the criminal justice system. We therefore think that in these circumstances a departure from the warrant requirement is justified. Such people are already fugitives with good reason to avoid arrest and it may be readily anticipated that they will flee if they become aware they are about to be apprehended. Thus the authority for the police to promptly enter places where they may be located to arrest them is necessary to avoid the flight risk inherent in the situation. Nor, for similar reasons, do we think that the police officer should be required, before exercising the warrantless power, to consider whether obtaining a warrant is practicable.²⁵

RECOMMENDATIONS

- 5.4 A police officer should be able to enter a place without warrant in order to search for and apprehend a person whom the officer has reasonable grounds to believe is in the place and the person is unlawfully at large.
- 5.5 A person should be regarded as unlawfully at large if he or she:
- is unlawfully at large in terms of the Corrections Act 2004 or the Parole Act 2002;
 - is a special or restricted patient who has escaped from an institution or is absent without leave under the Mental Health (Compulsory Assessment and Treatment) Act 1992;
 - has escaped from lawful custody under sections 119 or 120 of the Crimes Act 1961.

POWERS TO SEARCH PLACES INCIDENTAL TO ARREST

Current New Zealand law

- 5.26 The authority of a police officer to conduct a search incidental to an arrest has rested on common law authority that is over a hundred years old. In *Barnett and Grant v Campbell*,²⁶ police executing a search warrant for particular offending seized documentary evidence of different offending, but in the event did not arrest the occupier for anything. The Court of Appeal said:²⁷

²² Mental Health (Compulsory Assessment and Treatment) Act 1992, ss 53 and 56.

²³ Crimes Act 1961, s 119 (prison break) and s 120 (escape from lawful custody).

²⁴ Crimes Act 1961, s 317B.

²⁵ See *R v Laugalis* (1993) 10 CRNZ 350 (CA); *R v Williams* [2007] NZCA 52, para 24.

²⁶ *Barnett and Grant v Campbell* (1902) 21 NZLR 484 (CA).

²⁷ *Barnett and Grant v Campbell*, above n 26, 491-493.

We think it may be taken to be settled law that a constable who is legally authorised to arrest an accused person may, at the time of such arrest, and as incidental to it, seize and take possession of articles in the possession or under the control of the accused person, as evidence tending to show the guilt of such person. This is a power at common law, and exists as an incident to the arrest, ... It is founded on the right to search a person upon his arrest; ... In our opinion, therefore, the defendant could, if he had arrested Grant, have seized these books and papers, and have justified such seizure ... under the common-law authority which a constable executing a warrant of arrest has as above stated, these books and papers being at the time in the possession and control of Grant, ... in our opinion, it is from the actual arrest that the authority to seize the property in the possession of an accused person arises, and that the legal justification for such seizure exists. This power to seize under a warrant to arrest, or upon an arrest, is involved in and is a part of the power to search the alleged offender, and it is clear that before the right to search the person of the offender arises the arrest must be effected. The right to a personal search is clearly dependent not upon the *right* to arrest, but the *fact* of arrest, and that at the time of search the person is in custodia legis.

5.27 In *McFarlane v Sharp*,²⁸ this passage was quoted and *Barnett and Grant* upheld, on the basis that it was a long standing decision, and the Court was not satisfied of the need to reconsider it. The facts of *McFarlane* were similar to *Barnett and Grant*: a warranted search of the accused's premises, pre-arrest, revealed evidence of different offending.

5.28 These decisions leave unclear the scope of search powers incidental to arrest. Searching for and seizing articles "in the possession or under the control of the accused person" are justified, and in both *Barnett and Grant* and *McFarlane* the context in which this was discussed was a search of the accused's premises. It is not clear what the extent of the power might be where the accused is arrested while a guest on other premises (such as a friend's house), or in a public place (such as a bar): may police conduct searches of all or part of those places, and are they then entitled to return to the accused's house and search that too? Does the search power extend to the accused's work place?

Search incidental to arrest for evidential material of the instant crime

5.29 Our proposed search and seizure power incidental to arrest relates only to evidential material of the crime for which the person has been arrested. By itself, the fact of arrest cannot justify a general search for evidential material of other offending. Seizing evidential material relating to other crimes that the police may encounter in the course of such a search should be permitted only if it is in plain view as discussed in chapter 3.²⁹

28 *McFarlane v Sharp* [1972] NZLR 838, 840-841 (CA).

29 Chapter 3, paras 3.119-3.148.

Evidential material as opposed to other items

- 5.30 Unlike some other jurisdictions,³⁰ we do not propose a power to search for items that may cause harm or facilitate escape. In chapter 8 we make recommendations relating to the search of people on their arrest for items that could endanger the safety of others or facilitate escape.³¹ Once that search has taken place, an arrested person should no longer have the opportunity to access such items in the immediate environment. Moreover, a vast array of items in any home could cause harm or facilitate escape, ranging from wine bottles to keys to cutlery. To allow an incidental search for these purposes is in effect to authorise a fishing expedition (no matter how narrowly defined in terms of proximity to the exact place of the person's arrest), because it would authorise looking for virtually anything.

Pre-requisite for a search: reasonable belief that there is evidential material in the place

- 5.31 There are several options for determining the scope of the search, which are discussed below. It should be said at the outset that whichever option is preferred, it should in our view be subject to a requirement for reasonable belief that the place to be searched contains evidential material relating to the offence for which the person has been arrested. Consistently with the values discussed in chapter 2, we do not recommend an automatic right to search contingent on arrest.

What places may be searched?

- 5.32 We have considered five options:
- the immediate environs of arrest;
 - the House of Lords' approach in *Rottman*;
 - a place from which the arrested person has fled;
 - any place within the arrested person's possession or control;
 - any place, if there is an undue risk that delay may cause loss of the evidence.
- 5.33 The House of Lords' decision in *R v Commissioner of the Police of the Metropolis, ex parte Rottman* has some bearing on our reasoning in relation to several of the categories; we therefore summarise it here for convenience.³²
- 5.34 In *Rottman*, the House of Lords held that at common law a police officer who arrested a person in the driveway of his home, a few metres from the door to the arrested person's house, was entitled to search the house and seize any evidence

30 North American jurisprudence includes some authority to the effect that the rationale for a post-arrest search of immediate surroundings extends (or should extend) beyond the safety of police and security of the arrested person, to obtaining and securing evidence: see for example *R v Lim (No 2)* (1990) 1 CRR (2d) 136 (Ont HC); *Thornton v US* 124 S Ct 2127 (2002) Scalia J dissenting. However, in general the weight of authority in North America tends to treat a post-arrest search as being principally for the purpose of harmful items. See also *Cloutier v Langlois* [1990] 1 SCR 158 (SCC), 186 L'Heureux-Dube J; Law Reform Commission of Canada *Search and Seizure* (Report 24, Ottawa 1984) 36.

31 Chapter 8, paras 8.55-8.67.

32 *R v Commissioner of the Police of the Metropolis, ex parte Rottman* [2002] UKHL 20 (HL).

relating to the offence for which the arrest was made.³³ The majority held that it would be contrary to common sense to hold that the power to search and seize after an arrest did not extend to searching the remainder of the premises belonging to the suspect in or upon which he had been arrested. Regarding a submission that the respondent had been arrested in the grounds of the property, and therefore the police were not entitled to enter and search the house, Lord Hutton held that such a distinction (as with a distinction relating to the room in which the person is arrested) could produce nonsensical results; “premises” for the purpose of search following an arrest should be interpreted as meaning the whole house and its grounds.³⁴

Suppose after an attack on another person with a knife the police had pursued the attacker, carrying a knife, and had seen him enter his house through the front door and run through the hall into the kitchen, and the police had then entered the kitchen through the back door of the house and arrested him but found no knife in the kitchen, were the police acting unlawfully if they then went into the hall and, on finding that the suspect had put down the knife in the hall, seized it? To hold that the police had no power in law to act in this way would, in my opinion, be contrary to good sense. When the police are not authorised to arrest a man they should only have power to search his house pursuant to a search warrant or under statutory authority. But the position is different when the police are entitled to arrest him.

- 5.35 His Lordship held that the arrest and taking into custody of a person and the entry into his home to effect the arrest is a much greater intrusion into his home, his liberty, and his privacy than the search of his home and seizure of articles incidental to the arrest.

Option 1: immediate environs of arrest

- 5.36 The first option is the area within the accused’s immediate control. In *Rottman* this was discussed in terms of the room in which the accused was arrested; logically, it might be even more narrowly construed as the area within the accused person’s reach (within which they therefore have had the opportunity to deposit evidence). This is too narrow, for the reasons identified in *Rottman*. It is simply a matter of chance whether those arrested will have evidential material on them at the time and place of arrest. Confining the scope of the search in this way would only make sense if the rationale was to secure items that may facilitate harm or escape, as in North America, an approach which we reject for the reasons discussed above.³⁵

33 *Rottman* involved extradition proceedings, and therefore fell outside the domestic offence provision that has supplanted the common law as discussed by the House of Lords. The scope of Police and Criminal Evidence Act 1984, s 18(1) is similar: it authorises a police officer to enter and search “any premises occupied or controlled by a person who is under arrest” for evidence of the offence in question, or related or similar offences.

34 *R v Commissioner of the Police of the Metropolis, ex parte Rottman*, above n 32, paras 58-60. See also Lord Rodger at para 100: “to confine the police officers’ power to searching the accused’s person and seizing articles in the room where he happens to be when arrested would make it a matter of chance whether potentially important evidence was recovered or lost”. Authorities discussed in *Rottman* include *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299, and *Ghani v Jones* [1970] 1 QB 693. Lord Rodger also noted (at para 93) that it had long been the practice of UK police to search premises as well as the arrested person for material evidence, which was tacitly accepted by the courts, and arguably (in the opinion of the Home Office) thereby incorporated in the common law; and (at para 102) the Scottish law and practice of always, in conjunction with an arrest on a serious charge, seeking a warrant “to search the person, repositories, and domicile of said accused”, which is regularly granted by the sheriffs.

35 Para 5.30.

Option 2: the House of Lords' approach in Rottman

- 5.37 The second option is to adopt *Rottman* in its entirety, so that police are entitled to search the place of arrest as defined by its legal boundaries: that is, the house and its grounds. While the absurdities that arise from the room/house/grounds distinction are manifest, a premises/non-premises distinction is no less susceptible to criticism (for example, if the knife was thrown over the neighbour's fence instead of discarded in the hall). It is also not entirely transparent from the decision in *Rottman* whether the right to search arose by virtue of the fact that the property was the place of arrest (as it was on the facts), or was the property of the arrested person regardless of where the arrest was made (as to which, see option 4 below). The place of arrest may not necessarily be where evidential material is likely to be located, nor where there is a clear public interest in an intrusive search that outweighs competing privacy interests (for example, an arrest while visiting the home of an innocent third party). We note also that the House of Lords' approach in *Rottman* has been criticised in one High Court decision as being "out of step" with the general legislative scheme in New Zealand.³⁶

Option 3: as for option 2, but including places from which the arrested person has fled

- 5.38 The third option extends beyond the place of arrest, to include any place from which the arrested person has fled (that is, the location at which they would have been arrested, but for their flight). The advantage of this is that it removes an incentive to flee, which option 2 creates if there is evidential material in the place of arrest (which police are thereby entitled to search) that the accused person wishes to hide. However, in other respects, the disadvantages (chiefly arbitrariness) are the same as option 2.

Option 4: any place within the arrested person's possession or control

- 5.39 This has been adopted in the United Kingdom in section 18 of the Police and Criminal Evidence Act 1984 (UK) – "any premises occupied or controlled" by the arrested person. It would capture, for example, the accused's house, lockup and personal workspace – a wider range of places where evidential material might be, not constrained by the arbitrariness of the place of the arrest, and not interfering with the freedoms of innocent third parties. However, there is a likelihood with this approach that evidence of other offending will be captured (either under the plain view provision that we propose in chapter 3, or by equipping the police with information that they can then use to justify an application for a warrant). That is, an arrest for one offence would become a de facto justification for a sweep for other illegal activity. One can argue that this is in the public interest – those who have allegedly offended against society cannot expect to be treated with the same respect as law-abiding citizens (alluded to in *Rottman*). However, our Bill of Rights Act, existing search powers, and the rest of the criminal law are not cast in those terms: rights are universal, and up until the point of conviction the focus is on the particular alleged offending, as opposed to anything else that the accused has or may have also done wrong. Finally, it is worth recalling that what we are talking about here is a power of warrantless search. As noted at the start of the chapter, such a power is justified by the need for immediate intervention. Once the accused is arrested, there is less likely to be urgency relating to areas in his or her possession and control, not more.

36 *R v Noble* [2006] 3 NZLR 551, para 33.

Option 5: any place where there is undue risk that delay will cause loss of evidential material

- 5.40 The final option is a functional rather than location-based test. It would allow any place to be searched if the police officer conducting the search has reasonable grounds to believe both that:
- the place contains evidential material relating to the offence for which the person was arrested;
 - the delay in obtaining a search warrant will result in evidential material being concealed, destroyed or impaired.
- 5.41 The disadvantage of this option compared with others is that it does not provide a test that can be automatically applied. A location-based test provides a high degree of certainty, whereas this option relies on a police officer's assessment of both elements. That, in turn, depends on the availability and the quality of information on which the officer's reasonable belief is based. Moreover, where the search yields evidence, its admissibility may be challenged on the basis that the police officer's conclusion was flawed.
- 5.42 Nevertheless, this is our preferred option. It deals best with the two key objectives of the search in that its focus is on evidential material that is relevant to the offence; where the preservation of that material is in issue, it permits immediate intervention to secure it, regardless of where it is situated. This test also avoids the arbitrariness of basing search parameters solely on the place of arrest.

RECOMMENDATION

- 5.6 The existence of the power to search incidental to arrest, and the scope of such a power, should be codified to permit a police officer who has arrested a person to enter and search a place if the officer has reasonable grounds to believe that:
- evidential material relating to the offence for which the person was arrested is in the place; and
 - the delay caused by obtaining a search warrant will result in that evidential material being destroyed, concealed or impaired.

EXIGENT CIRCUMSTANCES

Current New Zealand law

- 5.43 At present, there are two kinds of critical or urgent circumstances that justify warrantless police entry onto private places. The first is to prevent crimes likely to have immediate and serious consequences. Section 317(2) of the Crimes Act 1961 provides:

(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.

- 5.44 The second arises from circumstances of necessity. In *Dehn v Attorney-General*,³⁷

³⁷ *Dehn v Attorney-General* [1988] 2 NZLR 564.

police evidence was to the effect that they wanted to satisfy themselves as to the safety of the occupants of premises (fearing that a crime may have been committed); crime prevention was not in issue and they therefore were unable to rely on section 317(2) of the Crimes Act 1961. Tipping J reviewed the authorities and concluded that in addition to section 317(2), a common law necessity power exists.³⁸

A person may enter the land or building of another in circumstances which would otherwise amount to a trespass if he believes in good faith and upon grounds which are objectively reasonable that it is necessary to do so in order (1) to preserve human life, or (2) to prevent serious physical harm arising to the person of another, or (3) to render assistance to another after that other has suffered serious physical harm.

- 5.45 The Court did not explicitly address the issue of whether necessity is available when the danger is to property rather than a person. In *R v Fraser* the Court of Appeal said (emphasis added).³⁹

The purpose of a 111 emergency system is to enable citizens to be put quickly in touch with the emergency service(s) they need and for that service to respond urgently if required. Its integrity is based on an acceptance by citizens that in exercising their duty arising from the emergency call police, fire service and emergency medical services may impinge upon private property rights. The trade off for all citizens is *the potential for saving lives and property, facilitated by the 111 emergency system.*

- 5.46 However, the Court also said: “We emphasise as the [Supreme Court of Canada] did in [*R v Godoy* [1991] 1 SCR 311] that entry into private property must be for the protection of life and for the safety of citizens”⁴⁰ and “Whether danger to property is envisaged by the doctrine of necessity is not something we need to be concerned with in this appeal”.⁴¹ The scope of necessitous powers in their application to property is therefore unclear.

A provision of broader scope than crime prevention

- 5.47 In Preliminary Paper 50, we suggested that a new section 317(2) of the Crimes Act 1961 could be substituted in the following terms.⁴²

(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.

- 5.48 This, to some extent, recognises the need for a provision not confined to crime prevention. However, it is still drafted by reference to prevention (of injury, as opposed to crime). It is therefore significantly narrower than the common law necessity power, which as stated in *Dehn*, includes rendering assistance to those who have suffered serious harm (that is, intervening after the fact). There are sound public policy reasons for this, given the ultimate value attributed to preserving human life.

38 *Dehn v Attorney-General*, above n 37, 580.

39 *R v Fraser* (2004) 21 CRNZ 158 (CA), para 28.

40 *R v Fraser*, above n 39, para 31.

41 *R v Fraser*, above n 39, para 33.

42 New Zealand Law Commission, above n 19, 8.

- 5.49 We considered a provision that simply authorised a police officer to enter premises without a warrant in “exigent circumstances”.⁴³ However, we decided to compile a specific and exhaustive list of the exigent circumstances where a warrantless entry was permissible. We did this in the interests of certainty and because we consider that crime prevention and necessity are the only circumstances that justify dispensing with the warrant requirement.
- 5.50 We propose that the two powers should be codified in a single provision with two limbs: one for crime prevention, and one for emergency assistance to people.⁴⁴ The two limbs overlap to some extent. Sometimes (for example, a 111 call with only a scream or silence) the police simply will not know if an offence is pending, or has already been committed, or if the emergency arises from an offence at all. Sometimes, too, depending on the nature of the crime and its imminence, the need for crime prevention will meet the common law emergency test (for example, murder, rape, arson). However, not all emergency scenarios will result from criminal offending (for example, a suicide attempt).

The degree of injury, loss or damage

- 5.51 In relation to crime prevention, section 317(2) requires that the imminent offence be one “that would be likely to cause immediate and serious injury to any person or property”. Our proposal removes the “serious” qualification in relation to personal injury. It should be sufficient to enter premises to prevent an offence where the officer has reasonable grounds to believe that someone will be injured. It will generally be difficult for a police officer to assess whether a feared assault will result in injury as opposed to serious injury; the severity of the outcome is not necessarily related to the intensity of the assault. Any violent incident carries with it the risk of escalation, making serious injury a possibility.
- 5.52 It is arguable that a higher threshold is called for in relation to crimes against property:⁴⁵

The safety of human lives belongs to a different scale of values from the safety of property. The two are beyond comparison and the necessity for saving life has at all times been considered a proper ground for inflicting such damages as may be necessary upon another’s property.

The incursion of property rights associated with a warrantless entry is only justified in situations where the alternative outcome (in terms of jeopardy to the property) would clearly be worse: that is, where the warrantless entry is the lesser of two evils. This view was shared by the New Zealand Law Society, who submitted that a warrantless entry power should be available only where the potential damage to property is more than trivial.

⁴³ Compare Criminal Code RSC 1985 c C-46 (Can), s 487.11.

⁴⁴ Compare Crimes Act 1961, s 41 which is a defence rather than an empowering provision, although in practice the effect of the two may be similar: “Everyone is justified in using such force as may be reasonably necessary in order to prevent the commission of suicide, or the commission of an offence which would be likely to cause immediate and serious injury to the person or property of any one, or in order to prevent any act being done which he believes, on reasonable grounds, would, if committed, amount to suicide or to any such offence.”

⁴⁵ *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218, cited in *Dehn v Attorney-General*, above n 37, 578. In *Dehn* the same approach is implicit, although the issue was not discussed at any length and remained unresolved.

- 5.53 We agree, and propose that warrantless entry to premises to prevent damage to or loss of property should only be permitted on those grounds – where the potential damage or loss is serious. While police officers before entering will generally be in no better position to assess the potential risk to property than to the person, the wrong assessment of the potential risk to a person could have life-threatening consequences, whereas an erroneous assessment in relation to property will merely increase the financial loss.
- 5.54 It could also be argued that a higher threshold is required to justify a warrantless entry for emergencies – unlike crime, these are not by definition a wrong against another, so that police incursion is justified only in situations that are life-threatening or a person is otherwise in serious jeopardy. It would not, for example, be appropriate for the police to enter premises forcibly where someone has cut their hand and fainted, unless they reasonably suspected that in the circumstances this apparently minor inconvenience may lead to more serious consequences (for example, where the person is a haemophiliac).
- 5.55 However, we think that our recommendation that entry should be permitted only where there is a risk to life or to the safety of any person and the circumstances require an emergency response necessarily incorporates an element of seriousness and that no further qualification is required.

“Reasonable grounds to suspect”

- 5.56 Unlike the other warrantless powers, the threshold that we are proposing for entry is reasonable grounds to suspect. These are circumstances where quick action is paramount; police delay out of concern that they do not know enough about the circumstances to satisfy the threshold of belief would jeopardise the interests that we are seeking to protect. The proposed threshold for further action, having entered, is reasonable belief.

Police action post-entry

- 5.57 Section 317(2) is also silent as to what the constable may do to prevent another offence being committed, having entered premises for that purpose. In some circumstances matters may have proceeded as far as an attempt, in which case an arrest could be made under the general law. The question is whether, and if so when, police should have power to intervene to stop conduct short of a criminal attempt.
- 5.58 It is reasonably clear that police officers have some common law anticipatory powers. Their extent was considered in *Police v Amos*,⁴⁶ where it was held that the police have power to intervene to stop a person acting unlawfully, and also (depending on the circumstances) to prevent lawful conduct that poses a danger to life or property:

As has already been said, it is beyond argument that the police must interfere to stop or prevent unlawful conduct, actual or apprehended. In addition circumstances may arise where there is a common law duty on a policeman to take steps which would otherwise be unlawful if he has apprehension on reasonable grounds of danger to life or property, but the limits to which he may go will be measured in relation to the degree

46 *Police v Amos* [1977] 2 NZLR 564, 569.

of seriousness and the magnitude of the consequences apprehended. There could be less justification for taking what would be prima facie unlawful interference with private rights for the protection of property than there would be in the case of danger apprehended to persons.

- 5.59 Regarding lawful conduct, Speight J noted that most of the case law relates to impending breaches of the peace; similarly, although the context in *Amos* was slightly different (craft protesting against the entry of a nuclear-powered vessel to Auckland harbour), it was police action in a public place.
- 5.60 Later, in *Minto v Police*,⁴⁷ the Court of Appeal upheld the common law duty and right of a police officer to take reasonable steps to prevent a breach of the peace from occurring (including, in that case, the impounding of personal property). The reasonableness of the action would be determined by the circumstances, including the imminence of the threatened breach of the peace. The court declined counsel's invitation to narrow down the constable's right by defining what constituted reasonable steps, Bisson J noting that this "would have the adverse effect of tying a constable's hands in a given situation where he must exercise his own judgment".⁴⁸
- 5.61 Two issues arise from these cases.
- As to whether the scope of the ability to intervene should be confined to breaches of the peace, or more broadly to other conduct only if it poses a threat in public places, we disagree with both propositions. There seems no reason in principle why the same approach should not apply where the threat to life or property occurs in a private place; the police incursion on rights is greater in such circumstances, but that is just one factor to be weighed in the mix of whether the particular intervention is reasonable.
 - We agree with Bisson J's conclusion in *Minto* that it is undesirable to be unduly prescriptive about what police can do proactively, because it will vary substantially from case to case.

RECOMMENDATION

- 5.7 Section 317(2) Crimes Act 1961 should be repealed and replaced with a provision that permits a police officer to:
- enter a place without warrant if he or she has reasonable grounds to suspect that in that place:
 - an offence is occurring or about to occur, which would be likely to cause injury to any person, or serious damage to or loss of any property; or
 - there is a risk to the life or safety of any person that requires an emergency response;
 - take any action that the police officer has reasonable grounds to believe is necessary to prevent the offending from occurring or continuing, or to avert the emergency.

⁴⁷ *Minto v Police* [1987] 1 NZLR 374 (CA).

⁴⁸ *Minto v Police*, above n 47, 378 Bisson J.

Non-police action: common law preserved

- 5.62 We are proposing a statutory power only for police officers; the common law defence of necessity would be available to other citizens, including ambulance officers and fire officers, in the same way as it is at present. In the circumstances in which such people usually act, it is unlikely in any event that they would be challenged; unlike police, they do not have an alleged collateral purpose for seeking entry.

RECOMMENDATION

- 5.8 The common law defence of necessity should be expressly preserved for people other than police officers.

ENTRY, SEARCH AND SEIZURE FOR SPECIFIED OFFENCES OR TO PRESERVE EVIDENCE

Current New Zealand law

- 5.63 At present, police officers have two particular warrantless powers of entry, search and seizure. The first is found in section 18(2) of the Misuse of Drugs Act 1975. It applies to all class A drugs, and some class B and class C drugs and precursor substances specified in particular parts of the Schedules. The second is a group of powers in sections 60 to 61 of the Arms Act 1983⁴⁹ which confer a similar authority in relation to firearms.

Retaining existing statutory powers

- 5.64 Ensuring that controlled drugs and firearms do not circulate in the community is very much in the public interest. So far as controlled drugs are concerned, prompt enforcement action is often called for to prevent drugs being used or distributed: they are easily concealed and readily disposed of. With respect to firearms, their possession in the circumstances set out in sections 60(2), 60A and 61 of the Arms Act 1983 pose a significant threat to public safety and there is a strong public interest in the police being able to respond to the threat promptly. We recommend that both powers be retained. They are justifiable exceptions of long-standing to the warrant requirement.
- 5.65 There is, however, one generic point about the use of warrantless powers that needs to be considered. In *R v Laugalis*,⁵⁰ the Court of Appeal held that a search conducted pursuant to a warrantless statutory power would be unreasonable where there were no urgent circumstances and where a warrant could have been applied for. In that case (a search for controlled drugs) there was no reason for the police officer not to have applied for a warrant. Where there is no risk that evidential material will be lost or damaged and there is sufficient time to apply for and obtain a search warrant, as the Court of Appeal noted, using a warrantless

49 Section 60(2) authorises entry and search where a police officer has reasonable grounds to suspect that a person who has possession or control of a firearm (etc) in any place, is, by reason of his or her physical or mental condition, however arising, incapable of having proper control of the firearm, or may kill or do bodily injury to himself or any other person. Section 60A provides similar powers where an officer has reasonable grounds to suspect that a person has possession or control of a firearm (etc) and that there is a protection order in force against that person, or grounds exist for applying for one. Section 61 provides an entry and search power where a commissioned officer of police has reason to suspect that there is in any place a firearm (etc) in respect of which any offence against the Act or any indictable offence has been or is about to be committed or which may be evidence of such an offence.

50 *R v Laugalis*, above n 25.

power is unnecessary, and such a search will be unreasonable.⁵¹ Furthermore, recourse to a warrantless power when a search warrant could have been obtained also conflicts with the warrant requirement discussed in chapter 2. For these reasons we believe that there should be a specific statutory provision that proscribes the use of warrantless powers under section 18 of the Misuse of Drugs Act 1975 unless the police officer exercising the power believes on reasonable grounds that it is not practicable to obtain a warrant.

- 5.66 The police submitted that such a requirement should not, however, extend to the warrantless powers under the Arms Act 1983 for two reasons. First, the principal rationale for the existence of the powers is the protection of public safety and the safety of individuals in the immediate vicinity of an incident involving firearms or similar weapons; two of the three powers are specifically concerned only with situations where there is an immediate threat to safety, rather than the suspected commission of an offence. The rapidly evolving nature of the circumstances means that the basis for exercising the power can change in a matter of minutes; they do not crystallise in a way that is conducive to accurate presentation to, or timely judicial assessment by, an issuing officer. Secondly, though the initial operational strategy of the police in most “armed offender” situations is generally to contain the situation, and to exercise the power when the circumstances indicate that entry can be effected with an optimal degree of safety, that decision often needs to be made in an instant; its timing cannot be anticipated. Safety would be compromised if the entry decision were predicated on the availability of a warrant.
- 5.67 We accept that, consistent with the public safety rationale for the existence of the Arms Act powers, it is most unlikely to be practicable for a warrant to be obtained before the power of entry and search can or should be exercised. We do not think there is any benefit in requiring such an assessment to be made.
- 5.68 Three other matters require brief discussion. First, in Preliminary Paper 50, we noted some apparent gaps in the search power provided by section 18(2) of the Misuse of Drugs Act 1975 with respect to precursor substances and methamphetamine.⁵² Those matters would now appear to have been rectified.⁵³
- 5.69 Secondly, in chapter 4,⁵⁴ we concluded that commissioned officers of police should not be able to issue an order in the nature of a warrant authorising police officers to conduct a search. Section 61 of the Arms Act 1983 contains such a provision. Where there are reasonable grounds for suspecting an offence against the Act, or an indictable offence has been or is about to be committed, a commissioned police officer may authorise in writing other members of the police to enter and search the place. For the reasons discussed in chapter 4, that authority should be repealed. We do not see how an authority issued by a commissioned police officer in such circumstances can be regarded as meeting the warrant requirement. However, a warrantless power to enter, search for and seize firearms in the circumstances provided for in section 61 is plainly necessary, for example, to deal with armed offender incidents. Accordingly, we recommend the power contained in section 61 of the Arms Act 1983

51 *R v Laugalis*, above n 25; *R v Williams*, above n 25.

52 New Zealand Law Commission, above n 19, para 33.

53 Misuse of Drugs Amendment Act 2005, s 14(1).

54 Chapter 4, paras 4.123-4.126.

be retained, but see no need to retain the requirement that it be approved by a commissioned police officer.

- 5.70 Thirdly, the search power under sections 60(2), 60A and 61 are predicated on the existence of reasonable grounds to suspect, rather than reasonable grounds to believe, which, for the reasons discussed in chapter 3, is our generally preferred threshold. In situations involving the use or potential use of firearms, a quick appreciation and assessment of rapidly changing circumstances and a prompt response is often called for. We accept that in such a situation, public safety interests are best ensured by permitting action to be taken once the lower threshold of reasonable suspicion is satisfied. Accordingly, we recommend that the present threshold should be retained.

Controlled delivery of drugs

- 5.71 Police and customs officers have specific warrantless search powers with respect to the controlled delivery of unlawfully imported drugs or precursor substances.⁵⁵ A controlled delivery usually follows a customs officer intercepting drugs coming into New Zealand, with the officer empowered to allow the package containing the drug (or a substance that has been substituted by the officer) to be collected or delivered for the purpose of the investigation. Police and customs officers have the power to search any person involved in the delivery and may enter any building, craft or vehicle to do so.
- 5.72 Customs advised us that, although the section provides authority for a customs officer to enter a building (for example), there is no power for that officer to search the building itself, only a person involved in the delivery. This appears to be a deficiency in the existing search power: the suspected person may have secreted the package elsewhere than on his or her person, or may have left it on the premises to be collected by someone else. In those circumstances, customs officers must rely upon the police to conduct the search under section 18(2) of the Misuse of Drugs Act 1975.⁵⁶
- 5.73 We believe that in a situation involving a controlled delivery of unlawfully imported drugs or precursor substances a warrantless power to search places (and vehicles or craft) as well as people should be available to both police and customs officers. We accept that the dynamics of such operations are unpredictable and the ability of the enforcement officer to choose the time and place for the search to be undertaken is essential to a successful result. It is unrealistic to expect police officers always to be available to provide assistance to customs officers in these circumstances. Accordingly, we recommend that section 12A of the Misuse of Drugs Amendment Act 1978 should be amended to include a search power for places and vehicles on the basis of a reasonable belief that they contain controlled drugs, precursor substances, a substituted package or other evidential material relating to the offence.
- 5.74 Customs also advised us that whilst the description of a controlled delivery contained in section 12 of the Misuse of Drugs Amendment Act 1978 is

55 Misuse of Drugs Amendment Act 1978, ss 12A to 12D. Precursor substances are the chemicals that may be used to manufacture controlled drugs. They are specified or described in the Misuse of Drugs Act 1975, Schedule 4.

56 A police officer in this situation will be able to invoke the separate power to search the building under the Misuse of Drugs Act 1975, s 18(2).

appropriate for most cases, other circumstances arise (such as the supervised delivery of a substituted package by a courier who has agreed to co-operate with the authorities) where the application of the controlled delivery provisions would be highly desirable. We do not think the search power should extend beyond controlled deliveries, but we accept that it is appropriate for the legislative description of what is a controlled delivery to be refined to meet the challenge of changes in unlawful drug importing patterns. We recommend accordingly.

RECOMMENDATIONS

- 5.9 Sections 60 to 61 of the Arms Act 1983 should be retained with the existing threshold of reasonable grounds to suspect, rather than reasonable grounds to believe. The requirement for a commissioned officer of police to authorise a search under section 61 in writing should be removed.
- 5.10 Section 18(2) of the Misuse of Drugs Act 1975 should be retained.
- 5.11 A police officer should not exercise the warrantless powers of search under section 18 of the Misuse of Drugs Act 1961 unless the officer exercising the power believes on reasonable grounds that it is not practicable to obtain a warrant.
- 5.12 Section 12A of the Misuse of Drugs Amendment Act 1978 relating to the controlled delivery of unlawfully imported drugs should be amended to authorise customs officers and police officers to search a place or vehicle as well as any person involved in the delivery. The description of a controlled delivery contained in section 12 should be refined to meet changes in unlawful drug importing patterns.

Evidence of other serious offending

- 5.75 Where there are reasonable grounds to believe that evidential material relating to very serious offending (such as homicide, aggravated robbery or rape) will be destroyed, concealed or impaired during the time taken to obtain a warrant, there is a strong argument to be made for allowing the police to enter the premises to search for and seize such material.
- 5.76 We considered the option of an alternative power for the police to enter and secure premises (but not conduct a search) in order to obtain a warrant.⁵⁷ However, if securing means doing whatever is necessary to prevent evidential material being destroyed (such as evicting any occupants, cordoning off the premises, or mounting a police guard), it is arguable that the disruption and intrusion upon privacy involved in entering and securing premises during the time taken to obtain a warrant would be just as great, or perhaps even greater, than the search itself. Thus, far from providing greater protection for the individual suspect or occupiers of the premises, it would instead intrude upon their lives and freedom of movement to a greater extent than we are proposing.

⁵⁷ In chapter 6 we made a recommendation relating to the powers of enforcement officers at a crime scene (recommendation 6.20). Those powers may sometimes be relevant in these circumstances, but they do not provide authority to enter a place and they apply only to evidential material located at the crime scene, not in any other place.

- 5.77 The law enforcement need to search for and seize evidential material that may be readily destroyed underpins the existing warrantless power under the Misuse of Drugs Act 1975. When it comes to the preservation and seizure of evidential material relating to the most serious crimes, we are of the view that the balance between the law enforcement interest in seizing such material and the privacy interests of the occupants of the place where it may be situated lies in ensuring that it is secured. Accordingly, when a police officer has reasonable grounds to believe that evidential material relating to the commission of a crime punishable by 14 years' imprisonment or more will be found in a particular place and there is a risk that the material may be concealed, destroyed or impaired while a warrant is being obtained, we consider the officer should be able to enter to search for and seize the relevant material.
- 5.78 There was debate amongst those we consulted about this proposal. Some did not believe that such a provision was justified; most supported the proposal, with some suggesting that a more appropriate level was 10 years' imprisonment (or even less) because of the seriousness of the offences that carry such a maximum penalty. However, in striking the balance we have been mindful that we are recommending the enactment of a new search power and that the threshold for its exercise should be limited to only the most serious offences. Hence our recommendation is that the proposed power should be limited to those offences punishable by 14 years' imprisonment or more.
- 5.79 As noted in para 5.69 we have recommended that the authority of a commissioned officer of police under section 78D of the Crimes Act 1961 to issue an order for a warrantless search for evidence of espionage in circumstances of emergency should be repealed. As the penalty for an offence against section 78 of the Crimes Act 1961 is 14 years' imprisonment, the warrantless power we recommend above will provide police officers with the appropriate search power should such an emergency situation arise.

RECOMMENDATION

- 5.13 A police officer should be able to enter and search any place if he or she has reasonable grounds to believe that:
- evidential material relating to an offence punishable by 14 years' imprisonment or more will be found; and
 - the delay caused by obtaining a search warrant will result in the evidential material being concealed, destroyed or impaired.

Road safety powers of entry

- 5.80 Section 119 of the Land Transport Act 1998 provides enforcement officers with warrantless powers of entry for two road safety purposes. First, subsection (2) empowers an enforcement officer to enter premises in the course of freshly pursuing a driver who failed to stop when requested to do so and who is reasonably suspected of having committed specified driving offences, for the purpose of determining whether the driver should be breath tested, and for exercising the relevant testing

powers.⁵⁸ There is clearly a significant public interest in empowering enforcement officers to enter premises without warrant in these circumstances.

- 5.81 Secondly, under subsection (3), an enforcement officer may enter any building or place to seize a vehicle that is to be impounded if:⁵⁹
- the enforcement officer is freshly pursuing the vehicle (paragraph (a)); or
 - it is likely that a person is about to remove, conceal, destroy or dispose of the vehicle (paragraph (b)); or
 - the officer suspects on reasonable grounds that the vehicle is about to be used in the commission of a crime (paragraph (c)); or
 - where in the circumstances it is impractical to obtain a warrant (paragraph (d)).
- 5.82 We make two recommendations with respect to these powers. First, the statutory threshold for the exercise of both is the existence of reasonable grounds to suspect rather than reasonable grounds to believe which we recommended in chapter 3. The police advised us that under subsection (2), the inference that a driver had been drinking can only rarely be determined to the standard of reasonable belief, where he or she failed to stop, and we accept the existing statutory test is appropriate for the exercise of that power. So far as the search power under subsection (3)(c) is concerned, however, there seems no compelling reason why the standard threshold of reasonable grounds to believe should not apply and we recommend accordingly.
- 5.83 Secondly, each of the alternatives listed in subsection (3) would not by itself appear to justify a departure from the warrant principle. The entry power should be available only when in addition to the circumstances described in paragraphs (a) to (c), it is impracticable to first obtain a warrant.

RECOMMENDATION

5.14 Section 119(3)(c) of the Land Transport Act 1998 should be amended so that the threshold is reasonable grounds to believe, not reasonable grounds to suspect. Subsection (3) should also be amended so that the power to enter and seize a vehicle in terms of paragraphs (a) to (c) can be exercised only when it is impracticable to obtain a warrant.

POWERS OF ENTRY AND SEARCH OF NON-POLICE ENFORCEMENT OFFICERS

- 5.84 There are numerous statutory provisions authorising the warrantless entry to and search of a place by non-police enforcement officers for law enforcement purposes.⁶⁰ Before exercising the power the enforcement officer is required to have reasonable grounds to believe (or suspect) that a breach of the law has occurred. Some powers are enacted for the purpose of investigating offences,⁶¹ some to deal with emergency situations,⁶² and some for other limited specific purposes.⁶³

58 Land Transport Act 1998, s 119(1) and (2).

59 Land Transport Act 1998, s 119(3). Where none of those situations applies, a warrant must be obtained pursuant to s 119(5).

60 Often a member of the police is deemed by the relevant statute to also be an enforcement officer for the purposes of the specific legislation – see, for example Fisheries Act 1996, s 196(2)(b).

61 See, for example Conservation Act 1987, s 40(1)(f); Driftnet Prohibition Act 1991, s 13(2)(a); Trade in Endangered Species Act 1989, s 37(1)(b); Wildlife Act 1953, s 39(1)(f).

62 Civil Defence Emergency Management Act 2002, s 87 (entry for saving life or preventing injury during a state of emergency); Children, Young Persons, and Their Families Act 1989, s 105 (removal of child in custody of chief executive); Dog Control Act 1996, s 52 (dog ranger in fresh pursuit of dog not under proper control).

63 See, for example, Corrections Act 2004, s 98(1)(c).

Scope of non-police warrantless search powers

- 5.85 In paragraph 5.7, we proposed that warrantless powers available to police officers should draw no distinction between different types of property such as dwelling-houses and other buildings. However, the warrantless powers currently available to non-police enforcement agencies do generally draw that distinction. They confine a search without warrant to land and buildings and require that a warrant be obtained for the search of dwelling-houses (and, in more recent statutes, for the search of marae).⁶⁴
- 5.86 In the context of searches by non-police agencies, we consider that this is an appropriate distinction and recommend its retention. Unlike the police, non-police searches are likely to be conducted in commercial premises rather than dwelling-houses or marae. Thus, the present regimes that preclude the exercise of warrantless powers in dwelling-houses or marae will seldom render them ineffective. Moreover, an extension of those powers to dwelling-houses or marae would arguably be difficult to justify by reference to the significance of the search and the nature of the evidential material it is intended to obtain.
- 5.87 Accordingly, we recommend that the search powers of non-police enforcement officers in respect of dwelling-houses or marae should be exercised only on the authority of a warrant.

Principles governing exercise

- 5.88 Non-police enforcement officers have an array of warrantless powers that extend far beyond those of police officers: they are often linked to the exercise of regulatory powers of inspection and sometimes duplicate those powers; the powers are available for investigating minor and serious offences alike; and the principal reason for the existence of the power may be a purpose other than law enforcement. Thus, it is not surprising that they do not conform to a standard pattern or appear to be based on any particular principles.
- 5.89 In chapter 2 and earlier in this chapter, we identified the values and principles that should determine whether a warrantless search power should be available for police law enforcement purposes. In our view, those values and principles provide the starting point for determining the principles that should govern the existence and exercise of non-police warrantless search powers.
- 5.90 The overarching principle is that search powers for law enforcement purposes should be exercised on the authority of a warrant issued by an independent officer acting judicially (the warrant requirement). Warrantless powers should be exceptional and justified only where there is a need to meet a greater public interest. In the context of police officers exercising warrantless powers, those interests have been identified earlier in this chapter as:
- to apprehend an offender:
 - who is a flight risk;⁶⁵

⁶⁴ See, for example, Animal Products Act 1999, s 87; Maritime Transport Act 1994, s 453; Wine Act 2003, s 62. An exception is the power of a customs officer with respect to the controlled delivery of unlawfully imported drugs: see 12A of the Misuse of Drugs Amendment Act 1978.

⁶⁵ See above, paras 5.16-5.19.

- who is unlawfully at large;⁶⁶
 - to prevent the imminent loss or damage to evidential material following arrest or where the offence is punishable by 14 years' imprisonment or more;⁶⁷
 - to avert an immediate risk to the life or safety of any person or serious damage to property;⁶⁸
 - to seize a substance that is harmful to people;⁶⁹
 - to remove an immediate threat to public safety or the safety of any person⁷⁰
- 5.91 Those public interests similarly provide a justification for departing from the warrant requirement in a number of warrantless search powers exercised by non-police officers. Examples include the power of customs officers to search a person for unlawfully imported drugs in the course of a controlled delivery operation;⁷¹ and the authority of social workers to enter premises to search for and remove a young person who is the subject of a supervision with residence court order.⁷²
- 5.92 In addition, because of the widely differing contexts in which various non-police enforcement officers operate, a number of other public interests may also justify a departure from the warrant requirement. Though our review of a large number of existing warrantless powers to search premises or places may not have led us to specify all those interests, we have identified the following:
- to protect New Zealand's borders;⁷³
 - to prevent serious damage to New Zealand's economy or to an industry that is significant to New Zealand's economy;⁷⁴
 - to comply with New Zealand's international obligations;⁷⁵
 - to protect animals from serious or immediate injury or exploitation;⁷⁶
 - to prevent serious damage to the environment.⁷⁷
- 5.93 We recommend that the public interests referred to in paragraphs 5.90 and 5.92 should be incorporated into the Legislation Advisory Committee's *Guidelines*. Unless a proposed law enforcement search power can be justified by reference to one of those public interests (or any other public interest that may be added in future by the Legislation Advisory Committee), it should not be enacted as a warrantless power.
- 5.94 We have referred by way of example to a number of non-police law enforcement search powers that are, in our view, appropriate exceptions to the warrant requirement. We have also identified others that on their face do not appear to be similarly justified or which seem to go further than necessary. These include:
- section 58 of the Immigration Advisers Licensing Act 2007 (power of immigration adviser to enter premises where offence suspected);

66 See above, paras 5.23-5.25.

67 See above, paras 5.26-5.42; 5.75-5.79.

68 See above, paras 5.43-5.61.

69 See above, paras 5.63-5.64.

70 See above, paras 5.66-5.70.

71 Misuse of Drugs Amendment Act 1978, s 12A.

72 Children, Young Persons and Their Families Act 1989, s 105.

73 For example, Immigration Act 1987, s 137(2).

74 For example, Fisheries Act s 199.

75 For example, Financial Transactions Reporting Act 1996, ss 38-39.

76 For example, Trade in Endangered Species Act 1989, s 37.

77 For example, National Parks Act 1980, s 65.

- section 453(2) of the Maritime Transport Act 1994 (power of authorised person to enter and inspect buildings where reasonable grounds to believe breach of Act or Regulations).
- 5.95 We recommend that these powers and any other non-police law enforcement search power that cannot be justified by reference to the public interests listed in paragraphs 5.90 and 5.92 should be further considered and either the relevant legislation should be amended so that the power is appropriately modified or exercised pursuant to a search warrant, or the provision should be repealed.
- 5.96 There are also a number of search powers that have been enacted for a law enforcement purpose in the sense that they require the enforcement officer to have reasonable grounds to believe (or suspect) that an offence has been committed before they can be exercised, yet they appear to cover the same ground as an inspection power possessed by the same officer in a regulatory context.⁷⁸ We see no need to make any specific recommendation with respect to those enactments even though the search power is largely duplicative.

RECOMMENDATIONS

- 5.15 Legislation providing non-police enforcement officers with a power to search a place without warrant for law enforcement purposes should be enacted only where there is a specific overriding public interest that justifies the departure from the warrant requirement.
- 5.16 The public interests that may justify providing a warrantless search power, which are described in paragraphs 5.90 and 5.92, should be incorporated into the Legislation Advisory Committee's *Guidelines*.
- 5.17 Warrantless search powers exercised by non-police enforcement officers should not extend to dwelling-houses or marae; a warrant should be required.
- 5.18 Legislation that provides for warrantless search powers that do not meet the criteria in recommendations 5.15 to 5.17 should be reviewed to determine whether the enactment should be repealed or amended so that the power is appropriately modified or exercised pursuant to a warrant. This includes:
- section 453(2) of the Maritime Transport Act 1994;
 - section 58 of the Immigration Advisers Licensing Act 2007.

⁷⁸ See, for example, Fisheries Act 1996, s 199.

Chapter 6

EXECUTING SEARCH POWERS



Chapter 6

Executing search powers

- INTRODUCTION** 6.1 This chapter is concerned with how powers of entry, search and seizure are exercised. It deals with search powers carried out under the authority of a warrant and search powers that may be exercised without warrant.
- 6.2 We make a number of recommendations that are intended to provide a consistent framework for the way in which search powers are exercised. They include recommendations about the responsibilities of enforcement officers exercising search powers, the assistance they should be able to use, their ancillary powers, their authority to secure the search scene, and the information about the search they should give to people affected by the exercise of the search power.

MANNER OF EXECUTION

Who may execute entry, search and seizure powers

- 6.3 Legislation governing the execution of search warrants commonly provides for the warrant to be directed:
- specifically to an individual enforcement officer;¹
 - generally to all enforcement officers;²
 - to both an individual enforcement officer and all enforcement officers.³
- 6.4 Additionally, where the search warrant is to be executed by a member of the police, a number of enactments authorise the warrant to be directed to “any class” of members of the police.⁴ And some enactments contain a provision that authorises any member of the police to execute a warrant directed to an individual officer. For example, section 198(2) of the Summary Proceedings Act 1957

1 Biosecurity Act 1993, s 110(1); Commerce Act 1986, s 98A(2); Fair Trading Act 1986, s 47(2). Search warrants for the investigation of criminal offences were initially directed to the individual “constable therein named”, though all warrants could be executed by any member of the police: see Justices of the Peace Act 1866, ss 119 and 121.

2 Films, Videos, and Publications Classification Act 1993, s 110(2); Gambling Act 2003, s 341(2): “A search warrant must be directed generally to every gambling inspector and every member of the police.”

3 Customs and Excise Act 1996, s 167(3); Motor Vehicle Sales Act 2003, s 132(b); Resource Management Act 1991, s 335(1); Serious Fraud Office Act 1990, s 15.

4 Civil Defence Emergency Management Act 2002, s 79; Extradition Act 1999, s 84(b); Proceeds of Crime Act 1991, s 31(2); Financial Transactions Reporting Act 1996, s 45(2); International War Crimes Tribunals Act 1995, s 49(2).



provides that a search warrant is to be directed to any constable by name or generally to every constable, and may be executed by any constable.⁵

- 6.5 There no longer seems any reason for different formulations as to whom a search warrant should be directed or by whom it should be executed, and they should be rationalised and simplified. First, it seems unduly limiting for the execution of a search warrant to be confined to a named enforcement officer; secondly, and conversely, such a restriction is rendered largely meaningless in those instances where the legislation also empowers any enforcement officer to execute the warrant; and thirdly, it is unclear what additional purpose is fulfilled by the option that permits a warrant to be directed to a specified class of police officer. This option is available in only a relatively small number of cases and does not apply to other enforcement officers.
- 6.6 The warrant issuing officer will not often be in a position to determine which enforcement officer should execute a search warrant; that judgment is better placed with the enforcement authority given the nature of the search and the availability of resources. In the rare case where a qualification on who may execute a warrant might be considered by the issuing officer, the matter could be dealt with by way of imposing a condition on the execution of the warrant.
- 6.7 Warrantless powers of entry, search and seizure generally do not impose restrictions on the level or rank of the enforcement officer who may exercise them. An exception to this is section 61 of the Arms Act 1983, which confers a warrantless power of entry and search of land or buildings for firearms, airguns, pistols, imitation firearms, restricted weapons, ammunition, or explosives on any commissioned officer of the police, or any member of the police authorised in writing by any commissioned officer of the police to exercise the power. The restriction on the use and authorisation of the warrantless power of entry to only commissioned officers seems largely historical⁶ and it is hard to find a substantive reason for treating powers in respect of Arms Act offences differently from other warrantless powers.
- 6.8 It might seem desirable that some powers of search without warrant should be exercised by only senior enforcement officers. As warrantless powers are exercised without prior judicial authorisation, ensuring that the decision to exercise them is correctly made is particularly important. Senior officers can be expected by reason of their experience to be more likely to make the correct decision and accordingly their involvement in the decision making process can act as a valuable check on the exercise of warrantless powers.

5 “Constable” is defined as “any member of the Police”: Summary Proceedings Act 1957, s 2(1). The Ozone Layer Protection Act 1996, s 23(2) and the Hazardous Substances and New Organisms Act 1996, s 119(2) provide that “[e]very search warrant shall be directed either to a member of the Police or to any officer by name, but in any of those cases, the warrant may be executed by any member of the Police”.

6 The power was initially vested in the Commissioner, superintendents and inspectors: see Arms Act 1920, s 16. Unless authorised in writing to do so by the commissioned officer under Arms Act 1983, s 61(1), other ranks may only accompany a commissioned officer without warrant if they are justified in entering under some other enactment.

- 6.9 Such a limitation would, however, be impractical in many instances. It assumes (incorrectly), the ready availability of senior officers at all times, since the circumstances justifying resort to warrantless powers will typically be those of urgency requiring immediate action. Appropriate reporting procedures and the thorough training of all enforcement officers vested with such powers in their legal responsibilities are, however, essential for ensuring the proper exercise of warrantless search powers.

Responsibilities arising from search

- 6.10 There are a number of duties or responsibilities imposed on a law enforcement officer who exercises a search power. These range from advising the person affected by the search of the authority for it, through to the provision of an inventory of anything seized as a result and, in some cases, the formal reporting of the search. Where, as is most often the case, more than one enforcement officer is involved, it is desirable that there be clarity as to who has the responsibility for discharging these duties.
- 6.11 To achieve this, the relevant enforcement agency should have administrative procedures in place to ensure that one of the officers exercising the search power is the responsible officer for the purposes of the search. That officer will have the ongoing responsibility for ensuring the legal requirements governing the manner of execution and the post-execution procedures are fulfilled. Where no such appointment is made, the most senior of the officers present (or where only a single officer is involved, that officer), should be deemed to be the responsible officer for the purpose of discharging those duties.

RECOMMENDATIONS

- 6.1 Search warrants should be directed to and executed by any enforcement officer with the statutory authority to exercise the relevant power.
- 6.2 An enforcement officer at any level should be able to exercise warrantless powers of entry, search and seizure.
- 6.3 Enforcement agencies should have administrative procedures in place to ensure that an officer is identified as the responsible officer whenever a search power is exercised. That officer should ensure that all legal and procedural requirements during and after the search are fulfilled. In the absence of such an appointment the most senior officer present should be deemed to be the responsible officer.

Prior announcement

- 6.12 The Court of Appeal has held that it is a fundamental principle of common law, and implicit in the power itself that, as a corollary to the citizen's basic right to the privacy of his or her home and the right to refuse entry to it, the police must, except in special circumstances, intimate their authority before they enter.⁷

⁷ *R v Briggs* [1995] 1 NZLR 196, 201 (CA). The Court noted (at page 202) that while "each case turns on its facts, an unannounced peaceable entry of occupied premises, or a forced entry of occupied premises without prior refusal following appropriate advice, is likely to render the search unlawful, and also unreasonable in terms of s 21 of the [New Zealand] Bill of Rights Act [1990]".

As a minimum, this involves informing the occupier of their presence, of their identity and of their purpose. A request for permission to enter is not necessary as that is conferred by the warrant or the power.

- 6.13 To clarify what is implicit in the present law, we consider that prior announcement should be generally required as a precondition for the lawful exercise of any entry, search and seizure power. Prior announcement serves a number of important purposes. It:
- reduces the risk of violence that might result from an unexpected intrusion into private property;
 - provides the occupier with the opportunity to allow entry, thereby reducing the need to use force to effect entry;
 - protects privacy by allowing the occupiers to prepare themselves by putting on clothes or getting out of bed;
 - enables the occupier to question the authority for the entry and search;
 - helps prevent the defective execution of entry and search powers, such as where the wrong address is targeted or the subject of the warrant is no longer at the address.

When prior announcement may be dispensed with

- 6.14 The prior announcement rule is not, however, absolute. Obviously there should be no obligation to make a prior announcement in respect of premises known to be unoccupied. Further, prior announcement may be dispensed with if it would risk the safety of the enforcement officer,⁸ or any other person. Dispensing with prior announcement may also be appropriate in order to preserve the integrity of evidence, (for example, where there are reasonable grounds for believing that an occupant will destroy or otherwise damage evidence if alerted to the presence of a law enforcement officer) or in order to ensure that a search remains covert so as to protect ongoing or subsequent investigations.

Use of force

When forcible entry may occur

- 6.15 Search warrant regimes generally contain specific provisions allowing for the use of force to gain entry to the place to be searched and for breaking open things found in the course of the search. In contrast, references to using force to seize items covered by the warrant or search power are largely confined to the seizure of things found on anyone who is being searched.⁹ The authority to use force for the purposes of entry, search and seizure should be expressly authorised in those circumstances where it is justified and to that end we recommend that provision be made for using force in respect of:
- entry to the place searched;
 - breaking open anything in the place searched;
 - the seizure of items that are the subject of the search.

⁸ *Swales v Cox* [1981] QB 849, 855; [1981] 1 All ER 1115, 1119 (DC).

⁹ Customs and Excise Act 1996, s 149C(2); Misuse of Drugs Act 1975, s 18. An exception is the power to seize goods under the Terrorism Suppression Act 2002, s 47C(1).

- 6.16 The numerous existing statutory provisions that relate to the use of force when exercising a search power lack consistency in the terms used. Two areas in particular require clarification; first, a single test as to when force may be used is required and secondly, there should be a consistent approach to describing the extent to which force may be used.
- 6.17 As to the first, there are several situations when the use of force may be required in the course of exercising a search power. For example, as the Court of Appeal noted in *R v Briggs*,¹⁰ the officer executing a search warrant may have to use force where the premises are unoccupied, or where an occupier refuses entry after having been given the appropriate information. In addition, even where enforcement officers have announced their intention to enter and search a place, they may have to use force to gain entry, if despite their efforts, the occupier remains unaware of their presence.
- 6.18 Force may also be required to gain entry quickly to preserve evidential material from being concealed or destroyed, though as the Court of Appeal has emphasised, this does not extend to routinely adopting a forced entry policy where a search warrant is executed on premises that are occupied and the presence of readily disposable evidential material is suspected.¹¹
- 6.19 It is not possible to comprehensively prescribe the circumstances in which it will be reasonable for an enforcement officer to use force in connection with the exercise of a search power, and we adopt the approach taken in section 198(3) of the Summary Proceedings Act 1957 which authorises the use of force where necessary. This approach ensures that force is used only when the circumstances require it; its use is not permitted on the grounds of expediency.¹²

Degree of force that may be used

- 6.20 The extent to which force may be used to facilitate entry and search powers is expressed in a number of different ways in legislation conferring the power. Many regimes permit the use of “such force as is reasonable in the circumstances”.¹³ Others provide a power to enter or search “by force if necessary”,¹⁴ or permit the use of “reasonable force if necessary”,¹⁵ or “such force as may be reasonably necessary”.¹⁶
- 6.21 These terms potentially impose slightly different tests when there is no obvious reason for doing so. For instance, the word “necessary” might initially be thought to impose a more stringent standard than “reasonable”, but in the context of quantifying the force that may be used to effect entry or search, there may be no

¹⁰ *R v Briggs*, above n 7.

¹¹ *R v Hapakuku* (1999) 16 CRNZ 520 (CA).

¹² *R v Hapakuku*, above n 11, 524.

¹³ Animal Welfare Act 1999, s 133(1)(d); Commerce Act 1986, s 98B(1)(c); Customs and Excise Act 1996, s 168(1)(c); Extradition Act 1999, s 85(1)(c); Films, Videos, and Publications Classification Act 1993, s 111(2)(c); Financial Transactions Reporting Act 1996, s 46(1)(c); International Crimes and International Criminal Court Act 2000, s 104(1)(c); International War Crimes Tribunals Act 1995, s 50(1)(c); Proceeds of Crime Act 1991, s 32(1)(c); Serious Fraud Office Act 1990, s 12(1)(c).

¹⁴ Children, Young Persons, and Their Families Act 1989, s 39(3); Summary Proceedings Act 1957, ss 198(3) and (4); Trade in Endangered Species Act 1989, s 38(1).

¹⁵ Crimes Act 1961, s 225(2); Customs and Excise Act 1996, ss 149B(4), 149C(3) and 168(4); Misuse of Drugs Amendment Act 1978, s 12B(2).

¹⁶ Fisheries Act 1996, s 205.

material difference between the two. Many enactments, particularly the more recent, use the standard of reasonableness. The word is commonly used and readily understood. The reasonableness standard promotes the use of the minimum level of force needed to gain entry through being sensitive to the particular circumstances of each case.

- 6.22 We conclude that it is highly desirable to have a single standard governing the extent to which force may be used and that standard should be the force that is reasonable in the circumstances.

RECOMMENDATIONS

- 6.4 Before entering the place to be searched, the enforcement officer should announce to the occupier his or her intention to enter and search the place pursuant to a search power, and identify himself or herself.
- 6.5 Compliance with recommendation 6.4 should not be required, where the officer exercising the search power has reasonable grounds to believe that:
- the place to be searched is unoccupied; or
 - compliance would endanger the safety of any person; or
 - compliance would prejudice the successful exercise of the search power; or
 - compliance would prejudice ongoing or subsequent investigations.
- 6.6 Statutory provision should be made to permit force to be used when exercising a search power where it is necessary for the purposes of:
- entering any place authorised to be searched;
 - breaking open or accessing any area within the place searched, or any item found in the place searched;
 - seizing any item.
- 6.7 The extent to which force may be used should be governed by the single standard of reasonable force.

Time of execution

- 6.23 Some enactments that provide a search warrant power in respect of criminal offences authorise the execution of the warrant at any time.¹⁷ Similarly, section 198(7) of the Summary Proceedings Act 1957 provides that any warrant may be executed “at any time by day or by night” and other enactments adopt the Summary Proceedings Act provision.¹⁸ Several other search warrant regimes authorise the execution of the warrant at any time,¹⁹ and two empower the issuing officer to specify the time or times of the day when the warrant is to be executed.²⁰

17 Prostitution Reform Act 2003, s 32(1)(a); Gambling Act 2003, s 342(2)(a); Films, Videos, and Publications Classification Act 1993, s 111(2)(a).

18 Boxing and Wrestling Act 1981, s 9; Misuse of Drugs Act 1975, s 18(1); Trade in Endangered Species Act 1989, s 38(2); Food Act 1981, s 15A; Transport Act 1962, s 68E.

19 Extradition Act 1999, s 85(1)(a); Financial Transactions Reporting Act 1996, s 46(1)(a); International Crimes and International Criminal Court Act 2000, s 104(1)(a); International War Crimes Tribunals Act 1995, s 50(1)(a); Mutual Assistance in Criminal Matters Act 1992, s 46(1)(a); Proceeds of Crime Act 1991, s 32(1)(a).

20 Wildlife Act 1953, s 39(1); Wild Animal Control Act 1977, s 13(7).

- 6.24 Other enactments relating to search warrant powers for specific offences confine the execution of the warrant to a time that is “reasonable in the circumstances”²¹ and a number of regimes of a regulatory nature contain a similar reasonableness standard.²² This standard appears to have generally been adopted from the recommendations contained in the Report of the Public and Administrative Law Reform Committee in 1983.²³
- 6.25 In 1988, the Search and Search Warrants Committee also recommended that as a general principle searches should only be executed at times that are reasonable in the circumstances. The Committee acknowledged that such a provision would be a new restriction, but noted that it was consistent with existing practice.²⁴
- 6.26 There is no clear pattern with respect to existing search warrant provisions, but it appears that it is common for legislation dealing with the execution of search warrants issued for criminal offences to have no restrictions on the time the search may be carried out, whereas warrants in respect of regulatory offences may usually be executed only at a time that is reasonable in the circumstances. There does not seem to be any compelling reason for such a distinction. At first sight it seems unsatisfactory that the timing of the execution of a search warrant is left solely to the discretion of the executing officer; even the issuing officer has no statutory authority to impose a condition as to the time of execution when the warrant is issued. That does not mean, however, that the executing officer can choose a time to conduct the search that is patently unreasonable. The Court of Appeal has made it plain that the time of execution is a relevant factor in assessing whether the search is unreasonable in terms of section 21 of the Bill of Rights Act.²⁵
- 6.27 A different approach has been taken in the New South Wales Law Enforcement (Powers and Responsibilities) Act 2002. This requires warrants to be executed between 6 a.m. and 9 p.m. unless the judge issuing the warrant permits execution outside this period where he or she is satisfied that there are reasonable grounds for doing so.²⁶ A similar formulation has been adopted in Canada and some other Australian states,²⁷ whilst the Commonwealth and Tasmanian jurisdictions provide for the warrant to state whether it may be executed at any time, or only during particular hours.²⁸ The Police and Criminal Evidence Act (UK) requires the entry and search to be at a reasonable hour “unless it appears to the constable executing it that the purposes of a search may be frustrated on an entry at a reasonable hour”.²⁹
- 21 Animal Welfare Act 1999, s 133(1)(a); Biosecurity Act 1993, s 111(1); Customs and Excise Act 1996, s 168(1)(a); Hazardous Substances and New Organisms Act 1996, s 119(5)(a); Serious Fraud Office Act 1990, s 12(1)(a); Sale of Liquor Act 1989, s 177(6)(a).
- 22 Animal Products Act 1999, s 95(1)(a); Commerce Act 1986, s 98B(1)(a); Commodity Levies Act 1990, s 20(1)(a); Fair Trading Act 1986, s 47A(1)(a); Motor Vehicles Sales Act 2003, s 131(1)(a); Climate Change Response Act 2002, s 40(2)(a); Wine Act 2003, s 66(1)(a).
- 23 Public and Administrative Law Reform Committee *Statutory Powers of Entry* (Seventeenth Report, Wellington, 1983).
- 24 Search and Search Warrants Committee *Search and Search Warrants: Final Report* (Wellington, 1988) 21.
- 25 *R v Hapakuku*, above n 11, 525, the search of a dwelling house took place at 12.50 a.m. with the only explanation for the selection of that time being one of administrative convenience in that it fitted the duty roster of the police officers concerned.
- 26 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 72, which re-enacted similar provisions of the Search Warrants Act 1985 (NSW), s 19.
- 27 Criminal Code RSC 1985 c C-46 (Can), s 488; Police Powers and Responsibilities Act 2000 (Qld), s 23; Crimes Act 1900 (ACT), s 194(9); Criminal Code Act Compilation Act 1913 (WA), s 711.
- 28 Crimes Act 1914 (Cth), s 3E(5)(f); Search Warrants Act 1997 (Tas), s 5(2)(f).
- 29 Police and Criminal Evidence Act 1984 (UK), s 16(4).

- 6.28 In the Commission's view, requiring warrants to be executed at a time that is reasonable in the circumstances would provide a standard that could be applied to all search warrant regimes and provide flexibility to take account of differences where necessary. Such a standard best assures consistency with the requirements for search and seizure under section 21 of the Bill of Rights Act. It also recognises the need to ensure that the execution of search warrants is as efficacious as possible.
- 6.29 It would not always be reasonable to confine searches to daytime hours. In many cases the occupants of a place will not be present then. Nor may it be possible to complete the search within the prescribed hours.³⁰ In those cases where the circumstances indicate the need for restrictions on the time the warrant should be executed, the judge or issuing officer should have the authority to impose such a condition when the warrant is issued.³¹
- 6.30 During the course of consultation, the Police expressed the view that a change to the Summary Proceedings Act provision, which presently permits execution to occur at any time, may unduly restrict law enforcement operations. We are unconvinced that this will necessarily follow. We have considered the alternative formulation adopted in the Police and Criminal Evidence Act 1984,³² but concluded it does not materially add to the test proposed. The reasonableness standard accommodates the exceptional case and, as the Search and Search Warrants Committee noted, it reflects law enforcement practice. Ultimately, the outcome of all searches is judged by the reasonableness standard in terms of the Bill of Rights Act.
- 6.31 The reasonableness requirement applies equally to the exercise of statutory powers of search without warrant. These powers are intended to enable law enforcement officers to conduct a search in circumstances where public interest demands that prompt action be taken and when there is insufficient time to apply for a warrant. The need for urgent action to be taken in itself means that there will be less likelihood that the time when such a search occurs will be unreasonable.

RECOMMENDATION

- 6.8 Search powers should be exercised at any time of the day or night that is reasonable subject, in the case of a warrant, to any restriction on the time of execution imposed by the issuing officer.

Conduct of search

- 6.32 A search warrant authorises only a search that is reasonable in the circumstances; a search that is carried out unreasonably exceeds the authority conferred by the

30 A search pursuant to a warrant that commenced during the daytime, but continued beyond the prescribed hours, appears to be unlawful in respect of the actions that occurred outside daytime hours: see *Myer Stores Ltd v Soo* [1991] 2 VR 597, 631 per McDonald J and the discussion of this issue in Victorian Parliament Law Reform Committee *Warrant Powers and Procedures: Final Report* (No 170 of Session 2003-2005, Melbourne, 2005) 152-154.

31 This approach was adopted in the International War Crimes Tribunal Act 1995, s 49(4)(e), but does not appear to have been followed in other legislation.

32 See above, para 6.27.

warrant.³³ There has been some judicial attempt to prescribe the elements of the procedures that should be followed when an enforcement officer executes a warrant, but as the courts have noted, what should be done will vary according to the circumstances of each case.³⁴ A balance must be struck between individual rights of privacy and law enforcement values for the search to meet the protection against unreasonable searches conferred by section 21 of the Bill of Rights Act.³⁵

- 6.33 The essence of the enforcement officer's responsibilities was described by Lockhart J in *Crowley v Murphy* in the following terms:³⁶

The overriding obligation of the searcher is to do no more than is reasonably necessary to satisfy himself by search that in all the circumstances of a particular case he has whatever documents are necessary to answer the terms of a warrant. Plainly this must vary from case to case. What is permissible on one occasion is impermissible on another.

- 6.34 We see little value in attempting to prescribe, even generally, the way in which this obligation may be discharged. To the extent it is practicable to do so, an enforcement agency's standard operating procedures may provide guidance. Nevertheless, we are of the view that any search by an enforcement officer should be conducted in a way that is no more intrusive than is consistent with the purpose for which it is being conducted. To best reflect the values discussed in chapter 2,³⁷ that guiding principle justifies recognition as a statutory obligation.
- 6.35 In practical terms this would, for example, require an enforcement officer exercising a search power who had no reason to believe that an occupier would be uncooperative, to ask for assistance in locating the object of the search before using force to find and seize it.

RECOMMENDATION

- 6.9 An enforcement officer should conduct a search in a manner that is not more intrusive than is consistent with the purpose for which it is being conducted.

Search in absence of occupier

- 6.36 There is no requirement for the occupier of premises searched to be present when a search warrant is executed, or search power exercised. This, no doubt, reflects the practicalities of the situation, but consistently with the human rights values discussed in chapter 2, some safeguards are required to ensure the integrity of the search process.³⁸ To this end a number of search warrant regimes presently require the enforcement officer who executes a warrant when an occupier is absent to leave a notice in a prominent place advising the owner or

33 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667, 694 (CA) Hardie Boys J.

34 *Crowley v Murphy* (1981) 34 ALR 496, 521 (FCA) Lockhart J; *Wilson v Maihi* (1991) 7 CRNZ 178, 181 (CA).

35 *Wilson v Maihi*, above n 34.

36 *Crowley v Murphy*, above n 34, 525 Lockhart J.

37 Chapter 2, paras 2.11 and 2.26.

38 In the Australian Commonwealth jurisdiction, the occupier, if present, has the statutory right to observe the search being conducted: Crimes Act 1914 (Cth), s 3P.

occupier of the fact that a search warrant has been executed and contact details for further information.³⁹ However, there is no such requirement in respect of search warrants issued under the Summary Proceedings Act 1957.⁴⁰ Nor is there a requirement to notify the owner or occupier of the exercise of the power to search without warrant for offences against the Misuse of Drugs Act 1975, or the Arms Act 1983.

- 6.37 Other measures such as the videotaping of searches, or the presence of an independent observer, have been proposed or introduced as a police practice in some Australian jurisdictions, but they have yet to be accepted as effective safeguards.⁴¹
- 6.38 We believe that whenever a search power is exercised when the occupier of a place is not there, the enforcement officer conducting the search should be required by statute to notify the occupier of its occurrence and provide details of the authority for the search and its result. Recommendations to this end are made below.⁴² We see no need for any other safeguards.

Covert searches

- 6.39 For operational reasons, law enforcement officers sometimes plan the execution of a search warrant to occur when the occupier of the premises to be searched is absent. The search is then carried out in a way that will not alert the occupier to the fact that it has occurred. Such a search is generally referred to as a covert search.
- 6.40 While it is possible to envisage situations where a covert search may take place pursuant to a warrantless power, these cases are likely to be extremely rare. Warrantless powers are generally only exercised in unplanned situations of exigency or emergency where there is no opportunity to obtain a warrant. Where there has been the opportunity to plan the search in advance to coincide with an occupier's absence, there will have generally been the opportunity to obtain a warrant. The remainder of the discussion in this section, therefore, is confined to searches pursuant to a warrant.
- 6.41 Covert searches (aptly tagged “sneak and peek” searches in the United States)⁴³ reflect an enforcement agency's operational need, in a small number of cases, to confirm the existence or whereabouts of the object of the search in the subject premises, before it is seized, without alerting the occupier. A typical example arises in the context of an organised crime investigation where it may be necessary to determine whether a consignment of controlled drugs destined for delivery to the suspect place has been delivered, or is still in transit. Another example is where a number of offenders are suspected of being involved in a crime and it is vital that the search is carried out without the occupier becoming aware of it, and warning other suspects who could then destroy evidential material. In such cases the surreptitious execution of the search warrant is seen as necessary to ensure that any subsequent execution or investigation is successful.

39 Commerce Act 1986, s 98D(1); Customs and Excise Act 1996, s 169(2); Films, Videos, and Publications Classification Act 1993, s 113(1); Gambling Act 2003, s 343(2); Resource Management Act 1991, s 335(4); Sale of Liquor Act 1989, s 177(8); Serious Fraud Act 1990, s 17(1).

40 Including search warrants issued for offences against the Misuse of Drugs Act 1975.

41 See Victorian Parliament Law Reform Committee, above n 30, 284.

42 See recommendation 6.31.

43 *United States v Pangburn* (1993) 983 F 2d 449 (2nd Cir); *United States v Johns* (1991) 948 F 2d 599 (9th Cir); *United States v Miranda* (2005) 425 F 3d 953, 956 (11th Cir).

- 6.42 Covert searches are lawful in New Zealand. Neither existing legislation nor court decisions draw a distinction in terms of the way in which the search warrant is executed. A Summary Proceedings Act search warrant authorises multiple entries and searches at any time and does not prohibit the executing officer from carrying out the search covertly to confirm the location of evidence that is believed on reasonable grounds to be on the premises.⁴⁴ Nor is the officer obliged to advise the occupier of the search. In practice, it seems that the intended covert execution of the warrant is sometimes brought to the attention of the issuing officer who grants it.⁴⁵
- 6.43 Overseas, the incidence of covert searches and their lawfulness achieved some prominence in the course of inquiries into the activities of the police in Canada⁴⁶ and in Australia.⁴⁷ In Canada, the Law Reform Commission of Canada subsequently recommended against the enactment of legislation authorising covert searches.⁴⁸ More recently, the topic has been revisited in Australia following the introduction of legislation in several jurisdictions dealing with covert searches as part of a package of anti-terrorism measures.⁴⁹ The enactment of regimes expressly authorising, but tightly regulating, covert searches for the purposes of investigating terrorist acts has led to the covert execution of search warrants being more widely considered and to proposals that legislation be enacted to regulate such searches.⁵⁰ In the United Kingdom, legislation has not dealt with covert searches separately.
- 6.44 None of the reviews undertaken overseas has discussed the basis for differentiating between covert searches and the execution of warrants in the absence of an occupier generally. The separate treatment of covert searches in some Australian jurisdictions and in Canada seems to arise from the general perception that as covert search warrants authorise entry, search and seizure on premises without the knowledge of the occupier, they authorise a significant impingement on the occupier's rights, and require more rigorous conditions than overt warrants.⁵¹ Canada's, Law Reform Commission concluded that modifying search and seizure procedures to accommodate surreptitious police intrusions would "result in serious sacrifices of the protective features of these procedures", raising problems of accountability.⁵²

44 *R v Power* (1999) 17 CRNZ 662 (CA). A challenge that a covertly executed search warrant was procured for an improper purpose was rejected in *R v Wallace and Others* (27 August 1998) HC AK T139/98 Giles J.

45 For example, in *R v Wallace and Others*, above n 44, the application for the search warrant referred to the intention of the police to conduct an initial covert search to confirm the presence of the object to be seized and to determine its location.

46 Summarised in Law Reform Commission of Canada *Police Powers – Search and Seizure in Criminal Law Enforcement* (WP 30, Ottawa, 1983) 260-269. Of concern to the Commission was the use of surreptitious intrusions for the purpose of "intelligence probes" based on a lesser standard than reasonable grounds to believe.

47 Criminal Justice Commission *Report on a Review of Police Powers in Queensland, Volume II: Entry, Search and Seizure* (Brisbane, 1993) iii.

48 Law Reform Commission of Canada *Search and Seizure* (Report 24, Ottawa, 1984) 61-63. In contrast, the Criminal Justice Commission in Queensland favoured the availability of warrants to covertly enter and search premises in limited circumstances: Criminal Justice Commission, above n 47, 378-383.

49 Terrorism (Community Protection) Act 2003 (Vic), ss 5-13; Terrorism (Police Powers) Act 2002 (NSW), ss 27A-27ZC. As noted above, bills containing similar provisions have also been introduced in South Australia and Western Australia.

50 Senate Standing Committee for the Scrutiny of Bills *Entry and Search Provisions in Commonwealth Legislation* (Canberra, 2000), 136-137; Victorian Parliament Law Reform Committee, above n 30, 265-293.

51 Victorian Parliament Law Reform Committee, above n 30, 265.

52 In particular, the requirements for announcement of entry, the provision of documentation to the occupier and allowing the occupant to witness the search: *Search and Seizure*, above n 48, 61.

6.45 There are presently a number of weaknesses in New Zealand's Summary Proceedings Act regime in respect of covert searches. However, the Commission believes that, provided these weaknesses can be addressed, a separate regime regulating covert searches in New Zealand is unnecessary. There are three reasons for that view. First, the difference between a covert search and the execution of a search warrant in the absence of the occupier lies in the intentions of the enforcement officer at the time the application for the warrant is made. A covert search will be planned to occur in the absence of the occupier; in contrast the execution of a warrant in the absence of the occupier will occur because the occupier's absence is unanticipated. Such a distinction does not provide a satisfactory basis for a separate regime. Moreover, the privacy implications of both are the same for the occupier. To the extent that the protective features or visibility features of a search⁵³ are absent in the case of a covert search, they are equally missing in other cases where the occupier is not present when a search warrant is executed. Secondly, the threshold to be reached before a search warrant can be issued – reasonable grounds to believe – applies to all warrants; no lesser standard can be justified for covert searches.⁵⁴ If the issuing officer is not satisfied that the application for a warrant for a covert search reaches that threshold, the warrant will not be issued. Thirdly, the recommendations made elsewhere in this report substantially remedy the accountability weaknesses in the present regime:

- a warrant may be executed only once, unless the issuing officer authorises further executions; if a covert search is planned, the issuing officer should be advised if approval for a second entry, search and seizure is sought;
- the applicant for a search warrant must advise the issuing officer of any previous applications in respect of the subject premises;
- notice of the search must be given to the occupier, unless a judge authorises the notification be postponed or dispensed with;
- once notice has been given, the occupier will have access to the application for the search warrant and the ability to test the lawfulness of its issue.

RECOMMENDATION

6.10 Provided the recommendations we make in this chapter and chapters 4 and 13 are adopted, a separate regime for covert searches is unnecessary.

Assistance in the exercise of search powers

Use of assistants

6.46 An enforcement officer exercising a search power will often need assistance. In the interests of efficiency this may require other enforcement officers to assist the executing officer in carrying out the search. Specialist assistance, such as an explosives detecting dog and handler to locate evidence, a forensic expert to gather samples for scientific analysis, or equipment to copy a computer file may also be needed.

⁵³ *Search and Seizure*, above n 48, 63.

⁵⁴ *Police Powers*, above n 46, 261-269.

- 6.47 In this section the term assistant is limited to a person who helps with the search at the search scene, while the term assistance includes the use of equipment, devices or dogs to aid the search.
- 6.48 Legislation dealing with search warrants has generally permitted the executing officer to be accompanied by assistants, though in doing so, existing statutory provisions adopt various formulations. Section 198(3) of the Summary Proceedings Act 1957 permits the officer executing the warrant to be accompanied by “such assistants as may be necessary”;⁵⁵ a number of statutes authorise the use of “such assistants as may be reasonable”;⁵⁶ and others permit the executing officer to “use such assistance as is reasonable in the circumstances”,⁵⁷ or “such assistance as is necessary in the circumstances”.⁵⁸
- 6.49 The Search and Search Warrants Committee recognised the need for specific provision to be made for the use of assistants when search powers are exercised. In particular, it noted the need for expert assistance to effectively carry out a search in areas such as gaining access to information stored in a computer. The Committee recommended a provision that authorised the person executing the warrant “to use such assistance as is reasonable in the circumstances”.⁵⁹ That formulation has already been adopted in a number of enactments⁶⁰ and has the incidental advantage that it would also seem to accommodate the use of non-human assistance such as a drug detection dog.⁶¹ We recommend a standard provision along those lines.

Responsibility for assistants

- 6.50 In *R v Sanders* the Court of Appeal observed with respect to the execution of warrants issued under section 198 of the Summary Proceedings Act 1957:⁶²

The word “assistants” implies that those accompanying the constable may also enter, search and seize, but the legal responsibility plainly remains with the constable to ensure that the methods and limitations stipulated in subsections (3) to (8) of section 198 are complied with. Only if the constable is personally present supervising the assistants could that responsibility be discharged.

- 6.51 Subsequently, in *R v Pickering*,⁶³ a case where the search of a property for cannabis was directed by a police officer from an aircraft flying over the property, the Court concluded that in that case controlling and directing the search did not require the executing officer to be physically present. It was clear that the executing officer was able to and did direct and supervise the actions of the assistants.

55 See also Insolvency Act 2006, s 151(1); Marine Mammals Protection Act 1978, s 14(1); Radiocommunications Act 1989, s 121(3).

56 Animal Welfare Act 1999, s 133(1)(c); Films, Videos, and Publications Classification Act 1993, s 111(1)(b); Financial Transactions Reporting Act 1996, s 46(1)(b); Proceeds of Crimes Act 1991, s 32(1)(b).

57 Commerce Act 1986, s 98B(1)(b); Customs and Excise Act 1996, s 168(1)(b); Fair Trading Act 1986, s 47A(1)(b); Serious Fraud Office Act 1990, s 12(1)(b).

58 Resource Management Act 1991, s 335(2)(a).

59 Search and Search Warrants Committee, above n 24, 21.

60 See above, n 6.57.

61 See *Wilson v Maihi*, above n 34, where the Court accepted that the police dog was not an “assistant” for the purposes of the Summary Proceedings Act 1957, s 198(3).

62 *R v Sanders* [1994] 3 NZLR 450, 473 (CA) Fisher J.

63 *R v Pickering* (1996) 3 HRNZ 499 (CA).

- 6.52 In England, a recent amendment to the Police and Criminal Evidence Act 1984 provides that the powers vested in a person assisting the executing officer can be exercised “only in the company, and under the supervision, of a constable”.⁶⁴ A similar approach in New Zealand can be found in section 66(4) of the Wine Act 2003 which provides that the assistant may act “only under the supervision and in accordance with the instructions of the member of the police or wine officer”.
- 6.53 The obligation to ensure that the search warrant is properly executed lies ultimately with the responsible enforcement officer and it follows that the responsibility for the direction and control of the assistance should be vested in that officer. The extent of the supervision to be exercised by the responsible officer will vary, depending on the nature of the assistance. Where, for example, it involves the forensic examination of a search scene, how the task is carried out will be left essentially to the expert providing the assistance, with the enforcement officer having minimal oversight. In other cases, personal direction and control may be necessary. Accordingly, the enforcement officer’s supervisory role should be framed in general terms, such as the approach taken in the Wine Act 2003, to reflect the different level of oversight required.
- 6.54 Legislation dealing with assistance in the exercise of search and seizure powers leaves it to the enforcement officer to decide whether assistance is required and if so, how many assistants are used. An alternative approach is for the issuing officer to make these decisions instead. In England and Wales a civilian assistant may only enter the place searched if the JP who issued the warrant has authorised him or her to do so.⁶⁵
- 6.55 That approach may better reflect the concern that the intrusiveness of the entry and search is increased with the presence of each additional assistant and should therefore be controlled by the issuer of the warrant, but it will often not be possible to foresee at the time of the warrant application the nature of the assistance required. It would unduly prolong the execution of search warrants if the executing officer were required to return to the judge or issuing officer to obtain authorisation to use assistants. We see no need to change the approach taken in New Zealand that the responsible officer or the enforcement agency executing the warrant is in the best position to determine the nature and extent of assistance required.

Powers of assistants

- 6.56 Assistants may carry out a range of functions. In respect of a police investigation into a serious crime, for example, a search team may consist of sworn police officers, specialist non-sworn members of police such as scene of crime officers and computer experts, and external experts such as forensic scientists. Additionally, non-sworn police staff may provide administrative assistance and scene guards may be employed.
- 6.57 Search and seizure powers vested in a constable or member of the police do not automatically extend to non-sworn members of the police.⁶⁶ The Commissioner

⁶⁴ Police and Criminal Evidence Act 1984 (UK), ss 16(2A) and (2B) as inserted by the Criminal Justice Act 2003, s 2.

⁶⁵ Police and Criminal Evidence Act 1984 (UK), s 16(2).

⁶⁶ Police Act 1958, s 6(1).

may, however, warrant any non-sworn member of the police to exercise particular powers, including search and seizure powers.⁶⁷ Accordingly, if warranted, a non-sworn member of police has, for practical purposes, the same powers as a constable except for the power to arrest or search any person.⁶⁸ We understand the warranting provision is rarely used for this purpose and in most cases assistants accompanying enforcement officers will not have their powers.

- 6.58 There is a lack of legislative guidance as to the proper role and powers of assistants executing Summary Proceedings Act search warrants. In *R v Sanders*,⁶⁹ the Court of Appeal observed that with respect to warrants issued under section 198 of that Act, certain aspects of the executing officer's role may not be delegated to civilian assistants. Only a constable had the authority to execute the search warrant; to enter premises and break open receptacles; and seize things pursuant to the warrant. Anything done by an assistant had to be done under the constable's personal supervision.
- 6.59 In contrast, some other search warrant regimes provide guidance as to what assistants may do by specifying the powers that they may exercise. They include the power to use reasonable force for gaining entry and for breaking open anything in the course of the search, the power to search for and remove documents or evidence⁷⁰ and the power to take copies of documents.⁷¹ Such powers, should, in our view be retained.
- 6.60 We think it important that the nature and extent of the powers that an assistant may exercise are provided for in legislation. Though a number of statutes presently prescribe specific powers that an assistant may exercise, they may be exercised without reference to the supervising role of the enforcement officer who is responsible for their direction and control. In the Commission's view, a better approach to achieving that linkage is for assistants to have the powers that are vested in an enforcement officer.
- 6.61 However, two qualifications should be made:
- the exercise of those powers should always be subject to the responsible officer's direction or supervision;⁷²
 - an assistant should not be able to undertake a search of the person.⁷³
- 6.62 We discuss the issue of protection from liability of people who provide assistance to an enforcement officer in the execution of a warrant or exercise of a search power in chapter 14.⁷⁴

67 Police Act 1958, s 6(2).

68 Police Act 1958, s 6(2). A similar extension of the powers of sworn officers has been vested in designated civilian "investigating officers" in the United Kingdom: see Police and Criminal Evidence Act 1984, s 16 and Police Reform Act 2002, Schedule 4, Part 2, para 16.

69 *R v Sanders*, above n 62, 473 Fisher J.

70 Commerce Act 1986, ss 98B(1)(c) and (d); Customs and Excise Act 1996, s 168(10); Financial Transactions Reporting Act 1996, s 46(2); Proceeds of Crime Act 1991, s 32(2); Resource Management Act 1991, s 335(3); Sale of Liquor Act 1989, s 177(6).

71 Commerce Act 1986, s 98B(1)(e).

72 In multi-agency operations (for example, between Police and Customs), the enforcement officers from each agency will be working in concert; our recommendation is not to be taken as implying that one agency is subject to the direction of the other.

73 Chapter 8, para 8.113.

74 Chapter 14, paras 14.46-14.48.

Use of equipment

6.63 The Court of Appeal observed in *Wilson v Maihi*⁷⁵ that it is beyond dispute a police officer executing a search warrant is entitled to use appropriate tools or instruments to search for and seize items described in the warrant. A torch or a crowbar would be obvious examples. But, the Court noted, as technology advances, the range of appropriate instruments should expand to avoid the law becoming an anachronism. In that case a trained dog under the searcher's control and used as an aid in detecting drugs was held to be a natural extension of the right to search conferred by the warrant.

6.64 To date only limited legislative recognition has been given to the use of equipment to assist an enforcement officer in the exercise of a search power. An example can be found in the Customs and Excise Act 1996 where the use of aids in the exercise of customs powers is expressly provided for:⁷⁶

In exercising any power of boarding, entry, or search conferred by this Act, a Customs officer or any member of the Police may have with him or her, and use for the purposes of searching, a dog, a chemical substance, x-ray or imaging equipment, or some other mechanical, electrical, or electronic device.

6.65 In Australia, the limitations of some search powers in accommodating developments in technology led to specific provisions being enacted. These authorise an officer executing a search warrant to bring to the premises being searched equipment reasonably necessary to examine or process things found there to determine whether they may be seized under the warrant.⁷⁷ Provisions were also enacted to authorise an executing officer in certain circumstances to operate electronic equipment at the premises being searched to access data that may constitute evidential material.⁷⁸

6.66 Though the Court of Appeal has recognised the need for the common law relating to the use of assistance in executing a search warrant to reflect advances in technology, it is desirable that legislative provision clarify the authority of searching enforcement officers to have and use equipment to facilitate a search. That should include the authority to:

- take such equipment as is reasonable for the purpose of exercising the search power on to the place being searched;
- use that equipment for the purposes of the search;
- use equipment found on the place searched where it is reasonable to do so.

The authority to use equipment found at the place to be searched is intended, for example, to permit the enforcement officer's use of a computer to provide access to evidential material that is the subject of the warrant or search power, or to use equipment such as a photocopier to copy documents that would otherwise have to be seized.

⁷⁵ *Wilson v Maihi*, above n 34.

⁷⁶ Customs and Excise Act 1996, s 172.

⁷⁷ Crimes Act 1914 (Cth), s 3K(1). See Australian Attorney-General's Department *Review of Commonwealth Criminal Law* (Fourth Interim Report, Canberra, 1990) referred to in *Hart v Commissioner, Australian Federal Police* (2003) 196 ALR 1, 6, 18-19 (FCA).

⁷⁸ Crimes Act 1914 (Cth), s 3L. For a similar provision in Canada, see Criminal Code RSC 1985 c C-46 (Can), s 487(2.1) and (2.2).

- 6.67 The reasonableness standard is necessary to ensure that the equipment or assistance used is referable to the lawful scope of the search or seizure power being exercised. For instance, it would not permit the police to bring a sniffer dog to search for drugs when they are authorised only to search for stolen goods.
- 6.68 The approach taken by the Australian legislation seems to address this issue better than the more prescriptive and potentially limiting authority contained in section 172 of the Customs and Excise Act 1996.⁷⁹
- 6.69 Reference should also be made to two related issues that have arisen in Australia. The first concerns taking electricity to operate equipment taken onto the premises being searched, in order to facilitate the search. The second relates to any damage to equipment used on the premises that may arise from an enforcement officer using it while exercising the search power.
- 6.70 As to the first, it was held, obiter, in one Australian case that using electricity from premises that were being searched amounted to a trespass in the absence of an express statutory power. However, this involved the use of electricity to operate equipment over a period of almost 200 hours.⁸⁰ Existing remedies would appear to be sufficient should an instance of the excessive use of utilities in the execution of a search warrant arise in New Zealand; the fleeting use of services at the premises being searched, such as switching on a light in a darkened room, would not seem to require further authority than the warrant itself.
- 6.71 As to the second, Australian legislation has made special provision for cases where damage is caused by a searching officer operating equipment located on the searched premises; compensation is payable to the owner of the equipment if insufficient care was exercised by the person operating the equipment, or in their selection.⁸¹
- 6.72 We do not recommend adopting a similar approach. It is not apparent that there is any reason to distinguish between damage caused by police use of equipment found in or on places searched, and other types of damage caused by police when exercising entry, search and seizure powers. Should damage be caused to such equipment as a result of negligent or unlawful police conduct, a remedy is available under the law of torts and/or section 21 of the Bill of Rights Act.
- 6.73 We understand that it is presently not uncommon for the police to repair or pay compensation for damage caused when carrying out a search power where the property of innocent third parties is concerned, or where the damage could be regarded as greater than that reasonably necessary to effect the search. Such a policy provides a speedy means of redress where it is needed and is an important supplement to the legal rights of the person affected.

Voluntary assistance

- 6.74 In some cases the occupier of the place searched may facilitate the search by locating and providing the enforcement officer with the evidential material that is the object of the search. This co-operation may be forthcoming as a result of

79 It was necessary to recently amend the Customs and Excise Act provision to include reference to “x-ray or imaging equipment”, see Customs and Excise Amendment Act 2004, s 34(3).

80 *Coco v The Queen* (1994) 179 CLR 427, 459 (HCA) Toohey J: “... it is difficult to conceive that the abstraction of electricity over a period of almost 200 hours could amount to anything other than a substantial trespass.”

81 Crimes Act 1914 (Cth), s 3M(1).

standing arrangements between the enforcement agency and the occupier. For example, an employee of a telephone company may extract and provide information relating to telephone calls specified in a warrant. Alternatively, an occupier may assist an enforcement officer by identifying the location of the item that is the object of the search warrant following a request to do so by the officer.⁸²

- 6.75 Third-party co-operation in executing a search warrant is not uncommon and has been acknowledged by the courts as a lawful and a reasonable response to the authority of the warrant.⁸³ It benefits both the enforcement officer and the occupier. For the enforcement officer it results in the objects of the search being quickly and efficiently seized, and for the occupier of the place searched it minimises what could otherwise significantly disrupt normal business activity. The result is that the warrant is executed in the manner that is the least intrusive in the circumstances.
- 6.76 In chapter 14 we discuss the circumstances in which an occupier who voluntarily assists an enforcement officer in the execution of a warrant or exercise of a search power should be protected from liability for doing so.⁸⁴

Compelled assistance

- 6.77 An occupier of a place searched is generally obliged to follow the lawful directions of an enforcement officer executing a warrant or exercising a search power.⁸⁵ However, several enactments go further and place a positive duty on an occupier to assist an enforcement officer executing a search warrant.⁸⁶
- 6.78 Whilst it is reasonable to expect that an occupier would co-operate or at least not hinder enforcement officers in these circumstances, we regard imposing a statutory obligation to assist as justifiable only if there are compelling policy reasons for departing from the general principle that an occupier should not be under such a legal duty. Nor, in our view, should there be a more broadly phrased duty to assist an enforcement officer by providing all reasonable facilities and assistance to execute a search warrant that is presently required under some enactments.⁸⁷
- 6.79 Where a departure from the general principle is justified in the public interest, the obligation should be specified and confined to those matters that are essential for the discharge of the search power. An example of an obligation to assist that would appear to be justified is the duty imposed on network operators to assist a surveillance agency by providing reasonable technical assistance and other steps to give effect to an interception warrant.⁸⁸

82 In recommendation 6.9 above, we propose that an enforcement officer's obligation to conduct a search so that its intrusiveness is consistent with its purpose be embodied in legislation.

83 See *R v Sanders*, above n 62, 470 Fisher J.

84 Chapter 14, paras 14.46-14.48.

85 See *Powerbeat International Ltd v Attorney-General* (1999) 16 CRNZ 562, paras 93-102. The refusal to obey a lawful direction may well constitute an offence of obstructing the officer in the course of duty: *Urlich v Police* (1989) 4 CRNZ 144.

86 See, for example, Commerce Act 1986, s 98E; Fair Trading Act 1986, s 47D; Financial Transactions Reporting Act 1996, s 46(e)(ii); Motor Vehicle Sales Act 2003, s 137; Telecommunications (Interception Capability) Act 2004, s 13.

87 Commerce Act 1986, s 98E; Fair Trading Act 1986, s 47D; Motor Vehicle Sales Act 2003, s 137; Radiocommunications Act 1989, s 124.

88 Telecommunications (Interception Capability) Act 2004, s 13. See also Summary Proceedings Act 1957, s 198B which provides that a constable executing a search warrant may require a specified person who has knowledge of a computer or computer network, to provide information or assistance to allow the constable to access data held in, or accessible from a computer on the premises named in the warrant.

RECOMMENDATIONS

- 6.11 An enforcement officer should be able to use such assistance, including, but not limited to human assistants, devices, equipment and dogs, as is reasonable for the purpose of exercising any search power.
- 6.12 Every person, other than an enforcement officer exercising an independent power of search, called on to assist with the execution of the search should be subject to the responsible officer's direction or supervision.
- 6.13 Except in relation to searching a person, an assistant should have the search powers that an enforcement officer is lawfully entitled to exercise, but an assistant may only exercise those powers under the supervision of the responsible officer.
- 6.14 An enforcement officer should be able to use equipment found in the place being searched where there are reasonable grounds for believing that the use of such equipment will provide access to evidential material, or where the use of the equipment is reasonable for the purposes of the search.
- 6.15 A duty to assist an enforcement officer in the execution of a search power should be imposed by legislation only when there is a compelling policy reason to do so and should be confined to those matters that are essential for the discharge of the search power.

Powers to take photographs, video recordings or other images

- 6.80 Most search and seizure regimes do not specifically authorise the executing enforcement officer to take photographs or video recordings of the place searched and items found therein. In contrast, section 66(1)(d) of the Wine Act 2003 provides that the member of the police or wine officer executing the warrant is authorised:

To take any photographs, and make any drawing or other representations of any wine, structure, substance, equipment, container, packaging, label, or other thing, if the member or officer has reasonable grounds to suspect that the object or thing in question is in breach of any requirement to this Act.

A similar provision can be found in section 119(5)(d) of the Hazardous Substances and New Organisms Act 1996.

- 6.81 Notwithstanding the absence of statutory authority, the police routinely record details of crime scenes searched, and the location and relationship of items that are seized, by way of photographs, video recordings and other images. We understand the Serious Fraud Office and other enforcement agencies adopt a similar practice. The recorded images and sounds may be evidence in any proceedings arising from the search or seizure and may also serve to protect law enforcement officers from allegations of impropriety in accessing the place to be searched or in undertaking the search. This seems to be a sound practice as it results in the compilation of an accurate, reliable, contemporary record of a scene or an article that can be reproduced or made available to the parties or to

the court at a later date. To preserve the legitimate privacy interests of the occupier, any recording should, so far as possible, be confined to those areas or things that are relevant to the purpose of the search.

RECOMMENDATION

6.16 In the course of exercising a search power, an enforcement officer should be entitled to take photographs or record images and sounds in the place searched and of anything found there where such photographs or recordings are relevant to the purposes of the search or to verify that the search power was properly exercised.

Powers to take copies or extracts of documents

6.82 A number of search warrant regimes provide that a search warrant confers the power to take copies of, or extracts from, documents. These powers may be exercised where the document concerned may itself be seized, or where the executing officer believes on reasonable grounds that the document may be relevant to the investigation.⁸⁹ The Summary Proceedings Act does not provide a similar authority.

6.83 A number of enactments adopt substantially the same definition of document:⁹⁰

Document means a document in any form whether signed or initialled or otherwise authenticated by its maker or not and include:

- any writing on any material;
- any information recorded or stored by means of any tape-recorder, computer, or other device; and any material subsequently derived from information so recorded or stored;
- any label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means;
- any book, map, plan, graph, or drawing;
- any photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced.

6.84 This definition extends to almost any medium on which information may be recorded or stored and definitions in other enactments similarly reflect a broad concept of the word.⁹¹ It includes electronically recorded information such as that held on a computer. Elsewhere we discuss issues relating to the cloning of computers.⁹²

89 Commerce Act 1986, s 98B(1)(e); Commodity Levies Act 1990, s 20(1)(e); Corporations (Investigation and Management) Act 1989, s 25(1); Fair Trading Act 1986, s 47A(1)(f); Financial Transactions Reporting Act 1996, s 46(1)(e)(i); Radiocommunications Act 1989, s 121(1)(a); Serious Fraud Office Act 1990, s 12(1)(e).

90 Serious Fraud Office Act 1990, s 2(1); Fair Trading Act 1986, s 2(1); Official Information Act 1982, s 2(1); Financial Transactions Reporting Act 1996, s 2(1); Proceeds of Crime Act 1991, s 2(1); Commerce Act 1986, s 2; Fisheries Act 1996, s 2.

91 Crimes Act 1961, s 217; Securities Act 1978, s 2.

92 Chapter 7, paras 7.23-7.52.

- 6.85 In our view, legislation providing a power of search and seizure should include a power to take a copy of a document or part of any document that may be lawfully seized. The extended definition of document used in a number of existing enactments provides a suitable model.

RECOMMENDATION

- 6.17 An enforcement officer should be entitled to copy any document, or part of a document, where there are reasonable grounds for believing that it may be seized under the search power.

Removing items for examination

- 6.86 In general, a search power authorises an enforcement officer to seize and remove only items for which there are reasonable grounds to believe are evidential material relating to the commission of an offence. In most situations, this assessment can be made at the time of the search and before the item is seized. However, there are two instances in particular where such an assessment may be difficult or impracticable.
- 6.87 First, an enforcement officer may find material of a type that may be lawfully seized, but its volume or nature is such that items relevant to the investigation cannot be identified and seized at the place searched. Secondly, an item that may be lawfully seized in terms of the warrant may be connected to or part of other items and cannot practicably be separated at the place being searched.
- 6.88 The common law permits the material on the premises to be sifted⁹³ and bundles of documents reasonably believed to contain evidential material to be removed for sorting elsewhere, provided that sorting is carried out expeditiously and documents that are not of evidential value are promptly returned.⁹⁴ Removing documents for the purpose of sifting through them to determine whether any of them fall within the scope of the warrant is not, however, permitted.⁹⁵
- 6.89 The recommendations made earlier in this chapter, to permit searching officers to bring equipment or other assistance with them to the place being searched, or to use equipment located at the place,⁹⁶ will better enable enforcement officers to determine whether items discovered during a search fall within the scope of the warrant without their removal from the premises.
- 6.90 Nevertheless, there are situations where it is not practicable to determine whether or not an item may be seized in terms of the search power at the place where the search is carried out. In such a case it is necessary for the examination or analysis of the item to occur elsewhere. Examples include:
- removing substantial quantities of documents for sifting to identify those that are material to the investigation;⁹⁷

93 *R v Leeds Magistrates' Court ex parte Dumbleton* [1993] Crim LR 866 (QB).

94 *Reynolds v Commissioner of Police of the Metropolis* [1984] 3 All ER 649 (CA).

95 *Reynolds*, above n 94; *R v Chesterfield Justices, ex parte Bramley* [2000] 1 All ER 411 (QB).

96 Recommendations 6.11 and 6.14.

97 See, for example, *A Firm of Solicitors v District Court at Auckland* [2006] 1 NZLR 586 (CA).

- removing a computer or other electronic device to facilitate the examination of the contents or the cloning of its hard drive for the purpose of isolating evidential material;⁹⁸
- taking computer discs so that material of evidential value may be identified and retained;
- removing a number of items where legitimate articles are intermingled with illicit items to allow for the separation of the two.⁹⁹

6.91 Statutory authority for enforcement officers executing warrants to remove such items has been enacted in some overseas jurisdictions. In Australia, officers executing a search warrant are empowered to remove items from the premises searched for examination or processing if it is significantly more practicable to do so.¹⁰⁰ In the United Kingdom, the Criminal Justice and Police Act 2001 authorises a searching officer who has reasonable grounds to believe that an item may be or contain something the officer is entitled to search for, to remove the item from the premises if it is not reasonably practicable to determine on the premises on two conditions: where it is something the officer is permitted to seize; or because the item contains something that the officer is entitled to seize.¹⁰¹ A further provision permits property that the officer would not be entitled to seize to be taken if it includes property that may be seized and it is not reasonably practicable to separate it.¹⁰²

6.92 New Zealand needs similar legislation. It is not always possible for a searching officer, even with assistance, to identify and extract or seize the evidence to which the search power relates at the time of the search. And where it is necessary to search a substantial volume of documents, permitting those likely to contain the evidence that is sought after an initial sift at the place searched to be removed, would align the law with common sense.¹⁰³

6.93 The removal of items should only occur if it is not reasonably practicable for their evidential status to be determined at the place searched. The approach overseas is to provide either general criteria¹⁰⁴ or specific factors¹⁰⁵ that the enforcement officer is required to take into account. In considering whether it is not reasonably practicable for the determination to be made at the place searched, we propose that the following factors should be taken into account:

- whether other options such as the use of equipment, either already at the place searched or brought in by the searching officer, are practicable in the circumstances;
- whether the evidence can only be accessed by using off-site equipment or expertise;

98 See also the discussion in chapter 7, paras 7.23-7.52 about the cloning of computer hard drives at the place being searched.

99 See, for example, Fisheries Act 1996, s 207(1)(b) that permits a fishery officer to seize both fish that the officer believes on reasonable grounds to have been unlawfully taken and fish with which they have been intermixed.

100 Crimes Act 1914 (Cth), s 3K.

101 Criminal Justice and Police Act 2001 (UK), s 50(1).

102 Criminal Justice and Police Act 2001 (UK), s 50(2).

103 *R v Chesterfield Justices, ex parte Bramley*, above n 95, 419 Kennedy LJ.

104 Crimes Act 1914 (Cth), s 3K(2)(a)(i): "having regard to the timeliness and cost of examining or processing the thing at another place and the availability of expert assistance".

105 Criminal Justice and Police Act 2001 (UK), ss 50(3)(a)-(e).

- the risk of damage to or destruction of evidence if the examination or analysis is carried out at the place being searched;
 - whether the use of off-site equipment or expertise is necessary to preserve the evidential integrity of the item;
 - the length of time it would take and the level of intrusiveness of the search if the examination or analysis were carried out at the place being searched;
 - whether a controlled environment is required to carry out the examination or analysis and it is not available at the place being searched.
- 6.94 We note that this power would not allow things not reasonably capable of including the items searched for to be removed; that would clearly be unlawful and unreasonable.
- 6.95 Items that are removed for sorting or examination should be processed as soon as reasonably practicable and should be returned once the enforcement agency has determined they are not to be seized and retained. We have considered whether there should be a provision along the lines of the Australian Commonwealth legislation that permits the person from whom the items were seized to be present at the processing, but do not believe it is necessary.¹⁰⁶ It is difficult to discern a basis for treating such items differently from items seized and retained as evidential material and in our view the provisions relating to access by the person from whom the articles were seized should be the same for both. Accordingly, the recommendations made in chapter 13 relating to access to seized items should apply to items removed for examination.¹⁰⁷

RECOMMENDATIONS

- 6.18 Where it is not reasonably practicable to determine whether an item may be seized pursuant to a search power at the place where the search occurs, an enforcement officer should be permitted to remove it for the purpose of examination or processing to determine whether it may be seized.
- 6.19 Items removed for examination should be:
- examined or processed as soon as reasonably practicable;
 - returned to the person from whom they were taken once the enforcement officer determines they are not to be seized and retained;
 - subject to the provisions as to access applying to seized items that are retained.

SECURING
THE SCENE

- 6.96 Either before or in the course of the exercise of a search power an enforcement officer may have to take steps to preserve evidence or to prevent its contamination or destruction. At present there is no statutory authority for an enforcement officer to secure a search scene in a public or a private place or to give directions to people who may be present while a search power is exercised.¹⁰⁸ Nor is there any specific power for a police officer or other enforcement officer to secure an intended search scene on private property (referred to below as a crime scene)

¹⁰⁶ Crimes Act 1914 (Cth), ss 3K(3)-(3C).

¹⁰⁷ Chapter 13, recommendations 13.1-13.4.

¹⁰⁸ But see Customs and Excise Act 1996, ss 168(3A) and (3B).

while a warrant is being obtained.¹⁰⁹ An occupier may consent to an enforcement officer's actions; but it has been largely left to the courts to develop the common law in this area on a case-by-case basis, sometimes in the context of a prosecution for obstructing or hindering a police officer in the exercise of the officer's duty.

6.97 While it could be argued that the common law has provided adequate authority for police officers in particular to maintain the security of a search scene while executing a warrant, the law should be codified for three reasons:

- An enforcement officer's actions in securing the place to be searched may have significant consequences for the occupant, particularly for a business: access to the whole or part of the place may be restricted; people's movement may be controlled until the search is completed; or access to a computer system may be curtailed. The authority for actions that have the potential for such consequences should be clear.
- Where the consent of an occupier is relied on, the authority for preserving a search scene becomes contingent upon that consent not being withdrawn.
- It is desirable that the nature and scope of the authority of enforcement officers conducting searches is clearly established for the benefit of both the people affected by the search and the officers themselves.

6.98 There are three separate areas where an enforcement officer's authority should be clarified by legislation:

- whether a crime scene may be secured pending the issue of a search warrant;
- whether a place that is the subject of the search may be secured to preserve potential evidence;
- whether people found at the place to be searched may be detained or restrained for the purposes of the search.

Securing a crime scene while a warrant is obtained

6.99 Unless a crime scene is in a public place, or on a road,¹¹⁰ or an occupier of private property consents, the authority of a police officer to preserve the scene until a search warrant can be obtained is unclear. In Australia, specific legislation authorises a police officer to establish a crime scene. In Queensland and New South Wales, legislation provides for crime scene warrants to be issued,¹¹¹ and similar legislation is proposed in Victoria.¹¹² While there are minor differences in approach, there are a number of common features. The legislation permits a police officer who is lawfully at a place to establish a crime scene if the officer has reasonable grounds for suspecting a serious crime has been committed there (including an offence arising from a traffic accident involving death or serious injury), or that evidence of a serious crime committed elsewhere is at the place, and it is necessary to preserve the scene to gather the evidence. A crime scene may be established in any way that gives a person who is at or

109 *R v H* (25 August 2004) CA 233/04, para 26 Robertson J for the Court.

110 A member of the police may temporarily close a road where there is danger to the public, or where an indictable offence has been committed or discovered: Local Government Act 1974, s 342A.

111 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), ss 88-98; Police Powers and Responsibilities Act 2000 (Qld), ss 170-175.

112 Victorian Parliament Law Reform Committee, above n 30, 293-94.

who wishes to enter the place notice that it is a crime scene.¹¹³ A police officer may then exercise a number of specific powers:¹¹⁴

- to direct a person not to enter or to leave a crime scene, or to remove a vehicle from the crime scene;
- to prevent a person entering, or removing evidence from the scene;
- to inspect, examine and photograph the scene and generally to perform any necessary investigation;
- to use electricity, or other utilities at the scene.

These powers may be exercised for up to three hours after the crime scene is established while a crime scene warrant is obtained.¹¹⁵ The Queensland legislation provides a power of entry without warrant to a place that a police officer reasonably suspects is a crime scene.¹¹⁶ In contrast, the New South Wales regime applies where a police officer is “lawfully on premises”.¹¹⁷

- 6.100 Provision is made in both jurisdictions for the issue of crime scene warrants, which are separate from search warrants. A crime scene warrant permits the enforcement officer to exercise crime scene powers for the duration of the warrant.¹¹⁸
- 6.101 As long as enforcement officers have the authority to give directions in the course of executing a search warrant as we propose below,¹¹⁹ we do not consider there is any need for a separate crime scene warrant. However, legislative clarification of the authority of an enforcement officer to secure a crime scene while a search warrant is being obtained is highly desirable. The main features of the two Australian enactments should be adapted to provide the framework along the following lines:
- where an enforcement officer is lawfully at a place, the officer may declare it to be a crime scene if he or she has reasonable grounds for believing that:
 - evidential material relating to an offence for which a search warrant could be obtained is at the place;
 - it is necessary to preserve that evidential material until a search warrant can be obtained;
 - a search warrant is being obtained as soon as reasonably practicable.
 - once a place is declared to be a crime scene, the officer may direct a person not to enter, or to leave the crime scene, and take any steps reasonably necessary to ensure the evidential material is not destroyed, concealed or impaired.

- 6.102 The enforcement officer’s powers in respect of a crime scene should end once the search warrant has been obtained, or when a fixed time has expired.

113 Police Powers and Responsibilities Act 2000 (Qld), s 165(3). Examples given in a footnote to the section include a police officer standing at a door to stop people entering and telling them, or putting up barricades or tapes indicating the place is a crime scene.

114 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 95; Police Powers and Responsibilities Act 2000 (Qld), ss 176-178.

115 The three-hour maximum is provided for only in the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s92(3); the Queensland legislation requires a crime scene warrant to be applied for as soon as practicable after the crime scene has been established: Police Powers and Responsibilities Act 2000 (Qld), s 166.

116 Police Powers and Responsibilities Act 2000 (Qld), s 164.

117 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 88.

118 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 95.

119 Recommendations 6.20 and 6.22.

We propose a six-hour time limit rather than the three hours prescribed in the New South Wales legislation to allow sufficient time for search warrant application in the more complex cases to be prepared. We do not consider the crime scene power should be extended to public places, since a search warrant would not be required to undertake a search. We do, however, recommend that the existing power of a police officer to temporarily close a road under section 342A of the Local Government Act 1974 where an indictable offence has been committed or discovered, should be retained, but shifted to our proposed legislation dealing with the search powers of the police.

- 6.103 We do not recommend that a separate power of entry be enacted. In most cases the enforcement officer will already be at the scene with lawful authority when a decision is made to establish a crime scene. Where a police officer needs to gain immediate entry in a critical situation, the warrantless power of entry in exigent circumstances discussed in chapter 5 should afford the necessary authority.¹²⁰ Having entered under the authority proposed in chapter 5, the officer will be lawfully in the place and thus entitled to undertake any of the steps outlined above.

Securing a search scene

- 6.104 Court decisions on the authority of a police officer exercising a search power to secure a search scene appear to be based on the premise that the search power itself includes the right to a measure of supervision and control over the actions and movement of people in the place being searched to enable the search to be carried out effectively.¹²¹ This includes requiring staff to move away from their workstations while the search is carried out and requiring workers to assemble at a common point so that the situation can be explained to them.¹²² Similarly, a searching officer has the right to ask occupants to remain in one place, effectively excluding them from parts of the premises until those parts have been searched. A refusal or failure to comply with the officer's instructions may constitute the offence of obstructing the officer in the execution of his or her duty.¹²³
- 6.105 There are, however, limits to the extent of the directions that may be given. For example, a search for evidence of bookmaking does not entitle the executing officer to answer the telephone at the address, or forbid the occupant from doing so.¹²⁴ Nor does a search power necessarily vest the enforcement officer with the authority to detain the occupier of the premises in question.¹²⁵
- 6.106 To put the matter on a proper footing, we recommend that enforcement officers who are exercising a search power should have statutory authority to give reasonable directions to any person at the place where the search is being undertaken to enable it to be carried out effectively, or for the purpose of preserving evidence or preventing its destruction or concealment. A direction may, for example, require the person not to enter, or to leave, the search scene

120 Chapter 5, paras 5.43–5.61.

121 *Powerbeat International Ltd v Attorney-General*, above n 85; *R v Nielsen* (15 June 1993) CA 53/93; *Police v Smith* (13 July 1993) CA 196/93.

122 *Powerbeat International Ltd v Attorney-General*, above n 85.

123 *Sawtell v Police* (24 August 1987) HC WN M282/87 Greig J.

124 *Police v Ford* [1979] 2 NZLR 1 (CA).

125 *R v P* [1996] 3 NZLR 132, 136; *R v Terry* [2000] DCR 464, 474.

or a part of it. Such a direction is not to require that person to assist in the search in terms of recommendation 6.15, above; it is to ensure that he or she does not hinder the exercise of the power. The authority to guard a scene and to prevent entry until the search is completed should also be provided for.

- 6.107 It should be an offence for a person to fail to comply with the reasonable directions of an enforcement officer given at either a crime scene or a search scene.

Advice to people affected

- 6.108 To limit the opportunity for misunderstanding, it should be incumbent on an enforcement officer who gives directions while undertaking a search, or who establishes a crime scene, to provide information to people who may be affected by the action taken. In terms of the identification principle¹²⁶ they should be informed of the officer's identity and the authority for his or her actions. Where it is practicable to do so, the boundaries of the crime scene should be identified.

Detaining people at search scenes

- 6.109 The proposed power to give directions in order to secure a search scene carries with it the implication that people at the scene may be detained, at least in the sense that they may be confined to a particular room or a part of the premises in order to ensure that the integrity of the search scene is maintained, or that the objectives of the search are not otherwise frustrated. However, such a power clearly does not enable the enforcement agency to prevent people from leaving the premises altogether, since they will not adversely effect the agency's ability to conduct the search.
- 6.110 In the course of our consultations the Police and Customs noted that when a search of premises is undertaken, people at the scene are often detained for the duration of the search or until it has been determined whether they are connected with the evidential material being searched for. However, only the Customs and Excise Act 1996 specifically provides such a power; section 168(3)(a), as inserted in 2002, empowers customs officers executing a search warrant to detain any person who is at the place referred to in the warrant (and anyone who arrives there while the warrant is being executed) "until the officer is satisfied that the person is not connected with the thing referred to in the warrant". All other statutory search powers are silent on the issue. As a result, the courts have sometimes been required to determine, long after the event, whether particular restraints on the liberty of people at the search scene are unlawful. They have often done so on the basis of fine and largely unproductive semantic distinctions between detention and restraint. We therefore believe that the issue should be clarified by legislation.
- 6.111 Police and Customs have strongly argued that the power to detain people, as contained in the Customs and Excise Act, is a necessary one and accords with current practice. For example, they have noted that, if they are searching premises for drugs, they will frequently not know the identity of some or all of the people discovered on the premises when the search began and will therefore not know whether they are implicated in the suspected offending that has led to the search.

¹²⁶ Discussed below, paras 6.120-6.122.

In those circumstances, it would generally be expected that they would detain everybody found on the premises until they have ascertained whether drugs are there, unless it is clear that particular individuals are not implicated.

- 6.112 Even if the identity of the suspects is known, the enforcement officers may wish to prevent them from leaving the premises so that they cannot alert co-offenders. This is particularly so when the search forms part of a larger investigative operation.
- 6.113 In our view, these limitations on individual freedom are not unreasonable and would accord with public expectations of enforcement agencies. It would be untenable to allow those connected to unlawful items or evidence of offending that is the subject of search to leave the scene and thus avoid detection and subsequently prosecution, or to alert co-offenders so that they can destroy or conceal other evidential material, when a short-term restraint on their liberty would have avoided that.
- 6.114 We stress that this does not amount to detention for questioning. Those detained will not be required to answer questions. Their right to remain silent will be preserved. In the event that they are not implicated by others or by the results of the search, and are thus not able to be arrested, they will be free to leave at the conclusion of the search.
- 6.115 We therefore recommend that, when a power to search premises is provided, it should carry with it a power that is framed in terms similar to section 168(3)(a) of the Customs and Excise Act 1996.
- 6.116 For the sake of completeness, we note that any detention for this purpose, at least when it involves more than a very temporary check on liberty,¹²⁷ will invoke the protections provided by section 23(1) of the Bill of Rights Act.

Detention and the use of force

- 6.117 The police advised us that specialist armed squads are often required to assist with the exercise of a search power on premises particularly in investigations of drug dealing or other serious crime where the occupants of premises may have access to firearms. Their deployment is necessary to ensure the premises are secure before the search is carried out and may result in members of the specialist squads temporarily handcuffing people found on the premises. Challenges to police handcuffing procedures in the course of exercising search powers have been largely unsuccessful, with such action being held to have been either justified¹²⁸ or reasonable in the circumstances.¹²⁹
- 6.118 We accept that such procedures may sometimes be necessary, but we do not think that provision should be made to deal with special operational circumstances of this kind. However, the authority to temporarily detain people at a search scene necessarily imports the ability to use reasonable force to do so and we consider that authority should be provided for in legislation, rather than left to implication. We recommend accordingly.

127 See *R v Fowler* (5 February 2007) CA 418/06.

128 In *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA), the actions of the Armed Offenders Squad were in part held to be justified under the Arms Act 1983.

129 See *R v Pay* [2003] DCR 586; *Martin v Attorney-General* (26 May 2006) DC WN CIV 2004-085-1246.

RECOMMENDATIONS

- 6.20 Where an enforcement officer is lawfully at a place and a search warrant to search that place is being or is about to be applied for, the officer should be authorised to:
- establish a crime scene at the place to be searched for the lesser of a period of six hours or until a search warrant is obtained and available at the scene;
 - give reasonable directions to a person at the crime scene to ensure that evidential material is not destroyed, concealed, or impaired.
- 6.21 The power of a police officer under section 342A of the Local Government Act 1974 to temporarily close a road should be retained, but shifted to the proposed legislation dealing with police search powers.
- 6.22 If it is necessary to enable a search power to be exercised effectively or to ensure that evidential material is not destroyed, concealed or impaired, an enforcement officer should be authorised to:
- give reasonable directions to a person at the place searched;
 - guard the scene, or arrange for it to be guarded and prevent persons from entering.
- 6.23 It should be an offence for anyone to fail to comply with the reasonable directions that an enforcement officer gives at a crime or search scene.
- 6.24 An enforcement officer who, in terms of recommendations 6.20 or 6.22, establishes a crime scene or gives directions while undertaking a search, should identify himself or herself to those affected and advise them of the authority for the action taken.
- 6.25 Where there is a statutory power to search premises, it should carry with it the power to detain a person who is at the place being searched, or who arrives there while the search is being undertaken, for such period as is reasonable, not exceeding the duration of the search, to enable the officer to determine whether the person is connected with the object of the search.
- 6.26 An enforcement officer who lawfully detains someone at a search scene should be able to use reasonable force to do so.

PROVIDING
INFORMATION
CONCERNING
THE SEARCH

- 6.119 Search warrant regimes and statutory powers of search without warrant generally require the executing officer to provide certain information before, during and shortly after the search to the person affected by it. Further, if the occupier of a place is not present while the search is carried out, many enactments specify the information the enforcement officer is to leave following a search warrant. However, existing statutory requirements as to the information to be provided vary significantly in substance and detail and the matter is best approached by reference to the relevant principles.

Information provided before and during the search

- 6.120 In its review of powers of entry in 1983, the Public and Administrative Law Reform Committee recommended that an enforcement officer must provide two

critical pieces of information to the person affected by the search in the initial stages of a search. The first was for the enforcement officer to identify himself or herself and the second was for him or her to advise the occupier of the authority for the search. Under the identification principle the Committee concluded:¹³⁰

An entrant should carry a warrant of authority to identify himself, the position he holds, and the source and nature of his authority, which he should produce upon initial entry, and if requested at any subsequent time.

- 6.121 The Search and Search Warrants Committee adopted that principle and recommended a provision that imposed a duty on an officer executing a search warrant to produce it for inspection upon initial entry and in response to any reasonable request thereafter. If requested, a copy of the warrant was to be provided within seven days of the request.¹³¹
- 6.122 Subsequent legislation has generally adopted the identification principle¹³² and it accords with best practice. It is fundamental to the exercise of a power of search that the person who is subject to its exercise is made aware of the executing officer's identity and the authority for his or her actions. Providing such advice may avoid misunderstanding as to the use of the power and gives the person affected essential information to be able to question its exercise. Accordingly, we make similar recommendations, but instead of the requirement to produce a copy of the search warrant for inspection, the enforcement officer should provide a copy of the warrant to the person appearing to be the occupier upon entry whether or not a request is made.¹³³ This will reduce the room for argument about an occupant's ability to inspect the warrant, particularly if several requests are made.

RECOMMENDATIONS

- 6.27 An enforcement officer who is exercising a search power should, upon entry, produce evidence of his or her identity as an enforcement officer and advise the person who appears to be the occupier of the authority for the search.
- 6.28 When a search warrant is being executed and the occupier of the place is present, the enforcement officer should, upon entry, give him or her a copy of the warrant.

Information as to anything seized

- 6.123 Some search warrant regimes require the executing officer to provide the owner or occupier of the place searched with a list of the items seized, either at the time of the search or within seven days thereafter.¹³⁴ However, some have no

¹³⁰ Public and Administrative Law Reform Committee, above n 23, 12.

¹³¹ Search and Search Warrants Committee, above n 24, 24-25.

¹³² Agricultural Compounds and Veterinary Medicines Act 1997, s 70(2); Animal Welfare Act 1999, s 134; Biosecurity Act 1993, s 112(1); Commerce Act 1986, s 98C; Films, Videos, and Publications Classification Act 1993, s 112; Gambling Act 2003, s 343(1); Motor Vehicle Sales Act 2003, s 133.

¹³³ The requirement would not apply where the place searched is owned or occupied by the enforcement agency executing the warrant and there is no other occupier.

¹³⁴ Animal Welfare Act 1999, s 135(2) (10 working days); Commerce Act 1986, s 98D (seven days); Gambling Act 2003, s 343(3) (10 working days); Motor Vehicle Sales Act 2003, ss 134, 135 (five working days); Sale of Liquor Act 1989, s 177(9) (10 working days).

requirement or a more limited one: the Summary Proceedings Act 1957 makes no provision for furnishing an inventory of things seized pursuant to a search warrant; and section 112(1)(c) of the Biosecurity Act 1993 requires that such information be provided only when the place is unoccupied at the time of the search. In contrast, others have an even more extensive requirement: for example, the Films, Videos, and Publications Classification Act 1993 requires that in addition to providing the inventory to the owner or occupier, the executing officer must give information relating to the seized property to “every other person whom the Inspector or member of the Police has reason to believe may have an interest” in it.¹³⁵

- 6.124 There is no rationale for these inconsistencies, and a standard approach should be adopted. In our view, where it is practicable to do so, the responsible officer should, when the search is completed, provide the person who appears to be the occupier of the place searched with an inventory of the items seized and removed as a result of the exercise of the search power, including any copy or clone of information taken or made. We do not consider that this obligation should be unduly onerous. For example, if a box of files is seized only the box, rather than each individual file within it, should be specified in the inventory. An inventory should also be completed where property is seized following a consent search.
- 6.125 If it is impracticable to provide the occupier with an inventory at the time the items are removed – for example, because of the large number of items seized, or because the enforcement officer needs to complete interviews of the occupants – the information should be provided as soon as reasonably practicable afterwards and in any case, within seven days of seizure. In the rare case where the seven-day maximum is insufficient owing to the nature or extent of the seizure, the enforcement officer should be able to seek an extension from a judge.
- 6.126 We have considered whether there should be a further duty on the responsible officer to notify people other than occupier of the place searched of the seizure of an item where the officer has reasonable grounds to believe that such people have an interest in the seized property. For practical reasons we do not consider the duty should generally extend beyond advising those in apparent occupation of the premises from which the property is seized. First, we are not aware of cases where a third party has been disadvantaged by the current practice – for example, innocent third parties who own property (such as the owners of stolen property) are routinely advised of its seizure even if they were not occupying the premises from which it was seized. Secondly, imposing a duty to locate and advise third parties with an interest in seized property could become unduly burdensome, particularly where there are a number of items seized. Thirdly, it will often be a matter of chance whether the enforcement officer is or becomes aware of anyone apart from the owner having an interest in the property seized; a failure to advise third parties with an interest would thus be commonplace and give rise to the potential for a significant increase in challenges to the validity of the search. This would outweigh any benefits achieved by a wider notification requirement.

135 Films, Videos, and Publications Classification Act 1993, s 113(2).

RECOMMENDATION

- 6.29 Unless recommendations 6.32 or 6.33 apply, if anything (including any copy or clone of information) is seized, the enforcement officer should give the occupier (i.e. the person who appears to be the occupier) an inventory of the things removed, unless it is not reasonably practicable to do so. In that case the inventory should be provided as soon as practicable and, unless an extension is approved by a judge, no later than seven days after seizure.

Other information to be provided with inventory

- 6.127 In chapter 13 we make recommendations relating to access to seized items, the retention, return and disposal of seized property, and access to documentation relating to the application for a search warrant or exercise of a search power. To ensure that people from whom items are seized are aware of their rights under each of these headings, the relevant information should be summarised on the back of the inventory form. We recommend accordingly.
- 6.128 A proposed procedure with respect to the seizure of privileged or confidential material is described in chapter 12. We recommend that sufficient features of that procedure should also be set out on the back of the inventory form so as to enable the person from whom property is seized to initiate a claim where he or she is of the view that a seized item is subject to that procedure.

RECOMMENDATION

- 6.30 The back of the inventory form should provide people from whom items are seized with information about:
- access to and the disposition of seized items;
 - their right of access to documentation relating to the application for a search warrant or exercise of a search power that would be discoverable under the Official Information Act 1982 or the Criminal Disclosure Act (when enacted);
 - the procedures to be followed where they wish to initiate a claim that privileged or confidential material has been seized.

Information to be provided where no occupier at place searched

- 6.129 Where the occupier of the place searched is not present at the time of the search, the Search and Search Warrants Committee recommended that the person executing the warrant leave in a prominent position at the place searched a notice containing the date and time the warrant was executed and the name of the person in charge of the search.¹³⁶ That recommendation has been implemented in a number of subsequent search warrant regimes, and though the details prescribed in different statutes vary, the information to be provided includes all or some of the following:

¹³⁶ Search and Search Warrants Committee, above n 24, 25.

- the time and date of the search;
- the name of the enforcement officer who entered the place;
- the fact that the person is an enforcement officer;
- the name, office or position, and employer of every person entering;
- the circumstances and purpose of entry;
- the authority under which the entry was made;
- the principal contents of the warrant;
- details of the items seized;
- the address of the police station or other office to which enquiries should be made.¹³⁷

6.130 The Summary Proceedings Act 1957 has no such requirement in respect of search warrants for general criminal offences, though the provision of information relating to the execution of a search warrant to an absent owner or occupier by leaving a notice in a prominent place, is in accord with sound enforcement practice.

6.131 Notifying the occupiers of a place that it was the subject of a search by law enforcement officers in their absence is a reasonable incident of the exercise of a search power. It provides occupiers with the type of information they would have been entitled to had they been there at the time of the search and it contributes towards the accountability of the enforcement agency by ensuring a person affected by the search has sufficient details of the intrusion to seek further information if necessary, or to challenge the issue of a warrant or the exercise of a power. Accordingly, we recommend that notice of the execution of a warrant or the exercise of a warrantless search power be left for or given to an absent occupier containing, at a minimum, the following information:

- the time and date of the search;
- the identity of the executing officer (by reference to his or her name or other unique identifier);
- a copy of the warrant, or, in the case of a warrantless search, the authority for the search;
- a list of items seized;
- a contact address for any inquiries.

Who is an occupier for notification purposes?

6.132 There may be instances where the person present at the place being searched should not be regarded as the occupier. For example, where the only person present is a young child, a guest of the householder, or a neighbour who happened to be at the place at the time of the search, he or she could not be said to be an occupier for the purposes of the notification requirement.

137 Agricultural Compounds and Veterinary Medicines Act 1997, s 70(3); Animal Welfare Act 1999, ss 129 and 135(1); Climate Change Response Act 2002, s 43(1); Commerce Act 1986, s 98D(1); Commodity Levies Act 1990, s 22(1); Customs and Excise Act 1996, s 169(2); Fair Trading Act 1986, s 47C(1); Local Government Act 2002, s 166(2); Motor Vehicle Sales Act 2003, s 134; Ozone Layer Protection Act 1996, s 23(7); Biosecurity Act 1993, s 112(1)(c); Films, Videos, and Publications Classification Act 1993, s 113(1); Hazardous Substances and New Organisms Act 1996, s 119(7); Maritime Transport Act 1994, s 456(1)(c); Prostitution Reform Act 2003, ss 33(2)(a)-(b); Sale of Liquor Act 1989, s 177(8); Serious Fraud Office Act 1990, s 17(1); Wine Act 2003, s 67(2).

- 6.133 Where adults are concerned, the question of whether or not they are an occupier and thus whether they should be left with a copy of the warrant or inventory of items seized, should be easily resolved. We are of the view, however, that a child under the age of 14 years who is the sole or oldest person present should not be regarded as an occupier for these purposes in any circumstances. As it is an offence for a parent or guardian to leave a child under 14 without reasonable provision for supervision and care, it would create an inconsistency if such a child were to be treated as an occupier for search and seizure notification purposes.
- 6.134 If the enforcement officer is in any doubt as to whether a person present at the time of the search is the occupier of the place, the procedure that is to be followed where there is no occupier present should be adopted.

Notification to a person other than an occupier

- 6.135 It will be apparent in some cases that notification should be given to someone other than the occupier. For example, where property is seized from the home of a burglar or where an item is seized from property occupied by the enforcement agency or from other publicly owned premises, some modification of the notice procedure will be necessary to achieve its purpose. In such a case the enforcement agency should be regarded as meeting its obligation if it makes reasonable efforts to identify the owner of the property searched or seized and to provide the notification.

RECOMMENDATIONS

- 6.31 Unless recommendations 6.32 or 6.33 apply, when the occupier of the place searched is not present at the time of the search, the responsible officer should leave in a prominent position notice of the search containing details of:
- the date and time of the search;
 - the name or unique identifier of the executing officer;
 - a copy of the warrant or, in the case of a warrantless search, the authority for the search;
 - the inventory of the things removed;
 - the contact address to which inquiries should be made.
- 6.32 Where an enforcement officer has reason to believe that the person present when a search power is exercised is not the occupier, the officer should leave the notice required as if the occupier were not present at the time of the search. A child under the age of 14 years should not be treated as an occupier for this purpose.
- 6.33 Where it is apparent that the inventory should be given to someone other than the occupier of the place searched, the enforcement officer need not notify the occupier, but should rather make reasonable efforts to identify the owner of the property seized and to provide the inventory to him or her unless recommendation 6.34 applies.

Dispensations from the notification requirement

- 6.136 In some circumstances, complying with the requirement to notify an absent occupier of the exercise of a search power may prejudice an inquiry or an ongoing or subsequent investigation. For example, where it is vital for the purposes of a serious criminal investigation that the search is carried out covertly,¹³⁸ complying with the notification requirement would undermine the law enforcement objective and would most likely compromise the investigation itself. In other cases where the search has arisen following information being received from a confidential source, notification at a particular time may endanger the informant's safety.
- 6.137 In some overseas jurisdictions provision is made for the notification requirement to be postponed where a judicial officer is satisfied that there are reasonable grounds for the postponement;¹³⁹ in other jurisdictions recommendations have been made as to postponement in cases where a warrant has been covertly executed.¹⁴⁰ In New Zealand, the Search and Search Warrants Committee recommended a similar provision where giving notice to the owner or occupier "would unduly prejudice subsequent investigations" and thus be contrary to the public interest. In such a case the Committee recommended that the enforcement officer should apply to a judge within seven days for exemption from the notice requirement, and unless the application was approved, the owner or occupier should be notified of the execution of the warrant forthwith.¹⁴¹
- 6.138 As there is no statutory notification process in respect of search warrants issued under the Summary Proceedings Act 1957 or in respect of warrantless powers, the need for dispensation from the requirement does not presently arise in criminal investigations. Exemption from the obligation to provide the owner or occupier with notice of a search has, however, been enacted in other legislation in the terms recommended by the Search and Search Warrants Committee.¹⁴²
- 6.139 We agree with the Search and Search Warrants Committee's view that in some circumstances there is an overriding public interest for postponing the notification requirement. However, it does not necessarily follow that the postponement should be for an indefinite period in every case, which is the approach taken in existing legislation. There may well be cases where, after an initial postponement, notification would not compromise the investigation. Accordingly, we recommend that a judge should be able to authorise the postponement of notification for a specified period up to 12 months. In many cases the postponement is likely to be for a relatively short period; if a further search is planned, notification will often be possible once it is completed.
- 6.140 Application for postponement of the notification requirement should be made to a judge within seven days of the exercise of the power. In those cases where the enforcement officer knows when a warrant is applied for that postponement

138 See above, paras 6.39-6.45.

139 See, for example, Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 67; Terrorism (Police Powers) Act 2002 (NSW), s 27U(9); USA Patriot Act 2002, s 213; 18 USC 2705.

140 Victorian Parliament Law Reform Committee, above n 30, 292; Criminal Justice Commission, above n 47, 382.

141 Search and Search Warrants Committee, above n 24, 25.

142 Customs and Excise Act 1996, ss 169(3) and 170(1). See also Resource Management Act 1991, s 335(4)(c); Misuse of Drugs Act 1975, s 36(1).

of the notification will be sought, the officer should seek the necessary judicial authority as part of the warrant application.

- 6.141 In the vast majority of cases notification will have occurred by the end of the postponement period. Nevertheless, we accept that occasionally, even at that point, compliance with the notification requirement may result in undue prejudice to an ongoing investigation or risk to someone's personal safety. In such a case, a further postponement of, or dispensation from, the notification requirement should be possible.
- 6.142 If an enforcement officer applies for the further postponement of, or for dispensing with, the notification requirement, a judge should be able to make a final order and:
- decline the application, in which case notification should proceed;
 - postpone notification for a further specified period, at the end of which the enforcement officer must advise the occupier; or
 - where the judge is satisfied that disclosure of the search will unduly prejudice ongoing or subsequent investigations, or endanger the safety of any person, order that the notification requirement be dispensed with.
- 6.143 However, as a matter of principle, the State should not be able to appropriate people's property without notifying them that this has occurred. In cases where property has been seized pursuant to a search power, therefore, there should be no power to dispense with notification altogether. If a postponement order is made, notice must be given at the end of the postponement period.
- 6.144 There is one exception to this. The requirement to give notice of seizure under recommendation 6.29 extends to copies or clones of information that are taken or made during the search. However, if the grounds for postponement of notice are made out, a judge should instead be able to dispense altogether with notice that such copies or clones have been taken or made. That is because the impact of the existence of a copy or clone on the person's property interests is small, and his or her privacy interests can be adequately protected in other ways.¹⁴³

RECOMMENDATIONS

> Continued next page

- 6.34 The requirement to provide the notice of search (including the inventory) need not be complied with if an application is made by an enforcement officer either at the time the warrant is applied for or within seven days of the exercise of the search power and a judge postpones the requirement upon being satisfied that there are reasonable grounds for believing that compliance would unduly prejudice ongoing or subsequent investigations, or endanger the safety of any person. Such postponement should be for a specified period of up to 12 months.

¹⁴³ See further chapter 13, paras 13.72 and 13.73.

RECOMMENDATIONS

- 6.35 If at the end of the postponement period the responsible officer believes that providing notice of the search to the occupier would continue to unduly prejudice ongoing or subsequent investigations or endanger the safety of any person, the officer should be able to make a further application to the judge. The judge should then make a final order:
- declining the application; or
 - if he or she is satisfied that the grounds for the application are made out, either extending the postponement until a future specified date when notification must then be given or dispensing with notification altogether.
- 6.36 Except in relation to copies or clones of information taken or made, where things have been seized, there should be no power to extend a postponement order or to dispense with the giving of the notice of search and inventory of things seized to the occupier.

Chapter 7

COMPUTER SEARCHES



Chapter 7

Computer searches

- INTRODUCTION** 7.1 Information retrieved from computers assists law enforcement agencies in detecting, investigating and prosecuting criminal activity.¹ Computer searches are necessary to investigate computer-related crime – both crime that is facilitated by computers, such as the distribution of child pornography, and crime that is committed against the owners of computer systems, such as hacking and transmitting computer viruses. Computer searches are also necessary to access evidence of non-computer related crime (for example, record-keeping of illegal drug transactions).
- 7.2 The concepts underpinning search and seizure powers apply with equal force to computer searches. But the rules regulating search and seizure powers have largely been designed with tangible items in mind, and their application to searches for data contained within a computer or other data storage device is at times uncertain.
- 7.3 For ease of reference, technical and other terms used in this chapter are explained in the glossary.

Parameters of this chapter

- 7.4 One of the terms of reference for this Report is that it consider “the adequacy of current powers in the light of modern technologies”.² In this chapter, we discuss computer searches in particular; however, our recommendations extend more generally to various devices that are capable of storing intangible data. While computers are an obvious location for storing information, other devices capable of holding information in an intangible form include mobile phones, electronic

1 Information technology is increasingly becoming the instrument of criminal activity: introductory remarks of Adam Graycar (ed) in Rodney McKemmish “What is Forensic Computing?” (1999) 118 *Trends and Issues in Crime and Criminal Justice* 1 Australian Institute of Criminology < <http://www.aic.gov.au> > (last accessed 19 February 2007).

2 In *Entry, Search and Seizure* (NZLC PP50, Wellington, 2002) the Law Commission did not deal directly with this topic on the basis that it had largely been dealt with in *Electronic Technology and Police Investigations – Some Issues* (NZLC SP12, Wellington, 2002). That Study Paper dealt particularly with interception warrants, the obligation to assist police with their investigations, tracking devices and Bill of Rights issues. Nevertheless, a number of further issues raised by modern technologies have now been identified and are discussed in this chapter, in chapter 3 (intangible items as evidential material: paras 3.31-3.34), in chapter 6 (for example, the proposed power to remove an item for examination: paras 6.86-6.95), in chapter 11 and in chapter 12 (paras 12.95-12.108, 12.113-12.119).



organisers, smart cards, security cards and network communications devices.³ Effective law enforcement requires a legal framework that permits its officers to retrieve information from these devices when appropriate.

- 7.5 The focus of this chapter is the search of stored data⁴ under law enforcement powers. Chapter 11 is relevant to law enforcement powers involving computers and other data storage devices that result in the real-time interception of communications or information.⁵
- 7.6 In this chapter we have specifically considered the powers of police to execute computer searches; however, our proposals extend to other agencies that require adequate powers to search computers in the course of their investigations.⁶
- 7.7 This chapter is primarily concerned with computer searches conducted under search warrant. There are circumstances in which the police and other agencies are authorised to search without warrant under our proposals.⁷ We have considered whether any additional requirements or criteria should apply before agencies may conduct computer searches when exercising such powers; however, we conclude that the criteria proposed in chapter 5 are sufficiently restrictive to make additional measures unnecessary – a warrantless search of a portable data storage device would be permitted only where the device could potentially hold evidential material relating to the offence for which the warrantless power is exercised. The recommendations made in this chapter are therefore intended to apply in the execution of search powers generally, both under warrant and without warrant (except where specifically limited to warrant powers).
- 7.8 This chapter covers issues that are of significance to searches for intangible data. However, the general recommendations in this report also apply to such searches, subject to any particular comments in this chapter.

Summary of recommendations

- 7.9 This chapter proposes clarifying and amplifying law enforcement powers to search computers and related powers as follows:
- computer searches to be conducted under the generic search and seizure framework subject to any necessary modifications;
 - statutory authorisation for law enforcement agencies to access and copy intangible data in the exercise of search powers;

3 Rodney McKemmish, above n 1. Examples of network communication devices are routers (devices that facilitate the transmission of data between computer networks) and hubs (devices that facilitate data transmission within a computer network).

4 Besides data storage, another key function of computers is external communication such as email, internet chat sites and more recently, telecommunication.

5 For example, the use of software technology by law enforcement agencies such as key-stroke loggers and other spyware would require a surveillance device warrant.

6 For example, the Serious Fraud Office, the Department of Internal Affairs, the Customs Service and the Ministry of Fisheries.

7 For discussion of warrantless powers of search and seizure, refer to chapters 5, 8 and 9.

CH 1
CH 2
CH 3
CH 4
CH 5
CH 6
CH 7
CH 8
CH 9
CH 10
CH 11
CH 12
CH 13
CH 14
CH 15
CH 16

- statutory authorisation for law enforcement agencies to use specialist forensic search methods for searching computers (such as previewing and forensic copying) under the proposed power to remove an item for examination;
 - statutory authorisation for law enforcement agencies, when exercising search powers, to:
 - access network data remotely from a computer or data storage device found on the search premises where remote access is otherwise lawful and where access is within the scope of the search power;
 - under search warrant, remotely access data where there is no specific physical location to which the search power can attach, but the search area is sufficiently identifiable by other means (for example, Webmail accounts);
 - conduct remote cross-border searches in limited specific circumstances;
 - applying the plain view doctrine to seizures of intangible data, to allow evidential material unrelated to the search warrant but which comes into plain view during a computer search to be seized;
 - expanding the power under section 198B of the Summary Proceedings Act 1957 to require assistance from certain people in accessing intangible data so that:
 - assistance can be sought from third party service providers holding access information;
 - assistance can be sought to access any type of data storage device;
 - the power is generally available to all law enforcement agencies, not just to the police;
 - clarifying that required assistance under section 198B of the Summary Proceedings Act 1957 includes handing over access codes, passwords and encryption keys;
 - adapting the power to use force to gain entry so that law enforcement agencies may use reasonable measures to gain access to data storage devices for search purposes;
 - requiring information about a computer search be given not only to the person whose computer is searched, but also to the person in overall charge of any computer network that is remotely accessed during the search;
 - in relation to forensically copied material:
 - requiring forensically copied material to be destroyed unless there is a basis for retention;
 - allowing agencies to retain forensically copied material in its entirety where a basis for retention is established.
- 7.10 Other recommendations in this Report that are relevant to computer searches include:
- clarification that “evidential material”, the proposed test for seizure in chapter 3 includes intangible material (chapter 3, recommendation 3.3);
 - the proposed power to remove an item (such as a computer hard drive, or a forensic copy of the hard drive) from the place where the search occurs for examination (chapter 6, recommendations 6.18 and 6.19);
 - the proposals relating to searches for information that may be subject to privilege or an obligation of confidentiality (chapter 12, recommendations 12.10, 12.17 and 12.18).

WHETHER
A DIFFERENT
SEARCH
REGIME IS
REQUIRED FOR
INTANGIBLE
MATERIAL

7.11 The initial question is whether the search and seizure regime that applies to tangible items should also apply to intangible material such as computer data or, alternatively, whether a more restrictive regime is required to regulate searches for intangible material. A more restrictive regime might impose a more stringent test to be met or different procedures for authorising and conducting a computer search.⁸

7.12 A principle that we have employed in considering powers of search and seizure with respect to intangible material is one of functional equivalence.⁹ The functional equivalence approach was developed in the context of electronic commerce, as a guide to adapting law developed for a paper-based environment to encompass electronic technology:¹⁰

The approach is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how these purposes or functions could be fulfilled through electronic-commerce techniques ... the adoption of the functional-equivalent approach should not result in imposing on users of electronic commerce more stringent standards of security (and the related costs) than in a paper-based environment.

7.13 Our recommendations in this area are therefore premised on the assumption that powers of search and seizure of intangible material should largely be equivalent to powers of search and seizure of tangible items, subject to particular provisions where there is no direct equivalent.¹¹

7.14 We have considered the potential impact of computer searches on human rights values such as privacy, outlined in chapter 2. The computer is a powerful repository of private information that has no exact equivalent in tangible terms. A person subjected to a search may be more concerned about law enforcement agencies accessing their computer than their premises, because of the complete picture that may be revealed about them. This is due to the range of information that may be present on a computer, such as personal correspondence, appointment diary, personal diary, business dealings, financial, banking and tax records and medical information. This information may also exist in tangible form, but tangible information is more likely to be dispersed throughout the premises and the specificity of the warrant is likely to preclude access to all of that information. In searching a person's computer, the concern is that a large amount of information of many

8 For example, if a specific warrant application was required to authorise search powers with respect to computer data, the judicial officer would have to determine whether the facts on which the warrant application is based justify a computer search in the circumstances.

9 The functional equivalence approach was utilised in the context of s 198A of the Summary Proceedings Act 1957 by Heath J in *A Firm of Solicitors v District Court at Auckland (A Firm of Solicitors (HC))* [2004] 3 NZLR 748, para 110 (HC). Heath J noted that s 198A was designed to deal with a paper-based environment but that now, more often than not, information is stored, primarily, in electronic form. Hence a functional equivalence approach to executing a search warrant is required.

10 United Nations Commission on International Trade Law *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment* 1996 (United Nations, New York, 1999) 20 < <http://www.uncitral.org> > (last accessed 10 July 2006). The functional equivalent approach was promulgated by the UNCITRAL Model Law and was followed by the Law Commission in *Electronic Commerce: Part One: A Guide for the Legal and Business Community* (NZLC 50, Wellington, 1998) para 14.

11 Although we acknowledge in paragraph 7.14 that the computer has no exact equivalent in tangible terms, we consider that functional equivalence is nevertheless a useful principle to employ in analysing the extent to which a search and seizure regime should be generic and the extent to which specific provision needs to be made for searches of intangible data.

different types, unrelated to the basis for the search, is potentially accessible.¹²

- 7.15 Another important factor is the pivotal role of computers in the commercial world, the sensitivity of a significant amount of commercial information held on computers and the potential for business disruption if computers are subjected to search and seizure by law enforcement.¹³
- 7.16 We have therefore considered whether it is desirable to create a more stringent search and seizure regime for intangible material. However, we have concluded that this would introduce additional hurdles for law enforcement agencies when collecting a significant proportion of evidential material that is created in intangible form. If it is harder for agencies to access intangible material than tangible information, this will also create an incentive for criminal organisations to use an electronic medium to conduct or record criminal activity wherever possible. The net effect would make it more difficult to investigate criminal activity.
- 7.17 Nevertheless, we have considered whether aspects of computer searches such as specialist search methods and remote access (discussed below) that challenge the traditional assumptions and protections of the search and seizure regime (that searches take place on and are limited to defined search premises) require that computer searches be regulated differently from other types of searches. In particular, we have considered whether these factors justify a requirement that computer searches be authorised by a specific warrant rather than a generic search warrant.
- 7.18 However, we do not favour distinguishing between tangible and intangible searches by using different procedures such as requiring a specific warrant to authorise a computer search.¹⁴ Often, law enforcement investigators may not know in advance of executing a warrant whether the required information is in tangible or intangible form.¹⁵ Any requirement that there be an additional warrant application after the initial search has located a computer needing to be searched would be problematic.¹⁶ An application for an additional specific warrant would be unlikely to contain any information additional to the information provided in support of a generic warrant, unless law enforcement agencies are to be required to conduct a search in stages, with a search for

12 Submissions were varied on whether a computer search involves a significantly higher level of intrusiveness than a physical search. The view of one submitter was that a computer search is substantively more intrusive. A counter view is that the fact that a search of data can generally be undertaken without the sort of intrusion upon a person's physical space that is often involved in the search for tangible items (for example, a thorough search of a person's bedroom) counterbalances to some extent the privacy issues raised by computer searches. The extent to which computer searches are automated is another factor reducing their potential intrusiveness. See Orin S Kerr "Searches and Seizures in a Digital World" (2005) 119 Harv L Rev 531, 551.

13 See Allan Watt, "Computer-based Offending in New Zealand" (1999) 5 NZBLQ 243, 253 as to commercial sensitivities arising out of computer searches.

14 A warrant may of course be specific in circumstances where a computer search is an express purpose of the warrant.

15 For example, financial records may be held in manual ledgers or on Excel spreadsheets on a computer, or a combination of the two; there is unlikely to be any way of specifying in advance the form in which the data is held.

16 In the Australian Attorney-General's Department *Review of the Commonwealth Criminal Law* (Fourth Interim Report, Canberra, 1990) para 39.30, it was noted, in the context of powers of examination and processing material found on premises in execution of a search warrant, that law enforcement will likely not know whether these specific powers are required in any particular case. It was considered that requiring the officer to return to the issuing authority to seek additional powers would risk a significant extension of the time taken to execute search warrants, to the inconvenience of all involved.

tangible items being conducted first, and the results of that initial search informing the application for a second warrant to search for intangible items. We do not believe that a staged approach to executing search warrants is practicable, given the additional complexity, potential for delay and risk to evidential material that would be introduced.

- 7.19 Accessing computer systems and seizing intangible material for law enforcement purposes constitutes such an interference with privacy rights that computer searches should be subject to and regulated by the search and seizure regime. However, the fact that information is stored in intangible form should not confer any greater protection from search and seizure than information that exists in tangible form; on balance, a different regime for the search and seizure of intangible material is not justified. We recommend that computer searches should generally be regulated by the search and seizure regime that applies to tangible items¹⁷ (subject to any necessary modification), in preference to creating a different regime carrying more restrictive requirements.
- 7.20 Our proposal for a generic regime, which allows for computer searches as an integral part of ordinary search powers, does not preclude specific legislative provision for computer searches for particular purposes. For example, Part 3A of the Customs and Excise Act 1996 confers specific powers on the New Zealand Customs Service in relation to computer searches.¹⁸

Australia: ancillary powers with additional threshold

- 7.21 We note that Australian legislation provides for an ancillary power to attach to search warrants for accessing of electronic data, and that no specific application for this power is required.¹⁹ However, the Australian provision specifies that the power to use a computer to access data may be exercised only where the officer executing the warrant has reasonable grounds to believe that the accessed data might constitute evidential material. The additional reasonable grounds to believe threshold (on top of satisfying the usual warrant requirements) appears to distinguish between searches for electronic data and searches for other items, suggesting that accessing a computer is regarded as a more significant act than searching for tangible items.
- 7.22 However, it is doubtful whether the additional threshold has any particular limiting effect. Under existing law, a warrant does not authorise searching any place in which the item being searched for could not reasonably be located. We do not see that the Australian threshold (that the data might constitute evidential material) would add any additional restriction to the New Zealand search and seizure regime, and arguably such a threshold would be redundant. We therefore do not favour introducing an additional threshold to be met in order to allow a computer search under warrant and recommend that whenever

17 The search and seizure framework and protections necessary to ensure consistency with reasonable expectations of privacy are outlined in chapter 2.

18 Part 3A of the Customs and Excise Act 1996 was enacted in 2004 as an intelligence-gathering measure to enable Customs to gain intelligence on the cross-border movement of people, goods and craft entering and leaving New Zealand in order to assess security and other risks that a particular person, good or craft may pose to New Zealand or to another country. It enables Customs to require people involved in the movement of goods, persons or craft (eg an owner/operator of a commercial craft or a travel operator) to provide access to certain information, whether electronically or otherwise.

19 Crimes Act 1914 (Cth), s 3L.

a warrant authorises a search for information, records or documents, which may be in tangible or intangible form, the officer executing the warrant may, without any other specific authorisation, search a computer system that may potentially contain the specified information.

RECOMMENDATIONS

- 7.1 Searches of computers should generally be regulated by the search and seizure regime that applies to tangible items (subject to any necessary modification), in preference to the creation of a different regime carrying more restrictive requirements.
- 7.2 Search powers should be generic and permit searches for tangible items or intangible material, with no specific application required to authorise a computer search.

LAW ENFORCEMENT ACCESS TO AND COPYING OF INTANGIBLE MATERIAL

Current New Zealand law

- 7.23 The search warrant regime under section 198 of the Summary Proceedings Act 1957 was developed before computer searches were contemplated. The terminology is therefore directed at searches for tangible rather than intangible items. For example, section 198 refers to the search for any “thing” which may be evidence of an offence and the authority to seize any such “thing.” Searches for and seizures of intangible material, such as computer data, do not fit this terminology.
- 7.24 Nevertheless, the courts have interpreted section 198 as extending to the accessing of computer data. Moreover, a number of recent legislative provisions²⁰ clearly contemplate that section 198 warrants allow computer data to be accessed, and may therefore be viewed as implicitly extending section 198 in this regard. But the extent to which data storage devices can be operated and data in them accessed is somewhat uncertain.
- 7.25 Police have the power under section 198 to open and search boxes and containers. By analogy this may offer some support for the view that the police are authorised to access computer data. But the analogy is imperfect, as there are significant differences between opening a box and looking inside and accessing data when carrying out a computer search.
- 7.26 The power to copy data is also unclear. Section 198 does not contemplate or expressly authorise copying or converting data into tangible form for removal. Section 198B empowers the officer executing the warrant to require assistance in accessing data, but this does not extend to assistance in copying or otherwise converting data into a form in which it can be removed.
- 7.27 As a matter of statutory interpretation, it could be argued that the current provision does not adequately authorise the police to access and copy intangible material when executing search powers. There are certain fundamental common law presumptions that the courts may apply in interpreting legislation, including the principles of

²⁰ For example, Summary Proceedings Act 1957, s 198B; Crimes Act 1961, s 252(3).

liberty of the subject and freedom of property.²¹ Arguably search and seizure powers need to be clearly stated, both as a matter of principle, and to avoid the risk of challenge to the authority of enforcement agencies to conduct computer searches.

- 7.28 Moreover, section 252 of the Crimes Act 1961 provides that it is a criminal offence to access any computer system without authorisation. Although access to a computer system pursuant to a search warrant or other legal authority is excluded from the offence under section 252(3), it is clearly desirable that the search and seizure regime expressly authorises enforcement agencies to access intangible material in the course of exercising their search powers.

Option for reform

- 7.29 Overall, compared with search warrant regimes in some New Zealand statutes²² and in overseas search warrant regimes, section 198 is deficient. We recommend express powers be enacted to allow enforcement agencies to access computer systems and other data storage devices and to copy intangible material in the exercise of their search and seizure powers.
- 7.30 Defined terms from current legislation, such as definitions of “access” and “computer system” contained in section 248 of the Crimes Act 1961 and the definition of “data storage device” from the Electronic Transactions Act 2002, could be adopted to provide an express power to access data.²³ Similarly, as recommended in chapter 6,²⁴ an express power to copy data could be structured around a definition of document²⁵ that includes information stored on a computer.

RECOMMENDATION

- 7.3 Law enforcement agencies should have express powers to access and copy intangible material from computers and data storage devices when exercising their search and seizure powers.

COMPUTER SEARCH METHODS

- 7.31 Computer searches can be conducted in different ways:
- by accessing data directly on the target computer and printing out or copying to disk any evidential material for removal (or requesting production of such material);

²¹ J F Burrows *Statute Law in New Zealand* (3ed, LexisNexis, Wellington, 2003) 219-226.

²² For example, the Serious Fraud Office Act 1990 and the Commerce Act 1986. In *A Firm of Solicitors v District Court at Auckland (A Firm of Solicitors (CA))*, [2006] 1 NZLR 586, para 100 (CA), the Court of Appeal noted that forensic copying of a computer drive appears to be the exercise of the power under s 12(1)(e) of the Serious Fraud Office Act 1990 to take a copy of a “document” (which includes, by virtue of s 2, any information recorded or stored by means of a computer or other device and any material subsequently derived from information so stored) if it is believed that the material on the hard drive may be relevant to the investigation. If there is such a belief, forensic copying is permitted, as is the removal of the copy from the premises at which the search occurs.

²³ See also the definitions and model provisions developed in The Commonwealth “Model Law on Computer and Computer Related Crime” (2003) 29(1) *Commonwealth Law Bulletin* 365.

²⁴ Chapter 6, recommendation 6.17.

²⁵ For a survey of various definitions of a document, see Judge David Harvey *internet.law.nz: Selected Issues* (2ed, LexisNexis, Wellington, 2005). See also the discussion of the Crimes Act 1961 definition of a document in *R v Misic* (2001) 3 NZLR 1, paras 31-38. See also definitions of electronic and information in the Electronic Transactions Act 2002, s 5, and the definition of publication in the Films, Videos, and Publications Classification Act 1993, s 2.

- by the use of write-blocking devices to preview data on the target computer. These devices allow a direct search of the data but quarantine it to preserve its evidential integrity, and allow enforcement officers or forensic analysts to copy evidential material;
 - by taking and searching a forensic copy of the hard drive of the target computer,²⁶ rather than searching the hard drive directly, thus preserving the evidential integrity of the data.²⁷
- 7.32 Computer data can easily be altered and merely turning a computer on causes data stored within the computer to change.²⁸ Any alteration of the data by the search process raises a risk of challenge to the reliability of evidential material produced from that search. A principal objective in the forensic examination of computer data is to ensure that data is not altered by the investigator during the examination process.²⁹ The first search method is therefore largely prohibited under police guidelines for computer searches, because of the risk the data will be altered and lose its evidential integrity,³⁰ although there may be circumstances where other search methods are not available to enforcement agencies and this is the only practicable method available.³¹

Previewing

- 7.33 Write-blocking devices allow enforcement officers or forensic analysts to preview data in read-only form without affecting the data.³² They also allow officers to copy evidential material and compile a detailed report on it for production as evidence in criminal proceedings.
- 7.34 However, the practicability of this search method depends on a number of factors:
- Because the search is conducted directly on the hard drive (which is removed for search under controlled conditions),³³ the search subject is deprived of the use of the computer for the duration of the search.
 - This search method allows the search of readily accessible data such as text, images and spreadsheets, but not categories of data that require specialist

26 Forensic copying is commonly known as cloning. However, the term forensic copying is now used by police computer forensics for consistency with their Australian counterparts. See the glossary for further explanation of forensic copying.

27 See Orin S Kerr “Digital Evidence and the New Criminal Procedure” (2005) 105 Colum L Rev 279, 288 for a case study outlining the forensic procedures used to conduct a computer search on a forensic copy of the computer hard drive.

28 See Allan Watt, above n 13, 256. See also *R v Good* [2005] DCR 804; Susan Brenner and Barbara Frederiksen “Computer Searches and Seizures: Some Unresolved Issues” (2001) 8 Mich Telecomm Tech L Rev 39, fn 82: “The very act of opening an application or file, even if there is no intention to alter anything, often in fact creates changes although they may not be immediately visible.”

29 *Kennedy v Baker* [2004] FCA 562, para 25.

30 See *R v Good*, above n 28, for a useful discussion of the consequences of the actions of a police officer who switched on a computer and searched computer files in breach of police guidelines. These procedures (New Zealand Police – Electronic Crime Unit Group Auckland *Basic Guidelines for the Recovery and Seizure of Computer Related Evidence at the Scene of the Crime*) are reproduced as Appendix 5, Judge David Harvey, above n 25.

31 For example, a selective copy of data may be the best available evidence where the data of the search subject is stored by a third party such as a bank or an internet service provider in conjunction with the data of a great many other clients.

32 See the description of the use of Fastbloc in *Kennedy v Baker*, above n 29, para 26.

33 This is current police practice. It is foreseeable in future that preview searches using write-blocking devices may be able to be conducted at the scene in mobile laboratories.

software to access or recover. Where enforcement officers or forensic analysts need to search for hidden or deleted data, for example, they will need to search a forensic copy of the data that allows a more complete search for evidential material.³⁴

- Where there are a number of hard drives to be searched or the computer contains a large amount of potentially searchable data, previewing can be time-consuming. A search of a forensic copy of the data may be the only practicable search method in the circumstances.

Forensic copying

7.35 In *Kennedy v Baker*³⁵ evidence was given describing the advantages of forensic copying over other methodologies.³⁶ While the witness confirmed that it is technically possible to copy relevant files from the examined hard drive, this is not the standard forensic practice because, in that case:

- the relevant files exist in a complex interrelationship with all other files, including the Microsoft Windows Operating System, and it will likely be essential to determine from both the file and the interrelated system files the date and the time the relevant files were created, modified or last accessed, the user responsible and the circumstances in which they were created;
- a file extracted from an examined hard drive may be meaningless without the ability to interpret it with the programme or programmes installed in the computer which created it;
- current forensic software is designed to deal with complete hard drives; extracting individual files greatly reduces the ability to maintain forensic integrity.

7.36 Forensic copying is therefore a tool that enables enforcement agencies to examine computer data in great detail, to locate and identify evidential material (including the recovery of deleted files and images), while maintaining the evidential integrity of the data.

Relative merits of different search methods

7.37 The choice of search method may vary depending on the law enforcement agency involved. In searching for objectionable images, the Department of Internal Affairs can efficiently use the preview search method to quickly identify offending material. The Serious Fraud Office prefers to search forensically copied material exclusively. The nature of the offences under investigation (complex fraud that often requires historical investigation) means that the search is

34 See the evidence of an independent forensic computer analyst as to the limitations of preview searches in *A Firm of Solicitors (HC)*, above n 9, para 82 (paragraphs 22-24).

35 *Kennedy v Baker*, above n 29, para 76. In that case, forensic copying is described as imaging.

36 See also the reasons advanced by an independent forensic computer analyst assisting the Serious Fraud Office in *A Firm of Solicitors (HC)*, above n 9, in favour of forensic copying as the preferred methodology at para 82 (paragraph 21):

- The entire evidence on the digital medium is available to the investigator to either substantiate or refute the allegations made;
- To avoid circumstances where a potential suspect may alter, destroy, or otherwise affect the evidence to which the investigator has the authority to seize;
- It is usually the fastest and most economical methodology, and ensures minimum disruption to the subject whose computers have been seized. At the same time it enables the investigation to proceed at the fastest possible rate.

document driven and that previewing is too limited a search method. The police either use preview searches or search forensically copied material, depending on the nature of the information sought.

- 7.38 Previewing will be a suitable search method in the case of less complex searches for readily accessible discrete data, where the search can be conducted relatively quickly (so that the search subject is not deprived of their computer for an unreasonably long period). Otherwise, we accept that for more complex searches where some data may not be readily accessible or may not exist discretely, or for lengthy searches, forensic copying should be the preferred search method.

Current New Zealand law

- 7.39 The use of specialist search methods to conduct computer searches does not fit comfortably within the current search and seizure framework. The main difficulties are:
- The data storage device must be removed from the search premises as a precursor to searching the device. A search warrant authorises a constable to seize “any thing which there is reasonable ground to believe will be evidence as to the commission of an offence punishable by imprisonment”.³⁷ If the material has not been viewed prior to removal, it will be difficult to form the necessary belief required to authorise the seizure of the computer hard drive (or a forensic copy).³⁸
 - Seizure of computer data is not selective. The removal of the computer hard drive involves the removal of a substantial amount of irrelevant material as well as any relevant material.³⁹ Concerns also arise where data removed may include legally privileged material.⁴⁰
- 7.40 Because of these difficulties, the extent to which enforcement agencies may utilise specialist search methods in order to execute a computer search is unclear. Different approaches can be discerned from New Zealand case law.
- 7.41 In *Calver v District Court at Palmerston North*,⁴¹ the High Court held that, notwithstanding the practical difficulties that may arise where the number of documents to be searched is large or stored on a computer, section 198 does not authorise irrelevant material to be seized. The necessary sifting process to determine relevance must be carried out on the warrant premises unless the owner consents to its removal.
- 7.42 Other High Court decisions have not rejected the use of specialist search methods such as forensic copying, although in some of those cases there were other

37 Summary Proceedings Act 1957, ss 198(1) and (5).

38 There is also an issue as to whether the removal of a forensic copy constitutes a seizure. See, for example, Victorian Parliament Law Reform Committee *Warrant Powers and Procedures, Final Report* (No 170 of Session 2003-2005, Melbourne, 2005) 296-297.

39 *Calver v District Court at Palmerston North* [2005] DCR 114, 130 (HC) Miller J: “Seizure of material for later sifting into that which is relevant and that which is not is still a search and seizure in obedience to the warrant. The issuer must believe on reasonable grounds that all of the material to be seized will be evidence of the offence.” It was noted that alternative options to forensic copying were available to the police in the circumstances of the case.

40 See further, chapter 12, paras 12.95-12.108.

41 *Calver v District Court at Palmerston North*, above n 39.

difficulties with issuing or executing the search warrant.⁴² In *Attorney-General v Powerbeat International Limited*,⁴³ Hammond J indicated that whether forensic copying is permitted depends on the circumstances and is to be judged on the basis of proportionality and reasonableness on a case-by-case basis.

7.43 In *A Firm of Solicitors v District Court at Auckland*,⁴⁴ the Court of Appeal specifically considered whether removing and forensically copying a computer hard drive off site were authorised by the warrant issued under the Serious Fraud Office Act 1990. The court noted that the forensic copying of a computer hard drive appears to be the exercise of the power under s 12(1)(e) to take a copy of a “document” if it is believed that the material may be relevant to an investigation. The Court did *not* consider it to be the law in New Zealand, at least in the context of the Serious Fraud Office Act, that:

- the Serious Fraud Office could never remove a computer hard drive containing irrelevant or privileged material; or
- forensic copying a hard drive on site followed by removal of the copy is never permitted.

7.44 The court considered that the search warrant had not been drafted with appropriate specificity. But the court went on to consider whether, if a warrant was appropriately specific, the Serious Fraud Office could remove the computer hard drive and make a forensic copy of it, subject to the warrant including conditions to protect legal professional privilege. The court expressed the view that a warrant could be issued that empowered the hard drive to be removed for forensic copying and extracting relevant (non-privileged) material if:⁴⁵

42 See, for example, *South East Resources Ltd v Chief Executive, Ministry of Fisheries, Michael Green and Rex Healy* (18 December 2001) HC WN CP 211/01 Heron J, where the High Court considered forensic copying of computer records in the context of a search under section 79 of the Fisheries Act 1983. See also *N v Attorney-General and the Auckland District Court* (19 March 2003) HC AK M1600-02 Randerson J, where a search warrant was executed at the surgery of a medical practitioner. Following judicial review proceedings, it was agreed that the hard drives of the medical practitioner’s computer could be copied by the police in the presence of an independent medical practitioner. See also *J v Hastings District Court* (16 December 2004) HC NAP CIV-2004-441-93 France J, where forensic copying of the hard drive was necessary for the police to determine whether two emails had been sent from a particular computer, and to rule out the possibility that they had been maliciously planted. Although the warrant was found to be too broad because it failed to specify conditions in order to protect patient confidentiality, the High Court declined to make an order that the warrant was invalid.

43 *Attorney-General v Powerbeat International Limited* (1998) 16 CRNZ 555. When executing a search warrant against a technology development company, three computer hard drives were seized for copying and then return to the company.

44 *A Firm of Solicitors (CA)*, above n 22. In the High Court decision, above n 9, forensic copying as the mode of execution of a warrant issued under the Serious Fraud Office Act was found to be reasonable and not in breach of s 21 of the Bill of Rights Act. However, the search warrant was found to have been invalidly issued and was quashed.

45 At para 111, the Court made an analogy between removal of a hard drive or a copy of it and “the removal of a book or very long document which contains a combination of relevant, irrelevant and privileged material. The fact that there is privileged material or irrelevant material in the book should not prevent the officers conducting the search from removing the book. It cannot be contemplated that the search would involve reading the whole book on site and tearing out the pages containing relevant and non-privileged information for removal.”

- the issuing judge was satisfied as to all of a number of relevant factors;⁴⁶
- the warrant was on such terms that it preserved the law firm's right not to disclose any privileged communication;
- conditions were imposed.⁴⁷

The court also noted that the issuing judge would need clear evidence that no practical alternative existed and that the forensic copying and subsequent extracting of evidential material should be undertaken by an appropriately qualified and independent expert, possibly supervised by the issuing judge or a person appointed by the judge for the purpose.⁴⁸ The court noted that similar considerations would apply to forensic copying conducted at the site of the search, and the subsequent removal of the forensic copy.

Options for reform

- 7.45 We consider that the use of specialist search methods such as previewing and forensic copying are indispensable forensic tools to investigations involving intangible material and that the use of these search methods should be clearly authorised under the search and seizure regime. As outlined above, using specialist forensic search methods generally requires removing the data storage device from the search premises for searching in a manner that ensures both the recovery of evidential material and the integrity and reliability of that material.
- 7.46 We considered whether forensic copying could be authorised under the recommended power to copy documents (including information stored in a computer or other device).⁴⁹ However, the terms of that recommendation provide that the power is conditional on there being reasonable grounds for believing that the document is seizable under the search power being exercised. As highlighted above, it may be unclear at the point that a forensic copy is made whether it includes data that is seizable.
- 7.47 In chapter 6 we have recommended a power allowing an item to be removed from the search premises for examination.⁵⁰ The power is not automatic but may be used where it is not reasonably practicable to determine whether an item may be seized at the place where the search occurs, for instance, where the enforcement

46 The necessary factors identified at para 106 were:

- there are reasonable grounds to believe that there is data stored on the hard drive which is, or may be, relevant to the investigation;
- this evidence cannot be extracted from the hard drive without the use of forensic investigative techniques;
- it is not practicable to carry out those extraction measures on site without the risk of destruction of the evidence or the risk that relevant evidence will not be successfully extracted; and
- there is no practicable alternative to removing the hard drive itself for the purpose of undertaking the extraction measures off site.

47 At para 107 the Court notes that these would need to include: (i) a condition ensuring that material relating to other clients of the firm was not accessed except where unavoidable to ascertain if the material is irrelevant, and (ii) a condition ensuring that irrelevant material relating to other clients or to the firm itself, and material relating to the client under investigation which was not relevant to the investigation, was permanently deleted from the clone after extraction the relevant, non-privileged, material, or returned to the law firm.

48 This supervisory requirement was suggested due to the presence of privileged material.

49 See chapter 6, paras 6.82-6.85 and recommendation 6.17. The power to copy documents was noted by the Court of Appeal to be the basis for making a forensic copy of a computer hard drive in *A Firm of Solicitors (CA)*, above n 22.

50 Chapter 6, recommendation 6.18.

officer is unclear whether an item contains evidential material or not without some further forensic analysis or processing that cannot safely be performed on site. We consider that a computer or data storage device falls into this category.⁵¹

- 7.48 We recommend that the proposed power to remove an item for examination should be supplemented with powers authorising (i) the forensic copying of data either at the place where the search occurs or following removal of the data storage device for purposes of such examination⁵² and (ii) examination of the forensic copy.
- 7.49 Criteria suggested in chapter 6 to assess whether or not it is reasonably practicable to assess on the search premises whether an item may be seized include:⁵³
- whether other options are practicable in the circumstances;
 - whether the evidence is not able to be accessed without using off site equipment or expertise;
 - the risk of damaging or destroying evidence if the examination or analysis is carried out at the place to be searched;
 - whether using off site equipment or expertise is necessary to preserve the evidential integrity of the item;
 - the length of time it would take and the level of intrusiveness of the search if the examination or analysis were carried out at the place where the search occurs.
- 7.50 Current forensic practice dictates that, because of the risk of compromising the evidential integrity of the data, it is never reasonably practicable to search computer data without using specialist search methods. This suggests that the power to remove a computer hard drive for examination (either to execute a preview search, or to take a forensic copy for search purposes) should be automatic, arising whenever the scope of the search power authorises a computer search. However, we consider that the proposed power to remove an item for examination, which is subject to an assessment of practicability, is an appropriate basis on which a computer hard drive or other data storage device may be removed for examination.⁵⁴ This maintains a presumption that generally a search is to be carried out on site unless there are special circumstances justifying the removal of certain items for off site examination. The not reasonably practicable test should be readily satisfied by enforcement agencies in circumstances where a computer search is necessary, given the forensic processes involved.

51 This test should apply to searches of data storage devices on the exercise of warrantless powers, as well as to searches carried out under search warrant.

52 The Commerce Commission submitted that best practice followed by contracted computer forensic experts is for the forensic copying process to be carried out off site. Because the making of a back-up copy can take nearly as much time as the forensic copying itself, it is almost always impractical to make a back-up on site.

53 Chapter 6, para 6.93.

54 This is different to the Australian approach where imaging of data is dealt with as a power to copy data (Crimes Act 1914 (Cth), s 3L(1A), as discussed in *Kennedy v Baker*, above n 29), rather than under the power to examine or process things (Crimes Act 1914 (Cth), s 3K). See also *Hart v Commissioner, Australian Federal Police* (2002) 196 ALR 1 and *Australian Securities and Investments Commission (ASIC) v Rich* (2005) 220 ALR 324. However, the proposal is consistent with the UK approach under s 50 Criminal Justice and Police Act 2001 (UK). For a US perspective, see “Digital Evidence and the New Criminal Procedure”, above n 27, 315, commenting that courts have loosened the traditional rules to allow off site searches and that there is now a new Fourth Amendment rule: “A valid warrant entitles investigators to seize computers and search them off-site at a later date.”

- 7.51 In the Serious Fraud Office case,⁵⁵ the Court of Appeal suggested that the issuing judge would need to be satisfied that there were reasonable grounds to believe that there was data stored on the hard drive which was, or may be, relevant to the investigation before a warrant under the Serious Fraud Office Act could empower the removal of a hard drive. We do not favour including this type of additional reasonable grounds to believe threshold for the reasons outlined in paragraph 7.22 above. Other factors suggested by the Court of Appeal have been reflected in the proposed criteria for whether or not it is reasonably practicable to determine on the search premises whether an item may be seized, outlined in chapter 6.⁵⁶
- 7.52 We acknowledge that the use of search methods such as previewing and forensic copying may impact on human rights values such as privacy, due to the totality of information that is copied or removed from the search premises so that the data can be searched. To minimise the potential impact on human rights values, it will be important to ensure that the power to remove data for examination is constructed as a power to examine the data in accordance with all the usual protections that apply to the exercise of search powers. These include the specificity requirement, conducting the search within the scope of the search power and observance of section 21 of the Bill of Rights Act. Post-seizure procedures regulating the retention, use and disclosure of data will also be important. Subject to this, we consider that specialist search methods for conducting computer searches should be available to enforcement agencies.

RECOMMENDATIONS

- 7.4 Specialist search methods for searching computers, such as previewing and forensic copying, should be available to law enforcement agencies under the proposed power to remove an item for examination outlined in chapter 6, recommendation 6.18.
- 7.5 Where an agency is authorised to remove a computer for examination, there should be express authority to forensically copy the computer hard drive or other data storage device, either before or after its removal for examination, and to examine the forensic copy.

SPECIFICITY Specificity of the warrant

- 7.53 Where enforcement agencies are authorised to conduct computer searches, they should not be able to access data indiscriminately. Warrants and the applications for them must identify what they are looking for with reasonable specificity.⁵⁷
- 7.54 This raises the issue of how the specificity requirement will be met in the context of computer searches. The US courts have considered the challenges that the particularity requirement (the US equivalent of the specificity

⁵⁵ *A Firm of Solicitors (CA)*, above n 22.

⁵⁶ Chapter 6, para 6.93.

⁵⁷ The specificity requirement is discussed in chapter 4, paras 4.134-4.135.

requirement)⁵⁸ may pose in searches of computer data. The US courts have held that the degree of specificity required will vary, depending upon the crime involved and the type of items sought. Thus a description will be valid if it is as specific as the circumstances and the nature of the activity under investigation permit.⁵⁹ A general description may suffice when investigators can supply no better information, but fail when a narrower description was available based on the information reasonably available to law enforcement.⁶⁰

7.55 A lack of particularity increases the likelihood that a warrant will be classified by the courts as a general warrant and therefore too broad. Descriptions of the information sought to be seized should include limiting phrases that can modify and limit the all records search, such as specifying the offence under investigation,⁶¹ the target of the investigation, if known, and the time frame of the records involved.⁶² But US courts have held that general or broad warrant descriptions such as “all computer hardware, software, and related equipment,”⁶³ are permissible in certain circumstances, such as where:

- a more precise description is not possible;⁶⁴
- the suspect made it difficult to describe particularly the items to be seized, for example, by mingling legitimate business documents with documents probative of criminal offending;⁶⁵
- the alleged offending was reasonably believed to permeate the suspect’s entire organisation;⁶⁶
- a complex scheme is under investigation.⁶⁷

7.56 In a New Zealand decision, the Court of Appeal noted a distinction between the information sought by the warrant and the storage devices sought to be searched for that information:⁶⁸

Some items were identified with great specificity, such as the sale and purchase agreement for the suspect transaction and correspondence, emails and file notes relating to the suspect transaction involving any of Z, A, B and the two suspected lawyers. But the list also included generic items which were clearly too broad, such as “Electronic media (including floppy discs, hard drives, hard copy CDs)” and “Hand held computers, or other electronic storage devices”. It may have been proper to

58 The Fourth Amendment to the US Constitution requires that a valid warrant “particularly describe the places to be searched and the things to be searched”: *United States v Hersch* (1994) US Dist LEXIS 14677. See also *In the matter of the search of 3817 W. West End* (2004) US Dist LEXIS 26895: “It is frequently said that the purpose of the particularity requirement is ‘to prevent a general exploratory rummaging in a person’s belongings’...But the particularity requirement serves another important purpose as well: it assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search and the limits of his power to search”.

59 *United States v Blum* (1985) 753 F 2d 999, 1001 (11th Cir), cited in *United States v Henson* (1988) 848 F 2d 1374, 1383 (6th Cir).

60 *United States v Ford* (1999) 184 F 3d 566, 576 (6th Cir); *United States v Henson*, above n 58, 1382-83.

61 *United States v Kow* (1995) 58 F 3d 423, 427 (4th Cir).

62 *United States v Ford*, above n 60.

63 See, for example, the description in *United States v Henson*, above n 59, 1382.

64 *United States v Cardwell* (1982) 680 F 2d 75, 78 (9th Cir), cited in *United States v Lacy* (1997) 119 F 3d 742, 746 (9th Cir).

65 *United States v London* (1995) 66 F 3d 1227, 1238 (1st Cir).

66 *United States v Bentley* (1987) 825 F 2d 1104, 1110 (7th Cir); *United States v Logan* (2001) 250 F 3d 350, 365 (6th Cir).

67 *United States v Hersch*, above n 58.

68 *A Firm of Solicitors* (CA), above n 22 para 79.

include these as items which needed to be searched for relevant evidence, but not to say that they were, themselves, items of evidence relevant to the investigation.

Specificity of the search

7.57 An additional specificity issue arises in the context of computer searches. Regardless of the degree of specificity of the data sought by the search, it is arguable that the nature of the storage medium gives rise to an increased risk that irrelevant material will be searched. Computer searches generally involve a great deal of irrelevant material that is intermingled with evidential material. A US commentator has argued that the particularity requirement does not impose the same restrictions on searches of computers as it does in the physical context due to the following factors:⁶⁹

- the large amount of information held on computers (compared to the amount of potential physical evidence in a search of premises);⁷⁰
- the fact that electronic evidence can be hidden anywhere, so that the usual rule limiting a search for tangible items to places where the evidence described in the warrant might conceivably be located does not provide the same limitation in a search for intangible items;⁷¹
- the thorough nature of a forensic examination of a computer compared to a physical search of premises;
- the fact that computer searches typically occur off site in the police computer laboratory and are not limited by the same time constraints as a search of premises.

The interplay of these factors gives rise to a perception that computer searches are at risk of becoming a general trawling exercise, rather than a focussed search for particular material. We have therefore considered whether there should be controls on the way that the computer search is conducted in order for the search to be sufficiently limited.

Options for reform

7.58 US courts have suggested technical means to limit computer searches to data that is reasonably likely to yield evidential material, such as searching by file name, directory or sub-directory; specifying the name or recipient of email to be searched; specifying particular types of files to be searched (such as .xls for spreadsheets, .jpg or .bmp for graphics files, .html for internet files or documents and .doc for word processing documents); use of specific key words or phrases in a keyword search; specifying file date and time of creation; and confining a search to a specific compartment such as email storage.

7.59 This approach to controlling computer searches is somewhat problematic. Specifically, there is a concern that limiting a computer search to keywords would produce an incomplete search, as keyword searches only operate on files

69 “Searches and Seizures in a Digital World”, above n 12. “The particularity requirement does less and less work as the storage capacity of computers gets greater and greater”, 565.

70 See also “Digital Evidence and the New Criminal Procedure”, above n 27. “Because computers can store an enormous amount of information, the evidence of crime is akin to a needle hidden in an enormous electronic haystack”, 301.

71 “Digital Evidence and the New Criminal Procedure”, above n 27, 304. “Digital evidence alters the relationship between the size of the space to be searched and the amount of information stored inside it”, 302.

containing identifiable text.⁷² A significant amount of potentially incriminating data is not stored as accessible text, but may be stored in other formats, (for example, images or video), as deleted text, or in a compressed or encrypted format. Keyword searches also require a high degree of accuracy as to the search term selected and will miss other spellings.

7.60 In relation to limits on computer searches generally, Kerr⁷³ has considered whether computer searches should be conditional upon the pre-approval of search protocols by a judicial officer, but concludes that ex ante restrictions such as search protocols are an inappropriate response, given the highly contingent and unpredictable nature of the forensic process: “Identifying the best [search] technique usually must wait until the search occurs.”⁷⁴

7.61 We have therefore concluded that the non-standard nature of computer forensic processes means that controls such as search protocols would not be a practical requirement to supplement the warrant specificity requirement:⁷⁵

It is important to remember that many criminals make an effort to conceal incriminating evidence. If the search methods employed do not take into consideration that evidence could be hidden, suspiciously modified, compressed, encrypted or even uniquely fragmented within all accessible forms of media, then we are conducting incomplete searches. Therefore, while methods [to] streamline and narrow digital data searches can be helpful in some situations, they could be a hindrance in others. Ultimately, searching for evidence on a computer system is a creative process requiring an experienced examiner. Restricting this creativity by specifying in the warrant how the search must be conducted can easily result in an incomplete examination and lost evidence.

7.62 We also note that judicially imposed controls on computer searches would be more restrictive than the general approach taken to the forensic analysis of tangible items. Forensic scientists, for example, are not usually directed as to the type of DNA test that should be used to analyse a sample.

7.63 We have considered whether introducing a post-search requirement that enforcement agencies compile a record of the forensic process used in a computer search (for example, keywords used and a summary of files viewed) would reinforce the specificity requirement in the context of computer searches, as an accountability measure and as an added incentive for agencies to ensure that the

72 See also the evidence as to the limitations of keyword searches of an independent forensic computer analyst assisting the Serious Fraud Office in *A Firm of Solicitors* (HC), above n 9, para 82 (paragraphs 22-25).

73 “Searches and Seizures in a Digital World”, above n 12, 572, in which Kerr responds to Raphael Winick’s influential article (“Searches and Seizures of Computers and Computer Data” (1994) 8 Harv J L & Tech 75) proposing that a US rule controlling intermingled documents (that where officers come across relevant documents so intermingled with irrelevant documents that they cannot feasibly be sorted at the site, the officers may seal or hold the documents pending approval by a magistrate of the conditions and limitations of a further search through the documents) should be applied to computer storage media. Kerr also notes a court decision adopting Winick’s approach (*In the Matter of the Search of 3817 W. West End*, above n 58, where the judge refused to allow a computer search without a specific judge-approved protocol). For counter-arguments to Winick’s proposal, see also David J S Ziff “Fourth Amendment Limitations on the Execution of Computer Searches Conducted Pursuant to a Warrant” (2005) 105 Colum L Rev 841.

74 “Searches and Seizures in a Digital World”, above n 12, 575. There is also an issue as to whether disclosure of the proposed search method would have a detrimental effect on police operations by providing the opportunity for potential offenders to avoid detection. See, for example, *Lawrence v Police* [2001] DCR 838.

75 J J Mclean “Homicide and Child Pornography” in E Casey (ed) *Handbook of Computer Crime Investigation: Forensic Tools and Technology* (Academic Press, San Diego, Calif., 2002) 373.

search is conducted within the limits of the search power. The advantages of such a requirement could include additional transparency around the way in which computer searches are conducted. We note that it may be difficult for a search subject to determine whether a computer search has been conducted reasonably and therefore in observance of section 21 of the Bill of Rights Act, if the search subject has no information as to how the search was conducted and what material was reviewed during the search.⁷⁶ Record-keeping may also benefit the agency conducting the search, should evidence derived from the search be challenged by the search subject and the agency be called on to justify the way in which the search was conducted.⁷⁷

- 7.64 However, we have concluded that any advantages that might be gained by introducing a mandatory record-keeping requirement in every case would likely be outweighed by the additional administrative costs and the diversion of resources involved in compiling such reports.⁷⁸ Moreover, it is not clear that search records, particularly in relation to complex searches, would necessarily allow a search subject to assess the reasonableness of the search. Search records may also add unnecessary complexity to trials in which evidential material derived from computer searches is adduced.
- 7.65 The key protection available for search targets remains the ability to challenge evidential material produced in court (either on the basis that the material is beyond the scope of the search power or was obtained unreasonably in terms of section 21 of the Bill of Rights Act). Where a law enforcement agency seeks to use evidential material derived from a computer search in prosecuting a particular offence, the defendant will have the opportunity to test the way in which the search was conducted through both discovery and cross-examination at trial.
- 7.66 A record-keeping requirement may provide an additional safeguard where computer searches exceed the scope of the search power, but either no evidential material is discovered, or such material is discovered but is not raised in court when the offence is prosecuted. In such a case, the search subject would have to pursue a remedy under the Privacy Act 1993 or a claim for damages under the Bill of Rights Act. A search record may make it easier to bring such a claim. Again, however, we do not consider that the advantage that might be gained in this context is sufficient to justify the additional costs that would be introduced by a requirement for mandatory record-keeping.
- 7.67 We note that the risk of abuse is limited by the professional standards of enforcement agencies, the time involved in computer forensics that militates against extraneous searches, the quantity of data to be searched that requires the search to be as targeted as possible and the risk of challenge to material gathered outside the scope of the warrant. We also note that, to a significant degree, computer searches are automated by virtue of electronic search tools, the results

76 A similar issue arises in searches for tangible items where the search subject is not present during a search. However, in a search for tangible items, there is usually a finite amount of material that is potentially searchable. In the context of a computer search, the amount of material that is potentially searchable is likely to be much greater.

77 This will be important in relation to plain view material discussed at paras 7.68-7.73 below.

78 Forensic software, such as EnCase, that is used to conduct a computer search produces a record of keyword searches. However, this is not a complete search trail as it does not record the visual checking of data by the enforcement officer or forensic analyst who would likely need to maintain a search log manually to comply with a record-keeping requirement.

of which are reviewed by enforcement officers or forensic analysts. This may actually be less intrusive in the circumstances that a physical search of numerous paper files. Finally, implementing the recommendation prohibiting the disclosure of information obtained from a search⁷⁹ would improve the privacy protection of searched data.

SEIZURES BEYOND THE SCOPE OF THE SEARCH POWER: PROPOSED OPERATION OF THE PLAIN VIEW DOCTRINE

- 7.68 We have considered the potential for computer search methods to uncover unrelated evidential material that enforcement agencies may seize under the plain view doctrine.⁸⁰ We have therefore considered whether there should be any limitations on the operation of the plain view doctrine in the context of computer searches. For example, if a computer is being searched for records relating to drug dealing and child pornography is discovered, should enforcement officers or forensic analysts be able to search all other files in the computer for child pornography without obtaining an additional search warrant?
- 7.69 In relation to tangible evidential material, our approach is that evidence that is not covered by the search power may only be seized if it comes into plain view⁸¹ during the course of the search; and that seizure of such material does not authorise the search of the premises for additional evidence of that or similar offences unless it is authorised by some other statutory provision (for example, section 18 of the Misuse of Drugs Act 1975) or by the obtaining of a further warrant.
- 7.70 We recommend that this approach apply similarly to intangible evidential material. Brenner and Frederiksen emphasise that the plain view doctrine is predicated on visual observation.⁸² In relation to computer data, whether the plain view doctrine would apply would depend on whether the incriminating nature of the information is immediately apparent to the enforcement officer, without further analysis. If enforcement officers or forensic analysts see evidential material for an unrelated offence during access pursuant to a search power and they have jurisdiction to obtain a warrant in respect of that offence,⁸³ they may seize or retain that material.⁸⁴ But officers may not then search for further evidence of that or similar offences (for example, by trawling through a large amount of data stored on a computer) without separate authority to do so. Where it is necessary to scrutinize a large amount of data while executing the search, the purpose of the scrutiny should be only to identify the data falling into the description authorised by the search power. Such scrutiny should not be conducted “at large” as an intelligence gathering exercise.⁸⁵

79 See chapter 14, recommendation 14.5.

80 In chapter 3, recommendation 3.11 we recommend that the plain view doctrine be codified in New Zealand.

81 Plain view requires that the material in question clearly be evidential material, with no further detailed examination of the material.

82 Brenner and Frederiksen, above n 28. See also Ziff, above n 73, 871: “the immediately apparent requirement, while of little protection against the seizure of child pornography, provides robust privacy protection for most other types of personal documents and information.”

83 Where the officer has no jurisdiction in respect of the unrelated offence, the officer may inform another law enforcement agency that has jurisdiction in respect of that offence: see chapter 3, paras 3.162-3.163.

84 See also Computer Crime and Intellectual Property Section, Criminal Division, United States Department of Justice *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* < <http://www.cybercrime.gov> > (last accessed 12 July 2006): “For example, if an agent conducts a valid search of a hard drive and comes across evidence of an unrelated crime while conducting the search, the agent may seize the evidence under the plain view doctrine. The plain view doctrine does not authorise agents to open and view the contents of a computer file that they are not otherwise authorised to open and review.”

85 James A Fontana (ed) *The Law of Search and Seizure in Canada* (5ed, Butterworths, Ottawa, 2002) 763.

- 7.71 We note that there is academic debate in the United States over how the plain view doctrine applies to computer searches. Because a great deal of information may come into plain view during forensic analysis of a computer hard drive due to the large amount of potentially searchable material and the thorough nature of the forensic process, there is an argument that the plain view doctrine should be more restricted in the context of computer searches.⁸⁶
- 7.72 Kerr suggests a number of possibilities that may limit the operation of the plain view doctrine with respect to computer searches:⁸⁷
- examining the intent of the executing officer:⁸⁸ where the officer tries to look for evidence described by the warrant, the discovered material may be seized, but where the officer ignores the warrant, the material may not be seized (although the officer's subjective intent may be difficult to know, especially where police policy mandates a very thorough search);
 - requiring investigators to use targeted search tools (although forensic tools are constantly evolving and vary depending on the different circumstances of each search);
 - assessing the reasonableness of the search and allowing the plain view evidence to be seized if the search is considered to be reasonable (although this may be difficult to assess where only part of the forensic process is found to be unreasonable and, because electronic evidence can be located anywhere on a hard drive, it may be difficult to find that a particular search was objectively unjustifiable);⁸⁹
 - limiting the operation of the doctrine by the type of offence, so that plain view evidence can only be seized for more serious offences (but it is difficult to draw the line between which offences are serious enough to allow the plain view doctrine to operate and which are not, and there may be a tendency for lawmakers to expand any category of serious offences over time, thus diluting the protection);
 - discarding the plain view doctrine entirely for computer searches (but Kerr concludes that while this solution may one day be necessary given likely future developments in technology, it is not warranted at present).
- 7.73 Some submissions to us argued in favour of the last of the above options, either because the application of the doctrine unduly extends the scope of the search, or because it is too difficult to apply the doctrine in the digital context. However, we consider that the fact that the plain view doctrine is necessarily limited to superficially apparent incriminating material, together with the protection

86 See "Searches and Seizures in a Digital World", above n 12, 577.

87 "Searches and Seizures in a Digital World", above n 12, 577 and following.

88 See, for example, two US cases discussed by Kerr in "Digital Evidence and the New Criminal Procedure", above n 27, 316-7: In *United States v Carey* (1999) 172 F 3d 1268 (10th Cir) an investigator searching through a seized hard drive for evidence relating to cocaine came across images of child pornography. The investigator stopped searching for narcotics-related evidence and spent the next several hours searching for images of child pornography. The court ruled that because the officer changed the focus of his search from one type of evidence to another, the discovery of the evidence beyond the scope of the warrant was impermissible and the evidence was suppressed. In *United States v Gray* (1999) 78 F Supp 2d 524 (ED Va) an investigator looking through a seized hard drive pursuant to a warrant for evidence of computer hacking came across an image of child pornography. The investigator continued to look for hacking evidence, but noted additional images of child pornography that he discovered along the way. The court upheld the admissibility of the child pornography, holding that the investigator's subjective intent kept the search within the scope of the warrant.

89 "Digital Evidence and the New Criminal Procedure", above n 27, 305.

against unreasonable search and seizure afforded by section 21 of the Bill of Rights Act, provide sufficient limits on its operation in the context of computer searches. Where investigators seize plain view material that is outside the scope of the search power, such material will be liable to be rendered inadmissible unless the seizure falls within the parameters of the plain view doctrine. Of relevance will be the nature of the forensic operations that located the plain view material, the nature of the scrutiny of the plain view material to ascertain its evidential value (given that the evidential value must be superficially apparent) and whether the forensic process used was the most targeted process available in the circumstances.

RECOMMENDATION

- 7.6 The plain view doctrine should apply to the seizure of intangible material, without any additional restrictions.

REMOTE ACCESS

Current New Zealand law

- 7.74 A potential method of gathering intangible evidential material is by the remote accessing of data. It is clear that enforcement agencies currently have no power to engage in remote accessing of a computer or computer network without a search warrant. But where an agency has obtained a warrant, it is unclear whether there is power to access data remotely,⁹⁰ except in the context of an interception warrant,⁹¹ under a specific statutory provision,⁹² or with consent.
- 7.75 The issue of remote police searches was considered by Parliament's Law and Order Committee in reporting back the Crimes Amendment Bill (No 6) 1999⁹³ and Supplementary Order Paper 85. The Committee noted some debate about whether section 198 authorises the police to conduct remote searches and left the issue for further consideration by the Law Commission in this report.
- 7.76 Rodney Harrison QC advised the Law and Order Select Committee in relation to the scope of search warrants issued pursuant to section 198 of the Summary Proceedings Act 1957 in the context of the Crimes Amendment Bill (No 6):⁹⁴

I do not for a moment accept that the s 198 search warrant procedure empowers police to search a computer system from a remote terminal (or to intercept communications such as emails) ... I accept that a search warrant pursuant to s 198 can (plainly)

90 Noel Cox "Cybercrime and Jurisdiction in New Zealand" in Bert-Jaap Koops, Susan Brenner, Paul de Hert (eds) *Cybercrime and Jurisdiction: A Global Survey* (TMC Asser Press, The Hague, 2006) 177-188, paras 14.2.3 and 14.4.2. The problems regarding network searches are discussed by Judge David Harvey, above n 25, 368. See also Yeong Zee Kin "Computer Misuse, Forensics and Evidence on the Internet (2000) 5(5) Communications Law 153, 160.

91 See chapter 11, paras 11.11-11.18.

92 For example, the Customs and Excise Act 1996, s 38F(1), provides that a person concerned in the movement of goods, people or craft who has been required to give access to information, must give Customs access to the information in the form and manner prescribed (for example, in an electronic form and manner). This provision enables Customs to require remote access to such information.

93 The Crimes Amendment Bill (No 6) 1999 resulted in the Crimes Amendment Act 2003 introducing crimes involving computers as sections 248-254 of the Crimes Act 1961.

94 Rodney Harrison QC to the Law and Order Select Committee "Crimes Amendment Bill (No 6) 1999" (20 May 2001) Letter.

authorise the obtaining of physical access to a computer by police, and also its seizure by them from the premises (or other location) named in the warrant. Arguably, such a search and seizure could extend to a search while on the premises of the data contained in the computer, and a seizure of that data (only), by copying. But such a physical search is by no means the same in fact or in law as the search of a computer by electronic access from a remote terminal, without physical entry upon the premises (or other location) or the removal by physical means of any “thing” from those premises.

- 7.77 As already noted, section 198 of the Summary Proceedings Act 1957 is directed at searches for tangible items rather than searches for intangible material and does not expressly authorise police access to computers, whether direct or remote. Section 198B allows police to require certain people to assist them with accessing data held in, *or accessible from*, a computer on warrant premises. Required assistance under section 198B thus extends to both direct and remote searches. If a person can be required to assist with remote access under section 198B, that implies that remote access is contemplated by section 198, but this is by no means clear. It might equally be argued that an extension of search powers beyond the search premises requires explicit statutory authorisation. At the least there is an ambiguity in the general provisions of section 198 and the specific provisions of section 198B that needs to be resolved. On balance, given the potential intrusiveness of such a measure, it seems unlikely that the legislature intended to authorise a power to access data remotely for search purposes without that power being expressly provided.
- 7.78 We have considered whether there are circumstances in which remote access by enforcement agencies should be authorised. We note that enforcement agencies cannot usually use specialist search methods such as previewing or forensic copying in searching remotely accessible data, as these search methods depend on the hard drive or server where the data is actually stored being available.⁹⁵ This may limit the usefulness of remote access and provide an incentive to obtain evidential material through direct rather than remote search. However, direct access to a data storage device may not be possible (for example, where the physical location of the data storage device cannot be identified, or where there is an imminent risk of destruction of the remotely accessible data) and remote access may be the only option available to secure data of significance to an investigation.

Options for reform

- 7.79 Options for reform in relation to remote access need to address the following scenarios:
- whether, where technical search capability and circumstances favour such method of execution, enforcement agencies should have a general authority to opt to execute a computer search remotely (Scenario A);
 - whether there should be a limited authority for enforcement agencies to search data that is remotely accessible from a data storage device located at the physical premises being searched (Scenario B);
 - whether there should be a limited authority for enforcement agencies to

⁹⁵ In particular circumstances, however, the target network may be configured such that remotely accessible data could be copied by the enforcement agency for search purposes. Otherwise, a copy of the hard drive of the computer from which the remote data is accessible may nevertheless provide evidence of data remotely accessed from the computer prior to the search.

remotely access data in circumstances where there is no specific physical location that can practicably be searched initially (for example, a Webmail account), but where a particular search area can be adequately specified by reference to access information (Scenario C);

- whether there should be authority under warrant to remotely access stored communications (for closer alignment of the interception and search warrant regimes) (Scenario D);
- whether there should be a warrantless power to conduct remote searches in exceptional circumstances such as where there is an imminent risk of data destruction (Scenario E).

Scenario A: Remote execution of the computer search

7.80 Under this scenario, an enforcement agency could conduct a computer search remotely, without physically entering the search premises where the data or any part of the relevant network is located. In many cases, physical entry to the search premises will be necessary, as the agency may have insufficient information about the existence or nature of the computer network to be able to commence a computer network search remotely. But where an agency has sufficient information to search data remotely, there are circumstances in which it may be efficient and/or advantageous to do so.

7.81 We accept that there is some logic in permitting remote executions. It may be more efficient for the enforcement agency and, given that it would obviate the need for physical entry onto premises, it would also often intrude less upon the search subject's privacy. Moreover, concerns about the covert nature of the search would arguably be adequately addressed by requiring post-search notification as recommended in chapter 6 (recommendations 6.29-6.33).

7.82 Nevertheless, we expect that empowering enforcement agencies to conduct computer searches remotely would prompt widespread concern about authorised state hacking into the lives of private citizens (albeit under search powers) and that there would not be sufficient public confidence that privacy interests would be adequately protected.⁹⁶ In the absence of a compelling law enforcement need for such a tool, we therefore conclude that it would be undesirable at present.

7.83 We propose that, where there are physical premises capable of being identified and searched, the presumption that a search power be exercised on those premises is to be preserved.⁹⁷ This is not to say that the search of the computer itself must be conducted on the search premises; we have already recommended that enforcement agencies be authorised to remove data storage devices from the search premises for offsite examination. But off site examination would be preceded by a physical search of premises so as to locate the data storage device for removal.

7.84 While we therefore reject the general case for remote execution of computer searches, we have nevertheless considered whether there is a case for authorising remote access to data in particular circumstances.

⁹⁶ See Allan Watt, above n 13, 253, commenting on the perception amongst the general public that the police have a big brother is watching attitude.

⁹⁷ This is not to say that the physical search must be conducted by enforcement officers. For example, in *R v Sanders* [1994] 3 NZLR 450, the documents sought by the search warrant were located and handed to police by the company named in the search warrant.

Scenario B: Remote access to data from a computer found on the search premises.

- 7.85 This scenario involves remote access to data from a computer found on the search premises when not all data accessible from that computer is stored at those premises.⁹⁸ The difficulty for law enforcement is that the physical premises to which a search power applies may not include the location where network data or other remotely accessible data is stored.
- 7.86 Given the properties of data that allow it to be accessed from various locations, and the structure of computer networks over multiple premises, we think that it would be somewhat artificial for search powers to be limited to data that is actually stored on the particular search premises. Such an approach places undue restrictions on enforcement agencies and requires significant additional initial surveillance and investigation to identify the likely storage location of data potentially relevant to an investigation. We also anticipate that prohibiting remote access to data in these circumstances would lead to servers and data storage devices being hidden in unlikely places to avoid being searched by enforcement agencies.
- 7.87 Article 19(2) of the Convention on Cybercrime⁹⁹ requires parties to expand search and seizure powers to allow for remote access (i) within its own territory and (ii) where the remote data is lawfully accessible. The Convention does not specify how remote access is to be authorised, although the Explanatory Report suggests possible options including:
- requiring the issuer of the search warrant to authorise an extension to the search;
 - allowing the investigative authorities executing the search warrant to extend the search to the remotely accessible data where there are grounds to believe that the specific data being sought may be among the remotely accessible data.
- 7.88 The first option would not be feasible where time is of the essence in executing the search warrant to find data that is at risk of being deleted.
- 7.89 We therefore consider that a modified form of the second option is preferable. As this scenario involves an initial physical search of premises to locate a computer terminal or other device, we consider that the general presumption outlined in paragraph 7.83 is maintained. Remote access would not automatically be authorised when enforcement officers access a computer under a search power, but would be permitted where data being searched for could reasonably be located at a remote site linked (or referenced) from the computer being accessed. However, we do not support imposing any additional threshold; the

98 This scenario is one where a computer on the search premises is linked to a network that spans two or more locations and/or can otherwise access data that is stored elsewhere, such as webmail accounts. Access to data from a computer linked to a computer network may be direct or remote or both, depending on the way in which data storage facilities have been arranged.

99 Convention on Cybercrime (23 November 2001) CETS 185 <<http://conventions.coe.int>> (last accessed 6 July 2006). This convention was developed by the Council of Europe and has been signed by 38 member States (ratified by 15 member States). In addition the convention has been signed by the following non-member States: Canada, Japan, Montenegro, South Africa and the United States. New Zealand is not a party to the convention. For a description of the Council of Europe and background to the Convention, see Michael A Sussman "The Critical Challenges from International High-tech and Computer-related Crime at the Millennium" (1999) 9 Duke J Comp & Int'l L 451, 477. For an overview of the Convention, see also Judge David Harvey, above n 25, para 4.4.4.

search power already confines the search to places in which the item being searched for could reasonably be located¹⁰⁰ and in our view, that is sufficient protection. We note that trawling through a computer network beyond the terms of the search power would almost certainly be unreasonable under section 21 of the Bill of Rights Act.

7.90 We recommend that remote access only be permitted when exercising a search power if remote access from the computer in question were lawful if conducted by the computer's authorised user. Remote access that is otherwise lawful would allow enforcement officers to access a computer system to which a computer on warrant premises is lawfully connected, without having to obtain a separate warrant.¹⁰¹ The requirement that remote access be lawful is recommended by the Convention on Cybercrime.¹⁰²

7.91 Our recommendation would not confine remote access only to the exercise of warrant powers. In our view, remote access (within the recommended parameters) should be available when carrying out warrantless search powers. We have recommended elsewhere in this report that, in exceptional circumstances, the police should have a warrantless power to search places,¹⁰³ vehicles¹⁰⁴ and people¹⁰⁵ where certain conditions are met, as applicable, namely:

- there are reasonable grounds to believe that evidential material relating to an offence punishable by more than 14 years' imprisonment or more will be found;
- the delay caused by obtaining a search warrant will result in the evidential material being concealed, destroyed or impaired.

The exercise of such a warrantless power may entail a computer search where the computer could potentially hold evidential material in relation to the offence that the search relates to. We see no basis for limiting that computer search to non-remote data, given the limited and urgent circumstances in which warrantless search powers arise.

7.92 A method of defining the parameters for remote access would be to use the definition of a computer system from section 248 of the Crimes Act 1961:

Computer system –

(a) means –

(i) a computer; or

100 This sort of threshold is discussed at paragraphs 7.21-7.22 above.

101 This means that remote access would be limited to existing lawful remote access routes. Where enforcement officers discover an operational remote access facility, for example, in the course of examining copied data, that facility should be considered to be lawful access, notwithstanding that it derives from copied data, rather than the target computer itself. But the lawful access requirement would not be met where remote data is not accessible without technical steps being taken by forensics officers to re-establish the remote access facility in, say, the police computer laboratory.

102 Above n 99. Article 19(2) requires parties to ensure that where its authorities “search or similarly access a specific computer system or part of it ... and have grounds to believe that the data sought is stored in another computer system or part of it in its territory, and such data is lawfully accessible from or available to the initial system, the authorities shall be able to expeditiously extend the search or similar accessing to the other system.”

103 Chapter 5, recommendation 5.13.

104 Chapter 9, recommendation 9.4.

105 Chapter 8, recommendation 8.12.

- (ii) 2 or more interconnected computers; or
 - (iii) any communications links between computers or to remote terminals or another device; or
 - (iv) 2 or more interconnected computers combined with any communication links between computers or to remote terminals or any other device; and
 - (b) includes any part of the items described in paragraph (a) and all related input, output, processing, storage, or communications facilities, and stored data.
- 7.93 Expressly authorising enforcement agencies to remotely access data within a computer system (where one computer within the network is located on the search premises) would be consistent with section 252(3) of the Crimes Act 1961. While accessing a computer system without authorisation is usually an offence, this provides an exception for access by a law enforcement agency under an interception or search warrant or under any other legal authority.

Scenario C: Access to remotely stored data in the absence of a dedicated computer

- 7.94 A search subject may use an internet data storage facility.¹⁰⁶ These facilities are accessible by user name and password from any computer providing internet access and can be used to store data such as email communications remotely. Where the search subject has established remote access to a facility of this sort from a home or office computer, the facility could be remotely accessed by an enforcement agency under Scenario B where a search power is exercised in relation to physical premises but extends to lawful remote access to a computer system from a computer located on those premises. But Scenario B does not cover the situation where the search subject does not possess or use a dedicated computer to access the facility, and instead accesses the facility from any computer with internet access.¹⁰⁷ Under this scenario there is no specific physical location that can practicably be searched to locate a device that can then be subjected to a computer search.
- 7.95 Enforcement agencies may obtain account information from a legal search of another data storage device, from an informant, or from an interception warrant.¹⁰⁸ However, once the agency has the log-on credentials that enable access to the account, there is no legal authority available to permit access to search the information held in the account. The interception warrant regime does not permit enforcement officers to access stored data contained in these accounts. Neither does the search warrant regime permit access to such remotely stored data.
- 7.96 The general presumption enunciated in paragraph 7.83, that executing a search should require the search of a physical location, is predicated on the existence of such a location. This scenario, where there is no specific physical location to

106 For example, as well as internet-based email services, there are numerous sites that store photos, calendars and contacts. Blogs and wikis allow a user to enter data on another's site and sites such as MySpace or YouTube allow the storage of user data.

107 Net cafes, open wireless routers, libraries and a host of other venues allow almost anyone access to the internet, virtually anonymously and untraceably: D Walker, D Brock and T R Stuart "Faceless-Oriented Policing: Traditional Policing Theories are not Adequate in a Cyber World" (2006) 79 *The Police Journal* 169, 172.

108 The gathering of account information may require significant investigation due to online technologies that make it relatively easy to disguise one's true identity: Russell G Smith "Impediments to the Successful Investigation of Transnational High Tech Crime" (2004) 285 *Trends and Issues in Crime and Criminal Justice* 1 Australian Institute of Criminology < <http://www.aic.gov.au> > (last accessed 19 February 2007).

which a search power can attach, falls outside the range of circumstances in which that presumption can operate and requires a different approach.

- 7.97 We recommend that search warrant regimes be expanded to allow for warrant applications to search spaces such as Webmail accounts, provided that the place to be searched is sufficiently identifiable, by, for example, log-on credentials, in lieu of a specific physical location to be searched. In relation to remote storage accounts, log-on credentials would comprise three key identifiers: the name of the service (for example, hotmail); user name; and password.
- 7.98 Unless enforcement agencies are authorised to access data from internet data storage facilities, a significant amount of computer data will be held beyond the investigative reach of law enforcement. There is anecdotal evidence that criminal enterprises are specifically making use of internet data storage facilities, in order to make it more difficult for police to access incriminating information under current search and seizure powers.
- 7.99 Under this scenario, to search an internet account, investigators would initially need to obtain the log-on credentials for the account in order to seek a search warrant. If they require an interception warrant to get the log-on credentials, they would first have to collect sufficient information to support the issue of an interception warrant¹⁰⁹ and then make a separate application for a search warrant, based on the log-on credentials obtained under the interception warrant.
- 7.100 We note that searches of internet data storage facilities will likely involve extraterritorial issues, discussed at paragraphs 7.109 to 7.127 below, that may impose some additional limitations on these searches.

Scenario D: Remote accessing of stored private communications as a parallel power to the interception warrant regime.

- 7.101 When certain offences are being investigated,¹¹⁰ the interception warrant regime allows police to get information from intercepting private communications. However, the interception warrant regime is anticipatory and can only be used to intercept communications, including data, as they are sent. The interception regime cannot be used to access data at the point that it is stored in a computer hard drive or server. Neither does the search warrant regime permit the remote execution of a warrant without the network owner's consent. It is somewhat of an anomaly that police may intercept information only as it is communicated and are unable to remotely access that information once it has been received.
- 7.102 We have considered whether this should be addressed by allowing enforcement agencies to remotely access stored communications under search warrant where there would have been a power to obtain a warrant to intercept them. The step has already been taken to extend the scope of the interception regime to include private communications sent by any means, such as email via computers.¹¹¹ But a proposal to further extend powers to allow the remote accessing of stored communications would raise some difficult issues. The main one is that such a proposal would blur the demarcation between the interception regime (under

109 Refer to chapter 11 paras 11.11-11.18 in relation to interception warrants.

110 See chapter 11, para 11.17 for the trigger offences for the interception regime.

111 Crimes Amendment Act 2003, s 9.

which interception by remote access is permissible) and the search regime (under which remote access is not generally permissible).

- 7.103 Another difficulty would be defining the ambit of the power. While the parameters of what is a private communication and how that communication is sent and received is generally clear in the context of oral or telephone communications, it is not so clear in the context of communications facilitated by computers. Communications via computers are capable of disseminating substantial amounts of information, for example as attachments to email messages. Communications are initially received by a computer mailbox, but receipt by the intended recipient does not occur until that mailbox is accessed. Computers allow an intended recipient to access messages or information as an alternative to the sending of that information to the recipient. Any proposed powers of remote access to stored communications for purposes of alignment with the interception regime would therefore be difficult to define and somewhat arbitrary. Any authorisation to search data remotely could not realistically be limited to certain types of data only. And if no sensible limits can be identified, the result would be a general authority to conduct searches remotely, a result that we have already rejected under Scenario A.
- 7.104 We therefore conclude that it would not be desirable to attempt to align the interception and search regimes by allowing remote access to stored private communications. This means that enforcement agencies would continue to have the option of seeking to obtain data remotely only while in transit under an interception warrant or via a computer search, preceded by a physical search of premises under a search warrant, once that data has been stored (Scenario B) or, where a prior physical search is not practicable, under Scenario C.¹¹²

Scenario E: Warrantless powers to search remotely in exceptional circumstances

- 7.105 One submitter suggested that where the conditions for executing a computer search under warrantless powers are met, the police should be authorised to search for evidential material remotely. We acknowledge that there is some force to the argument that remote access in these circumstances is consistent with the rationale of the warrantless power (preservation of evidential material otherwise likely to be destroyed.) However, given that we have rejected the remote execution of computer searches under Scenario A, and given that Scenario B (remote access following physical entry) encompasses both warranted and warrantless powers, we consider that no further provision for warrantless remote searches is desirable. We conclude that warrantless searches involving remote access should be limited to those contemplated by Scenario B.

RECOMMENDATIONS

> Continued next page

- 7.7 A general power to execute computer searches remotely is *not* recommended (Scenario A).

¹¹² In chapter 10, we also propose that agencies should be able to apply for monitoring orders to recover information held by a third party: chapter 10, recommendation 10.12-10.16.

RECOMMENDATIONS

- 7.8 Remote access to network computer data – that is, data which is accessible from a computer found on the search premises – should be permitted where the access is within the terms of the search power and is otherwise lawful, regardless of whether the data is remotely accessed from the search premises or elsewhere (Scenario B).
- 7.9 Search warrant regimes should permit search warrants to be issued for places such as internet data storage facilities where there is no specific physical location that can practicably be searched prior to remote access but where a particular search area can be adequately specified by reference to access information (Scenario C).
- 7.10 An alignment of the interception warrant regime with the search warrant regime to permit remote access to stored communications is *not* recommended (Scenario D).
- 7.11 Warrantless search powers involving remote access should be limited to Scenario B searches.

The privacy implications of remote searches

- 7.106 The Privacy Commissioner had a number of concerns about remote searches:¹¹³
- the [owner of the data] is unable to be present during the search;
 - the evidence obtained through a covert search of a computer is of questionable value unless the search is undertaken under carefully controlled conditions to ensure reliability and admissibility of evidence;
 - as an intrusive covert power, remote hacking by law enforcement should be a last resort; the search warrant, however, is not currently an instrument of last resort;
 - search warrants do not have a code on destroying records (compare the strict requirements for interception warrants);
 - there is no public reporting regime for granting search warrants in these circumstances compared to the interception warrant regime;
 - search warrants can be granted by people without professional, legal and judicial experience and are unsuited to the imposition of carefully crafted conditions to protect the privacy of third parties.
- 7.107 These concerns highlight the various issues involved and the care that is needed in this area to balance human rights values on the one hand and law enforcement values on the other. Some of these concerns are addressed by other general recommendations in this report that relate to the process of applying for and issuing search warrants, and the introduction of more stringent notification and post-seizure provisions, for example:

113 B H Slane, Privacy Commissioner, to the Minister of Justice “Supplementary Order Paper No 85 to the Crimes Amendment Bill (No 6)” (13 December 2000) Letter; Privacy Commissioner *Crimes Against Personal Privacy and Crimes Involving Computers: Intercepting Private Communications and Accessing Computer Systems Without Authorisation: Supplementary Order Paper No 85 to the Crimes Amendment Bill (No 6)* (Report to the Minister of Justice, 2000).

- chapter 13 addresses the need for rules regulating the retention of searched material (recommendations 13.5 to 13.13);
- chapter 4 addresses the qualifications of those issuing search warrants and recommends the development of a specialist cadre of judicial officers to have this function (recommendations 4.22 and 4.23).

7.108 We acknowledge that other issues raised are problematic and support a cautious approach to the authorisation of remote searches. We consider that the proposed extensions to search and seizure regimes to allow for remote access under Scenarios B and C recognise the realities of modern technological capability. The proposed powers would not be exercisable covertly unless the judicial officer issuing the warrant specifically authorises postponement of notification.¹¹⁴ The powers proposed are appropriately limited and justifiable, given the difficulties raised for law enforcement in the absence of a power to search remotely in these particular circumstances.

Extraterritorial issues

- 7.109 Data that is accessed remotely may be held either in New Zealand or offshore. A cross-border search occurs where an enforcement agency from New Zealand accesses a computer in another country to obtain evidential material in executing a domestic search warrant.¹¹⁵ The enforcement officer may not even be aware that the search has led him or her across a border. Where data accessible from New Zealand is held offshore, the question arises as to whether it is permissible for New Zealand law enforcement agencies to access that data remotely, given that there is a customary international law prohibition on conducting investigations in the territory of another sovereign state.¹¹⁶
- 7.110 There are competing views as to the appropriate legal categorisation for remote cross-border searches. The debate has been summarised as follows:¹¹⁷

Several scholars argue that the Internet is immune from territorial regulation, that it is oblivious to geographical constraints, and should be treated as a different space. Those who maintain this view support the legitimacy of Internet cross-border searches, arguing that “technological change alters the extraterritorial influence of purely territorial actions” and that “remote cross-border searches fit into the long-accepted practice of officials in one nation acting within their territory (or from public spaces) to extract information from another.”

.... Still, “there are strong arguments that the customary international law prohibits ... law enforcement functions in the territory of another state,” such as entering through remote Internet searches. According to this theory, such searches violate territorial integrity and, whatever the constitutional constraints that exist

¹¹⁴ Chapter 6, recommendation 6.34.

¹¹⁵ Sussmann, above n 99, 471.

¹¹⁶ The issue of gathering intangible evidence across borders is part of a larger topic of jurisdictional issues in relation to cybercrime. See, for example, Cox, above n 90; and Sussmann, above n 99.

¹¹⁷ Stewart M Young “Comment: Verdugo in Cyberspace: Boundaries of Fourth Amendment Rights for Foreign Nationals in Cybercrime Cases” (2003) 10 Mich Telecomm Tech L Rev 139, 159. Paul Boateng, then British Home Secretary, suggested that jurisdiction over a database should not now depend only on where it happens to be physically stored and that where the owners of the system have set it up to be accessible from another jurisdiction, it should be regarded as present in that jurisdiction for law enforcement purposes. See Sussmann, above n 99, fn 73. See also Yeong Zee Kin, above n 90, 160.

within the searching country, such searches are prohibited as violations of international law.

- 7.111 Some states have asserted that they possess a broad power to conduct remote cross-border searches, that is, to use computers within their territory to access and examine data physically stored outside of their territory, so long as the data is relevant to an investigation of conduct over which they have jurisdiction and their own law authorises the search.¹¹⁸
- 7.112 But states applying a stricter interpretation of customary international law to remote cross-border searches¹¹⁹ need to use various legal assistance mechanisms to conduct the search, such as mutual legal assistance treaties or co-operation at police level. Some steps have been taken toward developing international instruments that facilitate international co-operation and mutual assistance and the recognition of a limited power to conduct cross-border searches.
- 7.113 The Convention on Cybercrime¹²⁰ generally requires a nation pursuing a cybercriminal to consult with local officials before seizing, storing and freezing data on computers located in their countries.¹²¹ Chapter III of the Convention is targeted at making provision for international co-operation and sets out procedures that can be used in the absence of international agreements between party states.¹²² Article 32 allows remote cross-border searches:
- where the data is publicly available stored computer data, regardless of where the data is stored geographically, or
 - where consent is obtained from a person who has lawful authority to disclose the data.
- 7.114 The G-8 has developed similar principles under which a state can engage in cross-border searches of open-source (publicly available) data and closed-source data that the searching state obtains lawful consent to search.¹²³
- 7.115 Co-operative arrangements that depend on the bilateral or multilateral commitment of states¹²⁴ are therefore considered necessary in relation to closed-source data. However, even once these arrangements are in place, there are often delays in meeting requests for assistance. This will be problematic in the context of computer searches where evidence may be fleeting.¹²⁵ The traditional

118 Patricia L Bellia "Chasing Bits Across Borders" (2001) U Chi Legal F 35, 39. In November 2000, for example, during an investigation of a Russian hacking ring that had targeted several US companies, FBI agents downloaded extensive data from Russian computers.

119 For example, article 19(2) of the Convention on Cybercrime, above n 99, recommends only permitting remote searches within a country's territory.

120 Convention on Cybercrime, above n 99.

121 Jack L Goldsmith "The Internet and the Legitimacy of Remote Cross-Border Searches" (2001) U Chi Legal F 103, 107.

122 Article 29 covers requests between parties for the expeditious preservation of computer data and Article 31 covers mutual assistance regarding accessing of stored computer data, which can be expedited where the data is particularly vulnerable to loss or modification.

123 Annex 1 to Communiqué issued at the Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime (Moscow, 19-20 October 1999) < <http://www.globalsecurity.org> > (last accessed 11 July 2006). For background to the G-8 and its initiatives in relation to high tech crime, see Sussmann, above n 99, 481.

124 For various national self-interests that may dilute domestic implementation of co-operative arrangements, see Gregor Allan "Responding to Cybercrime: A Delicate Blend of the Orthodox and the Alternative" (2005) NZ Law Rev 149, 155.

125 Bellia, above n 118, 57.

international legal assistance regime often cannot accommodate requests for assistance that occur during a cyberattack because responses cannot be handled in real time.¹²⁶ Sometimes, too, data may be located in a safe haven jurisdiction outside any established mutual assistance regime, or its location may be unclear. Both the G-8 and the Council of Europe have agreed to consider broader provisions that do not depend upon mutual assistance arrangements.¹²⁷

- 7.116 It is possible that over time, sensible limits on cross-border searches will develop¹²⁸ and that states may come to accept such searches as legitimate.¹²⁹ In the meantime, co-operative procedures are likely to remain important for pragmatic reasons:¹³⁰

since it is possible to view a search as an intrusion into that country's sovereign territory – the likely view of the targeted country – nations will ultimately have natural incentives to “limit their searches to exigent circumstances, and to work out cooperative principles where possible” because of the extent to which aggressive searches could be reciprocated.

- 7.117 New Zealand has enacted the Mutual Assistance in Criminal Matters Act 1992, which is designed to facilitate New Zealand's providing and obtaining international assistance in criminal matters, including obtaining evidence, documents or other articles and executing requests for search and seizure. Section 8 provides that requests for assistance are to be made by the Attorney-General. Section 7 provides that a request for assistance pursuant to Part II of the Act may be made to any foreign country. However, the availability of mutual assistance depends on the negotiation of underlying bilateral arrangements.
- 7.118 We consider that these mutual assistance procedures, where they exist, should continue to apply. Where remote cross-border searches are within the scope of mutual assistance arrangements, they should be permitted.
- 7.119 Difficulties arise in situations where mutual assistance arrangements exist but are inadequate to cover cross-border searches; no mutual assistance arrangements are in place; or it is entirely unclear which jurisdiction remotely accessible data is held in.
- 7.120 There may be circumstances in which it may be desirable for New Zealand law enforcement agencies to conduct a remote cross-border search instead of or as well as using the mutual assistance procedures, for example, where assistance is not forthcoming in response to a request, or where as a matter of urgency there is insufficient time to use the mutual assistance procedures to obtain evidential material from a foreign country before that material is likely to be destroyed, concealed or impaired, or where mutual assistance arrangements are silent as to the availability of assistance in any particular case. However, we do not consider that mutual assistance arrangements should be bypassed.
- 7.121 One submission expressed concern that relying on mutual assistance arrangements would impede the ability of enforcement agencies to collect

126 Sussmann, above n 99.

127 Bellia, above n 118, 57-58.

128 Goldsmith, above n 121, 116.

129 Bellia, above n 118, 79.

130 Young, above n 117, 160.

information pursuant to a search warrant in a timely fashion.¹³¹ We acknowledge that current mutual assistance arrangements may not be sufficiently tailored to facilitate intangible evidential material being efficiently collected from other jurisdictions. Where there are deficiencies in mutual assistance arrangements, further bilateral negotiation may be necessary to establish appropriate procedures. One option would be to negotiate exceptions to the mutual assistance mechanisms to permit remote cross-border searches by law enforcement within certain parameters (for example, if the search was not unlawful in the offshore jurisdiction) either with or without notice to the foreign country in which the search takes place.

- 7.122 Where there are no mutual assistance arrangements in place between New Zealand and the jurisdiction in which the data is held, cross-border searches should be permitted, provided that the search is not unlawful in the jurisdiction in which the data is held. It would be undesirable for New Zealand law to authorise an action that may constitute an unlawful act under the laws of another country.¹³² Enforcement agencies would therefore need to investigate any local legal restrictions on the accessing and searching of data and ensure that any remote cross-border search is conducted in compliance with any such restrictions. Where an agency concludes that a search would not be unlawful in the relevant jurisdiction, any other possible consequences should be considered, bearing in mind the seriousness of the offending under investigation and the likely attitude of the country in which the data is held.¹³³ However, any such authority to conduct cross-border searches would be of somewhat limited scope, given that many countries have enacted or are likely to enact legislative provisions prohibiting such access to computer systems within their borders.
- 7.123 Where it is entirely unclear in which jurisdiction accessible data is held, there are clearly circumstances in which law enforcement agencies should be permitted to conduct such searches (for example, Scenario C discussed above). While principles of territorial sovereignty should be recognised to the maximum extent possible, this becomes impossible to observe where the identity of the relevant jurisdiction is unknown. To prevent law enforcement from investigating alleged offending solely because data is held in an unknown jurisdiction would also create an obvious incentive to hide data in offshore storage facilities. However, it is difficult to find workable parameters for cross-border searches in unknown jurisdictions. We considered whether authority should be contingent on there being no reason to believe that the search would constitute an offence under the laws of any particular jurisdiction. However, with the growing numbers of countries enacting prohibitions on the unauthorised accessing of computer systems this is likely to be unworkable in practice. We considered, alternatively, whether New Zealand law could be used as a benchmark. However, this is also unworkable in practice as a search of data held in New Zealand by foreign law enforcement is unlikely to be lawful under section 252 of the Crimes Act 1961.

¹³¹ Submission of the New Zealand Law Society Criminal Law Committee, 21 December 2006.

¹³² As an inverse example, if Australian police remotely accessed data held in New Zealand from warrant premises in Australia, it is unclear whether Australian police would be acting under authority for purposes of the New Zealand Crimes Act 1961, s 252.

¹³³ Sussmann, above n 99, fn 71, notes the difficult scenario that may arise where the searching country takes the view that a cross-border search is, under some theory, permissible and the searched country responds that the execution of the search is not only prohibited in its country but constitutes unauthorised access to its computers and is therefore a criminal offence.

- 7.124 The position for each of the three scenarios considered (mutual assistance arrangement inadequate, no mutual assistance arrangements in place, relevant jurisdiction unknown) is therefore somewhat unsatisfactory. Unlawful cross-border searches run the risk of censure by the foreign government, and the risk that evidential material derived from the search may be rendered inadmissible on the basis of foreign unlawfulness. The failure to conduct the search, on the other hand, runs the risk that evidential material will not be recovered, to the detriment of the investigation and any subsequent prosecution.
- 7.125 So far as the risk of foreign censure is concerned, we have considered whether remote cross-border searches should require prior approval from or notification to a government minister such as the Attorney-General or other government agency, given the potential risk to the government's relationships with foreign states. However, the submissions we received from enforcement agencies did not favour government approval as a pre-condition to a search, on the basis of uncertainty and potential delay.
- 7.126 The other option would be to permit remote cross-border searches as a matter of New Zealand law where they are specifically authorised under a search warrant. This would require disclosure in the warrant application that the search is or is likely to be a cross-border search, and the nature of any mutual assistance arrangements with the relevant country (if the identity of the country where the data is held is known). Where a warrant is issued without specific authorisation for a cross-border search, the enforcement agency would have to return to the issuing officer for further authorisation where the need for a cross-border search becomes apparent in the course of executing the initial search warrant. On balance this is the option we prefer. We accept that it is not entirely satisfactory for enforcement agencies to have to return for additional authorisation. Nevertheless, given the inconclusive state of international law in this area, we consider it is the best option at present. The issue should be kept under review in light of future developments in international law.
- 7.127 Finally, we recommend that New Zealand consider acceding to the Convention on Cybercrime.¹³⁴ Accession to the Convention would demonstrate New Zealand's commitment to international co-operation in this area. New Zealand would then be well placed to participate in future debate concerning development of additional Convention provisions that may resolve some of the current difficulties for law enforcement.

RECOMMENDATIONS

> Continued next page

- 7.12 Remote cross-border searches (under either Scenario B or Scenario C) should be permitted where:
- the search is limited to open-source (publicly available) data; or
 - the search is conducted in accordance with mutual assistance arrangements in place between New Zealand and the relevant jurisdiction; or
 - the search is specifically authorised under a search warrant.

134 Convention on Cybercrime, above n 99.

RECOMMENDATIONS

- 7.13 Consideration should be given to whether New Zealand should accede to the Convention on Cybercrime.

MEASURES TO ENABLE ACCESS

Requiring assistance

- 7.128 One of the terms of reference for this Report is “the extent, if at all, to which people should be compelled to assist in the execution of a search warrant.” In the interim, section 198B of the Summary Proceedings Act 1957 has been enacted, following the Law Commission specifically considering this issue.¹³⁵
- 7.129 Section 198B permits a person executing a search warrant to require a “specified person”¹³⁶ to provide reasonable assistance in gaining access to data held in or accessible from a computer on warrant premises.
- 7.130 We note that the equivalent Australian provision¹³⁷ may only be used following a court order. The Law Commission considered court orders as a mechanism for requiring assistance¹³⁸ and recommended that provision be made for an order imposing an obligation on a non-suspect to provide information and assistance in terms comparable with the relevant parts of the Australian provision. However, section 198B was implemented without any requirement for a prior court order (and was not confined to non-suspects) on the basis that, although there may be uncertainty about the extent to which assistance is required in an individual case, the advantages of a court order in removing that uncertainty are outweighed by the time, expense and risk of interference with or destruction of the computer data that the requirement for a court order would entail. We do not recommend any change to section 198B in that regard.
- 7.131 Another Law Commission recommendation was that a specific power to require a non-suspect person to furnish the key to electronic information be introduced.¹³⁹ This was not specifically adopted in the drafting of section 198B, but as the generic term “information or assistance” is a formula capable of embracing the surrender not only of access codes and passwords but also encryption keys,¹⁴⁰ the power to require such information (from suspects as well as non-suspects)

¹³⁵ *Electronic Technology and Police Investigations – Some Issues*, above n 2, paras 21, 29.

¹³⁶ A specified person is defined in s 198B as “a person who (a) is the owner or lessee of the computer, or is in possession or control of the computer, or is an employee of any of the above; and (b) has relevant knowledge of (i) the computer or a computer network of which the computer forms a part; or (ii) measures applied to protect data held in, or accessible from, the computer.”

¹³⁷ Crimes Act 1914 (Cth), s 3LA.

¹³⁸ *Electronic Technology and Police Investigations – Some Issues*, above n 2, paras 2, 29.

¹³⁹ *Electronic Technology and Police Investigations – Some Issues*, above n 2, para 29. The Study Paper suggested that a suitable definition would be the one used in the Regulation of Investigatory Powers Act 2000 (UK), s 56(1):

“key”, in relation to any electronic data, means any key, code, password, algorithm or other data the use of which (with or without other keys) –

(a) allows access to the electronic data, or
(b) facilitates the putting of data into an intelligible form.

¹⁴⁰ Judge David Harvey (ed) *Electronic Business and Technology Law*, (loose leaf, LexisNexis, Wellington) Criminal Proceedings, para 38.8.8 (last updated March 2005). See also discussion of the relevant Australian provision by Nickolas John James “Handing over the Keys: Contingency, Power and Resistance in the Context of Section 3LA of the Australian Crimes Act 1914” (2004) 23 UQLJ 7.

exists under section 198B as currently drawn. Nevertheless, we consider (in light of submissions received) that expressly including the handing over of access codes, passwords and encryption keys as a form of required assistance under section 198B would add clarity for enforcement agencies.

- 7.132 One shortcoming of the provision is that it does not extend to third party service providers (such as internet service providers and telecommunications providers) who may hold access information to data storage devices (such as computers, internet email accounts and mobile phones) or Webmail accounts, since they are not “specified persons” as defined in section 198B. We consider that such providers should be obliged to give assistance to enforcement agencies by way of access information. This will require extensions of section 198B so that:
- it applies to the accessing of data held in or accessible from any data storage device (not just computers) found at the place to be searched;
 - the definition of “specified person” includes third party service providers¹⁴¹ that hold access information.
- 7.133 We recommend that the section 198B power be extended to relevant agencies, besides police, that are empowered to access computers in the course of a search, as the power to require assistance is a necessary ancillary power in the conduct of computer searches.
- 7.134 We further recommend that the section 198B power be extended to warrantless searches (such as searches for drugs where tick lists may be held on a computer). As warrantless powers are generally reserved for the more serious offences, there is a strong case that enforcement agencies should be able to require assistance in order to gain access to data that the agency is entitled to search when investigating those offences. Some submissions expressed concern about extending section 198B to warrantless searches, given the absence of warrant safeguards. However, since warrantless searches should generally only be undertaken in urgent situations (where it is too time-consuming and detrimental to the end result to obtain a warrant), assistance with access may be even more critical to law enforcement. We are therefore satisfied that s 198B should extend to warrantless searches.
- 7.135 Finally, we received submissions that the penalty for failing to assist is inadequate and should be increased.¹⁴² We agree that the monetary penalty in particular is too low and should be reviewed.

RECOMMENDATIONS

> Continued next page

- 7.14 The power under section 198B of the Summary Proceedings Act 1957 to require assistance from specified persons in order to gain access to data:
- should be retained;
 - should be extended to apply to access to data held in or accessible from all types of data storage devices found at the place to be searched;

¹⁴¹ For a definition of service provider, see Convention on Cybercrime, above n 99.

¹⁴² The maximum penalty is a term of imprisonment not exceeding three months or a fine not exceeding \$2,000: Summary Proceedings Act 1957, s 198B(6).

RECOMMENDATIONS

- should expressly include the furnishing of access codes, passwords and encryption keys as a form of required assistance;
- should be extended so that it applies to third party service providers that hold access information;
- should be extended to relevant agencies, besides police, that are empowered to search computers;
- should be extended to warrantless searches.

7.15 The maximum monetary penalty for failing to assist should be increased.

Circumventing security

- 7.136 Currently, police may use force to gain entry to a place or to break open any box or receptacle.¹⁴³ The power to use physical force is not apt in the context of computer searches. We therefore recommend that, in addition to having the power to use reasonable force, executing officers have the power to use such *measures* as are reasonable to gain access to data held in any data storage device located at or accessible from the place or thing to be searched. Where computer searches are conducted by specialist computer forensic officers, the power to use reasonable measures to gain access to computer data should extend to these officers.¹⁴⁴ In chapter 6, we have recommended that assistants should have the powers that an enforcement officer is entitled to exercise (under the supervision of the responsible officer).¹⁴⁵
- 7.137 We further recommend that use of this power be authorised for the purposes of creating a forensic copy of a computer hard drive or data storage device that is removed for examination.¹⁴⁶

RECOMMENDATIONS

- 7.16 In addition to having the power to use reasonable force, enforcement officers should have the power to use such *measures* as are reasonable to gain lawful access to any data storage device located at or accessible from the place or thing to be searched.
- 7.17 Where an agency is authorised to forensically copy a computer hard drive, server or other data storage device, the agency should have the power to use such measures as are reasonable to create the forensic copy.

143 Summary Proceedings Act 1957, s 198(3). Refer to discussion of this power in chapter 6 and recommendations for reform (recommendations 6.6-6.7).

144 We note that once computer data has been forensically copied, forensic analysts would not be restricted to reasonable force or measures (given that the force or measures take place off the search premises and do not affect the property of the search subject) but may use any force or measures to access data.

145 Chapter 6, recommendation 6.13.

146 Above, paras 7.47-7.52.

Securing computer equipment

- 7.138 As discussed in chapter 6, no legislative provisions currently permit enforcement agencies to secure a place or thing to be searched.¹⁴⁷ In chapter 6, we have recommended that the enforcement officer should be authorised to guard the place being searched in accordance with a search warrant, including the power to exclude any person to the extent necessary to enable the search to be carried out effectively and to ensure that the evidential material is not destroyed, concealed or impaired.¹⁴⁸
- 7.139 We have considered whether a specific power to secure computer equipment is required to ensure that enforcement officers are able to prevent data being deliberately or accidentally destroyed or altered until it can be searched. We conclude, however, that the power recommended in chapter 6 is broad enough to cover the securing of computer equipment.
- 7.140 We have also considered whether the power should be extended to enable a computer network to be secured. If a computer network is located entirely on the search premises, then the search team would be able to secure the entire network. But what should the position be if components of the network are located elsewhere?¹⁴⁹
- 7.141 We consider that the power to secure items on search premises should not be extended to allow enforcement officers to enter other premises to secure a computer network of which a computer on search premises forms part, if there is no search power that extends to those other premises. The power to secure is incidental to a search of specific premises and it would be a significant departure to extend that power beyond the boundary of those premises. We have recommended a limited extension of a search power beyond specified premises in the context of remote searches.¹⁵⁰ However, in that context, no physical entry to the remote premises is required.

INFORMATION ABOUT THE SEARCH

- 7.142 In chapter 6, we have made a number of recommendations relating to the provision of information about a search by law enforcement agencies.¹⁵¹ In the context of computer searches, we make the following additional recommendation.

Remote access: post-search information

- 7.143 Where a computer search involves remote access under Scenario B,¹⁵² we consider that information about the search should be given to the person in overall charge of the computer network that is accessed remotely. In some circumstances, this person will be entitled to receive information under the provisions recommended

147 The Criminal Proceeds Recovery Bill 2007, No 81-1, cl 124(3), proposes that a person executing a search warrant in that context may secure a place or thing to be searched.

148 Chapter 6, recommendation 6.22.

149 Under the relevant Australian provision (Crimes Act 1914 (Cth), ss 3L(4) and 3L(5)), police can do whatever is necessary to secure equipment such as a computer for an initial period of 24 hours by locking up or placing a guard or otherwise if the executing officer believes on reasonable grounds that evidential material may be accessible by operating equipment on the premises, expert assistance is required, or material may otherwise be altered or damaged. This power is limited to securing equipment on warrant premises.

150 Above, recommendations 7.8 and 7.9.

151 Chapter 6, recommendations 6.27-6.33.

152 Discussed at paras 7.85-7.93 above.

in chapter 6. But where that is not the case, specific provision needs to be made for it, based on the recommendation in chapter 6 that notice be given where the owner or occupier is not present at the time of the search).¹⁵³ Postponement or dispensation of notification should be available to law enforcement as outlined in chapter 6.¹⁵⁴

- 7.144 This additional notice should not be required in relation to remote access under Scenario C. Notice should simply be provided to the accountholder for the remote storage location in accordance with the recommendations in chapter 6, subject to any authorised postponement.

RECOMMENDATION

7.18 Where a computer search involves remote access under Scenario B, information about the search should be given to the person in overall charge of the computer network that is accessed remotely, except if that person is entitled to receive information about the search on any other basis and subject to any authorised postponement or dispensation of notice.

PROCEDURES FOR MANAGING SEIZED MATERIAL

Returning and disposing of items removed and copies generated for examination

- 7.145 In chapter 6¹⁵⁵ we have recommended that items removed for examination be returned once the enforcement officer determines that they are not to be seized and retained. In relation to computers that are removed for forensic examination, generally forensic copies of material held on the computer will be seized and retained, rather than the computer itself, although there will be circumstances in which the computer itself is an evidential exhibit. Where the enforcement agency determines that the computer itself is not to be seized or retained because a forensic copy suffices, the obligation to return the computer would arise.
- 7.146 While the recommendation in chapter 6 provides a suitable mechanism for the return of computers and other data storage devices following their removal for examination, it does not expressly cover the destruction of forensic copies generated for the purposes of examination where there is no basis for ongoing retention, i.e. no evidential material is discovered. In chapter 13, we have recommended that an enforcement agency should be allowed to retain copies of seized items, even where the original has been returned or disposed of pursuant to a court order.¹⁵⁶ However, that should not apply to forensic copies generated for the purposes of examination, unless the examination confirms a basis for retention by establishing the presence of evidential material. Where no basis for retention can be established, all forensic copies should be destroyed.

153 Chapter 6, recommendation 6.31. Under the equivalent Australian provision, Crimes Act 1914 (Cth), s 3LB, if data is accessed remotely and it is practicable to notify the owner of premises where the data is held, then the executing officer must give notice as soon as practicable, including sufficient information to allow the person to whom notice is given to contact the executing officer.

154 Chapter 6, recommendations 6.34-6.36.

155 Chapter 6, recommendation 6.19.

156 Chapter 13, recommendation 13.21.

RECOMMENDATION

- 7.19 Once the enforcement agency has carried out an examination of forensically copied data, unless there is a basis for ongoing retention, all forensic copies should be destroyed.

Retaining forensic copies

- 7.147 Where, following the examination of a forensic copy, an enforcement agency determines that it should be retained due to the presence of evidential material, the agency should be empowered to retain the forensic copy in its entirety, and should not be required to separate and destroy irrelevant material. Where evidential material exists in a complex interrelationship with other data, it would be impracticable to require that only evidential material be retained. Forensically it is necessary to retain the forensic copy in its entirety, in order to maintain its evidential integrity.¹⁵⁷
- 7.148 In chapter 13, we have recommended a framework for the return of seized or retained items.¹⁵⁸ In particular, seized items should be returned if no prosecution has been commenced within six months of the seizure, unless the enforcement agency obtains an order authorising continued retention.¹⁵⁹ However, seized items that are copies would not be subject to these return requirements.¹⁶⁰ The enforcement agency would be able to hold forensic copies without having to apply to the court to do so. Nevertheless, a person would be able to apply for return of an item, and we have proposed a set of factors to which the court should have regard before making an order for return.¹⁶¹ This recommendation (as well as related recommendations)¹⁶² should apply to forensic copies.
- 7.149 Where an enforcement agency retains any forensic copies of at the conclusion of an investigation, we have recommended that the enforcement agency should be able to retain these for its official records.¹⁶³

RECOMMENDATIONS

> Continued next page

- 7.20 Where a basis for retaining forensically copied data is established, the police or other relevant agency should be empowered to retain the forensic copy in its entirety and should not be required to separate and destroy irrelevant material.

¹⁵⁷ This rejects the condition proposed by the Court of Appeal in *A Firm of Solicitors (CA)*, above n 22, para 107, that irrelevant material be deleted. From a technical point of view, it is not possible to delete irrelevant material from forensically copied data and maintain its evidential integrity. The EnCase procedure makes a copy of the entire electronic media that is unaltered and unalterable. If an attempt was made to delete irrelevant material, this would corrupt the evidential integrity of the data and render evidential material subject to challenge.

¹⁵⁸ Chapter 13, recommendations 13.5-13.13. As noted in chapter 13 (paras 13.2, 13.22, 13.54), the forfeiture or disposal of unlawful or prohibited items is a separate matter dealt with by specific statutory provision, for example, Part 14 of the Customs and Excise Act 1996.

¹⁵⁹ Chapter 13, recommendation 13.8.

¹⁶⁰ Chapter 13, recommendation 13.9.

¹⁶¹ Chapter 13, recommendation 13.11.

¹⁶² Chapter 13, recommendations 13.12 and 13.13.

¹⁶³ Chapter 13, recommendation 13.21.

RECOMMENDATIONS

- 7.21 Chapter 13 recommendations 13.11 to 13.13, relating to applications for the return of seized items, should apply to forensic copies that are retained by an enforcement agency.

Law enforcement custody of retained material

- 7.150 Where data is seized or copied for the purposes of a search, its owner and other users will have an interest in ensuring that the data and any copies (including data unrelated to the investigation) is handled appropriately and confidentially, and is not used for any purpose other than that authorised by the relevant search power.
- 7.151 We have recommended that the enforcement agency or any person claiming to be entitled to possession of a particular item, may apply to the court for directions as to the manner in which an item is to be treated while in the custody of the police¹⁶⁴ that there ought to be a legislative prohibition on the disclosure or use of information obtained through the exercise of search powers¹⁶⁵ and that under specified conditions, a person may apply to the law enforcement agency to access any seized item.¹⁶⁶ Those recommendations should obviously apply in this context as well.
- 7.152 The retention of forensically copied data raises an issue as to the extent to which an agency may subject that data to further examination. The power to examine should not become a general search power to search the data at any time for any information. We accept, however, that enforcement agencies should be authorised to conduct subsequent searches of forensic copies that are retained, as an investigation progresses, provided that such searches are within the parameters of the initial search power i.e. the search is directed towards the same evidential material specified in the initial power. However, any searches that exceed the scope of the initial search power should of course be subject to fresh judicial authorisation.

RECOMMENDATIONS

- 7.22 Chapter 13 recommendations 13.1 to 13.4, relating to access to seized items, should apply to forensic copies that are retained by an enforcement agency.
- 7.23 Enforcement agencies should be authorised to conduct subsequent searches of forensic copies that are retained, provided that such searches remain within the parameters of the initial search power.

¹⁶⁴ Chapter 13, recommendation 13.11.

¹⁶⁵ Chapter 14, recommendation 14.5.

¹⁶⁶ Chapter 13, recommendations 13.1-13.4.

Chapter 8

SEARCH OF PERSONS



Chapter 8

Search of persons

INTRODUCTION 8.1 The starting point for our consideration of search of the person is that “a violation of the sanctity a person’s body is much more serious than that of his office or even of his home”.¹ As the New Zealand Court of Appeal has noted, a “personal search is a restraint on freedom and an affront to human dignity”.²

8.2 Accordingly, the current law does not treat people like property: the circumstances in which personal search may be conducted are limited to compelling circumstances justifying warrantless search. There is no general authority to search anyone solely on the basis that there are reasonable grounds for believing that they have evidential material relating to an offence or illegal items in their possession. Common law and statute have typically allowed a search of the person only in narrowly prescribed circumstances and do not generally give the automatic right to such a search as a corollary of a right to search premises or vehicles.³ In addition, there is no general power to detain a person to enable a search to be made later.

8.3 There has been some departure from this restrictive approach in recent decades. For example, section 18 of the Misuse of Drugs Act 1975 permits someone to be searched simply because he or she is in a place that is the subject of a lawful search under that section (although the search must, of course, still be reasonable in the circumstances).

8.4 Notwithstanding this trend, our view is that the justification for searching a person must remain stronger than that required for places or vehicles. We do not suggest that the threshold for searching a person should be higher than the generally accepted test of “reasonable grounds to believe” (discussed in chapter 3), but rather that the circumstances in which a person may be searched need to be carefully circumscribed to ensure that such searches only occur where legitimate law enforcement objectives outweigh the protections otherwise accorded to the sanctity of the person.

8.5 There is one other respect in which searching a person should also differ from a search of premises, things or vehicles. Prior judicial authorisation has never been a general pre-requisite to a personal search for evidential material relating

1 *R v Pohoretsky* [1987] 1 SCR 945, para 5 (SCC) Lamer J.

2 *R v Jefferies* [1994] 1 NZLR 290, 300 (CA) Richardson J. See also *R v Williams* [2007] NZCA 52, para 113, where the Court of Appeal reaffirmed the highest expectation of privacy relates to searches of the person.

3 See, for example, *R v Ella Paint* (1917) 28 CCC 171, 175 (NSSC), where Harris J held that such action was “so unusual” and involved “pushing farther the invasion of one’s privacy than breaking open a door or closet”.



to criminal offending.⁴ We do not consider that there should be any change in that respect. In contrast to search of a place or thing, searching a person pursuant to a warrant is capable of being easily and readily frustrated in a number of ways and at any time. The article may be in clothing that a person discards, or he or she may transfer the object to someone else, or simply dispose of it in the immediate environment. Whereas an officer searching a place or thing, or a stationary vehicle, can take steps to secure the area pending a warrant being obtained, there is no ability to do so when a person is to be searched unless he or she is already in custody. Preventing the object of the search being relocated is thus unlikely to be practicable. In almost all instances, therefore, a requirement that a warrant be obtained would defeat the purpose of the search.

The meaning of “the person” for the purposes of this chapter

- 8.6
- Wherever a discrete power to search someone (independent of a power to search a private place) is provided, it should include a power to search any item that person is wearing or carrying, and any item in his or her physical possession or immediate control that is ordinarily capable of being worn or carried.
- 8.7
- This is because it is impracticable to require an officer to have reasonable grounds to believe that evidential material relating to an offence is in any particular bag or receptacle with the person before it may be searched.⁵ If a proper basis exists to believe that somebody has the evidential material with them, it could often be contained in items in their possession or immediate control.

RECOMMENDATION

8.1

The power to search people should include the power to search any item they are wearing or carrying, and any such item in their physical possession or immediate control.

Circumstances in which search of the person may occur for general law enforcement purposes

- 8.8
- This chapter focuses on searching people for law enforcement purposes, generally evidence-gathering. We propose that people may be searched in the following circumstances:
- by consent;
 - by virtue of being in a private place or vehicle that may be searched (with or without warrant);

4

However in Australia Commonwealth legislation makes provision for the issue of a search warrant in respect of a person: see Crimes Act 1914 (Cth), s 3E. See also the Law Reform Commission of Canada *Search and Seizure* (Report 24, Ottawa, 1984), 16, which recommended that a search warrant be available in respect of a person; a recommendation that was not subsequently enacted.

5

Where there are grounds for such a belief, the search warrant should be obtained so as to specifically authorise the search of the receptacle.

CH 1
CH 2
CH 3
CH 4
CH 5
CH 6
CH 7
CH 8
CH 9
CH 10
CH 11
CH 12
CH 13
CH 14
CH 15
CH 16

- under a power to search without warrant for specified purposes in specified places;
- where a person leaves a search location before the search is conducted or completed;
- incidental to arrest.

CONSENT

- 8.9 We have discussed the issue of consent searches in chapter 3. Consistent with our recommendations for the search of places and vehicles, we recommend that a person may be searched at any time and in any place with his or her informed consent. Generally such consent removes the need for reasonable belief or compliance with statutory obligations that would otherwise apply to searching someone (except, of course, the Bill of Rights Act). There are, however, a small number of legislative regimes where consent brings into play a range of specified procedural requirements, necessitating compliance with statutory obligations.⁶

WHERE THE PERSON IS IN A PRIVATE PLACE OR VEHICLE THAT IS BEING SEARCHED

- 8.10 Under current New Zealand law, it is unclear whether there is a power to search those who are found in places or vehicles that are the subject of a lawful search, and if so the nature and extent of that power. We acknowledge the argument that, since there is no general power to search people in public (even if there are reasonable grounds to believe that they have evidential material relating to an offence with them), no such general power should exist when people are in a private place. However, we consider it would unreasonably hinder legitimate law enforcement to absolutely preclude searching someone where a power to search a place or vehicle in which that person is situated is being lawfully exercised. Should reasonable grounds exist to believe that evidential material is in the place or vehicle, it will often be as likely to be found on someone there as in a drawer or a glove box.
- 8.11 Further, where an entry and/or search power is exercised in relation to private property, any privacy rights have already been compromised by the initial exercise of that power. While personal search necessarily involves greater intrusion on privacy than the search of property, it is arguably less of an intrusion when exercised as an incident of a primary power to search premises or vehicles than when it is exercised independently.
- 8.12 In this respect, there is no justification to distinguish between warrantless searches and searches pursuant to a warrant. The critical issue is whether the inability to search someone would unduly hinder the purpose of the search. However, our recommendation does not apply to consent searches; a consent given to search a place or vehicle should never provide lawful authority to search a person, in the absence of specific consent given for that purpose.

Options for reform

- 8.13 There are two options for reform:
- The first option is that currently adopted in section 18 of the Misuse of Drugs Act 1975. In particular, section 18(1) of the Misuse of Drugs Act provides a power to search anyone found in a place for which a search warrant has been

⁶ Misuse of Drugs Amendment Act 1978, s 13C and a range of provisions under the Criminal Investigations (Bodily Samples) Act 1995 concerning obtaining bodily samples by consent.

issued for an offence against that Act. Section 18(2) provides a corresponding warrantless power to search places and people found therein for certain controlled drugs. There is no statutory requirement that there be reasonable grounds to believe or suspect that drugs are on the person (as distinct from being generally in the area within which the person is located), and it is not clear whether the courts would read in such a requirement. While the overriding requirement in the Bill of Rights Act that the search be reasonable would at least necessitate that there be a reasonable possibility that the evidential material being sought is on the person, there is arguably no further threshold to be met.

- A second option is that currently used in section 168(3)(b) of the Customs and Excise Act 1996. That limits searching anyone found in the place specified in the warrant or who arrives there if the executing officer has reasonable grounds to believe that the relevant evidential material is on that person. This option was preferred by the Search and Search Warrants Committee.⁷

- 8.14 Generally we favour the latter option. If searching people was allowed simply on the basis of a reasonable possibility that the evidential material being sought was on them, that would place a personal search on the same footing in all respects as the search of a drawer or a glove box. This would run counter to the overriding principle that individual liberty and personal sanctity require greater protection. Accordingly, a higher threshold is required. The appropriate balance is achieved by the threshold used in the Customs and Excise Act.
- 8.15 Subject to the exception identified below, we therefore recommend that, wherever there is a power for the police to search a place or vehicle with or without warrant, a person who is found in that place or vehicle (or who arrives at the place or who alights from the vehicle) during the search can be searched, but only where there are reasonable grounds to believe that the object of the search is on that person.
- 8.16 The exception relates to the Misuse of Drugs Act 1975. We accept the view put to us by the police that in cases where there is authority to search premises or vehicles for controlled drugs, it will be rarely possible to establish reasonable grounds to believe that drugs are on any one person, especially in situations where several people are on premises where drug manufacturing or dealing is taking place or has recently occurred. Drugs are easily concealed on the person. A requirement to meet any threshold before a person present could be searched would often frustrate the exercise of the search power. We therefore recommend that section 18(1) and 18(2) of the Misuse of Drugs Act 1975 be retained in their current form in this respect. The search will nevertheless remain subject to the overall reasonableness requirement of section 21 of the Bill of Rights Act, and arguably, will be unreasonable if there is no basis to consider that controlled drugs might be on the person searched.
- 8.17 We have considered whether the arguments in favour of a power to search for controlled drugs without a reasonable belief or suspicion that drugs are on the person should apply to other items that are small and easily concealable on the

⁷ Search and Search Warrants Committee *Search and Search Warrants: Final Report* (Wellington 1988) 21.

person.⁸ We have rejected any such extension, primarily on the basis that possession of other items of that nature (such as jewellery and cash) is not, in itself, unlawful and there is therefore a lesser public interest in their seizure. We note also that there is no automatic right to search for them in either Canada or the United Kingdom. Nor do we think an extension should be made for weapons or firearms for similar reasons. Moreover, in the case of powers under the Arms Act, there is no indication that the existing law requiring a threshold of reasonable suspicion before such a search can be made leaves a gap that should be remedied.

- 8.18 One consequence of our approach is that there will need to be amendment to section 342(2)(d) of the Gambling Act 2003, which presently gives police officers and gaming inspectors the power to search anyone found on premises that are the subject of a search warrant. Although the objects of such searches (such as gambling chips) are small and easily concealable, they are not in themselves unlawful and therefore do not justify the same level of intrusion on personal privacy as the search for drugs. We therefore propose that section 342(2)(d) should require independent reasonable belief that the object of the search is on the person.⁹

RECOMMENDATIONS

- 8.2 Where the police are searching a place or vehicle pursuant to a search power, they should also have the power to search anyone who is found at or arrives at the place, or who is in or alights from the vehicle, if an officer has reasonable grounds to believe that evidential material that is the object of the search is on that person.
- 8.3 Sections 18(1) and (2) of the Misuse of Drugs Act 1975 should be retained in their present form and should not require a police officer to have a reasonable belief that the person being searched incidental to a search of a place or vehicle is in possession of controlled drugs.
- 8.4 Section 342(2)(d) of the Gambling Act 2003 should be amended to require a reasonable belief threshold before searching someone.

Search for dangerous items

- 8.19 The safety of police officers while searching a place or a vehicle pursuant to a search power is important. General offence provisions such as obstruction and existing powers to arrest or search a person reasonably suspected of unlawfully carrying a firearm are adequate to deal with most situations, but in one respect we believe the present law to be deficient. Where the police officer has reasonable grounds to suspect that a person at the place or in the vehicle being searched is in possession of a dangerous item, such as a knife or an offensive weapon, in circumstances that do not amount to an offence, the officer has no power to search that person.

8 See, for example, Gambling Act 2003, s 342(2)(d), which empowers any constable or gambling inspector executing a search warrant to search any person found at the place that is being searched.

9 There would need to be similar amendments to any other provisions of this nature, although we have not identified any.

- 8.20 We do not consider that the police officer should have to wait until the intentions of the person to use the dangerous item become clear; at that stage the officer's safety may be imperilled. The officer should be able to undertake a protective search of that person as soon as he or she has reasonable grounds to suspect the item poses a safety threat.
- 8.21 We propose a search power along the lines of section 168A of the Customs and Excise Act 1996, which empowers a customs officer executing a search warrant to search a person, if there are reasonable grounds to believe that the person possesses a dangerous item that poses a threat to safety and immediate action is needed to address the threat. We see no reason to confine such a search to situations where a warrant is being executed; it should be available whenever a police officer is exercising a search power in respect of a place or vehicle. For the reasons we have discussed in chapter 5,¹⁰ the threshold of reasonable grounds to suspect is justified in these circumstances.
- 8.22 Unless the possession of the dangerous item constitutes an offence, the item should be returned to the person from whom it was taken once the search has been completed, or when the police officer is satisfied there is no longer any threat to safety.

RECOMMENDATIONS

- 8.5 Where the police are searching a place or vehicle pursuant to a search power, they should also have the power to search anyone who is found at or arrives at the place, or who is in or alights from the vehicle, if an officer has reasonable grounds to suspect that person is in possession of a dangerous item that poses a threat to safety, and immediate action is needed to address the threat.
- 8.6 Unless the possession of the dangerous item constitutes an offence, the item should be returned to the person from whom it was taken once the search has been completed, or when the police officer is satisfied there is no longer any threat to safety.

POWER TO SEARCH FOR SPECIFIED PURPOSES AND IN SPECIFIED PLACES

- 8.23 Generally, the common law provided no right to search those reasonably believed to have evidential material on them, save in the event of an arrest. In New Zealand that position has been modified in a number of circumstances through statute, specifically:
- section 18(3) of the Misuse of Drugs Act 1975, relating to specified drugs;
 - section 12A of the Misuse of Drugs Amendment Act 1978, relating to the controlled delivery of specified drugs;
 - section 202B of the Crimes Act 1961, relating to knives, offensive weapons and disabling substances;
 - section 224 of the Crimes Act 1961, relating to stolen goods in transit;
 - section 13 of the Aviation Crimes Act 1972, relating to offences against that Act where a person has refused to consent to a search;
 - sections 60 to 61 of the Arms Act 1983, relating to firearms;

¹⁰ Chapter 5, para 5.70. See also chapter 8, paras 8.27 and 8.28.

- section 108 of the Biosecurity Act 1993, relating to uncleared risk goods or unauthorised goods;
- section 149B(2) of the Customs and Excise Act 1996, relating to dutiable, uncustomed, prohibited or forfeited goods or evidence of a contravention of that Act;
- section 55 (1)(b) of the Maritime Security Act 2004, relating to offences against that Act where a person has refused to consent to a search.

8.24 Generally, these powers give the police authority to remove from people items that they may not lawfully possess. Their primary purpose is not evidence-gathering, but rather public safety, or the return of stolen goods to their rightful owner.

Possession of potentially harmful items

8.25 We believe that the powers in section 18(3) of the Misuse of Drugs Act 1975, section 12A of the Misuse of Drugs Amendment Act 1978, section 202B of the Crimes Act 1961 and sections 60 to 61 of the Arms Act 1983, which all relate to potentially harmful items, should be retained, since there is an overriding public interest in ensuring that such items are not in circulation in the community.

8.26 However, there is some inconsistency between the enactments relating to weapons in relation to the threshold that must be reached before the power can be exercised. Under the Crimes Act provision, the officer must have “reasonable grounds to believe”; under the Arms Act, he or she must merely have “reasonable grounds to suspect” or “reason to suspect”.

8.27 In chapter 3 we have recommended that the standard statutory threshold for the exercise of law enforcement search powers should be reasonable grounds to believe. However, we accept the police view that an increase in the threshold to require reasonable grounds to believe would be too onerous and inappropriate in the Arms Act context. Given the potential danger that offences involving firearms pose, requiring reasonable grounds to believe before a personal search can be undertaken may mean that the police could not take prompt action in situations where the public interest is best served by immediate police intervention. Accordingly, we propose no change to the suspicion threshold for the Arms Act provisions that authorise personal search.

8.28 On the same basis we recommend that the threshold of reasonable suspicion should be preferred in section 202B of the Crimes Act (relating to knives, offensive weapons, and disabling substances) and that it should be amended accordingly. However, the same justification does not apply to section 18(3) of the Misuse of Drugs Act 1975 and section 12A of the Misuse of Drugs Amendment Act 1978, since the offences under those provisions do not carry the same potential for immediate harm to the community. The threshold in those sections should therefore remain reasonable belief.

8.29 Some concern was expressed in submissions to us about lowering the threshold in section 202B of the Crimes Act 1961 to suspicion rather belief. Notwithstanding those concerns, we consider that if a person has, without reasonable excuse, a knife, offensive weapon, or disabling substance in a public place, the public risk is such that the threshold before a search may be undertaken should be consistent with that in the Arms Act 1983.

RECOMMENDATIONS

- 8.7 The powers to search a person under section 18(3) of the Misuse of Drugs Act 1975, section 12A of the Misuse of Drugs Amendment Act 1978 and sections 60 to 61 of the Arms Act 1983 should be retained.
- 8.8 The power to search a person under section 202B of the Crimes Act 1961 should be retained, but amended so that the threshold for search is reasonable suspicion rather than reasonable belief.

Possession of items related to border control

- 8.30 Section 108 of the Biosecurity Act 1993 authorises a member of the police to search people where it is suspected that they have, in specified circumstances, uncleared risk goods or unauthorised goods in their possession. Sections 149 to 149BA of the Customs and Excise Act 1996 authorise customs officers and members of the police to search people for a range of goods (including prohibited items) and is limited to border control and customs-controlled areas only. The context of border control requires that powers be exercised immediately and regularly, so that risk, unauthorised or prohibited goods do not cross the border and get into domestic circulation. Such powers are therefore justified and we recommend that they be retained.
- 8.31 Section 149B(2) of the Act, extends to public places, the power to search where there are reasonable grounds to believe specified items are hidden on someone. This power is limited to those who have arrived in New Zealand within the last 24 hours at a place other than a customs place, or are about to depart New Zealand from a place other than a customs place. It is therefore the equivalent of the border power, and on this basis we again think that it is justified.
- 8.32 The threshold for conducting a search under section 149B (1) is suspicion rather than belief. As we noted in chapter 3,¹¹ border control is a particular area where the lesser threshold can be justified given the brief period of time available for the officer to assess whether the grounds for search exist.
- 8.33 The powers in the Aviation Crimes Act 1972, the Biosecurity Act 1993 and the Maritime Security Act 2004 referred to above are similarly justified as a form of border control. Moreover, given the significant potential consequences of a failure to discover the item being searched for, we again accept the need for the suspicion threshold in each case.
- 8.34 We do, however, have some concerns about the drafting of the relevant powers under section 13 of the Aviation Crimes Act 1972 and section 55 (1)(b)(i) of the Maritime Security Act 2004. That section in the 2004 Act provides:

A member of the police may, without a warrant, search a person and that person's personal effects or vehicle, and may detain that person for the purposes of that search, and may take possession of any article referred to in section 50(1) found in the course of that search, if—

11 Chapter 3, para 3.10.

- (a) a company or master refuses to carry a person who has refused to consent to the searching of his or her person or personal effects or vehicle; and
 - (b) the member of the police has reasonable grounds to suspect that–
 - (i) an offence against this Act has been, is being, or is likely to be, committed, whether by that person or by any other person; or
 - (ii) a search of the person refusing to consent is likely to disclose evidence that an offence against this Act has been, is being, or is likely to be, committed, whether by that person or another person.
- 8.35 The suspicion allows a personal search in cases where there is no basis to consider that a person being searched is in any way involved in an offence that has been, is being or is likely to be committed nor that the search will disclose evidence of an offence under the Act. While it is true that this power applies only to people who have refused to consent to a search of their person, the consequence of that failure is that the person may be required to leave the ship or port security area. On that basis any imminent harm in the area in which the power may be exercised would no longer exist. Accordingly, we do not consider that a search power in such wide terms can be justified. In our view the member of police should be required to have both reasonable grounds to suspect a relevant offence has been, is being, or is likely to be committed and that the search of the person is likely to disclose evidential material relating to that offence. We recommend that section 55(1)(b)(i) be amended accordingly.
- 8.36 A similar concern exists with regard to section 13(1) of the Aviation Crimes Act 1972. Under that section there is no purpose for the search specified. Before the restraint on freedom resulting from a personal search can be justified there should be some prior basis to consider that the item being searched for will be found on the person. That link is absent from this power and a two limb test of the nature we propose above for the Maritime Security Act should also be included.

RECOMMENDATIONS

- 8.9 The power to search a person under section 108 of the Biosecurity Act 1993 and sections 149 to 149BA of the Customs and Excise Act 1996 should be retained.
- 8.10 The search powers in section 13(1) of the Aviation Crimes Act 1972 and section 55(1)(b) of the Maritime Security Act 2004 should be amended to require the member of police conducting the search to have reasonable grounds to suspect both that a relevant offence has been, is being, or is about to be committed and that a search of the person will disclose evidential material relating to that offence.

Extension to other items that may not be possessed

- 8.37 We have considered whether a power of search should be extended to other items that may not be possessed. Such items include forged bank notes (section 263 Crimes Act); paper or implements for forgery (section 264 Crimes Act); counterfeit coins or things to make counterfeit coins (section 266 Crimes

Act); and possession of objectionable material (section 131 Films, Videos, and Publications Classification Act 1993).

- 8.38 In relation to forged bank notes, paper or implements for forgery and counterfeit coins, harm arising from them is economic rather than physical, and we do not regard it as appropriate to provide a warrantless power to search people to prevent that harm. In any case, we consider that the power would so seldom be used that it is not necessary to provide for it.
- 8.39 That leaves objectionable material under the Films, Videos, and Publications Classification Act 1993. There is an argument that as such material is regarded as harmful to individuals and injurious to the public good it is therefore in the public interest that it be removed from those possessing it, and that adequate powers should be available for that purpose. That may suggest the need for additional powers to search people in public for such material.
- 8.40 We understand, however, that the need for search powers for possession offences under the Films, Videos, and Publications Classification Act was fully considered in the context of the 2005 amendments to that legislation and that there was no demonstrable need for such a power. In the absence of such a need, we do not propose any change.

Stolen goods in transit

- 8.41 Under section 224 of the Crimes Act 1961, the police have the power to search people, and a range of containers and vehicles, in places of transit (railway lines, airports, etc), if they have reasonable grounds to believe that there are stolen goods in those places.
- 8.42 The section is anomalous, in two respects:
- the specified places that can be searched (for example, only for goods in places of transit as opposed to in storage);
 - its applicability to stolen goods only, as opposed to other offending in which there might be thought to be a comparable or greater public interest.
- 8.43 The in transit aspect of section 224 reflects the historical roots of the section, which was first enacted as a power to search for pillaged goods.¹² In chapter 9, we set out the reasons why the related power in section 225 to search vehicles for stolen (but not dishonestly obtained) goods should be retained.¹³ We do not, however, see those reasons as a justification for retaining the search power contained in section 224. In relation to vehicles, it is effectively redundant, since section 225 provides such a power without the limitations imposed by section 224(1)(b) before the search may be carried out. In relation to people, the “in transit” nature of the goods does not in itself provide sufficient reason to outweigh the special protections that the law should otherwise afford to the person. Given that we recognise that a personal search gives rise to issues of individual liberty and human dignity, compelling justification for such searches should exist. That justification is absent in respect of this power. We understand from the police that it is seldom exercised and there would seem to be no compelling operational reason for its retention.

¹² See Police Offences Amendment Act 1924, s 9, later Police Offences Act 1927, s 75.

¹³ Chapter 9, recommendation 9.6.

- 8.44 In short, we do not believe that the considerations that support the warrantless search of a person for controlled drugs or firearms or for evidential material relating to offences punishable by imprisonment of 14 years or more justify the warrantless search of someone for stolen goods in transit.

RECOMMENDATION

- 8.11 The power to search a person for stolen goods in transit under section 224 of the Crimes Act 1961 should be repealed.

Evidential material relating to serious offences

- 8.45 We have recommended elsewhere in this report that in exceptional circumstances the police should have the power to search private places¹⁴ and vehicles¹⁵ without warrant for evidential material relating to serious crimes. In relation to the warrantless search of places, for the reasons set out in chapter 5, we recommended that there should be a power to search for such material where there are reasonable grounds to believe that the following two conditions are satisfied:
- evidential material relating to offending punishable by 14 years' imprisonment or more is in the place;
 - it would be destroyed, concealed or impaired in the time taken to obtain a search warrant.
- 8.46 For similar reasons, a corresponding power to search a person in a public place is necessary. As we noted earlier, warrants are not generally available for personal search, and even if they were, they would usually be ineffective.¹⁶
- 8.47 In the absence of an effective search power, people who seek to avoid the seizure of evidential material relating to very serious offending can therefore do so merely by keeping it on their person at all times. The absence of such a power may also lead to other anomalous situations. For example, the police observing people on the street and believing them to have evidential material in their possession, would not at that time be able to search them, but would be able to do so when they entered a private place (relying on the warrantless entry power discussed above, and the associated power to search persons in such places discussed at paragraph 8.15 above).
- 8.48 We therefore think that providing the police with a power to search a person in a public place without warrant where a police officer has reasonable grounds to believe that the person is in possession of evidential material relating to an offence punishable by 14 years' imprisonment or more is a justified limitation on expectations of privacy. We recommend accordingly.
- 8.49 However, we recommend that the proposed threshold for the exercise of the power in relation to premises be modified in one respect. The second limb of the test – that the material would be destroyed, concealed or impaired in the time taken to obtain a warrant – is unnecessary in relation to people; the mere fact that the relevant evidential material is on the someone places it at risk, since

¹⁴ Chapter 5, recommendation 5.13.

¹⁵ Chapter 9, recommendation 9.4.

¹⁶ Above, para 8.5.

there is always the potential for it to be moved from one location to another, or destroyed or impaired.

- 8.50 The evidential material to which this proposal applies relates to offending that would only be investigated by police. Accordingly, the power should not be available to non-police enforcement officers.

RECOMMENDATION

- 8.12 The police should be able to search without warrant a person in a public place if there are reasonable grounds to believe that he or she is in possession of evidential material relating to an offence punishable by 14 years' imprisonment or more.

Where person leaves search location before search conducted or completed

- 8.51 We have proposed the retention or creation of a number of powers to search the person. It is not unusual for people to flee or attempt to flee from the police in situations where they are apprehended in a public place and liable to be searched. Nor is it uncommon for those present at a search scene, and who are liable to be searched, to leave before they can be detained or directed to remain. Such a situation may arise when the police are searching premises or a vehicle for controlled drugs and an occupant flees before the search takes place. The question then arises whether that person should still be able to be searched when he or she is subsequently located.
- 8.52 We think a police officer should have such a power in narrowly circumscribed circumstances – otherwise there would be an incentive for those who are liable to be searched to flee. A person leaving a place or vehicle in contravention of a police direction to remain could, in some circumstances, be arrested for obstructing the police in the execution of their duty and searched incidental to arrest. However, people who leave places or vehicles that are being searched before a specific direction to remain is given and before they are aware that the police wish to search them would not be committing the offence of obstruction. Moreover, we do not consider that the police should arrest people solely in order to search them.
- 8.53 Imposing specific temporal or geographical limits on the exercise of a power to search people when they are subsequently located would result in arbitrary distinctions between lawful and unlawful searches; encourage people to flee as far as possible, or to evade detection for as long as possible; and defeat the purpose for which the power of search is being provided. However, as the time and distance from the original search increases, the likelihood that reasonable grounds will exist to believe that the evidential material is still on the person will correspondingly diminish.
- 8.54 Requiring the police officer to be freshly pursuing the person to be searched would allow both elements of time and distance to be taken into account. A fresh pursuit test also provides a robust standard to meet the different circumstances that may give rise to such a search. Provided the police officer still has the requisite reasonable grounds for the search and is freshly pursuing the person when he or she is located, the officer should be able to carry out the search and to enter any private property for that purpose.

RECOMMENDATION

8.13 Where a police officer has formed an intention to undertake a lawful search of a person in a place (including a public place) or in a vehicle, and that person leaves the place or vehicle before being searched, the officer should be able to search him or her upon subsequent apprehension and to enter any private property for that purpose, provided that:

- the police officer is freshly pursuing the person from the location of the intended search;
- the officer believes on reasonable grounds that the person still has the relevant evidential material on him or her.

SEARCH
FOLLOWING
ARREST

8.55 There is a substantial body of case law on the power of the police to search a person upon arrest. Until 1979, the authority of the police to conduct such a search was dealt with solely by the common law. The Police Amendment Act 1979 then made specific provision for the search of arrested people who were to be locked up in police custody, whilst at the same time preserving the common law power to search those arrested incidental to their arrest.¹⁷ The nature and scope of the common law power and its relationship with the Police Act provision is unclear, prompting judicial observation that legislative clarification would be desirable.¹⁸ We agree.

8.56 The powers of police officers to search people upon their arrest should be brought together and codified. The arrest and detention of an arrested person is a continuous process. Thus, a single search power will not suffice to meet the different situations where a search may be necessary; such a power would be too wide at one point in the process and too narrow at another. Accordingly, we propose powers that are tailored to best achieve a balance between the rights of the arrested person and the public interest in three situations:

- a cursory or frisk search immediately upon arrest for the purpose of ensuring that the arrested person does not have articles that may harm others or facilitate an escape;
- a more extensive search if there are reasonable grounds to believe the arrested person is in possession of evidential material relating to the offence for which he or she was arrested, or items that may harm others or that may facilitate an escape;
- a search that will enable the arrested person's property to be taken and held for the period he or she is locked up in police custody.

Personal search incidental to arrest

The common law

8.57 In *Cloutier v Langlois*¹⁹ L'Heureux-Dubé J, delivering the judgment of the Canadian Supreme Court, quoted a text as authority for the following proposition:²⁰

17 See Police Act 1958, s 57A.

18 *Everitt v Attorney-General* [2002] 1 NZLR 82, paras 70 and 75 (CA) Thomas J.

19 *Cloutier v Langlois* [1990] 1 SCR 158 (SCC).

20 Winston McCalla, *Search and Seizure in Canada* (Aurora, Ont., Canada Law Book, 1984) 128-129.

The power to search incidental to arrest is firmly established at common law. It was never based on any express or specific authority other than the view that the power was a natural or assumed adjunct to the officer's control over the suspect. This has been attributed in part to the traditional tolerance of intrusive acts upon the person of an arrested individual.

However, that authority is not unqualified. It is dependent upon the lawfulness of the arrest itself²¹ and is limited to three purposes:

- to secure items on the person implicating him or her in the commission of an offence²² (or sometimes limited more narrowly to only the offence for which he or she has been arrested or charged);²³
- to secure objects that may cause harm to the arrested person or others;²⁴
- to secure items that may be used to aid escape from police custody.²⁵

8.58 It is unclear whether there needs to be a reasonable belief or suspicion that the person actually has items that implicate him or her or that may cause harm or facilitate escape. The Canadian Supreme Court has held to the contrary,²⁶ while in New Zealand the courts have variously observed that there needs to be reasonable grounds to believe, reason to suspect, or a mere possibility.²⁷ However, it is clear that, in New Zealand, searching an arrested person for no reason other than the fact that he or she has been arrested is unlawful.²⁸ It is also clear that in each case the need to search upon arrest must be assessed by reference to the particular circumstances and must be exercised only where there is good reason or where it is reasonably necessary to do so.²⁹

8.59 In framing our recommendations, we have recognised that police officers are subjected to an element of risk each and every time they make an arrest. As Williams J observed over 150 years ago in *Leigh v Cole*:³⁰

On one hand, it is clear that the police ought to be fully protected in the discharge of an onerous, arduous, and difficult duty – a duty necessary for the comfort and security of the community. On the other hand, it is equally incumbent on every one engaged in the administration of justice, to take care that the powers necessarily entrusted to the police are not made an instrument of oppression or of tyranny towards even the meanest, most depraved, and basest subjects of the realm.

8.60 Accordingly, we have sought to balance the general principles of human dignity articulated at the beginning of this chapter against the need to protect officers making an arrest. In order to achieve this we propose a two-step procedure for

21 *R v Stillman* [1997] 1 SCR 607 (SCC).

22 *Barnett & Grant v Campbell* (1902) 21 NZLR 484; *R v Jefferies*, above n 2.

23 Halsbury's Laws of England (4th ed) 121 referred to by Tompkins J in *Craig v Attorney-General* (1986) 2 CRNZ 551, 562. This statement has subsequently been overtaken by s 32 of the Police and Criminal Evidence Act 1984 (UK).

24 *Leigh v Cole* (1853) 6 Cox CC 329; *Lindley v Rutter* (1980) 72 Cr App R 1, 6, referred to by Richardson J in *R v Jefferies*, above n 2, 300.

25 *Lindley v Rutter*, above n 24.

26 *Cloutier v Langlois*, above n 19.

27 See, for example, *Craig v Attorney-General*, above n 23, 562; *Everitt v Attorney-General*, above n 18, 102. In *Craig*, Tompkins J also suggested a broader test: that there should be a "reasonable necessity" for the search.

28 *Craig v Attorney-General*, above n 23, 563.

29 *Lindley v Rutter*, above n 24; *Craig v Attorney-General*, above n 23.

30 *Leigh v Cole*, above n 24, 330-31.

search of the person following arrest: an initial frisk or pat-down search; and a more thorough search if reasonable grounds exist to believe that relevant items are upon the arrested person.

Step 1: An initial frisk search

- 8.61 We propose that an initial cursory frisk search should be permitted in order to ascertain whether there is anything on the arrested person that may be used to harm anyone, or to facilitate the arrested person's escape. Given the difficulty that police face in predicting when an arrested person may retaliate, resist or attempt to escape from custody, and the inherent risk to them arising from arrest, we do not believe that the police should be required to have reasonable grounds to believe or suspect that harmful items or items that facilitate escape are on the person. Rather, the authority to conduct a frisk search should arise solely from the fact that the person was arrested. We agree with the Canadian Supreme Court's justification for such an approach:³¹

In this regard a 'frisk' search is a relatively non-intrusive procedure: outside clothing is patted down to determine whether there is anything on the person of the arrested individual. Pockets may be examined but the clothing is not removed and no physical force is applied. The duration of the search is only a few seconds. Though the search, if conducted, is in addition to the arrest, which generally entails a considerably longer and more sustained loss of freedom and dignity, a brief search does not constitute, in view of the objectives sought, a disproportionate interference with the freedom of persons lawfully arrested. There exists no less intrusive means of attaining these objectives.

- 8.62 While there should be no threshold required before such a search can be made, every frisk search would be subject to the Bill of Rights reasonableness requirement. Thus, a police officer who has arrested someone for an offence would be expected to turn his or her mind to the need for a frisk search before undertaking it. While such a search would be the norm, subjecting an arrested person to it when, in the circumstances, it was plainly unnecessary would be unreasonable.
- 8.63 The initial frisk search should be for protective purposes only. It should not be conducted for the purpose of preserving or obtaining evidential material. We are of that view for two reasons. First, the common law in New Zealand presently requires a threshold of belief or suspicion as to the existence of the evidential material before such a search is made.³² Secondly, for the reasons discussed in chapter 5, we concluded that a search of a place incidental to arrest may be undertaken only if the arresting officer has reasonable grounds to believe that evidential material will be found there.³³
- 8.64 In reaching this conclusion we differ from the views of the Search and Search Warrants Committee.³⁴ That Committee was of the view that it would be too high a threshold to require that, before a search upon arrest for an item that could cause harm is conducted, there should be reasonable grounds to believe

³¹ *Cloutier v Langlois*, above n 19.

³² See *Craig v Attorney-General*, above n 23.

³³ Chapter 5, para 5.31. A similar threshold should also be met before a vehicle may be searched incidental to arrest: see chapter 9, recommendation 9.8.

³⁴ Search and Search Warrants Committee, above n 7, 36.

that such an item is on the person. However, the Committee further concluded that such a threshold was also too high to search for material evidence upon arrest. That conclusion may have been reached because the Committee only regarded the search incidental to arrest as being cursory in nature and undertaken immediately after arrest. As discussed below,³⁵ we consider that, provided the grounds for it exist, a more extensive search for weapons or evidential material should also be permitted.

- 8.65 The scope of a frisk search should be prescribed. The Corrections Act 2004 with its definitions of “rub-down search”³⁶ and the Aviation Security Legislation Bill³⁷ provide examples of provisions defining the scope of similar searches. However, both are drafted for specific purposes and neither may be entirely suitable for the range of circumstances where frisk searches will be required on arrest. The precise scope of a frisk search is a drafting matter, but it should have regard to the protective purpose for which it is provided while not being so broad as to allow routine examination of the mouth, nose or ears.

Step 2: A more thorough search

- 8.66 The limited nature and purpose of the frisk search following arrest will resolve any immediate safety concerns. Between that point and the time when the arrested person is processed or locked up in a police station, a more thorough search may be necessary, particularly to ensure that he or she does not dispose of evidential material relevant to the offence for which he or she was arrested. In the Commission’s view such a search should be authorised only if the officer has reasonable grounds to believe that there is anything on the person:
- that may be used to cause harm to the arrested person or any other person;
 - that may be used to facilitate the arrested person’s escape;
 - that is evidential material relating to the offence for which the person is being arrested.
- 8.67 The reasonable belief that justifies this search may be derived from the frisk search, where that search identifies the presence of items that require a more thorough search of the arrested person.

RECOMMENDATIONS

> Continued next page

- 8.14 Police officers effecting an arrest should be entitled to undertake a frisk search to ensure the arrested person is not carrying anything that may be used to facilitate his or her escape or to harm anyone.
- 8.15 No threshold of belief or suspicion should be required before a frisk search may be undertaken following arrest.
- 8.16 The scope of a frisk search should be prescribed, having regard to its protective purpose.

35 Below, paras 8.66-8.67.

36 Corrections Act 2004, s 89.

37 Aviation Security Legislation Bill 2007, No. 110-1, cl 6, repealing and substituting the Aviation Crimes Act, s 12 (search of passengers).

RECOMMENDATIONS

- 8.17 Police officers effecting an arrest should be entitled to search the arrested person if they have reasonable grounds to believe that there is anything on the person:
- that may be used to cause harm to anyone;
 - that may be used to facilitate the arrested person's escape;
 - that is evidential material relating to the offence for which the person is being arrested.

Search at police lock-up

- 8.68 At the point where arrested persons are to be locked up in police custody, they may be further searched and any property or money on them taken and held pursuant to section 57A of the Police Act 1958. A police officer may use such reasonable force as may be necessary to conduct the search or to take any money or property.³⁸ The purpose of this provision is to provide a lawful basis to search people being locked up in police cells for two reasons:³⁹
- to remove any items that may be used to harm themselves or other prisoners or police staff; and
 - to safeguard their property while they are in custody.
- 8.69 The rationale for this provision is thus to ensure the safety and security of police cells and to enable an inventory of an arrested person's property to be taken. The power to search only arises when a person is to be locked up in police custody. The fact that a person is arrested or taken into police custody does not, in itself, give rise to the section 57A power.
- 8.70 The term locked up has been considered in *Everitt v Attorney-General*⁴⁰ and in *R v McMullan*.⁴¹ In *Everitt*, Richardson P noted that detention for a short period while formalities are attended to and consideration given to whether bail will be granted is not a lock-up; that "requires further confining within a separate part of the police station whose function is to hold and detain people securely".⁴² In *McMullan*, Williams J was of a similar view: "that phrase is the rough equivalent of detention of an arrested person with no possibility of police bail".⁴³
- 8.71 The police submission made in response to Preliminary Paper 50,⁴⁴ noted that the courts had held that section 57A did not confer a power to search where a person is detained but is to be bailed upon processing. The police pointed out, however, that any arrested person who is being held pending a decision on the granting of bail is likely to be placed in a holding cell with other prisoners. The inability to search an arrested person in such a situation undermined the safety and security rationale of the section 57A power.

38 Police Act 1958, s 57A(1).

39 Hon T F Gill (4 October 1979) 426 NZPD 3331, introduction of the Police Amendment Bill 1979.

40 *Everitt v Attorney-General*, above n 18.

41 *R v McMullan* (5 August 2004) HC AK CRI 2004-004-2977 Williams J.

42 *Everitt v Attorney-General*, above n 18, para 39.

43 *R v McMullan*, above n 41, para 20.

44 New Zealand Law Commission Entry, *Search and Seizure: A Discussion Paper* (NZLC PP50, Wellington, 2002).

- 8.72 In our view the ability to conduct a search under section 57A only after a decision has been made that a person is not to be granted bail is too restrictive. We consider that a person should be considered to be locked up for the purposes of section 57A if he or she is to be detained in secure custody in a police facility whether pending his or her first appearance in court, a decision as to bail pursuant to section 21 of the Bail Act 2000, or for taking particulars pursuant to section 57 of the Police Act 1958.
- 8.73 The absence of any threshold before exercising the section 57A search power may be seen as being at odds with our proposals for the power to search the arrested person incidental to arrest, where we propose a prerequisite of reasonable grounds to believe. This may sometimes mean that the police officer conducting the search at the lock-up will find evidential material relating to the offence for which the person was arrested when there were no grounds for believing that the arrested person was in possession of the item concerned. There is thus the potential for a police officer who may have no more than a suspicion that the arrested person is in possession of evidential material to simply delay the search to the time when no threshold of belief is required.
- 8.74 This possibility is also a weakness in the present law. We have therefore considered whether a threshold of belief should be a prerequisite for a section 57A search. Such a threshold could only relate to items that pose risks to the safety of the arrested person or other prisoners, the security of the arrested person's property and the security of the premises in which they are detained. However, there may often be very little to indicate whether the arrested person has such items in his or her possession upon arrest. There may also be no grounds for believing that an innocuous item such as a pen could be used in a way that creates safety or security risks. In a great many cases the existence of any risk arising from an arrested person retaining his or her valuables and other property whilst in custody would be likely to be a matter of intuition or chance rather than belief.
- 8.75 We conclude, therefore, that a threshold requirement is not compatible with the objectives of the search power contained in section 57A, as it would in many cases frustrate those purposes. Accordingly, we recommend that the power to search arrested people who are to be locked up should not be subject to the requirement for a threshold to be reached before such a search may be made.
- 8.76 The authority to search is still limited only to those who are to be detained; it would not apply to an arrested person who is released immediately on police bail, or pursuant to a summons issued under section 19A of the Summary Proceedings Act 1957. Moreover, as the power is discretionary and not mandatory, there may be no need for such a search in some circumstances – for example, where the arrested person had been recently searched pursuant to some other search power.

Search by members of the police other than constables

- 8.77 Under section 6(2) of the Police Act 1958, non-sworn members of the police may, if warranted by the Commissioner, exercise particular powers of a sworn officer except a power to arrest or search any person. The Police have queried the appropriateness of retaining the restriction on searching people who are in police

custody, believing that it is operationally desirable that the function of escorting prisoners and any associated search be able to be undertaken by police members other than constables. We note that section 57B of the Police Act 1958 presently permits the police to employ searchers for the purpose of conducting searches of arrested persons under section 57A in certain circumstances.⁴⁵ We see no objection to delegating such a power to any appropriately trained members of the police and note that the authority to search detained persons has recently been vested in designated civilian staff in the United Kingdom.⁴⁶ We recommend accordingly.

RECOMMENDATIONS

- 8.18 The power in section 57A of the Police Act 1958 to search an arrested person who is to be locked up in police custody should be retained.
- 8.19 For the purposes of that section, a person should be regarded as being locked up if he or she is to be detained in secure custody in a police facility whether or not a decision has been made as to the grant of police bail.
- 8.20 The Commissioner of Police should be able to authorise any suitably trained members of the police to search people who are held in police custody pursuant to section 57A of the Police Act 1958.

POWER TO SEARCH FOLLOWING DETENTION

- 8.78 There are a several enactments that vest a police officer with a power to detain that is effectively a power to arrest and take into custody. These include section 109 of the Mental Health (Compulsory Assessment and Treatment) Act 1992, section 37A of the Alcoholism and Drug Addiction Act 1966, section 385 of the Children, Young Persons, and Their Families Act 1989 and under Part 6 of the Land Transport Act 1998.
- 8.79 The risks to police officers in detaining a person under these enactments are the same as those arising from an arrest. Accordingly, we recommend that the power to search the person by way of frisk search, followed, if necessary, by a more extensive search, should be available to the police as if they were arresting the person. However, the power should be for the purpose only of searching for items that may cause harm or facilitate escape. Since the detention is not predicated on the commission of an offence, a search for evidential material is not justified.⁴⁷

RECOMMENDATION

- 8.21 A police officer's authority to search a person following arrest for items that may cause harm or facilitate escape should also apply to a person who has been detained pursuant to a statutory power of detention.

⁴⁵ To enable the search to be carried out by a person of the same gender, or for the search to be undertaken within a reasonable time of the arrested person being taken into custody: Police Act 1958, s 57B(2).

⁴⁶ Police Reform Act 2002, s 38(2)(b) and Schedule 4, para 34.

⁴⁷ If a police officer finds evidence of criminal offending during the course of the search, he or she will be able to seize it in accordance with the plain view doctrine. See above, chapter 3, paras 3.119-3.148.

SEARCH OF THE PERSON FOR IDENTIFYING MARKS

- 8.80 The Police have suggested to us that a power to search an arrested person for identifying marks, such as tattoos, birthmarks, or scars, would be a valuable investigative tool in linking a particular person to the commission of a crime. In cases such as sexual or other assaults where the victim is able to describe the perpetrator by reference to a mark upon his or her body, a power to search a person to verify the presence of the described mark could be of considerable corroborative value. Unless the identifying feature is on the suspected person's face, or is otherwise generally visible, there is presently no authority to confirm the existence of such evidential material unless the suspect consents to a search.
- 8.81 In the United Kingdom section 54A of the Police and Criminal Evidence Act 1984 allows an officer of at least the rank of inspector to authorise a person who is detained in a police station to be searched or examined, or both, "for the purpose of ascertaining whether he has any mark that would tend to identify him as a person involved in the commission of an offence".
- 8.82 In New Zealand section 57 of the Police Act 1958, headed "Particulars for identification of person in custody", allows a member of the police to take particulars of someone in lawful custody on a charge of having committed an offence. In *Keenan v Attorney-General*,⁴⁸ Cooke P expressed the view that, apart from photographs and fingerprints (specifically authorised to be taken), the section extends to taking measurements and particulars of distinctive features such as birthmarks or tattoos. Nevertheless, this provision does not appear to authorise a search or examination of an arrested person for what is essentially an evidential purpose.
- 8.83 We initially considered adopting the United Kingdom approach by proposing the enactment of a specific provision to authorise such a search; on reflection we concluded that it is appropriately encompassed by the proposed power to search upon arrest where the necessary threshold is reached.⁴⁹ The purpose of the search is to confirm the existence of an identifying mark or feature by visual inspection, with the result being conveyed in evidence, possibly by photograph. As such, the exercise of the search power may produce evidential material in the same way as a physical item that is found in the possession of the arrested person. In either case the importance of what is discovered during the search lies in linking the arrested person with the mark or item concerned.
- 8.84 Accordingly, we do not recommend that searching an arrested person for identifying marks should be specifically provided for; where there are reasonable grounds for believing that such a search will lead to the discovery of an identifying mark or feature that is relevant to the offence for which the person was arrested, the power to search for evidential material following his or her arrest vests the police with the appropriate authority.

RECOMMENDATION

- 8.22 A specific power to authorise the police to search an arrested person for identifying marks is not necessary, such authority being provided by the power to search an arrested person proposed in recommendation 8.17.

⁴⁸ *Keenan v Attorney-General* (1986) 2 CRNZ 204, 207 (CA).

⁴⁹ Above, recommendation 8.17.

SEARCHES OF
PERSONS BY
NON-POLICE
AGENCIES

- 8.85 Statutory authority to search a person is conferred on non-police agencies in a small number of instances. Our starting point is that the same principles that we have indicated should govern the police in exercising such powers should also apply to non-police enforcement officers. In summary those key principles are:
- the justification for search of the person should be greater than for places or vehicles;
 - the circumstances in which a person may be searched must be carefully circumscribed to ensure that such searches only occur where legitimate law enforcement objectives (including protection of life) outweigh the protections otherwise accorded to the sanctity of the person;
 - the threshold required to undertake the search should generally be reasonable grounds to believe that the item being searched for is on the person;
 - where there is a threat of immediate and serious harm to other people, (for instance, from firearms or offensive weapons), a suspicion threshold may be justified.
- 8.86 We recommend that the Legislation Advisory Committee consider revising its *Guidelines*⁵⁰ to incorporate these principles and to make it clear that they apply to both police and non-police officers.
- 8.87 We have outlined above the powers available to the police that can be justified on the basis of these principles.⁵¹ We have also identified the powers where a derogation from the normal threshold of reasonable belief is warranted – namely those that are exercised to avert a serious or immediate threat to public safety, and those that are being exercised at the border.⁵²
- 8.88 Statutory powers to search the person have been given to non-police agencies only rarely. Given the greater justification that is required for personal searches than for other searches, we agree with this approach. However, we have identified a small number of circumstances in which such powers ought to be available by reference to the above principles. Some of those are contained in existing statutes; others are powers that we have recommended for police and believe should be similarly available to non-police enforcement officers. We consider each of these circumstances below.

RECOMMENDATION

- 8.23 The principles that govern the powers of police officers to conduct personal searches are equally applicable to non-police enforcement officers. The Legislation Advisory Committee should consider a revision of its *Guidelines* to incorporate these principles.

50 Legislation Advisory Committee, *Guidelines on Process and Content of Legislation* (Ministry of Justice, Wellington, 2001).

51 Above, recommendations 8.2-8.5, 8.7-8.10, 8.12-8.14, 8.17, 8.18 and 8.21.

52 Above, recommendations 8.7-8.10.

Border Control

- 8.89 First, as discussed above,⁵³ the powers available to police and customs officers under sections 149 to 149BA of the Customs and Excise Act 1996 ought to be retained. By the same token, the personal search power contained in section 38(1) of the Financial Transactions Reporting Act 1996, which allows customs officers to detain and search persons (and accompanying baggage), where there is reasonable cause to suspect that the person arriving in or leaving New Zealand has failed to make a required cash report or that it has not been completed correctly, should be retained. This is important for border-protection; among other things, it enables New Zealand to meet its international obligations to combat money-laundering.
- 8.90 An unusual feature of these powers, and of the search warrant provisions of section 168(5) of the Customs and Excise Act 1996, is that before the search power is exercised, the customs or police officer is required to advise the person concerned of his or her right to be taken before a JP, a community magistrate or a nominated customs officer (collectively referred to as a “reviewer”). If such a request is made, the reviewer then determines whether there is a proper basis for the search and gives a direction that the person is or is not to be searched.
- 8.91 The ability for a person who is to be searched by a customs officer to request to be taken before a JP has historic origins.⁵⁴ On its face it is consistent with the human rights values discussed in chapter 2, as it provides the opportunity for a neutral third party to review the adequacy of the grounds on which the search power is to be exercised. Nevertheless, we understand that in practice it is seldom utilised.⁵⁵
- 8.92 In our view there is little to be gained in retaining this procedure. There would appear to be nothing exceptional in these particular searches that calls for an additional procedural requirement, particularly in the case of a search that has already been sanctioned by an issuing officer pursuant to a warrant under section 167(1) of the Customs and Excise Act 1996. Furthermore, in some cases the benefits of a review of the basis for the search may be outweighed by the intrusion arising from the additional time that the person searched is detained before a reviewing officer is available. In those cases where people to be searched are detained for more than a brief period, advice of their right of access to a lawyer is more likely to assist.
- 8.93 We conclude that the provisions in sections 149D and 168 of the Customs and Excise Act 1996 and section 38 of the Financial Transactions Reporting Act 1996 requiring police or customs officers to advise persons who are to be searched under those enactments of their right to be taken before a nominated officer, a JP or a community magistrate before being searched should be repealed.

⁵³ Above, paras 8.30-8.32.

⁵⁴ The procedure was first enacted in the Customs Laws Consolidation Act 1882, s 208.

⁵⁵ A record of the number of relevant searches is not generally kept. However, at one international airport where the number of searches has been recorded, Customs advised that out of the 200 searches conducted over a two and a half year period, no requests for a review were made by the person searched. One request for a lawyer was made: interview, George Smollett, Senior Investigator, Investigations Support, New Zealand Customs Service (Wellington, 2 May 2007).

RECOMMENDATION

8.24 The right in sections 149D and 168 of the Customs and Excise Act 1996 and section 38 of the Financial Transactions Reporting Act 1996 of a person who is to be searched under those enactments to request to be taken before a reviewing officer before being searched should be repealed.

Endangerment to life

- 8.94 Statutory powers provided to non-police agencies to search persons, where failing to do so may result in serious harm to persons or loss of life, should be retained.
- 8.95 An example of such a power, albeit an unusual one in that it can be exercised by a non law enforcement officer (the master or crew members of a ship), is provided by section 12(2)(a) of the Maritime Crimes Act 1999. The crimes against that Act have the potential to endanger life; the authority to search is confined to only those circumstances where it is impracticable to obtain law enforcement or police assistance within a reasonable time; and the power is predicated on a reasonable belief threshold. We therefore consider it to be justifiable.
- 8.96 On the same basis, we broadly support the proposed power in the Aviation Security Legislation Bill⁵⁶ allowing in-flight security officers to conduct a personal search based on reasonable suspicion of the commission of an offence under the Aviation Crimes Act 1972. This power may only be exercised in narrowly defined and specific circumstances where,⁵⁷ in the absence of such power, catastrophic loss of life could result.

RECOMMENDATION

8.25 In narrowly defined circumstances, non-police enforcement officers should have the power to search a person to prevent loss of life or serious harm to others. The power of search in section 12(2)(a) of the Maritime Crimes Act 1999 and a similar power proposed in the Aviation Security Legislation Bill 2007 are justified on this basis.

Powers to search persons incidental to a search power for places or vehicles

- 8.97 We have recommended that if a police officer is exercising a power to search a place or vehicle, the officer should have power to search people in the search location if he or she has reasonable grounds to believe that they are in possession of the evidential material that is the object of the search.⁵⁸ A number of statutes grant enforcement officers other than the police power to search premises or vehicles pursuant to a warrant. Two such examples are section 200 of the Fisheries Act 1996 and section 168 of the Customs and Excise Act 1996. The issue is whether the search of people found in places or vehicles being searched pursuant to a search power should be permitted.

56 See above, n 37, introduced 13 March 2007.

57 See clause 8, inserting a proposed new section 15F in the Aviation Crimes Act 1972.

58 Above, recommendation 8.2.

- 8.98 In our view, an officer who has the power to search a place or vehicle for law enforcement purposes and also any statutory arrest power should be able to search a person found in the place or vehicle (or who alights from the vehicle) in the same way as the police. Where the legislature has granted enforcement officers the power to search places and arrest people (the power to arrest carrying with it the authority to search the arrested person), it can reasonably be assumed that adequate training has been given to those officers to exercise these powers appropriately.

RECOMMENDATION

- 8.26 Non-police enforcement officers who have any statutory arrest power and who are searching a place or vehicle pursuant to a search power should be able to search anyone who is found at or arrives at the place, or who is in or alights from the vehicle, if the officer has reasonable grounds to believe that evidential material that is the object of the search is on that person.

Search for dangerous items

- 8.99 We have recommended that if a police officer is searching a place or vehicle, he or she should have the power to search any person if there are reasonable grounds to suspect that the person is in possession of a dangerous item that poses a threat to safety, and immediate action is needed to address the threat.⁵⁹ We similarly recommend that non-police enforcement officers, who have any statutory arrest power and are searching a place or vehicle, should have the same power to search the person.

RECOMMENDATION

- 8.27 Recommendations 8.5 and 8.6, which relate to the power of police officers to search people for dangerous items incidental to the search of places or vehicles, should apply equally to non-police enforcement officers who have any statutory arrest power.

Where the person leaves the search scene and is subsequently found elsewhere

- 8.100 We have recommended that if a police officer is freshly pursuing a person who has left a place or vehicle before he or she can be searched, the officer may search that person wherever he or she is apprehended if the officer has reasonable grounds for believing he or she is still in possession of the relevant evidential material.⁶⁰ We similarly recommend that non-police enforcement officers who have any statutory arrest power, and the primary power to search a person incidental to the search of a place or vehicle should have the same power to search that person following fresh pursuit if he or she left the place or vehicle before the search power could be exercised.

⁵⁹ Above, recommendation 8.5.

⁶⁰ Above, recommendation 8.13.

RECOMMENDATION

8.28 Non-police enforcement officers who have any statutory arrest power should have the same power as a police officer to search anyone apprehended after leaving the location of an intended search in the circumstances described in recommendation 8.13.

Search incidental to arrest

- 8.101 We have recommended that police officers should have the power to conduct a frisk search upon arrest for items that may facilitate escape or harm any person and that a more extensive search may be conducted if reasonable grounds to believe that such items or relevant evidential material are on the arrested person.⁶¹
- 8.102 The authority to conduct an initial frisk search and the more intrusive search should also be available to other enforcement officers (such as customs and fishery officers) who are vested with the power of arrest. This is necessary to ensure that arresting officers and members of the public are not put at risk, or that evidential material in relation to the offence for which the person is being arrested is not destroyed, concealed or impaired. Those risks can arise following arrest but before the person is placed in police custody. If enforcement officers of agencies other than the police are entrusted with the power of arrest, it follows that they should be able to carry out any search that is a necessary corollary of that arrest power.

RECOMMENDATION

8.29 Non-police enforcement officers who have any statutory arrest power should be able to conduct a frisk search or a more extensive search of an arrested person as proposed in recommendations 8.14 to 8.17.

Power to search following detention

- 8.103 We have recommended that the police should have authority to search a person who has been detained under an enactment for items that may cause harm or facilitate escape as if he or she had been arrested.⁶² Where a person other than a member of the police may exercise a statutory power to detain someone, that person should have similar powers of search. An example is the power of social workers under section 385 of the Children, Young Persons, and Their Families Act 1989 to detain absconding children and young persons. The risks to that person are the same as those for a police officer in such a situation.

RECOMMENDATION

8.30 Non-police officers who have a statutory power of detention should have the power to search a detained person as proposed for police officers in recommendation 8.21.

⁶¹ Above, recommendations 8.14-8.17.

⁶² Above, recommendation 8.21.

Method of search

- 8.104 As with all searches, whenever a personal search is undertaken it must not be conducted with a greater degree of intrusiveness than is consistent with its purpose; any force used must be reasonable in the circumstances and the way the search is otherwise carried out must also be reasonable.

Use of devices or aids

- 8.105 The use of devices and aids to facilitate the non-invasive search of a person may be necessary in some limited circumstances. The Customs and Excise Act 1996 provides an example where the use of imaging, mechanical, electrical or electronic devices for searches under that Act is authorised.⁶³ Provided the use of devices to search someone involves no or minimal contact, and is reasonable in the circumstances, their use should be permitted.

Strip searches

- 8.106 A personal strip search may be necessary in an exceptional case, where, for example, controlled drugs may be secreted on the body. The circumstances in which it will be reasonable to conduct a strip search will be limited,⁶⁴ and will vary from agency to agency, depending on the specific legislative framework and search regimes. For that reason standard statutory guidelines governing such searches are not practicable. We understand that agencies such as the Police and Customs have internal instructions that provide an operating framework for the conduct of strip searches. Specific guidelines should exist if a search of this nature is to be conducted by any other enforcement agency, and those guidelines should be readily accessible (perhaps by being placed on the agency's website) to ensure that those who are subject to strip searches and their lawyers can easily determine whether the correct procedures were followed in any given case.

Internal body searches

- 8.107 Internal body searches are highly intrusive and potentially harmful. They are presently permitted in only narrowly circumscribed situations, with enhanced procedures to provide necessary protections to the human rights of the subject of the search.⁶⁵ Internal body searches should always be specifically authorised by legislation. That legislation should always require a judicial determination, on a case-by-case basis, as to whether such a search should be conducted; it should never be left to an enforcement officer's discretion.
- 8.108 However, the common law justification of necessity should remain available to law enforcement officers, as it is to other citizens. It would apply, for example, where a law enforcement officer is required to assist a person who is in a life-threatening position by, for example, opening his or her mouth to look for and remove an item that may be obstructing breathing.
- 8.109 During the preparation of this report the police raised concerns about the adequacy of the current 21-day maximum period of detention under the Misuse

63 Customs and Excise Act 1996, ss 149A and 172.

64 See *Everitt v Attorney-General*, above n 18.

65 See, for example, Misuse of Drugs Act 1975, s 18A.

of Drugs Amendment Act 1978, where a detention warrant has been issued and there is reasonable cause to believe a person has internally concealed a class A or class B controlled drug. Any changes to the existing law and statutory procedures in this regard would require detailed consideration of the desirability of prolonged periods of detention or compelled examination or medical treatment. We have not had the opportunity to consider this issue fully, and are not in a position to make recommendations on it. However, we do recommend that it receive further policy consideration.

RECOMMENDATIONS

- 8.31 The use of devices or aids to facilitate a search should be permitted if their use is reasonable in the circumstances.
- 8.32 A strip search should only be conducted by an enforcement officer in accordance with the enforcement agency's guidelines governing the conduct of such a search.
- 8.33 An internal body search for law enforcement purposes should only be conducted in accordance with specific legislative authority and should require judicial authorisation on a case-by-case basis.
- 8.34 Further policy consideration should be given to whether the current maximum period for detention following the issue of a detention warrant under section 13E of the Misuse of Drugs Amendment Act 1978 is adequate.

Advice to the person being searched

- 8.110 Several enactments require an enforcement officer who is searching someone pursuant to a search power to provide that person with specific information relating to the search.⁶⁶ Other statutory powers to search a person do not have such a requirement.⁶⁷ In some areas the duty of the enforcement officer has been supplemented by the common law. For example, in *Brazil v Chief Constable of Surrey*,⁶⁸ Goff LJ concluded that anyone required to submit to a personal search should be advised of the reason for it. Similarly, in *Craig v Attorney-General Tompkins J* stated:⁶⁹

And I agree with Goff LJ that a person about to be searched is entitled to be told of the reason unless that course is impractical or the need to search is so obvious that to state a reason is unnecessary.

- 8.111 In chapter 6, we made a number of recommendations with respect to the information that an enforcement officer exercising a search power should provide to the occupier of a place that is the subject of a search.⁷⁰ Two of these recommendations should also apply, with some modification to a search of the person.

⁶⁶ See, for example, Arms Act 1983, s 60(3); Crimes Act 1961, s 202B(2); Gambling Act 2003, s 343; Misuse of Drugs Act 1975, ss 18(4).

⁶⁷ See, for example, Crimes Act 1961, s 224; Misuse of Drugs Act 1975, s 18(1).

⁶⁸ *Brazil v Chief Constable of Surrey* [1983] 3 All ER 537.

⁶⁹ *Craig v Attorney-General*, above n 23, 562-563.

⁷⁰ Chapter 6, recommendations 6.4 and 6.27-6.33.

- *Advice of the authority and reason for the search.* An officer conducting a personal search should generally advise the person of the reason and authority for the search, and identify himself or herself by name or unique identifier. However, we agree with Tompkins J that in some circumstances it will be impracticable for an officer to provide this information. The person may, for example, be intoxicated, aggressive and resisting the officer. Accordingly, we recommend that, where a personal search is to be carried out, the officer should first identify himself or herself and advise the person to be searched of the authority and reason for the search unless it is impracticable to do so in the circumstances.
- *Provision of an inventory.* Where items are seized as a result of the exercise of a search power (and also where the person consents to the search), an inventory of the property taken should be promptly prepared and a copy provided to the person searched.

8.112 However, neither of these requirements should apply under section 57A of the Police Act 1958. Since such searches are routine when a person is locked up in police custody, they do not need to be undertaken for any reason specific to the individual case. It would therefore be pointless to give the statutory authority and the reason for the search, since that is not open to challenge. It would also be unnecessary to give the person a copy of the inventory of items taken; the present administrative practice of entering the inventory onto the back of the charge sheet and getting the person to sign it suffices.

RECOMMENDATIONS

- 8.35 Where an enforcement officer is exercising a personal search power, other than a search of a person in custody under section 57A of the Police Act 1958, that officer should first identify himself or herself by name or unique identifier and advise the person to be searched of the authority and reason for the search, unless it is impracticable to do so in the circumstances.
- 8.36 Where items are seized as a result of the exercise of a search power (and also where the person consents to the search), an inventory of the property taken should be promptly prepared and the person searched given a copy. Where property is removed from an arrested person after a search under section 57A of the Police Act 1958, the person searched should be shown the inventory and verify its accuracy.

Using assistants

8.113 In chapter 6 we discussed the role of assistants when entering and searching premises. We do not propose that assistants be given any power to search a person. While the scope of the search of places or vehicles is such that assistants may properly be required to help with it, the same is not true of personal search. Generally the search will take just a few minutes, or less. Further, in view of the special considerations of individual liberty and human dignity referred to at the beginning of this chapter, it is generally inappropriate to have people other than trained law enforcement officers conducting personal searches. There will clearly be circumstances where it may be necessary for an assistant to help an

enforcement officer restrain a person about to be searched, but that should not allow the assistant to participate in the search itself.⁷¹ There are two qualifications to this: first, where an enforcement agency has demonstrated a need for such assistance and that need has been recognised in specific legislation;⁷² and, secondly, where a person consents to the search being undertaken by someone other than an enforcement officer.

RECOMMENDATION

8.37 No person other than an enforcement officer should conduct a personal search unless specifically authorised by legislation, or the person to be searched consents to the search being conducted by someone other than an enforcement officer.

Detaining people who are being searched

- 8.114 In chapter 6, we recommended that a power to search premises should carry with it the authority to detain a person who is at the place being searched for such period as is reasonable to enable to officer to satisfy himself or herself that the person is not connected with the object of the search.⁷³ Here we deal with the authority to detain people who are to be searched pursuant to a personal search power.
- 8.115 A number of statutory provisions specifically allow people to be detained so they can be searched.⁷⁴ Others do not.⁷⁵ While it may be argued that the authority to detain is implicit in the search power, we think that a consistent approach is desirable. Accordingly, we recommend that whenever a statutory power to search a person exists, an express power to detain the person for that purpose should be specified.⁷⁶ The detention should be for no longer than is necessary to conduct the search.

RECOMMENDATION

8.38 Any power to search a person should expressly include the authority to detain the person to allow the search to be carried out. The detention should last only as long as is necessary to achieve that purpose.

71 See Police Act 1958, s 53 which provides for persons over 18 years of age to assist a police officer to “apprehend or secure” (but not search) any person.

72 See, for example, Police Act 1958, s 57B which authorises appropriately trained people to conduct section 57A searches.

73 Chapter 6, recommendation 6.25.

74 For example, Crimes Act 1961, s 202B(1)(a); Misuse of Drugs Act 1975, s 18(3); Misuse of Drugs Amendment Act 1978, s 12A(1)(b); Arms Act 1983, ss 60(1)(b) and 60(2)(b).

75 For example, Misuse of Drugs Act 1975, ss 18(1) and 18(2); Gambling Act 2003, s 342(2)(d).

76 Although this may not always be sufficiently lengthy to amount to detention for the purposes of the Bill of Rights Act (see *R v Fowler* [2007] NZCA 1, para 8), it will often be so. In that event, the protections afforded by s 23(1) of the Bill of Rights Act, including advice as to the right to a lawyer, will apply. However, that should not in our view, impede the continuing execution of the search.

- 8.116 In New Zealand there is no statutory framework or restriction on the police collecting DNA from persons other than by way of blood or buccal sample under the Criminal Investigations (Bodily Samples) Act 1995. However, the Act does contemplate that DNA samples might be obtained, by consent, from people by means other than blood or buccal sample (see, for example, section 16(3)(a)). In the Canadian case of *R v Stillman*,⁷⁷ a suspect's DNA profile was obtained by analysing a paper tissue discarded by the suspect who had earlier refused to consent to provide bodily samples. The potential for a similar scenario exists in New Zealand.
- 8.117 Obtaining of DNA from bodily specimens is a discrete area of the law that gives rise to its own legal issues. These include the need for any proposals in this area to dovetail with the 1995 Act; the potential privacy issues that arise when a search is conducted for bodily specimens to obtain a DNA sample; and the extent to which the discarding of bodily tissue extinguishes any proprietary interest through abandonment. Given that, we do not propose to deal with that issue in this report. However, we do recommend that further work be undertaken with a view to developing a clear policy on collecting, using and storing DNA samples other than by way of blood or buccal sample under the current statutory procedures.

RECOMMENDATION

- 8.39 Further work should be undertaken with a view to developing a clear policy on collecting, using and storing DNA samples obtained other than by way of blood or buccal sample under the current statutory procedures.

⁷⁷ *R v Stillman*, above n 21.

Chapter 9

SEARCH OF VEHICLES



Chapter 9

Search of vehicles

- INTRODUCTION** 9.1 As a general rule, present statutory powers of search and seizure in respect of premises also apply to vehicles.¹ For the most part, there is no reason to distinguish between searches of places and searches of vehicles. The powers and processes for searching a vehicle should therefore correspond to those for searching a place, unless compelling reason exists for a difference in approach. Accordingly, the recommendations made in chapters 4 and 6 with respect to the issue and execution of search warrants should apply to a vehicle search with any necessary modifications. Similarly, warrantless vehicle search powers and requirements should generally be aligned with those applicable to the warrantless search of a place. In that regard the proposals made in chapter 5 are a starting point for the warrantless powers discussed in this chapter.
- 9.2 However, the mobility of vehicles and the fact that they are commonly used in public places raise issues that do not exist for private dwellings and other buildings. As vehicles travel on public thoroughfares, search powers in some circumstances should be aligned with those that exist for people in public places.
- 9.3 In this chapter we discuss issues that arise from the present law relating to search and seizure of vehicles and propose that:
- the term “vehicle” should be defined;
 - police officers should have the power to search vehicles without warrant for evidential material relating to serious offences;
 - the power to search a vehicle incidental to arrest should be codified;
 - a warrant to search a vehicle should authorise entry onto private property where the vehicle is situated;
 - police powers to stop vehicles to arrest or search should be modified;
 - non-police enforcement officers powers to stop and search vehicles should be clarified.
- 9.4 As indicated in chapter 1, the discussion and proposals in this chapter do not extend to statutory powers to stop and inspect vehicles for regulatory compliance purposes or for other non-law enforcement purposes.²

1 See, for example, Summary Proceedings Act 1957, s 198 (search pursuant to a warrant); Misuse of Drugs Act 1975, s 18(2) and Arms Act 1983, s 60 (warrantless search).

2 For example, section 132 of the Biosecurity Act 1993 authorises the establishment of road blocks, cordons or check-points to stop and search vehicles to control or prevent the spread of pests or unwanted organisms following the issue of a judicial warrant.



CURRENT LAW AND THE PROBLEMS WITH IT

- 9.5 There are numerous statutory powers authorising the police and other enforcement officers to stop and/or search vehicles without warrant. The power to search a vehicle following the arrest of an occupant has been recognised by the courts, but its scope is unclear.³ Beyond this, the police have no authority to stop and search a vehicle. There is no additional common law power.⁴
- 9.6 The present powers to search vehicles are unclear in some areas and inconsistent in others. The problems can be summarised below:
- *Uncertainty*: In *R v Jefferies*⁵ Cooke P observed, in relation to United States authority, the “intolerably confusing” nature of the law on vehicle search and seizure and later in his judgment noted the “regrettably diverse judgments” delivered by the Court of Appeal in that case. In *R v Pointon*⁶ the Court of Appeal noted the uncertain nature of the power to search a vehicle after the arrest of its occupants. In *R v Burns (No 10)*⁷ Chambers J doubted “that there would be many lawyers or police officers who would be able accurately to list the circumstances when such warrantless searches of cars can lawfully be undertaken.” The proliferation of statutory powers authorising vehicle search, the growing number of arrestable offences, and the number of vehicle search cases coming before the Court of Appeal suggest that there exists a real need to clarify and simplify the law relating to vehicle search.
 - *Different thresholds*: Many vehicle search provisions require that there be “reasonable grounds to believe” that the statutory pre-conditions exist before the search may be undertaken. However some others, such as section 13 of the Marine Mammals Protection Act 1978, include the lesser threshold of suspicion. Unless there is a compelling case for a different standard, there is no reason why a single uniform threshold should not apply to all powers of stopping and searching vehicles. For the reasons discussed in chapter 3,⁸ that threshold should be reasonable grounds to believe.
 - *Use of road safety powers for crime detection purposes*: The power to stop a vehicle for road safety purposes under section 114 of the Land Transport Act 1998 has often been used inappropriately for law enforcement purposes. Such searches have consistently been held by the courts to be unlawful.⁹ Clarifying and expanding the basis for a lawful vehicle search would reduce the potential for use of the Land Transport Act power for unintended purposes.

3 *R v Ataria* (17 July 1997) CA 58/97 Blanchard J for the Court, cited in *R v McFall* (2 June 2005) HC HAM T20514, para 18 Priestley J. However, in *R v Pointon* (1999) 5 HRNZ 242 (CA), 249, Elias J for the Court noted that the power to search a vehicle after the arrest of its occupants was “a matter of some uncertainty”.

4 See the majority decision in *R v Jefferies* [1994] 1 NZLR 290 (CA).

5 *R v Jefferies*, above n 4, 298 and 299.

6 *R v Pointon*, above n 3, 249.

7 *R v Burns (No 10)* (2 August 2000) HC AK T 991986, para 48 Chambers J.

8 Chapter 3, paras 3.2-3.12.

9 See, for example, *R v Bainbridge* (1999) 5 HRNZ 317 (CA); *R v Thomas* (2001) 19 CRNZ 392 (CA); *R v Fletcher* (2002) 19 CRNZ 399.

- *The definition of “vehicle”*: There are significant variations in the statutory formulation of what is encompassed by the term vehicle.¹⁰ There appears to be no rationale for these differences. Specifically including one type of vehicle in an enactment and omitting it in another creates uncertainty as to whether such a conveyance may be searched pursuant to a search power under the enactment where it is not included.¹¹ Simplifying the law by adopting a standard definition will ensure a consistent approach to law enforcement powers.

9.7 The above problems or issues with the existing law result in a significant number of vehicle search cases coming before the courts. Rationalising and clarifying the law in the manner we propose in this chapter should assist in providing greater certainty and less complexity in the law and result in fewer legal challenges.

DEFINITION OF VEHICLE

9.8 Unless the context of the legislation requires a departure from it,¹² we recommend that a uniform definition of vehicle be adopted in legislation in relation to all search powers. The definition should include any conveyance that is capable of being moved under the control of any person, whether or not it is being used for the carriage of persons or goods.¹³ The definition that we propose would include motor vehicles, aircraft, trains, ships and bicycles. Also included would be conveyances such as caravans in which people may live, but which retain their mobility. Of course, such a conveyance may be both a dwelling and a vehicle at the same time, in which case the powers in respect of both dwellings and vehicles would be available.

RECOMMENDATION

9.1 Unless the context of the statute requires otherwise, a uniform definition of vehicle should be adopted for search powers in respect of vehicles.

POWER TO SEARCH WITH WARRANT

9.9 If enforcement officers in the course of their duties encounter a vehicle that they believe needs to be searched, it is usually impracticable to obtain a warrant. By the time they have done so, the vehicle would have been moved to an alternative location, and the resource required to follow the vehicle to that location generally makes that unrealistic. Without a power to detain the vehicle until a warrant is obtained, which we consider to be objectionable as it may cause greater disruption to the driver and passengers than the conduct of the search itself, warrantless search powers are required. Thus, on a day-to-day basis, the vast majority of vehicle searches by enforcement officers need to be undertaken pursuant to statutory warrantless powers.

10 Animal Welfare Act 1999, s 131, “vehicle, aircraft, or ship”; Arms Act 1983, s 61, “aircraft, vessel, hovercraft, carriage, vehicle”; Care of Children Act 2004, s 75, “aircraft, ship, vehicle”; Summary Proceedings Act 1957, s 198, “aircraft, ship, carriage, vehicle”; Wild Animal Control Act 1977, s 13 “vehicle, vessel, or aircraft”; Wildlife Act 1953, s 39, “vehicle ...boat, launch, or other vessel, or any aircraft while on the ground or on the water, or any other device for carriage or transportation...”.

11 For example, a search warrant may be issued under the Summary Proceedings Act 1957, s 198(1) in respect of any “aircraft, ship, carriage, vehicle...”, but a police officer executing such a warrant under the Misuse of Drugs Act 1975, s 18 may search any “aircraft, ship, hovercraft, carriage, vehicle...”.

12 The Land Transport Act 1998 and the Fisheries Act 1996 are examples of statutes that may require discrete definitions to cover the specific kind of vehicles that the relevant Act is required to apply to.

13 In *R v Pratt* [1990] 2 NZLR 129 (CA), the Court of Appeal held that a road roller was a vehicle for the purposes of Crimes Act 1961, s 228 (now s 226, dealing with vehicle conversion), notwithstanding that it was not designed to carry passengers or goods.

- 9.10 However, for the reasons outlined in chapter 2, any departure from the warrant requirement is only justified where there is a compelling need for a search power to be exercised without prior judicial authorisation. Accordingly, the availability of a warrant to search vehicles, as currently reflected in section 198 of the Summary Proceedings Act 1957, should be retained and the recommendations made in chapters 4 and 6 relating to search warrants in respect of places should also apply to the search of vehicles.

RECOMMENDATION

- 9.2 The recommendations relating to applications for and the execution of search warrants in respect of places should apply with the necessary modifications to vehicles.

POWER TO SEARCH WITHOUT WARRANT

General approach

- 9.11 As we have already indicated, any power to search a vehicle without warrant should mirror the powers to search places and people without warrant. In addition, however, the general mobility of vehicles requires that a power to search be accompanied by a power to stop, which is discussed below. Otherwise flight would enable the ready disposal or destruction of evidential material and thus frustrate the purpose of the search.
- 9.12 It has been argued that the reasonable privacy expectations in respect of a vehicle in a public place are lower than those attaching to persons or private premises. The courts, too, have suggested that a vehicle search involves a lesser intrusion upon privacy than the search of a home.¹⁴ However, while it is generally true that the search of a vehicle often occurs while it is being driven on either a road or some other public place and that this factor in itself may reduce the privacy expectations of the driver or other people in the vehicle, that will not always be so: the privacy expectations attaching to an item in a locked boot of a car on a public road are at least the same as those attaching to an item in the front garden of a house. Furthermore, every time a moving vehicle is stopped a person is detained for the duration of any search that takes place. Accordingly, we see no basis for departing from the threshold generally applicable to the searches of people and places.

Exigent circumstances

- 9.13 In chapter 5, we discussed the law with respect to the power of a police officer to enter a private place in an emergency situation or exigent circumstances, and made recommendations for the purpose of clarifying the scope of the power presently contained in section 317 of the Crimes Act 1961. There is, however, no corresponding power to stop or enter vehicles. Consistent with our objective to broadly align powers in respect of vehicles with those applying to places, we have considered whether similar provisions are warranted.

14 *R v Jefferies*, above n 4, 296-297 Cooke P, 305 Richardson J; *R v Thomas*, above n 9, 397. See also *R v Williams* [2007] NZCA 52, para 113 where the Court of Appeal confirmed that there is a lesser expectation of privacy in vehicles than residential property.

- 9.14 Such a power is required where life or safety is endangered,¹⁵ or where it is necessary to prevent the commission of an offence likely to cause immediate and serious injury.¹⁶ Some existing statutory provisions indirectly provide such a power by enabling a vehicle to be stopped for other specific purposes – for example, for the purposes of road safety, or to search for drugs, firearms or offensive weapons,¹⁷ or for the purpose of making an arrest.¹⁸ In practice, situations where life or safety may be endangered will generally enable one of these powers to be invoked. However, we are inclined to the view that it is undesirable for police officers to have to rely upon an ancillary power to protect life or safety; they should be explicitly provided with such powers as they need for this purpose. We therefore recommend that the powers available in respect of premises for this purpose also apply to vehicles.

RECOMMENDATION

- 9.3 Powers to enter premises without warrant in emergency situations to protect people and property (see chapter 5, recommendation 5.7) should apply in the same terms to vehicles.

Evidence of serious offending

- 9.15 In the course of dealing with warrantless searches of private places in chapter 5,¹⁹ we recommended an additional power to search places where there are reasonable grounds to believe that evidential material relating to serious crimes (offences punishable by 14 years' imprisonment or more) is in the place, and that the evidential material will be destroyed, concealed or impaired in the time taken to obtain a warrant. The considerations leading to that recommendation are applicable to vehicles.
- 9.16 However, we recommend that the proposed threshold for the exercise of the power in relation to premises be modified in one respect. The second limb of the test – that the evidential material would be destroyed, concealed or impaired in the time taken to obtain a warrant – should not be required in relation to vehicle searches. If the evidential material is in the vehicle it will be at risk, since the mobility of the vehicle means there is always the potential for the material to be moved from one location to another, or destroyed, concealed or impaired before a warrant can be obtained.

RECOMMENDATION

- 9.4 A police officer should be able to search a vehicle without warrant if he or she has reasonable grounds to believe that the vehicle contains evidential material relating to an offence punishable by 14 years' imprisonment or more.

15 See *R v Fraser* (2004) 21 CRNZ 158 (CA).

16 Crimes Act 1961, s 317(2).

17 Land Transport Act 1998, s 114; Misuse of Drugs Act 1975, s 18(2) (controlled drugs); Arms Act 1983, s 60 (firearms); Crimes Act 1961, s 202B (offensive weapons).

18 Crimes Act 1961, s 317A.

19 Chapter 5, paras 5.75-5.79 and recommendation 5.13.

Unlawfully possessed items

- 9.17 The reasons for our recommendations that the existing warrantless search powers in respect of drugs and firearms should be retained²⁰ and that the power to search for stolen or unlawfully obtained goods whilst they are in transit should be repealed²¹ apply equally to the search of vehicles.
- 9.18 The mobility of vehicles and their use in public may, in exceptional circumstances, justify an extension to search powers that apply to places. One such exception concerns the carriage of offensive weapons in a public place. The potential risks to public safety in transporting weapons from place to place is recognised in the existing warrantless power to search both persons and vehicles where a police officer has reasonable grounds to believe that a person is in possession of an offensive weapon.²² We recommend that the current power be retained in respect of vehicle searches for offensive weapons, but for the reasons set out in chapter 8, the threshold for the exercise of the power should be the same as for firearms, namely reasonable grounds to suspect.²³

RECOMMENDATION

- 9.5 The warrantless powers to search vehicles in section 18 of the Misuse of Drugs Act 1975, sections 60-61 of the Arms Act 1983 and section 202B of the Crimes Act 1961 should be retained, but the threshold for a search under section 202B of the Crimes Act 1961 should be changed to reasonable grounds to suspect.

Stolen and dishonestly obtained property

- 9.19 In chapter 8,²⁴ we considered section 224 of the Crimes Act 1961, which gives the power to search people and vehicles for “stolen or unlawfully obtained” goods in transit and recommended its repeal.
- 9.20 However, a similar power in section 225, confined to vehicles, gives a warrantless power to search vehicles for “stolen or dishonestly obtained goods.” This provision empowers a police officer who has reasonable grounds for believing that stolen property or property obtained by a crime involving dishonesty is in a vehicle, to search the vehicle without warrant for the purpose of locating that property. It was enacted in 1997 along with other measures relating to the stopping and searching of vehicles.²⁵ At the time it marked a significant extension to the powers of search without warrant.
- 9.21 In chapter 5 dealing with warrantless powers of entry, search and seizure, we outlined five areas where the departure from the warrant requirement may be justified. One of those areas is where the entry or search relates to specified offences where the public interest in vesting police officers with the authority

20 Chapter 5, paras 5.64-5.69. We also recommend in paras 5.71-5.74 that the powers of customs officers under section 12A of the Misuse of Drugs Amendment Act 1978 should be extended to include vehicles.

21 Chapter 8, recommendation 8.11.

22 Crimes Act 1961, s 202B.

23 Chapter 8, para 8.28.

24 Chapter 8, paras 8.41-8.44 and recommendation 8.11.

25 See Crimes Amendment Act (No 2) 1997.

to conduct an immediate search is sufficiently compelling to outweigh the need for the search to be judicially sanctioned in advance by way of a warrant. On this basis the warrantless search for and seizure of unlawfully possessed items such as controlled drugs and items posing a risk to public safety (such as firearms and offensive weapons) can be justified.

- 9.22 Searching vehicles for stolen or dishonestly obtained property does not fall into that category. Whilst there is undoubtedly a strong public interest in detecting and apprehending offenders who commit burglary and crimes of dishonesty, and there is considerable benefit in endeavouring to do so whilst they are transporting the property, usually on a public road, there is no threat to public safety and the unlawfulness of the possession of the property arises from the way it was acquired rather than from the intrinsic nature of the property itself.
- 9.23 The New Zealand Law Society Criminal Law Committee submitted that there is insufficient justification for retaining the section 225 power given that no threat to public safety arises. On the other hand, both the Police and the Ministry of Justice supported its retention. The police consider this provision to be an essential tool in combating burglary. Given the widespread incidence of this crime and the use of vehicles in its commission, we agree that there are grounds for departing from the warrant requirement in this instance. We recognise the need for the police to have a range of law enforcement tools available to investigate burglary and to retrieve stolen goods; in that regard the ability to intercept the property while it is being transported is highly desirable.
- 9.24 However, we consider that section 225 of the Crimes Act 1961 is presently drawn too widely with its inclusion of property that is obtained by a “crime involving dishonesty”, a term that is defined as including a wide range of offences that have little relevance to the power.²⁶ The reference to stolen property is sufficient to include the proceeds of burglary, a robbery and receiving as well as theft. Accordingly, we recommend that the warrantless power contained in section 225 should be retained, but confined to stolen property.

RECOMMENDATION

- 9.6 The power to search vehicles without warrant for stolen or dishonestly obtained property in section 225 of the Crimes Act 1961 should be retained, but confined to stolen property.

POWER TO SEARCH VEHICLES INCIDENTAL TO ARREST

- 9.25 The existence of a common law power entitling a police officer to search a vehicle following the arrest of a person who is on or has alighted from the vehicle, has been accepted by the courts in New Zealand.²⁷ However, as noted above,²⁸ the scope of the power is unclear.
- 9.26 In overseas jurisdictions the common law has been clarified. As early as 1990 the Canadian courts recognised that a search of a vehicle could be conducted as

²⁶ For example, crimes involving deceit (ss 240–242); money laundering (ss 243–245); crimes involving computers (ss 248–254); forgery and counterfeiting (ss 255–265).

²⁷ *R v Ataria*, above n 3; *R v McFall*, above n 3, para 18.

²⁸ Above paras 9.5–9.6.

a lawful incident of arrest.²⁹ The justification for the search was for the “prompt and effective discovery and preservation of evidence relevant to the guilt or innocence of the arrested person”.³⁰ The search was not necessary to protect the police officers from immediate harm from the arrested person who was held in custody in a police car at the time of the search.

- 9.27 In the United States, the Supreme Court has created a number of arrest-related exceptions to the Fourth Amendment requirement for law enforcement officers to obtain a warrant before undertaking a search or seizure. In these cases the Court has permitted the warrantless search of an arrested person and the immediate vicinity;³¹ the entire passenger compartment of a vehicle and containers therein following the arrest of an occupant;³² and the search of a vehicle following the arrest of its occupant after he or she has alighted from the vehicle.³³
- 9.28 In *Thornton v United States*,³⁴ Justice Scalia (concurring with the judgment allowing a vehicle to be searched incidental to arrest even if the person is not apprehended until after he or she has exited the vehicle) rejected as a basis for search the need to protect the officer after the person has been secured. He reasoned that once a person had been arrested and secured away from the vehicle, the only possible justification for search is for evidence relevant to the arrest.
- 9.29 That reasoning is also reflected in our view, discussed in chapter 5 in the context of the search of private places incidental to arrest, that there is no justification for a post-arrest power to search for things that may cause harm or facilitate escape.³⁵
- 9.30 Whatever the common law position in New Zealand, the power to search vehicles following an arrest needs to be codified.
- 9.31 We therefore propose that a search incidental to arrest may occur where there are reasonable grounds for believing that the vehicle contains evidential material relating to the offence for which the person was arrested. The proposed power should not contain the chapter 5 requirement, in relation to places, that the officer should have reasonable grounds to believe that the delay in obtaining a warrant will result in the evidential material being destroyed, concealed or impaired. The inherent mobility of vehicles means that if the power is not exercised immediately there is potential for the vehicle to be moved and the opportunity for the evidential material to be concealed or otherwise tampered with. It is true that if the driver is arrested that person cannot move the vehicle. However, passengers or friends may have the opportunity to move the vehicle and destroy, conceal or impair evidential material in the period in which the officer is obtaining a warrant.
- 9.32 Our proposal contains no temporal or geographical limitations as to its exercise, nor any requirement that the arrested person own or have any proprietary or other

29 *R v Lim (No 2)* (1990) 1 CRR (2d) 136 (Ont HC); see also *R v Caslake* [1998] 1 SCR 51, (1998) 155 DLR (4th) 19 (SCC).

30 *R v Lim (No 2)*, above n 29, 45 Doherty J.

31 *Chimel v California* (1969) 395 US 752.

32 *New York v Belton* (1981) 453 US 454.

33 *Thornton v United States* (2004) 124 S Ct 2127.

34 *Thornton v United States*, above n 33, 2136-2137.

35 Chapter 5, para 5.30.

interest in the vehicle in question. Whilst this may potentially impact on the privacy rights of others, requiring that the search be made as an incident to arrest ensures a contextual limitation on the exercise of the power. The greater the time or distance of the search from the arrest, the less likely it will be that a police officer will have reasonable grounds to believe that the evidence is in the vehicle.

- 9.33 The New Zealand Law Society Criminal Law Committee submitted that a warrant should be required for all vehicle searches outside the existing statutory exceptions. That approach cannot be justified in this context, where the public interest dictates that a warrantless power should be provided.

RECOMMENDATIONS

- 9.7 The power of a police officer to search a vehicle without warrant incidental to arrest and the scope of such a power should be codified.
- 9.8 The power should be exercised when a police officer has reasonable grounds to believe that the vehicle contains evidential material relating to the offence for which the person was arrested.

AUTHORITY TO SEARCH VEHICLE FOUND AT A PLACE OTHER THAN THE LOCATION WHERE THE VEHICLE IS STOPPED OR FOUND

- 9.34 In chapter 8 we recommended that in relation to some powers to search the person, where the person flees before the search is commenced or completed, there should be authority to search that person at another location where he or she is found if the police officer is freshly pursuing that person when located and the officer believes on reasonable grounds that the relevant evidential material is still on the person.³⁶ The same principle should apply to vehicle searches.
- 9.35 If the vehicle is removed from the location where it is to be or is being searched without the authority of the police officer exercising the search power, before the search is completed, there should be authority to search that vehicle in any place, including a private place if:
- the officer is freshly pursuing the vehicle when it is located;
 - the officer believes on reasonable grounds that the relevant evidential material is still in the vehicle.

RECOMMENDATION

- 9.9 Where a police officer has formed an intention to search a vehicle pursuant to a search power, and the vehicle leaves the search location before the search can be commenced or completed, the officer should be able to search that vehicle wherever it is subsequently located, provided that:
- the police officer is freshly pursuing the vehicle when it is located;
 - the officer believes on reasonable grounds that the relevant evidential material is still in the vehicle.

³⁶ Chapter 8, recommendation 8.13.

Certain police powers to be extended to non-police enforcement officers

- 9.36 In chapter 5 we have identified the principles justifying warrantless searches of places for law enforcement purposes.³⁷ One such principle is to prevent loss or damage to evidential material following an arrest. As discussed above,³⁸ this principle should be applied and modified for vehicle search purposes. The principles justifying this power for police apply equally to non-police enforcement officers who have any statutory power of arrest. We recommend accordingly.
- 9.37 We have also recommended that a police officer who has the power to search a vehicle that leaves the search location before the search can be completed should be able to search that vehicle if the officer is freshly pursuing it when it is located and the officer believes that relevant evidential material is still in the vehicle.³⁹ We consider that such power should also be available to any non-police enforcement officer who has both the primary power to search a vehicle and any statutory power of arrest.

RECOMMENDATIONS

- 9.10 Non-police enforcement officers who have any statutory power of arrest should have the power to search vehicles on the same basis as police officers under recommendation 9.8.
- 9.11 Non-police enforcement officers who have any statutory power of arrest should have the same power as a police officer to search a vehicle found after leaving the location of an intended search in the circumstances described in recommendation 9.9.

Additional vehicle search powers for non-police enforcement officers

- 9.38 As identified in chapter 5,⁴⁰ the widely differing contexts in which various non-police enforcement officers are required to exercise powers may justify a departure from the warrant requirement and the availability of discrete powers, especially where those powers can only be exercised in specifically defined areas.
- 9.39 In chapter 5⁴¹ we have articulated a number of public interests that may justify specific additional powers for non-police enforcement officers. Those public interests include border protection, protecting animals from serious injury or exploitation and prevention of serious damage to the economy or an industry that is significant to the economy.
- 9.40 There are three sets of vehicle search powers that can be justified by reference to these principles.

³⁷ Chapter 5, paras 5.90 and 5.92.

³⁸ See above, paras 9.25-9.35 and recommendations 9.7 and 9.8.

³⁹ Above, recommendation 9.9.

⁴⁰ Chapter 5, paras 5.84-5.92.

⁴¹ Chapter 5, para 5.92.

Border protection

- 9.41 A number of discrete statutory warrantless vehicle powers can be justified as falling within the public interest of border protection:
- Section 144(1), (3) and (4) of the Customs and Excise Act 1996, giving customs officers power to stop, search and detain vehicles on suspicion that a vehicle in a customs place contains dutiable, uncustomed, prohibited or forfeited goods or that the vehicle contains goods subject to the control of Customs.
 - Section 144(2) of the Customs and Excise Act 1996, giving customs officers (and police) power to stop, search and detain a vehicle if there are reasonable grounds to believe that it contains any goods that have been unlawfully imported or are in the process of being unlawfully exported. While this power can be exercised at places other than the border, it is in our view a justifiable extension to the border power.
- 9.42 In some cases the public interest justifies not only a discrete kind of search power, but also an exception to the requirement of a threshold of reasonable belief as to the presence of evidential material, discussed in chapter 3.⁴² The powers in section 144 of the Customs and Excise Act 1996 (other than subsection (2)), allowing stop and search of vehicles without warrant in a customs place on the basis of suspicion rather than belief as to the relevant grounds, are an example because of the very limited opportunity for the customs officer to reach the threshold and conduct the search.

Protection of animals from harm or exploitation

- 9.43 Section 13(1) of the Marine Mammals Protection Act 1978 gives marine mammals officers the power, on belief or suspicion that a breach of the Act or Regulations has been or is being committed, to enter, inspect and examine any vehicle, vessel, aircraft or hovercraft. This power appears to be justified on the basis of the public interest of protection of animals from serious injury or exploitation.
- 9.44 However, the drafting of the current power is defective. The requisite belief or suspicion as to criminal offending does not need to be reasonably held by the officer exercising the power. Given that this is a law enforcement power, there is no basis for departing from the normal requirement that there be reasonable belief or suspicion. Furthermore, there is currently no requirement that the officer believes that the vehicle, vessel, aircraft or hovercraft to be searched contains relevant evidential material. In other words, there is no required connection between the commission of the offence and the purpose of the search. The power in section 13(1) of the Marine Mammals Protection Act 1978 should be amended to require the officer exercising the power to have reasonable grounds to believe that a breach of the Act or Regulations has been or is being committed and that relevant evidential material will be found in the vehicle, vessel, aircraft or hovercraft to be searched.

Fisheries Act 1996 power

- 9.45 Section 199 of the Fisheries Act 1996 contains a mix of regulatory and law enforcement powers. To the extent that the warrantless vehicle (including

42 Chapter 3, para 3.10.

vessel) search powers in that section are law enforcement in nature, we consider them to be justified by the principle of prevention of serious damage to the economy or an industry that is significant to the economy.

- 9.46 As recommended in chapter 5,⁴³ the public interests that may justify the provision of warrantless search powers should be incorporated into the Legislation Advisory Committee's *Guidelines* and existing legislation that provides for warrantless search powers that do not meet those criteria should be reviewed.

RECOMMENDATION

9.12 The search power in section 13(1) of the Marine Mammals Protection Act 1978 should be amended to require the officer exercising the power to have reasonable grounds to believe that a breach of the Act or Regulations has been or is being committed and that relevant evidential material will be found in the vehicle, vessel, aircraft or hovercraft to be searched.

STOPPING VEHICLES TO SEARCH

Police powers

- 9.47 Sections 314A and 314B of the Crimes Act 1961 provide the general authority to stop a vehicle for the purposes of search pursuant to a statutory power. This power is vested only in police officers. Section 314B contains a number of requirements before the power to stop can be exercised.⁴⁴ It also stipulates that, immediately after the vehicle has stopped, the police officer must identify himself or herself and advise the driver of the authority for the stop and the authority for the related search power.⁴⁵ Ancillary powers, such as the authority to require any person in the stopped vehicle to provide identifying particulars and to require the vehicle to remain stopped for as long as reasonably necessary to enable the search power to be exercised, are provided for in section 314C. Section 314D provides for offences of failing to stop and failing to comply with the requirements made by a police officer under section 312C.
- 9.48 Some enactments take a different approach,⁴⁶ simply providing a power to search a “thing” rather than specifically referring to a vehicle. In these cases, sections 314B to 314D are applied, with necessary modification, if the thing required to be searched is a vehicle.
- 9.49 In addition, a number of statutory provisions⁴⁷ provide that if it is necessary for a constable to stop a vehicle to exercise a statutory power to search a person, then sections 314B to 314D Crimes Act 1961 apply with necessary modifications as if references in those sections to a statutory search power are references to the relevant power to search a person.

⁴³ Chapter 5, recommendations 5.16 and 5.18.

⁴⁴ The member of the police must be wearing a uniform or a distinctive cap (Crimes Act 1961, s 314B(2)(a)), or following in a vehicle displaying flashing lights and sounding a siren (s 314B(2)(b)).

⁴⁵ Crimes Act 1961, s 314B(4).

⁴⁶ See, for example, Proceeds of Crime Act 1991, ss 32(1) and 32A; Films, Videos, and Publications Classification Act 1993, ss 111(2) and s 111A.

⁴⁷ See, for example, Arms Act 1983, s 60(1A); Misuse of Drugs Act 1975, s 18(3A); Crimes Act 1961, s 202B(2A).

- 9.50 We consider that a provision authorising a police officer to stop vehicles for the purpose of exercising a search power is appropriate. If a power to search exists, but no specific power to stop a vehicle is provided, the power to search could be rendered nugatory. The obligations on a police officer exercising the power are appropriate and the incidental powers and offence provisions flow from the exercise of the search power. We therefore propose a single statutory provision authorising a police officer to stop a vehicle for the purposes of a lawful search and incorporating the requirements, powers and obligations in sections 314A to 314D. Consistently with the recommendation made in chapter 8,⁴⁸ the requirement enacted in section 314B(4)(a) that the officer identify himself or herself, should be amended to make it clear the obligation is discharged by providing either the officer's name or unique identifier.
- 9.51 Section 314A(3) excludes "aircraft, hovercraft, ship or ferry, or other vessel, train, or carriage" from the term "vehicle" for the purposes of the exercise of the power to stop. There is no obvious reason for any form of conveyance to be excluded from the definition of the term "vehicle". For example, even in respect of aircraft, aspects of the sections 314B and 314C powers and requirements may be applicable whilst the aircraft is on the tarmac. Section 314A(3) should be amended accordingly.
- 9.52 Requiring the vehicle to remain stopped for as long as is reasonably necessary to enable the police officer to conduct the statutory search will continue to be relevant. So too will the requirement in section 314B(2) that the police officer demonstrate his or her official status in advance of the stop, although it will need to be recast to take account of the variety of vehicles involved.
- 9.53 The power to stop in section 114 of the Land Transport Act 1998 is limited to road safety purposes under that Act. It may not be used as a basis to initiate a search for unrelated law enforcement purposes and we do not propose any extension to that power. Similarly, the power for police to stop a vehicle under section 127(2) of the Animal Welfare Act 1999 may only be used for the animal welfare purposes specified in that section.

RECOMMENDATIONS

- 9.13 Police powers to stop a vehicle for the purpose of exercising a power to search the vehicle should be governed by a single statutory regime incorporating the requirements, powers, and obligations contained in sections 314A to 314D of the Crimes Act 1961. The requirement in section 314B(4)(a) for the officer to identify himself or herself should be met by the officer providing his or her name or unique identifier.
- 9.14 The definition of vehicle in section 314A(3) should be expanded to include all types of vehicles. The requirement in s 314B(2) that the police officer demonstrate his or her official status in advance of the stop should be retained, but recast to take account of the greater variety of vehicles involved.

⁴⁸ Chapter 8, recommendation 8.35.

Power of non-police enforcement officers to stop vehicles

- 9.54 A number of statutes give enforcement officers other than police the power to stop vehicles for the purpose of search.⁴⁹ In each case the legislation vesting the power has only minimal requirements as to the manner in which it is to be exercised. We are of the view that the significance of this authority requires a statutory framework to provide consistency and guidance to all non-police enforcement officers exercising the power.
- 9.55 We have considered whether the Crimes Act provisions governing the stopping and searching of vehicles by police officers should apply. However, so far as the provisions of section 314B(2) are concerned, we understand from agencies we have consulted that non-police enforcement officers frequently stop vehicles whilst not in uniform. Such a situation arises because enforcement officers (including honorary fishery and conservation officers) are often required to respond to complaints or information received when it is not practicable for them to do so in uniform; in other cases it may be necessary for operational reasons that the officer is not in uniform. The alternative statutory authority for police officers to stop a vehicle, by displaying flashing lights and sounding a siren, also has practical difficulties for other enforcement agencies.
- 9.56 Accordingly, we do not recommend that in exercising the authority to stop a vehicle, non-police enforcement officers should be in uniform. We note in passing the advice we received from enforcement agencies that instances of non-compliance with the direction of non-uniformed officers for the driver of a vehicle to stop are relatively infrequent and when they occur, are able to be managed by the agencies concerned.
- 9.57 The other obligations of a police officer that arise when the vehicle has stopped as set out in section 314B(4) of the Crimes Act 1961, are equally as applicable to other enforcement officers:
- to identify himself or herself to the driver by name or unique identifier;
 - to tell the driver the authority for the stop;
 - if not in uniform and if so required, to produce evidence of his or her authority as an enforcement officer.
- We recommend that these requirements extend to non-police enforcement officers.
- 9.58 The authority to require the vehicle to remain stopped for as long as is reasonably necessary for the search power to be exercised and to require persons in the vehicle to provide their particulars should be available to all non-police enforcement officers as well as police officers. Offence provisions along the lines of those presently contained in section 312D of the Crimes Act 1961 (but with a requirement that the driver know that the direction to stop was given by an enforcement officer) are appropriate to deal with situations where the motorist fails to comply with the enforcement officer's directions.

49 For example, Animal Welfare Act 1999, s 133(1)(a); Conservation Act 1987, s 40(1)(d); Customs and Excise Act 1996, s 144(1); Fisheries Act 1996, s 199(2); National Parks Act 1980, s 65(1)(a); Trade in Endangered Species Act 1989, s 37(1)(a); Wild Animal Control Act 1977, s 13(1)(e); Wildlife Act 1953, s 39(1)(d).

RECOMMENDATIONS

- 9.15 Where an enforcement officer other than a police officer has a statutory power to stop a vehicle, the officer should, after the vehicle has stopped:
- identify himself or herself to the driver by name or unique identifier;
 - tell the driver the authority for the stop;
 - if not in uniform and if requested, produce evidence of his or her authority as an enforcement officer.
- 9.16 A non-police enforcement officer should have the authority to require persons in the vehicle to supply their particulars and to require the vehicle to remain stopped for as long as reasonably necessary for the exercise of the search power. Offences similar to those in section 314D of the Crimes Act 1961, but with an appropriate knowledge requirement, should be provided for.

POWER TO
STOP VEHICLES
TO ARREST

- 9.59 Section 317A of the Crimes Act 1961 provides the power to stop vehicles in order to arrest where a police officer has reasonable grounds to suspect that someone who is unlawfully at large or who has committed an offence punishable by imprisonment is in the vehicle. Section 317AA provides powers incidental to stopping vehicles under section 317A, including a power to search the vehicle.
- 9.60 These provisions are the equivalent of section 317(1) (entry to premises to arrest) but are cast in quite different terms. There is no requirement of fresh pursuit, nor that the vehicle has been used in the commission of the offence. Section 317(1) does not refer to the arrest of a person who is unlawfully at large and it has no complementary search power, once entry has been secured.
- 9.61 The provisions for stopping and searching a vehicle to arrest a person should, in two respects, be more closely aligned with our recommendations to enter and search private places to arrest contained in chapter 5. First, we see no justification for departing from our recommended threshold requirement of reasonable grounds to believe before the power is exercised. Accordingly, we recommend that the present prerequisite to the exercise of the power to stop a vehicle for the purpose of arrest, that the police officer has reasonable grounds to suspect, should be replaced by a requirement that the officer has reasonable grounds to believe the matters set out in section 317A(1).
- 9.62 Secondly, the term “unlawfully at large” is defined in section 317A(5) for the purposes of that section as including, but not limited to, cases where a warrant for the arrest of the person exists. To remove any uncertainty as to its scope,⁵⁰ the present inclusive definition should be replaced with one that exclusively describes the categories of person subject to the section as being those unlawfully at large in terms of the Corrections Act 2004 or the Parole Act 2002, escapees from lawful custody under the Crimes Act 1961,⁵¹ special and restricted patients who have escaped or are absent without leave,⁵² and people in respect of whom an arrest warrant is in force.⁵³

50 See Hon Bruce Robertson (ed) *Adams On Criminal Law* (looseleaf, Brookers, Wellington, 1992) para CA 317A.04 (last updated 31 October 2005).

51 Crimes Act 1961, s 119 (prison break) and s 120 (escape from lawful custody).

52 Mental Health (Compulsory Assessment and Treatment) Act 1992, ss 53 and 56.

53 See chapter 5, paras 5.10-5.12 and recommendation 5.1.

- 9.63 We have considered whether to extend to vehicle searches the recommendations we made in chapter 5 requiring that there be reasonable grounds to believe that the person may flee to evade arrest, or damage or destroy evidence, before the power to enter a place without warrant to arrest a person may be exercised. However, both the Police and the Ministry of Justice expressed the view that imposing those limitations would be untenable, since assessing flight risk in relation to a person in a vehicle would be very difficult, if not impossible. The mere fact that the person to be arrested is in a vehicle in itself increases the opportunity and the likelihood that he or she will flee. We accept that the risks of flight or the disposal of evidence are much greater where a person who is to be arrested is in a vehicle and that specific information as to the likelihood of flight or the disposal of evidence may be difficult to obtain and assess. It is also desirable that a police officer should be able promptly to effect an arrest in such a situation, rather than having to delay it whilst an assessment is made as to the likelihood of flight. Accordingly, we have concluded that the recommendations we made in chapter 5 as to the existence of reasonable grounds to believe the person to be arrested may flee or dispose of evidence should not apply in respect of the arrest of a person in a vehicle.
- 9.64 One issue that requires clarification is the scope of the power of search under section 317AA(1)(b). That subsection provides for the search of a stopped vehicle to locate someone whom the police seek to arrest, and evidence of the offence for which they are to be arrested. However, the power in subsection (1)(b)(ii) appears to go further and to authorise the search of a vehicle that has been stopped for the purpose of arrest even if the person who is to be apprehended is not in it.
- 9.65 The search authorised by section 317AA is incidental to the power to stop a vehicle for the purpose of arresting a person contained in section 317A(1). The search of the vehicle for evidence of the offence is consistent with the power of search incidental to arrest discussed above.⁵⁴ Such a search is also justifiable if the person whose arrest is intended flees the vehicle before the arrest can be effected. That justification does not, in our view, extend to afford a more general power to search for evidence when the person whose arrest is sought is not in the vehicle when it is stopped. We recommend that section 317AA(1)(b)(ii) of the Crimes Act 1961 be amended accordingly.

RECOMMENDATION

- 9.17 The Crimes Act powers to stop and search vehicles for the purpose of arrest should be retained in their present form, except that:
- the reasonable grounds to suspect threshold in section 317A(1)(a) should be replaced with reasonable grounds to believe;
 - the expression “unlawfully at large” should be redefined in the same terms as proposed in chapter 5 (warrantless search of places);
 - the power to search for evidence in section 317AA(1)(b)(ii) should apply only where the person to be arrested has been apprehended, or is seen fleeing from the vehicle before he or she can be apprehended.

⁵⁴ Above, paras 9.25-9.33.

- ROAD BLOCKS** 9.66 The need for the police to establish road blocks arises typically where either an escaped prisoner or a suspected offender for a serious crime is endeavouring to avoid arrest by leaving an area in a vehicle. The authority to stop vehicles and search for the person sought is presently provided by section 317B of the Crimes Act 1961. It empowers a senior member of the police to authorise the establishment of a road block for a period of 24 hours. If it is necessary for the road block to operate for a longer period, the authority of a judge is to be sought.
- 9.67 As well as providing the authority for the police to establish road blocks, section 317B of the Crimes Act 1961 vests members of the police with a number of powers while the road block is in operation. Central to these is the authority to stop vehicles at or in the vicinity of the road block. In contrast to the provisions of section 317A relating to the power to stop a vehicle for the purpose of arrest, section 317B does not require that the police officer have reasonable grounds to suspect that the person sought is in a particular vehicle before the power to stop it is exercised.
- 9.68 The road block provisions codified in section 317B of the Crimes Act 1961 appear necessary to complement other enactments relating to the stopping of vehicles for the purposes of arrest or search and they are accompanied by a number of appropriate procedural requirements. We do not consider any changes to those provisions are required, other than to apply the definition of “unlawfully at large” discussed above,⁵⁵ with the exception presently contained in section 317B(9) relating to persons who are the subject of an arrest warrant.

RECOMMENDATION

- 9.18 The current authority to establish road blocks provided by section 317B of the Crimes Act 1961 should be retained, with the addition of a definition of unlawfully at large.

MOVING A VEHICLE TO ANOTHER LOCATION TO SEARCH

- 9.69 A number of cases have come before the courts challenging the lawfulness of the actions of a police officer where the officer has a power to search a vehicle, but exercises it at a later time and in a different place from where the vehicle was stopped or located. For example, moving the vehicle may arise from the need for a forensic or other detailed examination,⁵⁶ or to safeguard the vehicle and its contents following the arrest of the driver.⁵⁷ It may also be necessary to move it for road safety purposes to prevent an obstruction.
- 9.70 Whilst the justification for moving the vehicle may be regarded as implicit in the exercise of the search power itself,⁵⁸ it is desirable that the lawfulness of such action be clarified and put on a firm basis. In our view an enforcement officer who has a power to search a vehicle (whether pursuant to a warrant or through the exercise of a warrantless power) should be empowered to move the vehicle to a police station or other place to conduct the search or for safekeeping.

55 Above, para 9.62.

56 *R v Pay* [2003] DCR 586; *R v Caslake*, above n 29.

57 *R v Thompson* (3 October 2001) CA 161/01.

58 *R v Pay*, above n 56.

- 9.71 The New Zealand Law Society Criminal Law Committee considers that no power to move vehicles should be provided unless a warrant has first been obtained, including in cases where warrantless search is authorised. We disagree. If authority exists to search, it is in the public interest that the search is conducted in the best possible conditions to ensure that the objectives of the search can be achieved.

RECOMMENDATION

- 9.19 Where a vehicle is found or stopped by an enforcement officer, the officer should have the power to move the vehicle to another place if:
- there is a lawful authority to search the vehicle, but is impracticable to do so at that place; or
 - the officer reasonably believes that the vehicle needs to be moved for safekeeping or for road safety purposes.

ENTRY OF PREMISES TO SEARCH VEHICLES

- 9.72 In chapter 4, we recommended that a warrant issued to search a place should authorise the search of a vehicle at that place if the evidence could reasonably be located in a vehicle. However, a warrant to search a specified vehicle does not authorise the law enforcement officer executing it to trespass on private property to carry out the search. Whilst it may be argued that the power to search authorised by the warrant implicitly carries with it the authority to enter private land to carry out the search of a vehicle on it, such a proposition must be open to considerable doubt.⁵⁹
- 9.73 In the Commission's view, the authority to enter private property to execute a search warrant in respect of a vehicle should be expressly provided for. Accordingly, we recommend that where a search warrant is issued in respect of a vehicle, the warrant should also authorise entry to any place where there are reasonable grounds to believe the vehicle may be found.
- 9.74 However, this should not extend to warrantless powers to search vehicles, unless there is an independent power to search the premises on which the vehicle is believed to be located. Thus, for example, the warrantless power to search vehicles for stolen goods under section 225 of the Crimes Act 1961 should not, in itself, provide authority to enter premises to search a vehicle for stolen goods. Having regard to the greater privacy rights that attach to private premises, independent authority should exist to enter such places.

RECOMMENDATIONS

- 9.20 A warrant to search a vehicle should authorise entry onto any private place where the vehicle is reasonably believed to be located to conduct the search.
- 9.21 A warrantless power to search a vehicle should not in itself authorise entry onto any private place on which the vehicle is believed to be located.

⁵⁹ See *Choudry v Attorney-General* [1999] 2 NZLR 582 (CA).

INVENTORY
SEARCHES

- 9.75 The police sometimes undertake an inventory search of a vehicle that has lawfully come into their possession or control. This may arise when the vehicle has been impounded or removed because it is causing an obstruction or for other road safety purposes, to safeguard the property of an injured or incapacitated motorist, or following the apprehension of the driver. An inventory of property in the vehicle may be compiled for a number of reasons: to safeguard the property from vandalism or theft; to protect the police from claims that the vehicle was damaged or that property went missing when the vehicle was in their control; or in some cases to ensure the property in the vehicle does not pose a hazard or risk to safety.⁶⁰
- 9.76 The courts in New Zealand⁶¹ and overseas⁶² have held that the search of a vehicle for the purpose of itemising articles for safekeeping is reasonable as an incident of the police's function of securing and protecting the community's property. In exercising that function police are entitled to identify what has been secured so that it may be recorded and accounted for.⁶³ However, the ability to undertake such a search as part of a caretaking function does not provide the authority for the police to search for evidence gathering purposes.⁶⁴ Nor should a search for the purpose of cataloguing property for protective purposes be used as a pretext or ruse for a search for evidence gathering purposes.
- 9.77 We see no reason to recommend codification of the existing common law authority permitting inventory searches undertaken as a caretaking function in the proposed statute dealing with law enforcement search and surveillance powers. Where the search is undertaken for evidence gathering purposes, it will need to be carried out pursuant to a warrant or in accordance with a specific warrantless power that is relevant to the circumstances.

60 *South Dakota v Opperman* (1976) 428 US 364, 369.

61 *R v Ngan* (1 December 2006) CA 220/06, para 14 Robertson J for the Court; *R v Ngan* (24 November 2005) CA 241/05.

62 *R v Caslake*, above n 29, *Colorado v Bertine* (1987) 479 US 367.

63 *R v Ngan* (24 November 2005) CA 241/05, paras 23 and 24.

64 *R v Caslake*, above n 29; *Florida v Wells* 110 S Ct 1632 (1990).

Chapter 10

PRODUCTION AND MONITORING POWERS



Chapter 10

Production and monitoring powers

INTRODUCTION 10.1 This chapter considers the nature of and justification for production and monitoring regimes and their relationship with general search powers.

10.2 A number of statutory regimes in New Zealand compelling the production of information or documentation fall outside the scope of our consideration because they were enacted primarily for a non-law enforcement purpose, although some may have an incidental enforcement component.¹ Similarly, we are not concerned with enactments that provide an enforcement officer with the power to require a person to produce a licence or other form of authority.² Finally, statutory requirements that include an obligation to answer questions as part of a production regime are also beyond the scope of this chapter. We confine our discussion here to production and monitoring processes that serve a law enforcement function.

10.3 In general, search powers do not require those who are the subject of a search to assist in their execution. Whilst we have recommended that there ought to be a provision to ensure that people do not obstruct or hinder an enforcement officer in the execution of a search power,³ we have taken the view that there generally should be no positive duty upon any person to assist.⁴ There are good policy reasons for this general approach. First, by virtue of the privilege against self-incrimination, people should not be compelled to produce evidence which is self-incriminating. Even if there were such an obligation, self-interest would generally motivate those under investigation to conceal relevant material or prevaricate rather than comply. Thus any curtailment of the privilege would

1 See, for example, Commerce Act 1986, s 98; Customs and Excise Act 1996, ss 22 and 161; Securities Act 1978, s 67; Tax Administration Act 1994, s 17; Trade in Endangered Species Act 1989, s 37(1)(c).

2 For example, the authority of a member of the police to require the driver of a motor vehicle to produce his or her driver licence: Land Transport Act 1998, s 5(4); secondhand dealer's licence: Secondhand Dealers and Pawnbrokers Act 2004, s 36(1); or firearms licence: Arms Act 1983, s 26(1)(a). A fishery officer may require the production of a permit, authority or licence in terms of the Fisheries Act 1996, s 201(f).

3 In chapter 6, recommendation 6.22 we recommend that an enforcement officer exercising a search power should be authorised to give reasonable directions to a person at the place searched to the extent that is necessary to enable the search to be carried out effectively or for the purpose of preventing evidential material from being damaged, interfered with or destroyed.

4 In chapter 6, recommendation 6.15 we recommend that a statutory duty to assist an enforcement officer in the execution of a search power should be imposed only when there is a compelling policy reason to do so.



likely be self-defeating. Secondly, the general sanction for failure to comply with a requirement to produce information is provided by way of an offence. However, common law jurisdictions have generally eschewed liability for omissions to act unless there is an exceptional and compelling reason to impose it in the public interest. This is because, while a prohibition on specified conduct leaves a multitude of other actions open to the citizen, a requirement to assist removes freedom of choice completely.

- 10.4 Those two factors indicate that generally a production regime is more appropriate as a mechanism to ensure compliance with statutory requirements of a regulatory or administrative nature, rather than as a means to investigate the commission of criminal offences. There are, of course, exceptions to this general approach. For example, we have recommended that section 198B Summary Proceedings Act 1957 be retained and extended.⁵ However, such provisions ought to be the exception rather than the rule and should only apply to the extent that the requirement is essential for the exercise of the search power.
- 10.5 It is against this background that we assess whether there is any case for introducing a general production power regime to complement standard search powers.

PRODUCTION POWERS

- 10.6 Production powers take two forms: production orders made by a judicial officer, and production notices issued by an authorised person within an agency. Both require the subject to produce the specified information to the agency. Failure to do so is generally a criminal offence. Internationally, production powers are common in proceeds of crime, money-laundering and related legislation and they can also be found in some jurisdictions in legislation containing general investigative powers.

Production Orders

New Zealand

- 10.7 There is no production order procedure available for *general* criminal investigative purposes.⁶ However, a specific power exists under the Proceeds of Crime Act 1991.
- 10.8 Under that Act, a commissioned police officer may apply to a High Court judge for a production order if the person has been convicted of, or the officer has reasonable grounds to believe that he or she has committed a drug-dealing offence or a serious offence that is transnational in nature and is in possession of

5 See chapter 7 on computer searches (recommendations 7.14 and 7.15). The power under Summary Proceedings Act 1957, s 198B permits a person executing a search warrant to require a “specified person” to provide information or reasonable assistance in gaining access to data held in or accessible from a computer on warrant premises.

6 A similar procedure is, however, available under the Children, Young Persons, and Their Families Act 1989, s 59 (a police officer or a social worker may apply for an order to produce documents for the purpose of determining whether a child or young person needs care or protection).

property-tracking documents relating to the offence.⁷ The order may be made if the judge is satisfied that there are reasonable grounds to believe that the person has committed or was convicted of the offence, that he or she derived a benefit from committing the offence and that the property specified in the application is subject to his or her effective control. The regime contains safeguards to prevent the rule against self-incrimination being violated.⁸

United Kingdom

- 10.9 In the United Kingdom, the Proceeds of Crime Act 2002 enables a production order to be made against a person subject to a confiscation investigation,⁹ or a money laundering investigation,¹⁰ or in respect of property subject to a civil recovery investigation.¹¹ If the statutory grounds for making the order are met, the order requires the specified material be produced to an appropriate officer.
- 10.10 The Proceeds of Crime Act 2002 also provides for making customer information orders relating to people subject to a confiscation order or a money laundering or civil recovery investigation.¹² Such an order requires a financial institution to produce customer information, which includes an account holder's name, date of birth, address, account numbers and related information.
- 10.11 Another regime providing a production order procedure for criminal investigation purposes in respect of material that may not generally be the subject of a search warrant is contained in the Police and Criminal Evidence Act 1984.¹³ Where a judge is satisfied that "special procedure material"¹⁴ may be evidence of an indictable offence that could not be obtained by other methods, and it is in the public interest to do so, the judge may make a production order. Such an order is often made in relation to financial records sought in connection with fraud investigations.¹⁵ A second procedure is prescribed to cover special procedure material or "excluded material"¹⁶ where other conditions are met.¹⁷ The application is required to be made on notice, though the bank or person holding the material usually does not contest the application and is commonly

7 Proceeds of Crime Act 1991, s 68.

8 Proceeds of Crime Act 1991, s 72.

9 Defined as an investigation into whether a person has benefited from his criminal conduct, or the extent or whereabouts of his benefit from criminal conduct: Proceeds of Crime Act 2002 (UK), s 341(1).

10 A number of offences under the Proceeds of Crime Act, the Criminal Justice Act 1988 and the Drug Trafficking Act 1994 are prescribed money laundering offences: Proceeds of Crime Act 2002 (UK), s 415.

11 A civil recovery investigation is an investigation into whether property is recoverable property (essentially property derived through unlawful conduct) or associated property (essentially interests in recoverable property); who holds the property; or its extent or whereabouts: Proceeds of Crime Act 2002 (UK), s 341(2).

12 Proceeds of Crime Act 2002 (UK), ss 363-369.

13 Police and Criminal Evidence Act 1984 (UK), s 9 and Schedule 1.

14 Defined as being journalistic material that does not meet the criteria for excluded material and certain other non-excluded material held in confidence as a result of an express or implied undertaking by the person holding it or by reason of a statutory obligation: Police and Criminal Evidence Act 1984 (UK), s 14.

15 Michael Zander *The Police and Criminal Evidence Act 1984* (5ed, Sweet and Maxwell, London, 2005) para 2-27.

16 "Excluded material" is defined as being personal records (relating to a person's physical or mental health, spiritual counselling or assistance given or to be given to the person or certain counselling or assistance given or to be given for the purposes of personal welfare by certain organisations or people); human tissue or tissue fluid taken for the purposes of diagnosis or medical treatment and which is held in confidence; and certain journalistic material: Police and Criminal Evidence Act 1984 (UK), s 11.

17 Police and Criminal Evidence Act 1984 (UK), s 9 and Schedule 1, para 3.

not at the hearing.¹⁸ The order requires the person who appears to the judge to be in possession of the material to produce it to a constable to take away or give a constable access to it within seven days.

Australia

- 10.12 The Commonwealth Proceeds of Crime Act 2002 provides that a magistrate may make a production order requiring a person to produce or make available property tracking documents to an authorised officer.¹⁹ The term “property tracking document” is defined widely to include a document relevant to identifying, locating or quantifying the property of any person who has been convicted of, charged with or reasonably suspected of having committed specified serious offences.²⁰ Similar legislation providing production order powers in the context of both criminal and civil confiscation exists in several Australian states.²¹
- 10.13 Production order regimes for general criminal investigative purposes exist in several jurisdictions. In New South Wales, a judicial officer may issue a notice directed to a financial institution requiring documents that may be connected with an offence committed by someone else to be produced.²² A similar production order regime operates in Queensland where a magistrate is satisfied there are reasonable grounds for suspecting that documents held by a cash dealer may be either evidence of the commission of an offence by someone else, or confiscation related evidence.²³
- 10.14 A production order regime is also available to enable Commonwealth police officers to investigate serious offences. A Federal magistrate may issue a notice to produce documents to someone who the magistrate is satisfied on the balance of probabilities has documents that are relevant to and will assist in the investigation of an offence punishable by two years’ imprisonment or more.²⁴ The information that may be sought is confined to certain prescribed matters.²⁵

Canada

- 10.15 Canadian legislation contains a production order regime for general crime investigations. A judicial officer may make an order requiring someone other than a person under investigation for an offence who has possession or control of documents or data, to produce them to an enforcement officer. The judicial officer

18 *R v Lewes Crown Court, ex parte Hill* (1990) 93 Cr App R 60; Michael Zander, above n 15, para 2-26.

19 Proceeds of Crime Act 2002 (Cth), ss 202-212. There are restrictions on issuing a production order. It may only be made if the magistrate is satisfied by information on oath that the person is reasonably suspected of having control or possession of a property tracking document. Such an order cannot be made to compel production or making available to any authorised officers, documents other than those in the possession or control of a body corporate, used or intended to be used in the carrying on of a business. Further, a production order cannot require any accounting records used in the ordinary business of a financial institution (including ledgers, day-books, cash books and account books) to be produced to an authorised officer.

20 Proceeds of Crime Act 2002 (Cth), s 202(5).

21 Criminal Assets Recovery Act 1990 (NSW), ss 33-37A; Confiscation of Proceeds of Crime Act 1989 (NSW), ss 58-64; Police Powers and Responsibilities Act 2000 (Qld), ss 188-195; Criminal Assets Confiscation Act 2005 (SA), ss 149-159; Confiscation Act 1997 (Vic), ss 100-108.

22 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), ss 53-58.

23 Police Powers and Responsibilities Act 2000 (Qld), ss 180-187.

24 Crimes Act 1914 (Cth), s 3ZQO.

25 Crimes Act 1914 (Cth), s 3ZQP. The prescribed matters include information about a specified person’s account held with a financial institution, travel details, details relating to the transfer of assets, utility accounts, telephone account and calling details, and residential details.

must first be satisfied that there are reasonable grounds to believe that an offence has been, or is suspected of having been, committed and the documents or data sought will afford evidence with respect to the commission of the offence.²⁶

- 10.16 The Canadian Criminal Code also contains a complementary regime relating to the production of financial and commercial information.²⁷ A judicial officer may issue a production order directed to a financial institution requiring the institution to provide an enforcement officer with account details of the person specified in the order and to confirm details of the account holder's identity (such as date of birth and address). Before issuing the order, the judicial officer must be satisfied that there are reasonable grounds to suspect that an offence has been committed and that the information will assist in its investigation.

The rationale for production orders

- 10.17 From the above it can be seen that production orders have been a common feature of proceeds of crime legislation for a number of years, particularly in respect of documentary evidence of asset and financial transactions. More recently, production orders have become adapted as a tool to assist in general crime investigation. In Canada and in some Australian states production orders have been introduced, generally with an emphasis on financial information. A similar procedure is available in the United Kingdom, although the power has been more narrowly confined.
- 10.18 The arguments in favour of a production order are largely derived from the fact that it is easier for the person against whom the order is made to locate the information than it is for a law enforcement officer to do so:
- it makes the investigative process more efficient;
 - it obviates the need for a physical search of the premises and is less disruptive to a person's privacy or business activities;
 - because the order is directed to the person rather than a specified location, it enables a law enforcement agency to apply for a production order without specifying where the particular information is situated.
- 10.19 It may be argued that most of the benefits of a production power can be realised through executing a search warrant:
- It is always open to the enforcement officer executing the warrant to request that documents or other evidential material be produced before making a search. Indeed, our recommendation that a search not be more intrusive than is consistent with its purpose carries with it the implication that such a request would be made when the person who is the subject of the search is an innocent third party and there is no reason to believe that he or she will be unco-operative.²⁸
 - It has become common practice in New Zealand where a search warrant is issued in respect of business documents or records for the holder of the documents to co-operate with the enforcement officer executing it, by handing the evidential material over to the officer without the officer needing to

26 Criminal Code RSC 1985 c C-46 (Can), s 487.012(3).

27 Criminal Code RSC 1985 c C-46 (Can), s 487.013.

28 Chapter 6, recommendation 6.9.

conduct a search. In *R v Sanders*,²⁹ a challenge to this practice on the grounds that it unlawfully delegated the execution of the warrant to the third party was rejected by the Court of Appeal. The Court concluded that there was nothing objectionable in the executing officer relying in the first instance on the third party's selection of the relevant documents as falling within the terms of the warrant. Such a practice, the Court noted, had advantages for both the police and the commercial community; a lawful seizure was not necessarily contingent on a prior search, so long as the items removed fell within the scope of the warrant, were taken from the location referred to in the warrant and taken for the purpose referred to in the warrant.³⁰

- If the person does not fully comply with the request, the enforcement officer can continue with the search for the documents or other evidential material pursuant to the warrant.

10.20 A separate production order regime of general application could potentially add unnecessary duplication to investigation procedures: it will be confusing to have two processes directed to obtaining the same information. It could also introduce added complexity. Where a production order is obtained and the person fails to comply with it, then the enforcement officer will need to obtain a search warrant in order to look for the evidential material, with the risk that the documents sought might in the meantime be destroyed.³¹

10.21 Finally, there is the possibility that a production power would encourage enforcement agencies to indulge in fishing expeditions or searches for documents in case they exist somewhere, rather than searches for specific documents reasonably believed to be in existence at a specified place.

Production orders for criminal investigations

10.22 Notwithstanding the benefits of adapting the search warrant procedure to provide a de facto production power for general law enforcement purposes where evidential material is held by a business or institution, there are a number of advantages in enacting a specific authority for that purpose. For the reasons that follow, we propose that a production order regime should be included in search and seizure legislation for enforcement agencies in New Zealand:

- Whilst a search warrant is presently used to achieve the same result as a production order, where the subject of the warrant is co-operative the use of a production power better reflects the nature of the transaction: the powers inherent in a search warrant are unnecessary; there is no entry or search; and seizure can only be said to occur after the evidential material sought has been produced.
- Where evidential material is produced by the subject of the warrant, the execution and post-execution procedures applicable to search warrants such as the delivery of an inventory are generally unnecessary or irrelevant.
- If the enforcement agency knows who holds the information sought, they do not have to specify its precise whereabouts. The person to whom the production order is directed is obliged to locate and provide it.

29 *R v Sanders* [1994] 3 NZLR 450 (CA).

30 *R v Sanders*, above n 29, 454 Cooke P and Casey J; 470-474 Fisher J.

31 See, for example, Police and Criminal Evidence Act 1984 (UK), s 9 and Schedule 1, para 12; Proceeds of Crime Act 2002 (UK), s 352(6).

- It is a less intrusive form of coercive power to obtain evidential material for investigative purposes, especially in the case of a co-operative third party.
 - As well as being available in several overseas jurisdictions, production powers are already available in New Zealand for investigations into suspected serious fraud by the Serious Fraud Office.³² Our understanding is that they are effective and work well in practice.
- 10.23 While it is true that two different forms of authority may be applied for to obtain the same information, the circumstances will very often indicate which is the more appropriate. Where routine business or commercial evidential material is sought from a party whom the enforcement agency has no reason to anticipate will be other than co-operative, a production order would be sought. In a situation where the party concerned may not be co-operative, or documents are sought from a potential suspect, the enforcement agency would apply for a search warrant. There is nothing inherently wrong in enforcement officers having a choice as to which form of process is applied for.
- 10.24 The criteria for the issue of a search warrant should generally apply to the issue of a production order; the issuing officer must be satisfied that there are reasonable grounds to believe that:
- the order is sought in respect of an offence for which a search warrant could be applied for;
 - the offence specified has been, is being or is about to be committed;
 - the order relates to the production of specified documents or things that are evidential material relating to the offence;
 - the documents or things sought are in the possession or control of the party to whom the production order is directed.
- 10.25 There would seem to be no good reason to confine production powers to financial records.³³ A production order should afford sufficient authority for the party to whom it is directed to provide the enforcement agency with any business or other records including, for example, utility use data or telephone records.³⁴
- 10.26 We have considered whether there should be a lesser threshold for issuing production orders for specific types of information. For example, the production of limited account information held by financial institutions in Canada requires only a threshold of reasonable grounds to suspect that the information sought will “assist in the investigation of the offence”.³⁵ We do not favour such a provision for two reasons. First, there does not seem to be anything special about account-holder information held by financial institutions that marks it off from other types of customer information. We are thus not persuaded that there is any particular justification for departing from the thresholds referred to in chapter 3 in respect of account-holder details for the purposes of general crime investigations.³⁶ Secondly, as production orders should, in our view, be available as an alternative to search warrants, attaching a lower threshold to the issue of

32 Serious Fraud Office Act 1990, ss 5 and 9.

33 See Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), ss 53-58; Police Powers and Responsibilities Act 2000 (Qld), ss 180-187.

34 See *R v Zutt* (2001) 19 CRNZ 154 (CA).

35 Criminal Code RSC 1985 c C-46 (Can), s 487.013.

36 Chapter 3, paras 3.2-3.12 (threshold for use of law enforcement powers) and paras 3.13-3.61 (seizure of evidence).

production orders could be seen as sanctioning fishing expeditions for certain types of information when there is no compelling reason for doing so.

- 10.27 Existing and proposed protections and immunities should extend to production orders. Our proposals for dealing with privileged material are readily applicable to the evidential material that is the subject of a production order.³⁷ The person to whom the production order is directed should be protected in respect of their compliance with the terms of the order.³⁸ This is particularly important where the information is or could be the subject of an obligation of confidence to a client and compliance with the order could expose the person or business to whom it is directed to liability for breaching that obligation. The statutory immunity that applies to an enforcement officer's execution of search warrants should also extend to production orders.
- 10.28 Finally, as is common in production order regimes, a sanction is needed where the person to whom the order is directed fails to comply without reasonable excuse and within a reasonable time.³⁹

Privilege against self-incrimination

- 10.29 In a number of overseas jurisdictions, legislation specifically precludes issuing a production order in relation to someone who is suspected of committing an offence, or who is the subject of the investigation.⁴⁰ We initially favoured a similar provision as being consistent with the privilege against self-incrimination now codified in section 60 of the Evidence Act 2006.
- 10.30 The Serious Fraud Office pointed out a difficulty with this approach as it is often not possible to identify a person as a suspect, particularly in the early stages of an investigation. If the subject of a production order should later be charged as a result of the investigation, a challenge to the admissibility of the evidence obtained in compliance with the order would be inevitable. Instead, the director advocated the approach adopted by Parliament in respect of the investigation of serious fraud, whereby the privilege against self-incrimination is expressly abrogated.⁴¹
- 10.31 We see little to be gained by recommending, for general crime investigations, a statutory process that requires suspects or people who may be the subject of the investigation to produce documents that may incriminate themselves. For the reasons set out earlier,⁴² the effectiveness of the order will often be open to question. Secondly, the option to apply for a search warrant to obtain the items sought is available to the investigating enforcement officer; where there is any possibility that the subject of a production order could be an offender, a warrant would be applied for.⁴³ Moreover, we can see no compelling reason to justify

³⁷ See Chapter 12, paras 12.154-12.155.

³⁸ See the discussion on immunities in chapter 14, paras 14.46-14.48.

³⁹ See, for example, Serious Fraud Office Act 1990, s 45; Commerce Act 1986, s 103(1)(a).

⁴⁰ For example, Criminal Code RSC 1985 c C-46 (Can), ss 487.012 and 487.013; Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 54(1)(b); Police Powers and Responsibilities Act 2000 (Qld), s 181(1)(b).

⁴¹ Serious Fraud Office Act 1990, s 27.

⁴² Above, para 10.3.

⁴³ Unlike the Serious Fraud Office Act 1990, ss 6 and 10, which require the director to first satisfy the issuing judge that a production notice has not been or would not be effective to obtain the documents specified.

abrogating such a fundamental privilege for the purposes of a production order regime dealing with general crime.

- 10.32 We have concluded that the issue of production orders where the person to whom the order is directed may be a suspect or the target of the investigation should not be expressly restricted. The person to whom an order is directed should be obliged to produce the items or documents specified. However, if producing the material referred to would be likely to incriminate that person in terms of section 60(1) of the Evidence Act 2006, his or her non-compliance with the order should be justified by the privilege against self-incrimination.

RECOMMENDATIONS

- 10.1 A production order regime should be available to enforcement agencies for investigating offences and enforcement officers should be able to apply for a production order or a search warrant.
- 10.2 The criteria relating to the issue of production orders should be the same as those applying to the issue of search warrants.
- 10.3 The immunities and protections proposed with respect to search warrants should apply to production orders.
- 10.4 It should be an offence to fail to comply with a production order without reasonable excuse and within a reasonable time.
- 10.5 Non-compliance with a production order should be justified if the production of the items specified would be likely to incriminate the person to whom the order is directed in terms of section 60 of the Evidence Act 2006.

Production orders and proceeds of crime investigations

- 10.33 Part 5 of the Proceeds of Crime Act 1991 contains a comprehensive code relating to the use of production orders in proceeds of crime investigations.⁴⁴ Orders may be sought in respect of property-tracking documents – documents relevant to identifying, locating and quantifying the property of a person who has been convicted of, or believed on reasonable grounds to have committed a drug dealing offence or an offence that is transnational in nature. However, an order may not be made in respect of any accounting records used in the ordinary course of banking.⁴⁵
- 10.34 We understand that the police have made very limited use of these provisions partly because of their unavailability in the case of bank records, and partly because the information is often obtained through executing a search warrant in the course of the criminal investigation. We nevertheless believe that the provisions should be retained and note that a court-ordered production regime is proposed under the Criminal Proceeds (Recovery) Bill 2007, which is intended to replace the Proceeds of Crime Act 1991.

⁴⁴ Proceeds of Crime Act 1991, ss 67-76A.

⁴⁵ Proceeds of Crime Act 1991, s 69(4).

- 10.35 Retaining the production order regime is also relevant to New Zealand's international obligations arising, for example, from its membership of the Financial Action Task Force.⁴⁶ Whilst implementing the recommendations of the Task Force is left to the particular circumstances and constitutional frameworks of member countries, production order powers of the nature contained in the Proceeds of Crime Act are recognised internationally as an important law enforcement tool for identifying and confiscating the proceeds of serious criminal offending. This is further emphasised through a specific provision in the Act authorising the issue of production orders in respect of foreign investigations that are the subject of an application for investigative assistance in New Zealand through the Mutual Assistance in Criminal Matters Act 1992.⁴⁷

RECOMMENDATION

- 10.6 A production order regime should be retained for the purposes of proceeds of crime investigations.

Production notices for criminal investigations

- 10.36 Having concluded that a production power in the form of an order approved by an issuing officer should be introduced for general criminal investigation purposes, we turn to consider whether a regime that allows the enforcement agency to issue production notices without such authorisation should be available as an aid for the investigation of crime. Legislation in some jurisdictions already provides for the issuing of production notices by an officer of the agency responsible for the investigation, though the authority is confined to particular types of investigation.

New Zealand

- 10.37 The only legislation providing for the use of production notices for criminal investigative purposes in New Zealand is the Serious Fraud Office Act 1990. The director may issue production notices under that Act at two stages of an investigation. The first arises at the detection stage if the director has reason to *suspect* that an investigation into the affairs of any person may disclose serious or complex fraud. In such a case the director may, by notice in writing, require any person to produce for inspection specified documentation which the director has reason to believe may be relevant to any suspected case of serious or complex fraud.⁴⁸ The second stage arises where he or she has reasonable grounds to believe that an offence involving such fraud may have been committed.⁴⁹
- 10.38 Production notices were designed as the primary investigative tool for obtaining documents in serious and complex fraud cases, with the search warrant power available only where the notice procedure has not achieved or would not achieve its

⁴⁶ The Financial Action Task Force is an international intergovernmental body (with 33 member countries) that promotes national and international policies and legislation to combat money laundering and terrorist financing: see < <http://www.fatf.gafi.org> > (last accessed 30 April 2007).

⁴⁷ Proceeds of Crime Act 1991, s 76A.

⁴⁸ Serious Fraud Office Act 1990, s 5.

⁴⁹ Serious Fraud Office Act 1990, s 9.

objective.⁵⁰ The director issues notices to produce documents in significant numbers: in 2005/06 the director issued 44 notices under section 5(a) and 547 under section 9(f); in 2004/05, 118 notices were issued under section 5(a) and 560 under section 9(f).⁵¹ By virtue of section 27 of the Serious Fraud Act 1990, a person is not excused from producing any document on the ground of self-incrimination.

United Kingdom

- 10.39 United Kingdom legislation provides for two law enforcement production powers without judicial authorisation. Under the first, the director of the Serious Fraud Office has similar production notice powers with respect to the investigation of serious or complex fraud to those held by the director in New Zealand.⁵²
- 10.40 More recently, the Serious Organised Crime and Police Act 2005 introduced a “disclosure notice” regime in respect of serious organised crime or terrorist investigations.⁵³ Such notices may be issued by an investigating authority (the director of Public Prosecutions, the director of Revenue and Customs Prosecutions, or the Lord Advocate).⁵⁴ A police officer, a member of the staff of the Serious Organised Crime Authority, or a customs officer may give a notice to any person appearing to the investigating authority to have information that is likely to be of substantial value to an investigation. The person to whom the notice is directed is required to answer questions on any matter relevant to the investigation, or provide information or produce documents relating to any matter specified in the notice.⁵⁵ A disclosure notice may not require the person to provide information or produce documents that would be the subject of a claim of legal professional privilege or to provide or produce confidential banking information or documents.⁵⁶

Australia

- 10.41 Under the Commonwealth Crimes Act, authorised officers of the Australian Federal Police have limited production notice powers in respect of terrorism offences. The authorised officer may request information or documents relating to terrorist acts, from operators of aircraft or ships⁵⁷ and in the course of investigating a serious terrorism offence the officer may issue a notice requiring a person to produce documents relating to certain prescribed matters.⁵⁸

50 Under the Serious Fraud Office Act 1990, s 6, a warrant can be issued at the detection stage only when a judge is satisfied that there are reasonable grounds for believing a person failed to produce all of the documents specified in the notice, or that service of the notice is not practicable. Under s 10 of the Act, a warrant may be issued at the investigation stage where there are reasonable grounds for believing that any information supplied pursuant to a notice issued under s 9 is false or misleading in a material particular; that a person failed to comply with an obligation imposed pursuant to s 9; that service of a notice is not practicable; or that the service of a notice “might seriously prejudice the investigation”: see *A Firm of Solicitors v District Court at Auckland* [2006] 1 NZLR 586 (CA). In 2005/06 the director applied for four search warrants under s 10 and in 2004/05 five warrants were obtained. One search warrant was obtained under s 6 of the Serious Fraud Office Act 1990 in 2005/06: Serious Fraud Office “Report of the Serious Fraud Office” [2006] AJHR E40 19; [2005] AJHR E40 23.

51 Serious Fraud Office, above n 50, 19; 23.

52 Criminal Justice Act 1987 (UK), s 2.

53 Serious Organised Crime and Police Act 2005 (UK), ss 60-70, amended to include terrorist investigations by the Terrorism Act 2006 (UK), s 33.

54 Serious Organised Crime and Police Act 2005 (UK), s 60.

55 Serious Organised Crime and Police Act 2005 (UK), s 62(3).

56 Serious Organised Crime and Police Act 2005 (UK), s 64.

57 Crimes Act 1914 (Cth), s 3ZQM.

58 Crimes Act 1914 (Cth), s 3ZQN. The prescribed matters are contained in s 3ZQP: see above n 25.

- 10.42 While State police officers are not vested with production notice powers for general law enforcement purposes, the Victoria Parliament Law Reform Committee supported the use of production powers instead of search warrants, though it was unable to resolve whether they should be issued by a law enforcement official or an independent officer.⁵⁹

Justification for production notice power

- 10.43 Overseas statutes providing a production power by way of notice have confined their issue to serious fraud, serious organised crime and terrorism investigations, though the reasons for this are not clear. It might be suggested that the investigation of such offences needs to be undertaken with particular urgency and it is more efficient and effective to have the notices issued by a person who is responsible for the investigation, rather than an independent officer.
- 10.44 On a more general basis, it may be argued that in the case of a production notice directed to a firm or an institution requiring factual information in the nature of routine business records to be produced, the privacy interests at stake are different and significantly less than those involved with the execution of a search warrant. Furthermore, from the perspective of the person to whom the notice is directed, its discharge is significantly less intrusive than the execution of a search warrant. Accordingly, the need for the exercise of the production power to be assessed by an independent issuing officer is far less compelling. Moreover, it may also be suggested that there is no logical reason in New Zealand to confine production notice powers to the investigation of crimes that constitute serious fraud, and that they should be applicable to the investigation of other equally or more serious crimes.
- 10.45 Finally, the Serious Fraud Office's use of production notices points to its practical utility as a significant investigation tool. Based on its positive experience with issuing and using production notices for more than 15 years, the Serious Fraud Office strongly endorsed the wider availability of this investigative tool. The director advised that for many people who see assisting the authorities as their civic duty, a notice provides them with formal backing for their co-operation. For these people, the position of the person issuing the notice is irrelevant; it is rather the authority of the notice that sanctions their assistance.
- 10.46 There are, however, a number of objections to allowing production notices to be used for general law enforcement purposes or for the investigation of specific forms of crime:
- There do not appear to be any substantial grounds to justify departing from the warrant principle requiring enforcement officers exercising a coercive power to first obtain authorisation from a neutral person acting judicially.⁶⁰ Cases where it is not practicable to seek such authority before a production power is exercised are unlikely to arise.
 - There is no rational basis for restricting the notice power to offences that are committed in an organised crime, terrorism or serious fraud context. Such a distinction is arbitrary and not always easy to apply. Nor does there seem to

59 Victorian Parliament Law Reform Committee *Warrant Powers and Procedures: Final Report* (No 170 of Session 2003-2005, Melbourne, 2005) 298-301.

60 Chapter 2, paras 2.52-2.60.

be any rationale for the production notice regime being available for the investigation of some serious crimes, but not others.

- The production notice power enacted in the Serious Fraud Office Act 1990 was part of a package of “forceful and rigorous powers to combat serious and complex fraud” that were introduced in light of international experience at the time, which suggested that traditional investigative powers had been found wanting.⁶¹ We believe that those circumstances do not provide a justification for extending it to the investigation of other offences. Indeed, as the recommendations we make in this report provide a wider range of search powers for law enforcement investigations generally, the need for a separate suite of powers for investigating complex or serious fraud has not been sufficiently established.
- Though a production power may not need the same safeguards as a search warrant regime, it is nevertheless highly desirable that an independent person rather than the enforcement officer responsible for the investigation undertakes the balancing of the law enforcement interests with the privacy interests of the person to whom the notice is directed. This may be of particular importance when the notice is for the production of information that could be the subject of privilege or an obligation of confidentiality to a client by the business or person to whom it is directed. Further, the position of others, such as a person with an interest in the document or thing that is required to be produced or a suspect, may need to be considered. Whereas these are matters that an independent issuing officer routinely takes into account, it is expecting a great deal of a person with a responsibility for the investigation to apply the same detached consideration to those matters.
- There is nothing to suggest that investigating specific categories of offending in New Zealand, such as organised crime or terrorism offences, requires an enhanced production power over and above that available for general crime investigations.

10.47 We therefore do not consider that the issue of production notices for general law enforcement purposes by an officer of an enforcement agency rather than by an independent officer acting judicially can be justified. We accept that in some specific areas of activity, such as border protection where routine operational conditions would normally not be conducive to obtaining prior judicial approval, an exception is justified. Accordingly, such a provision as section 160 of the Customs and Excise Act 1996 is justified and should be retained.

10.48 We do not regard the Serious Fraud Office Act provisions as falling into that category. Nevertheless, as we have indicated above, the production notice powers of the director under that Act form part of an integrated suite of search powers and any proposal to change these powers should be considered in the context of the scheme of that Act as a whole. Accordingly, we propose that those powers should be considered as part of a separate review of the search powers under the Serious Fraud Office Act 1990.

61 Hon WP Jeffries, Minister of Justice, when introducing the Serious Fraud Office Bill: (5 December 1989) 503 NZPD 14022.

RECOMMENDATIONS

- 10.7 The exercise of production powers should be authorised by an independent issuing officer and enforcement agencies should not be able to issue production notices for general law enforcement purposes.
- 10.8 The issue of production notices may be justified in some specific operational circumstances. On this basis the production notice powers of customs officers under section 160 of the Customs and Excise Act 1996 is justified and should be retained.
- 10.9 The production notice powers of the director under the Serious Fraud Office Act 1990 should not presently be repealed, but their continued justification should be considered as part of a broader review of the nature and scope of the powers under that Act.

Production notices for proceeds of crime investigations

- 10.49 Legislation vesting production notice powers in police officers carrying out proceeds of crime investigations has been enacted in at least two overseas jurisdictions. In Australia, under the Commonwealth Proceeds of Crime Act, a specified officer may notify a financial institution in writing, requiring it to provide information or documents relevant to a range of matters.⁶² Similarly, in Victoria, the chief commissioner of police may authorise a member of the police of the rank of inspector or above to issue information notices.⁶³ The notice is directed to a financial institution and requires it to provide information about a specified account or account holder so the applicant can determine whether to take action under the Confiscation Act 1997 (Vic).
- 10.50 In New Zealand, the Proceeds of Crime Act 1991 does not provide for the issue of production notices. However, in addition to a production order regime, the Criminal Proceeds (Recovery) Bill empowers the director of Criminal Proceeds Confiscation to require the production of specified documents that he or she reasonably believes are relevant to an investigation or proceedings under that legislation.⁶⁴ It is difficult to identify the rationale for the additional production notice power contained in the Bill; the fact that it is a power that is vested only in the director of a specialised agency would not, in itself, provide a sufficient reason for departing from the principle that the use of such powers should be authorised by an independent person acting judicially.
- 10.51 There does not appear anything inherent in the nature of proceeds of crime investigations or proceedings to justify taking a different approach to the investigation of offences so far as the issue of production notices is concerned. Accordingly, we recommend against the enactment of such a regime.

62 These include whether an account is held by a specified person with the institution, the current balance of the account, and details of account transactions over a specified period up to six months. A notice may not be issued unless the officer reasonably believes that giving the notice is required to determine whether to take any action under the Act or in relation to proceedings under the Act: Proceeds of Crime Act 2002 (Cth), s 213.

63 Confiscation Act 1997 (Vic), s 118B.

64 Criminal Proceeds (Recovery) Bill 2007, cl 114.

RECOMMENDATION

10.10 Production notices should not be available for proceeds of crime investigations.

MONITORING
ORDERS

- 10.52 Unlike search warrants or production orders, monitoring orders are intended to afford enforcement agencies ongoing access to evidential material including information that is not in existence at the time the order is made. Monitoring order regimes are common in proceeds of crime legislation. Such an order usually obliges a financial institution to provide information on transactions conducted through an account held by a specified person over a specified period.
- 10.53 Whilst monitoring orders as such are not available for general crime investigations, in some jurisdictions including New Zealand, legislation has been enacted providing for similar processes to enable enforcement officers to obtain particular types of information. Their effect is to impose an ongoing obligation on the institution to whom the process is directed to provide specified information to the enforcement agency.
- 10.54 We here review the use of monitoring orders and equivalent processes in both proceeds of crime and general crime investigations, and make recommendations with respect to each. While monitoring orders are often associated with obtaining information derived from electronic transactions, there is no reason to consider them in that context alone; the issues discussed below are applicable whatever the form in which the information is held.

Existing statutory regimes

New Zealand

- 10.55 Under the monitoring order regime of the Proceeds of Crime Act 1991, on the application of a commissioned police officer, a High Court judge may make an order directing a financial institution to supply to the police account transaction information relating to a specified person. The judge must be satisfied that there are reasonable grounds for believing that that person has committed or is about to commit a drug dealing offence, or has benefited or is about to benefit from the commission of such an offence. A monitoring order applies to transactions conducted during a specified period not exceeding three months from the date the order is made.⁶⁵
- 10.56 A call data warrant is a similar process available to police and customs officers for general crime investigations into offences punishable by imprisonment. Such a warrant requires a telecommunications network operator to supply call associated data in respect of a specified person at the times and in the form required by the police or customs officer for a period not exceeding 30 days.⁶⁶

⁶⁵ Proceeds of Crime Act 1991, ss 77-81A. "Financial institution" is defined as including a wide range of banking and non-banking institutions in s 2.

⁶⁶ Telecommunications (Residual Provisions) Act 1987, ss 10A-10S. Alternatively, a call data warrant may authorise the enforcement officer to connect and monitor a telephone analyser: see s 10C(2)(b).

United Kingdom

- 10.57 Under the Proceeds of Crime Act 2002 (UK), an appropriate officer may apply to a judge for an account monitoring order to be directed to a financial institution in relation to an account holder subject to a confiscation investigation, a money laundering investigation or a civil recovery investigation. If satisfied that the conditions relating to the investigation are met and that there are reasonable grounds for believing that compliance with the order is likely to be of substantial value to the investigation, a judge may issue an account monitoring order. The order may last for up to 90 days.⁶⁷
- 10.58 A process similar to a call data warrant is contained in the Regulation of Investigatory Powers Act 2000 (UK). The legislation provides for the issue of an authorisation to obtain “communications data” for general criminal investigations.⁶⁸ A designated person may issue the authorisation in the form of a notice to a postal or telecommunications operator. This notice requires the operator to disclose communications traffic data in the operator’s possession at that time and for up to a month afterwards.⁶⁹

Australia

- 10.59 A judge may issue a monitoring order under the Australian Commonwealth Proceeds of Crime Act to require a financial institution to provide account transaction information. Such an order may be made if the judge is satisfied that there are reasonable grounds for suspecting that the person from whose account the information is sought has been or is about to be involved in serious offending, or has benefited or is about to benefit from such an offence. A monitoring order may also be issued if the judge is satisfied that there are reasonable grounds for suspecting that the account is being used to commit a money-laundering offence. The order is in force for up to three months from the date it is issued.⁷⁰ Similar provisions exist in state legislation.⁷¹

Canada

- 10.60 In Canada there is no specific monitoring order power. However, the general warrant procedure in the Criminal Code is capable of being used to collect financial transaction information over a specified period of time.⁷²

The rationale for monitoring orders

- 10.61 Monitoring orders are a relatively recent innovation. They were introduced to meet a perceived need for an effective process to capture ongoing financial information

⁶⁷ Proceeds of Crime Act 2002 (UK), ss 370-375.

⁶⁸ Regulation of Investigatory Powers Act 2000 (UK), ss 21-25.

⁶⁹ A “designated person” includes a police officer of or above the rank of superintendent (and in some cases, an Inspector): see The Regulation of Investigatory Powers (Communications Data) Order 2003, art 2 and Schedule 1.

⁷⁰ Proceeds of Crime Act 2002 (Cth), ss 219-224.

⁷¹ Criminal Assets Recovery Act 1990 (NSW), ss 48-52; Confiscation of Proceeds of Crime Act 1989 (NSW), ss 68-72; Police Powers and Responsibilities Act 2000 (Qld), ss 198-204 and ss 205-210 (suspension orders); Criminal Assets Confiscation Act 2005 (SA), ss 165-170; Confiscation Act 1997 (Vic), ss 115-118; Criminal Property Confiscation Act 2000 (WA), ss 67-69 (monitoring and suspension orders).

⁷² Criminal Code RSC 1985 c C-46 (Can), s 487.01. Advice received as to its application from the Canadian Department of Justice, July 2006.

and to trace the transfer of funds arising from the increasing sophistication of financial crimes, money laundering and the operations of criminal enterprises, where the analysis of financial transactions is a significant source of evidential material. Existing warrant procedures are deficient in providing a mechanism to obtain such information and they could not be readily adapted to do so.

- 10.62 A monitoring order remedies that deficiency by providing a procedure that enables evidential material to be gathered in respect of a suspect's transactions over a period of time; it provides a means to obtain details of those transactions as soon as they occur; the monitoring may be undertaken covertly; and only a single authorisation is required. Moreover, a monitoring order avoids the unnecessary steps that are required upon the execution of a search warrant. Finally, neither search warrants nor production orders extend to future transactions and, unless an issuing officer authorises the execution of a search warrant on more than one occasion, a separate authority is required for each new transaction.

Monitoring orders and surveillance device warrants

- 10.63 A common feature of monitoring orders and surveillance device warrants is that they authorise enforcement officers to gather evidential material on an ongoing basis. There is, however, one important difference. A surveillance device warrant authorises an enforcement officer to capture or record information as it is occurring, or in real time. In contrast, a monitoring order is concerned with the recovery of information after it has been stored or otherwise held.

Monitoring order powers for proceeds of crime investigations

- 10.64 The existing monitoring order provisions of the Proceeds of Crime Act 1991 have limited application. Orders may be directed only to financial institutions, and only in respect of proceeds derived from drug dealing offences. We understand from the Police that relatively few orders have been sought and that one of the principal reasons for that is the fact that they are available only for proceeds of crime investigations in respect of drug dealing offences.
- 10.65 Overseas, legislation providing for monitoring orders in proceeds of crime investigations also confines their availability to financial account information. In such an investigation, there appear to be no other types of information for which a monitoring order would be appropriate. Accordingly, in proceeds of crime investigations, monitoring orders should be available only for transactions through an account held with a financial institution.
- 10.66 However, it seems unduly restrictive to confine the availability of monitoring orders to only proceeds of crime investigations arising from drug dealing offences. Search warrants and production orders may be applied for in relation to a serious offence – any offence punishable by imprisonment for five years or more – and there is no reason why monitoring orders should not be similarly available. Accordingly, we recommend that monitoring orders should be available for proceeds of crime investigations into any serious offence.

RECOMMENDATION

10.11 Monitoring orders for proceeds of crime investigations should be confined to transactions through an account held with a financial institution, but should be available where the proceeds relate to any offence punishable by five years imprisonment or more.

Monitoring order powers for general crime investigations

10.67 At present, monitoring order procedures or their equivalent are only available in general crime investigations for communications data transactions (in New Zealand and the United Kingdom), or for financial account information in the course of money laundering investigations (in jurisdictions in Australia and the United Kingdom). These procedures have been introduced as a legislative response to an increasing need in criminal investigations for ongoing access to information held by financial institutions or telecommunications service providers.

10.68 The limitations of search warrant powers and also of the existing call-data warrant regime have been illustrated, so far as account data relating to telecommunications is concerned, in a number of cases. In *R v Zutt*,⁷³ the police executed search warrants on a mobile phone company to obtain copies of text messages sent by members of a drug dealing conspiracy. As the mobile phone company purged its database of the content of text messages every 24 hours, many of the warrants related to the capture of text messages sent on future dates. At trial, those warrants were held to be invalid because of their prospective nature,⁷⁴ but the evidence obtained was nevertheless held to be admissible, a decision that was upheld on appeal. In *R v Pue*,⁷⁵ where the police had applied for call data warrants in respect of text messages, the Crown accepted at trial that the warrants did not authorise the disclosure of the content of the text messages to the police.

10.69 Later, in *R v Cox*, where both call data warrants and search warrants had been issued to obtain text messages, the Court of Appeal concluded:⁷⁶

On the basis of what we have earlier held, the obtaining of the texting information was not in breach of any legal principle other than the arguable breach of s 21 New Zealand Bill of Rights Act. It is reasonably apparent from what we have said that although call data warrants and search warrants were of some application, neither was particularly well-suited to the obtaining of texting information. A call data warrant would not automatically give police access to the content of text messages and a search warrant would not, in terms, cover the actions of Vodafone, at the request of the police, preserving texting information for future seizure.

10.70 Developments in financial crime investigations have been reflected in legislation creating new crimes of money laundering,⁷⁷ participation in an organised

⁷³ *R v Zutt*, above n 34.

⁷⁴ The invalidity of a search warrant obtained on such a basis was not in issue on appeal: see *R v Zutt*, above n 34, para 5.

⁷⁵ *R v Pue (No 1)* (5 December 2003) HC AK T030161 Harrison J.

⁷⁶ *R v Cox* (2004) 21 CRNZ 1 (CA), para 59.

⁷⁷ Crimes Amendment Act 1995, s 5.

criminal group,⁷⁸ and requirements on financial institutions to report suspicious cash transactions.⁷⁹ Decisions in cases such as *R v Thompson*⁸⁰ (involving the disclosure of an accused's bank account details without warrant) and *R v Harris*⁸¹ (involving the disclosure of suspicious transactions allegedly in breach of the Financial Transactions Reporting Act 1996) concern the boundaries of the relationship between a financial institution and its customer where the "disclosure of iniquity" to law enforcement authorities was held to be justified.

- 10.71 Though challenges to the use of search warrants and call data warrants to obtain financial and telecommunications data derived from account transactions have revealed shortcomings in current legislation, the courts have usually held the evidential material obtained to be admissible.⁸² Nevertheless, we consider it desirable for the enforcement officer's authority to access account transaction information to be specifically provided for in legislation and for its boundaries to be clearly established. The search warrant procedure cannot be readily adapted to provide that authority; a monitoring order procedure would appear capable of doing so.

Issues for reform

- 10.72 Determining the nature and scope of a monitoring order power for general criminal investigations requires considering several issues, including the types of evidential material for which monitoring orders should be available; the nature of the information obtained; the seriousness of the offences to which the power should apply; what account holders should be monitored; whether only specific types of offending characterised by regular or ongoing transactions should be covered; and who should issue the order.

TYPES OF EVIDENTIAL MATERIAL FOR WHICH MONITORING ORDERS ARE AVAILABLE

- 10.73 Legislation overseas mainly provides for the issuing of monitoring orders for financial information in the context of the investigation of specific types of offending such as money laundering and fraud-related offences. The only other category of information for which the equivalent of a monitoring order is presently available is subscriber account transactions held by telecommunications operators.⁸³
- 10.74 There appears to be limited scope for monitoring orders to be used when investigating offences for anything other than customer account transactions held by financial institutions or telecommunications operators (including internet service providers). Utilities and other service providers may keep data relating to customer transactions on an ongoing basis for billing purposes, but there are no indications that such information is a source of evidential material for law enforcement investigation purposes. Nevertheless, we can see no reason to restrict the application of a monitoring order regime to information relating to account transactions held by financial institutions and telecommunications operators and we recommend that monitoring orders should be available for any type of information.

78 Crimes Amendment Act (No 2) 1997, s 2.

79 Financial Transactions Reporting Act 1996 ss 15-23.

80 *R v Thompson* (1995) 13 CRNZ 546.

81 *R v Harris* [2000] 2 NZLR 524, paras 7-10 (CA).

82 See *R v Cox* above, n 76; *R v Zutt* above, n 34; *R v H* (20 October 2006) HC WN CRI-2005-085-4963,

83 Above, paras 10.56 and 10.58.

SCOPE OF ACCOUNT TRANSACTION INFORMATION

- 10.75 Existing monitoring order regimes expressly exclude content information from account transaction information.⁸⁴ In some instances, however, such as text messages, content information is associated with the account transaction data. Where the critical evidential material sought is in the form of the content of the transaction, the enforcement officer must separately apply for a search warrant. As illustrated in *R v Cox*,⁸⁵ this results in the enforcement officer applying for two processes, with the search warrant only able to be applied for in respect of evidential material once it comes into existence.
- 10.76 Where content information is associated with transaction information, this seems to be unnecessarily duplicative. Accordingly, provided the applicant enforcement officer can satisfy the issuing officer that there are reasonable grounds to believe that such information will be evidential material, the monitoring order should be able to include content information as well as details of the transaction.

GENERAL REQUIREMENTS FOR MONITORING ORDERS

- 10.77 We consider the requirements and procedures recommended in respect of search warrants should generally apply to monitoring orders:
- They should be available in respect of any offence for which a search warrant could be obtained. Whilst monitoring orders (along with other investigative processes) for proceeds of crime investigations are available only in respect of serious offences, there seems to be no basis for such a distinction for general crime investigations. There would be little reason to have a monitoring order process for one group of offences and only a search warrant, with its shortcomings and its higher level of intrusiveness, for other offences.
 - An order should be issued only by an independent officer acting judicially. Despite the approach taken in the United Kingdom legislation which permits an authorisation to be issued by senior police officers and other non-judicial officers, we see no justification for departing from the general requirement that such orders require the intervention of a detached judicial mind before the power is exercised.
 - A monitoring order should be issued in relation to the transactions of any specified person. The account may belong to someone other than the person directly under investigation for the commission of the offence. As with a search warrant, the issuing officer must be satisfied that there are reasonable grounds for believing the account information of a particular person will provide evidential material relating to an offence.
 - An order should be available for a period up to 30 days. Though this period is shorter than the maximum for proceeds of crime monitoring order regimes, in many cases an investigation will be concluded inside that period. For longer-running investigations, it is appropriate for the issuing officer to be satisfied as to the ongoing need for the order.

⁸⁴ Telecommunications (Residual Provisions) Act 1987, s 2: para (c) of the definition of “call associated data” excludes from the definition the “content” of the telecommunication, with content being separately defined to include the information that the sender intends to convey to the recipient of the communication. See also Regulation of Investigatory Powers Act 2000 (UK), s 21(4)(b).

⁸⁵ *R v Cox* above n 76; see para 10.69 above.

- Other recommendations made in chapters 4 and 6 relating to the application for, issue and execution of warrants (such as those relating to renewal and notification), should, where relevant, also apply.

CALL DATA WARRANTS

- 10.78 The proposed regime would enable call associated data presently captured by a telecommunications network operator pursuant to a call data warrant to be the subject of a monitoring order.⁸⁶ A monitoring order could not, however, be applied for to authorise the Police or Customs to connect a telephone analyser to a network which is presently also sanctioned under a call data warrant.⁸⁷ As the connection of a telephone analyser to the network provides the police or customs officer with direct access to call associated data as it is transmitted, a surveillance device warrant rather than a monitoring order would provide the appropriate authority. A separate call data warrant regime would thus no longer be required and the provisions of the Telecommunications (Residual Provisions) Act 1987 should be repealed.

RECOMMENDATIONS

- 10.12 Enforcement officers should be able to apply for a monitoring order in respect of offences for which a search warrant may be issued.
- 10.13 A monitoring order regime should not be restricted to information held by financial institutions or telecommunications service providers; monitoring orders should be available for any type of information.
- 10.14 Where the transaction information held by an institution or provider includes the content of the transaction, the monitoring order should be able to include that information.
- 10.15 Monitoring orders should be authorised by an independent issuing officer who should be satisfied that there are reasonable grounds for believing that the information to which the order relates will provide evidential material relating to a specified offence.
- 10.16 A monitoring order should have a maximum life of 30 days.
- 10.17 A separate call data warrant regime is no longer required and the relevant provisions of the Telecommunications (Residual Provisions) Act 1987 should be repealed.

⁸⁶ Telecommunications (Residual Provisions) Act 1987, s 10C(1)(c) and (2).

⁸⁷ Telecommunications (Residual Provisions) Act 1987, s 10C(1)(a) and (b).

Chapter 11

INTERCEPTION AND SURVEILLANCE



Chapter 11

Interception and surveillance

- INTRODUCTION** 11.1 One of the most challenging aspects of our work in regulating search, seizure, interception and surveillance powers has been determining the proper framework within which to regulate non-trespassory forms of search and seizure. There are many reasons for this.
- 11.2 In the first place, there are questions of definition. While the concept of a trespass is well understood, there is substantial debate as to what types of non-trespassory surveillance should be regarded as a search or seizure for the purposes of section 21 of the New Zealand Bill of Rights Act 1990. There is even more controversy about what type of surveillance is reasonable and unreasonable.
- 11.3 Secondly, in the non-trespassory field (whatever the outer bounds of surveillance may be), there are also constantly evolving technologies that allow people to see, hear and smell, monitor presence upon and use of property, intercept communications and so on in ways that were unimaginable only a few years ago. In turn, evolving technologies pose a real problem when framing a law regulating interference with privacy. For example, the very fact that technologies evolve means that should Parliament define the threat to privacy in terms of the instruments or devices used to undertake, say, audio or visual surveillance, there is a danger that that legislation will become obsolete within a short period.
- 11.4 Thirdly, common law has been slow in regulating non-trespassory surveillance. Most non-trespassory surveillance does not amount to a tort and only in the last few decades has Parliament intervened to criminalise some forms such as audio interception of private communications.
- 11.5 Finally, the appropriate legislative model is not immediately obvious. One traditional New Zealand response when extending non-trespassory powers has been to adopt an approach involving criminalisation with an exception for law enforcement. The interception regime is an example of this. There can be significant disadvantages associated with this type of legislation if the regulated activity cannot be carefully defined; after all, vaguely defined offence provisions raise significant fairness and due process issues.



11.6 In this chapter we consider the challenges posed by attempts to regulate non-trespassory surveillance and give close attention to the attempts overseas to regulate in this field. Having considered the arguments from first principles and the overseas experience, we conclude that it is proper for a statutory framework to be put around law enforcement activities which amount to non-trespassory surveillance. Further, we make recommendations as to the features of that framework:

- The use of audio, visual and tracking surveillance devices by law enforcement officers should be the subject of a statutory scheme.
- There should be a single scheme for the use of audio, visual and tracking surveillance devices that is simple and effective and that provides for streamlined application procedures, preconditions, restrictions and reporting requirements.
- The audio, visual and tracking surveillance devices scheme should be as consistent as possible with the scheme that we recommend in earlier chapters in respect of trespassory search and seizure. To that end, except in urgent cases, it should require authorisation by judicial warrant before law enforcement officers can use audio, visual and tracking surveillance devices.
- Other forms of non-trespassory surveillance should be regulated by a residual non-specific regime, the key feature of which is the need for a warrant. Such a regime ought to parallel the requirements of the other warrant regimes proposed in this report. This residual regime will enable law enforcement to obtain judicial authorisation before using new technologies that may interfere with reasonable expectations of privacy, but which are not the subject of a specific statutory regime.
- As a concomitant of our recommended move to extend statutory regulation of non-trespassory forms of surveillance, Parliament should take the opportunity to provide a list of activities that in its opinion do not amount to an interference with reasonable expectations of privacy.

CURRENT
GENERAL
APPROACH
TO THE
REGULATION
OF NON-
TRESPASSORY
SURVEILLANCE

Common law

11.7 There is no specific common law in place that prohibits or regulates non-trespassory surveillance. In its recent judgment in *Hosking v Runting*¹ a majority (three to two) of the Court of Appeal held that New Zealand common law does recognise a common law tort of breach of privacy. The majority held that to make out a successful claim for interference with privacy, a plaintiff had to show:

- the existence of facts in respect of which there was a reasonable expectation of privacy;
- publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

11.8 The definition of the tort in this way does not provide a strong indication that the tort will develop to protect people against audio or visual surveillance by law enforcement officers, let alone more exotic forms of non-trespassory surveillance. Indeed, the court expressly left open the question of whether intrusive behaviour

1 *Hosking v Runting* [2005] 1 NZLR 1 (CA).

such as surveillance constitutes a tort. The decision does indicate, however, a growing awareness that the common law needs to evolve to better protect personal privacy, a move that may quicken in New Zealand if our courts follow the approach of English courts (following the rapidly developing Strasbourg case law on privacy under article 8 of the European Convention on Human Rights).

Statute

- 11.9 Other than the general prohibition on unreasonable search and seizure in section 21 of the Bill of Rights Act, New Zealand statute law has not sought to deal with the field on any comprehensive basis. In particular, there is virtually no statutory regulation of visual or video surveillance or other non-auditory forms of surveillance.

General search warrant regime not applicable

- 11.10 In *R v Fraser*² the Court of Appeal held that the general search warrant regime established by section 198 of the Summary Proceedings Act 1957 is directed to “entry” onto property or places to “search” for and/or “seize” “things”; it does *not* apply to visual observations or surveillance from outside the property that is being observed. It follows that section 198 does not apply to audio or olfactory surveillance that does not involve a trespass.

Interception of private communications

- 11.11 In respect of audio surveillance, there has been some legislative activity by Parliament.
- 11.12 Part 9A of the Crimes Act 1961 (sections 216A-216F) is the starting point. Though headed “Crimes against Personal Privacy”, its focus is more limited than that, as it only deals with the unlawful interception of private communications by means of interception devices.
- 11.13 In essence, Part 9A prohibits the use of interception devices to (intentionally) intercept any private communication (section 216B). The offence is punishable by imprisonment for a term of up to two years. Further subsidiary offences, including disclosing private communications that have been unlawfully intercepted (section 216C) and dealing in listening devices (section 216D), are also contained in Part 9A.
- 11.14 The regulation of audio surveillance is confined to the “interception” of a “private communication” by means of an “interception device”. Each of these terms is defined in section 216A. A “private communication” means a communication (whether oral, written or otherwise) made in circumstances that reasonably indicate that any party to it desires the communication to be confined to the parties to it. Importantly, however, a communication is not private if, in the circumstances, any party to it ought to reasonably expect that the communication may be intercepted by a third party (without express or implied consent). Through the concept of “private communication”, Parliament has sought to constrain the otherwise potentially wide application of the prohibition. In particular, by linking the concept of “private communication” to reasonable

2 *R v Fraser* (1997) 3 HRNZ 731, 742 (CA).

expectations of privacy, Parliament has recognised that not all communications between individuals are private. On the other hand, the definition delegates a significant margin of judgment to the courts to determine reasonableness.³

- 11.15 Interception is not exhaustively defined, but “includes” hearing, listening to, recording, monitoring, acquiring or receiving a private communication either while it takes place or while it is in transit. “Interception device” means any electronic, mechanical, electromagnetic, optical, or electro-optical instrument, apparatus, equipment, or other device that is used or is capable of being used to intercept a private communication. On the basis of these definitions, Part 9A does not purport to regulate interception of a communication by means that do not involve the use of an interception device. Nor does it cover the accessing of the contents of a communication after its transmission is complete.⁴
- 11.16 Recording of the communication by a participant to the communication is not prohibited (section 216B(2)(a)).
- 11.17 Part 9A carves out a number of exceptions to the interception device prohibitions for law enforcement officers. Of particular interest to us, are the schemes created by Part 11A of the Crimes Act 1961 and by the Misuse of the Drugs Amendment Act 1978. Between them those two pieces of legislation authorise the police to intercept private communications by means of interception devices but subject to a number of tightly circumscribed conditions (references are to the Crimes Act provisions, except where noted otherwise):
- Other than in emergency situations,⁵ interception can only occur on the basis of an interception warrant or a so-called emergency permit.⁶
 - Interception is only permissible in respect of a limited class of offences, including terrorism, serious violent crimes, and organised crime (section 312A) and drug dealing offence (section 10 of the Misuse of Drugs Amendment Act 1978).
 - Only a High Court judge can issue an interception warrant or an emergency permit.
 - A warrant or permit can only be issued where the judge is satisfied that to do so is in the best interests of the administration of justice and that there are reasonable grounds to believe that a trigger offence has been, is being, or will be committed; that evidence relevant to the case will be obtained; that other investigative techniques and procedures:
 - have been tried and failed; or
 - are unlikely to facilitate the successful conclusion of the case; or
 - are likely to be too dangerous to adopt; or
 - are impractical due to urgency;

³ See the discussion in *Moreton v Police* [2002] 2 NZLR 234 (HC).

⁴ See, for example, *R v H*, (20 October 2006) HC WN CRI-2005-085-4963 Gendall J, where the court held that use of a search warrant to obtain text messages that had been transmitted over the network and that were recorded on a network computer was not a breach of the interception regime as no interception was involved. On the related question of remote accessing of communications stored on computers, see chapter 7 paras 7.74-7.108.

⁵ See Crimes Act 1961, s 216B(3).

⁶ An emergency permit can be granted by a judge where the matters justifying an interception warrant exist, but it would not be practicable in the circumstances for a warrant to be obtained (Crimes Act 1961, s 312G(1)). In most material respects, however, the process around emergency permits mirrors that pertaining to interception warrants.

and that privileged communications are not likely to be intercepted (sections 312C(1), 312CB(1), 312CD(1)).

- In each case, the judge must consider the extent to which the privacy of any person(s) would be interfered with (sections 312C(2), 312CB(2), 312CD(2)).
- An interception warrant has a limited life of 30 days (section 312D(3)), while an emergency permit is valid for a maximum of 48 hours (section 312G(6)).
- Irrelevant records of information obtained through interception must be destroyed as soon as practicable after they have been made (section 312I(1)) and relevant records must be destroyed as soon as it appears that no proceedings (or further proceedings) will be taken (section 312J(1)).
- Notice must be given of an intention to adduce evidence obtained pursuant to an interception warrant (or emergency permit) (section 312L).
- Unlawfully intercepted private communications (together with derivative evidence) are (subject to some limited exceptions) inadmissible in evidence (section 312M).
- Lawfully intercepted private communications may only be given as evidence in relation to a limited class of offences (section 312N).
- Police must report to a High Court judge (usually the judge who issued the warrant or permit) on the use that was made of the warrant or permit, as soon as practicable after its expiry. The report must contain a range of information, such as where the device was installed, the number of interceptions made, and whether relevant evidence was obtained (section 312P). In addition, the Commissioner of Police must provide collated information on interception warrants and permits in his or her Annual Report to Parliament (section 312Q).

- 11.18 As will be seen, the interception regime is far more restrictive in its terms than the regime governing the granting of ordinary search warrants. In particular, interception warrants are only available for a limited range of serious crimes, can only be issued by a High Court judge, are to be issued as a last resort, and are subject to ongoing judicial supervision. Evidence obtained by interception is subject to a strict admissibility regime. Below we recommend that these restrictions be relaxed as part of our proposed new surveillance devices regime.

Visual surveillance

- 11.19 In respect of visual surveillance there has been negligible statutory activity. Section 30 of the Summary Offences Act 1981 prohibits a person from “peeping and peering into a dwellinghouse”. But the offence must occur at night-time and is subject to a “reasonable excuse” defence (which is likely to be available to a police officer seeking to detect evidence of offending). Section 52 of the Private Investigators and Security Guards Act 1974 makes it an offence for a private investigator to take photographs or make a videotaping of another person without that person’s consent. But that prohibition has no application to state law enforcement officers.
- 11.20 More recently, as a result of the enactment of the Crimes (Intimate Covert Filming) Amendment Act 2006, section 216H of the Crimes Act 1961 now

makes it an offence to undertake covert visual recording of a person who is in a place which in the circumstances would reasonably be expected to provide privacy and the person is naked, or engaged in intimate sexual activity, or engaged in showering, toileting or dressing. The prohibition applies to a visual recording that is taken “in any medium using any device” (section 216G(1)) without the knowledge or consent of the person who is recorded. Specific exception for certain law enforcement officers provided (sections 216N(1)(a), (b), (c), (d) and 216N(3)) so long as the covert filming is for law enforcement purposes and is not done in bad faith or without reasonable cause (sections 216N(4) and 216N(5)).

- 11.21 Finally, there is a view that visual surveillance (and more particularly surreptitious video surveillance) engages the protections of the Information Privacy Principles created by the Privacy Act 1993. However, there is a strong contrary argument.⁷ In any event, even if those principles did apply to that type of activity, the Court of Appeal has made it clear that they are not relevant to determining – in a criminal or civil court – privacy rights.⁸ In this regard section 11(2) of the Privacy Act 1993 is quite clear; redress is instead available under the Act through the Human Rights Review Tribunal, which can award compensation.

Tracking surveillance

- 11.22 Sections 200A to 200P of the Summary Proceedings Act 1957 govern the installation, use and removal of tracking devices. The provisions are relatively new, having been inserted in 2003. A tracking device is defined as a device that may be used to help ascertain (by electronic or other means) the location of a thing or person and/or whether a thing has been opened, tampered with, or dealt with in some other way (section 200A). A High Court or District Court judge can issue a tracking device warrant upon application by an authorised officer (either a police officer or a customs officer), if satisfied that there are reasonable grounds to believe that an offence has been, is being, or will be committed; that information relevant to the offending can be obtained by using a tracking device; and that it is in the public interest for a warrant to be issued having regard to the seriousness of the offence, the degree to which privacy or property rights will be interfered with, and whether the information can be obtained in another way (section 200C).
- 11.23 A tracking device warrant authorises the installation, monitoring, maintenance and removal of a tracking device (section 200D(1)), and also authorises entry onto premises specified in the warrant, breaking open or interfering with any thing or the temporary removal of any thing from any place (section 200D(2)). A tracking device can be installed, monitored or removed without warrant if it is not practicable to obtain a warrant and the authorised officer believes that a judge would issue a warrant if time permitted (section 200G(1)). A tracking device installed under section 200G can only be monitored for 72 hours unless a warrant is subsequently obtained (section 200G). As with the interception regime, a range of reporting requirements are imposed in respect of not only individual warrant applications and the use of devices without warrant but also the general use of tracking devices.

⁷ The whole issue is discussed in Paul Roth, *Privacy Law and Practice* (loose leaf, LexisNexis, Wellington, 1994), para 1006.17 (last updated June 2006).

⁸ *R v Wong-Tung* (1995) 2 HRNZ 272 (CA).

- 11.24 While not as restrictive as the interception regime, the tracking device regime is still more restrictive than the ordinary search warrant regime. So while a tracking device can be used in respect of any offence, only a High Court or District Court judge can issue a tracking device warrant and there is provision for ongoing judicial monitoring of a tracking exercise.

Bill of Rights case law

- 11.25 There has been little case law to date on the impact of section 21 of the Bill of Rights Act on non-trespassory surveillance. The Court of Appeal has even refrained from expressing a definitive view on whether or not non-trespassory audio and visual surveillance amount to searches or seizures for section 21 purposes. Moreover, the Court has resisted calls from defence counsel (based on European and Canadian precedents) to use section 21 as the source of a principle that non-trespassory surveillance that is not specifically authorised by statute must necessarily be unlawful. Rather, in the absence of statutory regulation, the Court has preferred to adopt a case-by-case assessment of reasonableness under section 21.⁹

Video surveillance

- 11.26 In *R v Fraser*,¹⁰ the Court of Appeal closely examined police operations which involved placing the external door of a house under video surveillance for a period of three months. The court held that the area could be observed by the naked eye, from neighbouring properties. The court considered that there was nothing objectionable in the police employing a video camera to record that which could have been seen by the eye. In so concluding the court stated: “Reasonable expectations of privacy for activities readily visible from outside the property must be significantly less than, for instance, for activities within buildings”.
- 11.27 Subsequently in *R v Gardiner*,¹¹ the Court of Appeal stated: “Such is the importance of personal privacy that it will be a case out of the ordinary where surveillance by video is reasonable when it encompasses the interior of a dwelling”. In the absence of statute on the point, the court held that its task was to conduct a case-by-case assessment of all the circumstances. In the instant case, the court upheld the reasonableness of the video surveillance (even though it captured activity taking place within the target house) on the grounds that:
- substantial drug dealing was reasonably suspected;
 - the occupants had taken precautions to prevent oral communications from being intercepted by listening devices;
 - no warrant or other process existed for the police to legitimate their use of video surveillance.
- 11.28 Finally, in *R v Smith (Malcolm)*¹² the Court of Appeal held that it was not unreasonable for section 21 purposes to send a police informant into a suspected drug-dealing house armed with a small hidden camera. In the court’s view the purpose of the camera was to record that which the informant could observe with his own eyes. The camera did not enhance the informant’s ability to see

9 *R v Gardiner* (1997) 4 HRNZ 7, 13 (CA), *R v Smith (Malcolm)* [2000] 3 NZLR 656, 665-667 (CA).

10 *R v Fraser*, above n 2, 743.

11 *R v Gardiner*, above n 9.

12 *R v Smith (Malcolm)*, above n 9.

things, but rather put the credibility of his recollections beyond impeachment. This was not unreasonable.

Audio surveillance

- 11.29 In the field of audio surveillance a similar sort of judicial approach is evident (although the Bill of Rights Act 1990 has not had to be often invoked bearing in mind the existing statutory regulation of the field). In *Queen Street Backpackers v Commerce Commission*,¹³ the Court of Appeal held that it was not unreasonable for section 21 purposes to admit into evidence tape recordings of meetings between businesspersons that one of the participants had made for the purpose of passing it onto the Commerce Commission (which was conducting a price-fixing inquiry into backpacking accommodation). The court held that participant recording was not objectionable; all it did was facilitate the memory of a person who was party to a conversation and who would be allowed to give evidence as to what transpired in any event.
- 11.30 In *R v A*¹⁴ the Court of Appeal also upheld the admissibility of tape recordings of a conversation where one of the participants to that conversation had consented to the police taping it. The court held that participant recording of a conversation was a search and seizure for section 21 purposes. It went on to hold that the recording was, in all the circumstances, not “unreasonable” for section 21 purposes. Parliament had not prohibited participant recording; people in the community were aware of the relative ease with which a discussion could be recorded by another participant; the law enforcement context was important; and the public interest supported admissibility of such recordings.

Other forms of non-trespassory surveillance

- 11.31 We are unaware of court decisions on the consistency with section 21 of other forms of non-trespassory surveillance such as olfactory surveillance or the use of infra-red technology to detect thermal surface radiant temperatures.¹⁵

Conclusion

- 11.32 The Court of Appeal has approached challenges to the admissibility of evidence obtained by audio and visual surveillance on the basis that it is subject to section 21, but has not reached a definitive view on the matter. That is because, to date, the court has not found any particular audio or visual surveillance technique to violate section 21 in the circumstances of the cases that it has considered. It has resisted calls from defence counsel to declare that audio or visual surveillance techniques that are not specifically authorised by statute are presumptively unreasonable. As we shall see shortly, however, the Court of Appeal has made clear its desire that Parliament become active in the field of regulating visual surveillance.

¹³ *Queen Street Backpackers Ltd v Commerce Commission* (1994) 2 HRNZ 94 (CA).

¹⁴ *R v A* [1994] 1 NZLR 429 (CA).

¹⁵ See the overseas cases referred to in Butler & Butler, *The New Zealand Bill of Rights Act: A Commentary*, LexisNexis Wellington, 2005) paras 18.11.5(2) and 18.11.11.

SHOULD NON-TRESPASSORY SURVEILLANCE BE THE SUBJECT OF STATUTORY REGULATION?

- 11.33 There are five principal reasons why the status quo is inadequate and that the field of non-trespassory surveillance should be subject to greater statutory regulation.
- Non-trespassory surveillance implicates reasonable expectations of privacy**
- 11.34 As noted in chapter 2 above, we believe that our proposals must be consistent with the right of everyone not to be subjected to unreasonable search and seizure, as guaranteed by section 21 of the Bill of Rights Act.¹⁶
- 11.35 The commentary to article 19 of the White Paper on the draft Bill of Rights explicitly noted that article 19 (which was in all material respects in the same terms as section 21) “should extend not only to the interception of mail, for example, *but also to the electronic interception of private conversations, and other forms of surveillance*”.¹⁷
- 11.36 The approach that the Ministry of Justice and the Crown Law Office have taken in advising the Attorney-General on the consistency of proposed legislation with the Bill of Rights Act 1990 mirrors that commentary, as does the Ministry of Justice’s publication, *Guidelines on the New Zealand Bill of Rights Act 1990*.¹⁸ Moreover, New Zealand’s international human rights obligations extend to the control and regulation of non-trespassory forms of search and seizure, including audio and visual surveillance.
- 11.37 While the Court of Appeal has yet to adopt a definitive position on whether electronic surveillance constitutes a search for the purposes of section 21, we consider that at least some forms of non-trespassory surveillance do implicate reasonable expectations of privacy. In turn such surveillance ought to be conducted pursuant to a law that authorises and regulates its use.

Status quo creates unnecessary uncertainty and fails to respect human rights and law enforcement values

- 11.38 Under the status quo only a very few audio and visual surveillance activities are the subject of comprehensive statutory regulation. This is unsatisfactory for both citizens and law enforcement agencies.
- 11.39 Turning to citizens first, the status quo leaves many of the three core human rights values identified in chapter 2 exposed. The lack of statutory regulation obviously imperils a citizen’s right to privacy because it means that the citizen is left uncertain as to how far his or her right to privacy extends. This may well have a significant chilling effect on his or her exercise of privacy rights. Next, to the extent that some visual surveillance techniques allow enforcement officers to penetrate a person’s clothing in order to undertake visual examination of a person’s external body

16 As with our analysis of other issues involving search, seizure, interception and surveillance powers, we note the further commitments New Zealand has assumed under article 17 of the International Covenant on Civil and Political Rights that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence ... Everyone has the right to the protection of the law against such interference or attacks.”

17 Ministry of Justice “A Bill of Rights for New Zealand: A White Paper” [1984-85] I AJHR A6, para 10.152 (emphasis added).

18 Ministry of Justice *The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector* (Wellington, 2004).

features (or even some internal features), personal integrity is clearly implicated. Thirdly, the absence of statutory regulation raises significant rule of law concerns. In addition to the chilling effect on a citizen's willingness to act in the expectation of privacy, the absence of statutory regulation means that the protection inherent in a warrant regime will not be available. Rather, at best, the citizen has to rely on a court's *ex post facto* assessment of reasonableness some time after an interference with privacy has occurred. This is not the type of system that comports well with a society subject to the rule of law.

- 11.40 Equally, from the perspective of law enforcement officers, the status quo is unsatisfactory. Principally, the absence of clear statutory authority for a particular type of surveillance activity creates the real possibility that a court will, after the event, find that the activity is unlawful and/or unreasonable and declare the results of what may have been a long surveillance operation inadmissible at a criminal trial. Such a consequence would not only represent a significant waste of law enforcement time and resources but, more importantly, could result in the collapse of the prosecution's case, a far from desirable outcome.¹⁹ Secondly, as argued in chapter 2 above, good law enforcement practice seeks consistency with human rights norms. It is undesirable, in terms of law enforcement culture, for activities that constitute significant intrusions on privacy to be conducted without statutory authority. Finally, we note that the regimes that currently regulate interception of private communications and the use of tracking devices contain different procedures, preconditions and requirements. To some extent dissonance between the regimes may cause confusion among law enforcement officers tasked with complying with those schemes. This conflicts with the principle of simplicity, which is one of the law enforcement values discussed in chapter 2.

Court of Appeal preference for statutory regulation

- 11.41 From cases such as *Gardiner* it can be inferred that the Court of Appeal is of the view that the whole field of audio and visual surveillance could usefully be the subject of statutory regulation. *Gardiner* involved visual surveillance, using a long lens video camera positioned in a neighbouring property and trained on a room of the target premises. While the Court of Appeal held that in the particular circumstances of that case the surveillance was not unreasonable for Bill of Rights Act purposes, it nonetheless took the opportunity to state:²⁰

Parliament has not yet chosen to legislate on the subject of video surveillance as it has done for the use of devices enabling interception of private communications: ... The situation may be thought to be unsatisfactory for the police as well as the citizen. The police may invest substantial time and resources in such a surveillance operation, unable to obtain authorisation because there is no power for anyone to grant it, but exposed to the risk that afterwards a Judge may hold their actions, in a relatively untested field, to be an unreasonable search.

Existing statutory regimes have operated satisfactorily

- 11.42 Some New Zealand legislation already regulates the interception of private communications and the use of tracking devices. Apart from a few technical

¹⁹ See, to the same effect, *R v Gardiner*, above n 9.

²⁰ *R v Gardiner*, above n 9.

wrinkles that have now largely been fixed, the legislation appears to have worked satisfactorily; there is no real evidence that the requirements governing either regime have been found to be unworkable or have generated a substantial amount of litigation. This experience suggests that despite the use of some vague concepts and terminology, such as privacy and reasonable expectations of privacy, statute can adequately regulate this sort of activity.

Surveillance regimes exist in overseas jurisdictions

- 11.43 In a good number of overseas jurisdictions, legislatures have adopted laws that regulate non-trespassory surveillance on a much broader basis than is currently the case in New Zealand. In a number of other jurisdictions, for example, the use of devices to conduct audio and visual surveillance is the subject of strict control. Some, albeit fewer, jurisdictions regulate even more forms of surveillance, including covert human intelligence (UK) and any form of law enforcement action that, if not conducted pursuant to warrant, would amount to unreasonable search or seizure (Canada). In our view, consideration of these regimes strongly suggests that it is both possible and desirable to extend the statutory control of search and surveillance powers to a much broader range of surveillance measures than is currently provided for through the interception and tracking device regimes.

Australia

- 11.44 In Australia, legislatures have been active in regulating the use of tracking, audio, and visual surveillance devices. While many states and the Commonwealth had prohibited the use of listening devices (with law enforcement exceptions) since the 1970s and 1980s, more recently those statutes have been overhauled to include tracking devices and visual surveillance devices. Western Australia has, for example, enacted the Surveillance Devices Act 1998 (WA), which regulates the use of listening devices, optical surveillance devices and tracking devices. It is a comprehensive Act which generally prohibits the use of such devices, while carving out exceptions for law enforcement and public interest purposes. The Act carefully defines the circumstances in which a warrant can be issued and the nature of the law enforcement activities that it seeks to regulate. Similar legislation can be found in South Australia (Listening and Surveillance Devices Act 1972 (SA) (amended in 2001 to extend its coverage to surveillance devices more generally), the Northern Territory (Surveillance Devices Act 2000 (NT)) and Victoria (Surveillance Devices Act 1999 (Vic)). In Queensland the Crime and Misconduct Act 2001 authorises the use of a range of surveillance devices including tracking, listening and visual surveillance devices.
- 11.45 More recently the Federal Parliament has adopted similar legislation – the Surveillance Devices Act 2004 (Cth). Unlike most of the state legislation, the Commonwealth Act only purports to regulate the use of surveillance devices by law enforcement agencies (both state and federal). It does not contain general criminal or civil liability provisions. Interestingly, the Commonwealth legislation authorises the warrantless use of optical surveillance devices if the use of the device does not involve entry onto premises or interference with a vehicle or thing (section 37), while conversations can be listened to or recorded without warrant if the enforcement officer is participating in the conversation or is given permission by one of the participants to make a recording of the conversation (section 38).

- 11.46 Finally, in 2001 the New South Wales Law Reform Commission issued an interim report on surveillance, in which it proposed a surveillance devices law modelled closely on the Western Australian law.²¹

United States

- 11.47 In the United States, many states have enacted laws that authorise and regulate visual and audio surveillance by enforcement officers. An example is article 700 of the New York State Consolidated Laws (Criminal Procedure). Broadly speaking article 700 requires law enforcement officers to obtain a judicial warrant before undertaking “eavesdropping” or “video surveillance” activities. “Eavesdropping” means wiretapping, mechanical overhearing of conversations and the intercepting or accessing an electronic communication. “Video surveillance” is defined as meaning (section 700.05.9):

the intentional visual observation by law enforcement of a person by means of a television camera or other electronic device that is part of a television transmitting apparatus, whether or not such observation is recorded on film or video tape, without the consent of that person or another person thereat and under circumstances in which such observation in the absence of a video surveillance warrant infringes upon such person’s reasonable expectation of privacy under the constitution of this state or of the United States.

- 11.48 As will be seen, the definition of “video surveillance” in section 700.05.9 seeks to provide some measure of certainty for enforcement officers (through the definition of devices/instruments that trigger the definition of video surveillance), while at the same time providing comprehensive protection to a citizen’s reasonable expectations of privacy (through using that concept to give an open-ended description of the circumstances to which the warrant regime applies).

United Kingdom

- 11.49 In the United Kingdom, the Regulation of Investigatory Powers Act 2000 (together with other more limited legislation such as the Interception of Communications Act 1985 and the Police Act 1997) regulates the interception of postal and telephone communications (Part I) and the use of certain types of surveillance devices and methods and covert human intelligence sources (Part II). The regime contains a complex set of definitions and different types of regulation depending on the type of surveillance in issue, and the urgency of the situation. Surveillance includes:

- monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications;
- recording anything monitored, observed or listened to during surveillance;
- surveillance with the assistance of a surveillance device (which means any apparatus designed or adapted for use in surveillance (section 48) and thereby covers audio and visual surveillance).

- 11.50 Part II distinguishes between so-called “directed” surveillance and “intrusive” surveillance. Intrusive surveillance refers to covert surveillance that is carried out in relation to anything taking place on residential premises or in any private

21 New South Wales Law Reform Commission *Surveillance: An Interim Report* (R98, Sydney 2001).

vehicle and that involves the presence of an individual on the premises or vehicle or is carried out by means of a surveillance device. Directed surveillance is surveillance that is not “intrusive” but is nonetheless focussed on a specific investigation or case, is likely to result in obtaining personal information, and is not urgent in nature. Part II puts in place authorisation mechanisms around these different types of surveillance, involving an elaborate system of authorisation, review and appeal.

Canada

- 11.51 In Canada, the Criminal Code prohibits the interception of private communications but permits interception by enforcement officers for the investigation of a wide range of offences (Part VI “Invasion of Privacy”). In this regard it is similar to the scheme provided for interception by New Zealand’s Crimes Act 1961. The Criminal Code, in addition to the ordinary trespass-focussed search warrant regime (section 487), provides for a so-called “general warrant” regime (section 487.01) under which a warrant can be granted in respect of any law enforcement activity that, if not judicially authorised, would unreasonably interfere with reasonable expectations of privacy (including video surveillance: section 487.01(4)) but that is not otherwise regulated by statute. We discuss section 487.01 of the Canadian Criminal Code in more detail below (see paragraphs 11.123-11.133).

Ireland

- 11.52 In Ireland, the Law Reform Commission in its *Report on Privacy: Surveillance and the Interception of Communications*,²² proposed a wide-ranging tort of privacy-intrusive surveillance, with exceptions provided for law enforcement activities. Interestingly, the Irish Commission recommended an open-ended definition of surveillance that included aural and visual surveillance (including participant recording of a conversation) and the interception of conversations, but extended to any activity that amounted to the invasion of a person’s privacy (privacy being defined in terms of what that person’s reasonable expectation of privacy was in all the circumstances). The Privacy Bill 2006, introduced into the Irish Senate would create a statutory tort of interference with privacy. The Bill provides for certain broadly expressed defences for, among others, law enforcement agencies.

Conclusion

- 11.53 The existence of these overseas regimes and proposals indicates that other jurisdictions have seen the need for the statutory regulation of non-trespassory forms of surveillance and have devised schemes which can sensibly define the controls that they impose. Together with the other arguments already discussed (the impact of non-trespassory surveillance on privacy; the disadvantages associated with the lack of a statutory scheme; the Court of Appeal’s support for statutory intervention – at least in so far as visual surveillance is concerned; and experience of the audio and tracking devices regime to date), the overseas experience shows that these types of surveillance can and should be regulated.

22 Law Reform Commission *Report on Privacy: Surveillance and the Interception of Communication* (LRC 57-1998, Dublin, Ireland, 1998).

RECOMMENDATION

11.1 Certain specific forms of non-trespassory surveillance by enforcement officers should be statutorily regulated.

MOVING FROM THE STATUS QUO: ISSUES

11.54 Having rejected the retention of the status quo, we turn to consider how non-trespassory surveillance should be regulated. In the next section of this chapter we recommend that:

- due to the limited scope of our terms of reference, our proposals on non-trespassory forms of surveillance should be confined to regulating the activities of law enforcement officers and should not criminalise the use of surveillance devices by other citizens;
- non-trespassory forms of surveillance should be regulated by a scheme that regulates the use of audio, visual and tracking surveillance devices, and in respect of other forms of non-trespassory surveillance, provides for a warrant procedure for any other activity that may interfere with reasonable expectations of privacy;
- consideration ought to be given to whether Parliament can identify those activities that, in its view, do not amount to an interference with reasonable expectations of privacy (and hence do not need to be subject to statutory regulation) or that, if they do amount to an interference with reasonable expectations of privacy, do not need to be authorised by warrant before they occur.

SHOULD REGULATION OF NON-TRESPASSORY SURVEILLANCE APPLY ONLY TO LAW ENFORCEMENT OFFICERS AND SHOULD IT INVOLVE THE USE OF THE CRIMINAL LAW?

11.55 As discussed above, in New Zealand, legislative regulation of audio, visual and tracking surveillance has, so far, been piecemeal and, relatively speaking, minimalist in scope. Where Parliament has sought to regulate surveillance in the past, it has done so in two ways.

Criminalisation with a law enforcement exception

11.56 The first approach is to criminalise the conduct but create a law enforcement exception. Broadly speaking, under this approach Parliament makes it an offence to engage in particular forms of surveillance. The offence provisions apply, in principle, against private persons and against the Crown (including law enforcement officers). The provisions, however, are usually accompanied by a set of detailed exceptions. These spell out the circumstances in which it is lawful for either a private person or a public authority (including enforcement officers) to interfere with personal privacy contrary to the general prohibition.

11.57 Part 9A of the Crimes Act 1961 – discussed earlier – is a good example. Under it the use of interception devices to (intentionally) intercept any private communication (widely defined) is an offence punishable by imprisonment for a term of up to two years (section 216B). Further subsidiary offences, including the disclosure of private communications that have been unlawfully intercepted (section 216C) and dealing in listening devices (section 216D), are also contained in Part 9A.

11.58 However, a number of exceptions to the general prohibitions in these offence-creating provisions have been created. So, for example, the prohibition on use of an interception device does not apply where:

- the person intercepting the private communication is a party to that private communication (section 216B(2)(a));
- interception has been undertaken by a person providing an internet or other communication service to the public (in relatively tightly prescribed circumstances) (section 216B(5));
- enforcement officers are acting under various statutory authorities and/or warrants, including Part 11A of the Crimes Act and the Misuse of Drugs Amendment Act 1978 (section 216B(2)(b));
- a police officer is in an emergency situation and has reasonable grounds for believing that any person is threatening the life of, or serious injury to, any other person in his or her presence or in the immediate vicinity of the officer (section 216B(3)).

11.59 This model is the one employed by most of the Australian state legislation that regulates the use of surveillance devices.

Law enforcement regulatory regime

11.60 The second approach is the law enforcement regulatory approach. Under this approach Parliament establishes a statutory regime to regulate how law enforcement officers are to undertake surveillance powers, but no complementary criminal offence or tort is enacted.

11.61 The tracking devices regime inserted in 2003 into the Summary Proceedings Act 1957, sections 200A to 200P, is a good example. That regime regulates the installation, monitoring and removal of tracking devices. There is a general requirement that a warrant be sought before a tracking device is installed and/or monitored (with exceptions for emergency situations) and removed. The subpart explicitly sets out what the granting of a tracking device warrant authorises the relevant law enforcement officer to do (section 200D). It also deals with aspects of civil liability. In particular, the subpart provides that a tracking device that remains in place after the expiry of a warrant authorising its installation must not be monitored, but explicitly provides that its remaining in place beyond the expiry of the warrant “does not constitute a trespass” (see sections 200E(3) and 200G(4)). In addition, in the case of the installation and monitoring of a tracking device without warrant in emergency situations, the subpart provides immunity from civil or criminal liability unless the officer acted in bad faith or without reasonable care (section 200G(8)). Importantly, the model adopted in respect of tracking devices:

- does not create any new criminal offence (as against the Crown or private individuals);
- only purports to regulate the activities of certain enforcement officers (by requiring them to respect the tracking device warrant regime), leaving private persons unregulated (or, more accurately, leaving them to be regulated by the common law);
- does not deal with the civil liability of private persons, though presumably trespass-based torts would be applicable to the unlawful interference with the vehicle or thing upon which the tracking device is placed.

11.62 The law enforcement regulatory model is the one used in the Surveillance Devices Act 2004 (Cth), discussed at paragraph 11.45 above.

Conclusion

- 11.63 This mix of legislative responses to the regulation of surveillance powers indicates that there can be a degree of flexibility around the models to be used in this field. Since the focus of this Report is solely on the regulation of activities undertaken by enforcement officers, we regard questions such as whether unreasonable visual surveillance by private persons should be criminalised or the subject of a comprehensive civil liability regime as beyond the scope of our endeavours.²³ They are matters more naturally related to a broader review of privacy protection. Accordingly, in this Report we propose to regulate non-trespassory surveillance activities undertaken by enforcement officers using the law enforcement regulatory model currently used in the tracking devices regime in sections 200A to 200P of the Summary Proceedings Act 1957 (discussed above at paragraph 11.61). This should not be regarded as expressing a Commission view that non-trespassory surveillance should not be the subject of the criminal law or give rise to civil liability where privacy is unreasonably intruded upon. It simply recognises the many difficult issues which arise out of any proposals to expand criminal and civil liability in so far as personal privacy is concerned and the limited scope of the referral that is the subject of this report.

RECOMMENDATION

- 11.2 Surveillance activities should be regulated without creating additional criminal or civil liability; whether any additional liability is needed is beyond the scope of our report and requires separate consideration.

SURVEILLANCE DEVICE REGIME

- 11.64 Overseas, a large number of jurisdictions have introduced statutory regimes for the regulation of audio, visual and tracking surveillance devices. For reasons discussed earlier in this chapter, we support adopting a similar type of regime in New Zealand. In developing the details of the regime, we have had regard to the existing New Zealand legislative regimes for tracking and interception devices, as well as regimes established overseas, and have endeavoured to achieve consistency with the requirements for the ordinary search warrant regime.
- 11.65 We recommend that the existing interception and tracking devices regimes should be repealed and replaced with a single surveillance device regime that would cover audio and visual surveillance and surveillance by means of a tracking device. Under our proposed regime, a law enforcement officer would be able to seek authority to use a single device that can perform several surveillance functions (for example, a tracking device that is also capable of conducting audio surveillance) and/or to use multiple surveillance devices (for example, two video cameras to cover different entry points to the target premises and an audio interception device to intercept private communications occurring within the target premises). The authorising judge would be entitled to place conditions on the use of such devices. For example, in the case of a multi-function device, the judge would be able to prohibit its use for one purpose which it is

²³ See, for example, the recommendations of the (Irish) Law Reform Commission in its *Report on Privacy*, above n 22, which included the creation of a tort of privacy-invasive surveillance: chapter 7. See now the Privacy Bill 2006 (Irl) introduced to create a wider tort of interference with privacy (which includes unlawful surveillance).

capable of performing, while in the case of the use of multiple devices the judge could impose conditions as to the purposes for which each device could be used and the duration of their use.

- 11.66 We set out below the elements of the surveillance device regime that we recommend. Unless otherwise noted, these elements are generic, applying to all types of surveillance device. However, as noted below in paragraphs 11.102 to 11.103, the legislation would need to include specific provisions relating to the installation, use and removal of devices that would vary between one type of device and another. To that end, some of the provisions currently governing interception and tracking devices (such as the issuance of a warrant to enable the removal of a tracking device) would need to be carried over.

RECOMMENDATIONS

- 11.3 A new generic surveillance device warrant regime should be created, replacing the current interception and tracking device regimes.
- 11.4 A judge issuing a surveillance device warrant should be able to authorise the use of a multi-function surveillance device as well as multiple surveillance devices within the terms of a single warrant.

Coverage

- 11.67 We favour a regime which defines its ambit as being concerned to regulate the use by enforcement officers of audio, visual and tracking devices in order to achieve certain things. This approach is consistent with the interception device and tracking device regimes found in the Crimes Act 1961 and the Summary Proceedings Act 1957. Those regimes permit respectively the “interception” of “private communications” by means of an “interception device” and the installation, monitoring, maintenance and removal of a tracking device. A similar focus on devices is apparent in the overseas surveillance statutes.²⁴
- 11.68 In relation to the use of audio and tracking devices, we recommend retaining the existing statutory formulations. In relation to visual surveillance, having regard to overseas visual surveillance regimes and the approach under New Zealand’s interception regime, we recommend that the surveillance regime apply to enforcement officers who observe visually private activity by means of a visual surveillance device.
- 11.69 We would define “observe visually” in an open-ended manner so as to include observation, recording and monitoring by means of a visual surveillance device. In turn, we would define “visual surveillance device” to mean any instrument, apparatus, equipment or other device that is used or is capable of being used to visually observe a private activity, but to exclude spectacles, contact lenses, or a similar device used by someone with impaired sight to overcome that impairment.

24 See, for example, Listening and Surveillance Devices Act 1972 (SA), Surveillance Devices Act 2000 (NT), Surveillance Devices Act 1999 (Vic), Crime and Misconduct Act 2001 (Qld), New York State Consolidated Laws (Criminal Procedure), art 700.

- 11.70 That brings us then to the key concept of “private activity”. We favour a definition that can be easily applied and that accords with our perception of what most people would regard as private. In our view, subject to a number of qualifications which we discuss below, any activity carried on within a private building in circumstances that indicate that any of the parties to the activity reasonably expect to be visually observed only by themselves plainly amounts to a private activity. The protections that arise from a warrant requirement in respect of that private activity should extend to all parties to that activity, whether or not they are an occupant of the private building or its curtilage where the activity takes place.
- 11.71 The more difficult question is whether activities that occur in non-private buildings or that occur outside buildings can also amount to private activities. In our view, activities that occur within non-private buildings do not amount to private activities in the sense that visual observation of them ought to occur only pursuant to warrant. A person who undertakes activities within a non-private building cannot reasonably expect that others including enforcement officers will not be observing them. A non-private building will need statutory definition. We have in mind, by way of example, that private buildings would include private residences, offices and commercial premises to which no member of the public would normally have access; non-private buildings, in contrast, would include those parts of hospitals, bus and train stations, airports and shops to which members of the public routinely have access.
- 11.72 As regards activities that occur outside a building, a more nuanced approach is required. In many statutes the curtilage of a private building (for example, the garden area around a house) is often regarded as falling within the area of greatest protection afforded by search and seizure law. We think that New Zealanders would regard as private an activity that occurs within the curtilage of a private building in circumstances that indicate that any of the parties to the activity reasonably expect not to be visually observed by anyone other than themselves. However, activities within the curtilage are not as private as activities that occur in the interior of a private building. The former are more susceptible of visual observation by a casual observer and enforcement officers. Moreover, if visual observation of the curtilage were to always fall within the concept of “private activity”, regardless of the duration of the observation, then law enforcement activities that involve fleeting observation of the curtilage of houses (for example, the use of visual surveillance devices by police helicopters) would require authorisation by warrant in all cases. That would be going too far in terms of privacy protection.
- 11.73 In our view, it is appropriate to recognise that members of the public can demand that prolonged visual observation of activities in their gardens and on their decks be authorised by warrant. We propose that where enforcement officers visually observe the curtilage of a private building for more than three hours over a 24-hour period or more than eight hours in aggregate, and any part of that observation involves the use of a surveillance device, then a warrant must be sought (except, of course, where a relevant emergency warrantless surveillance power is available – see below, paragraphs 11.104-11.113). “Curtilage” is a term used in some legislation (for example, the Fisheries Act 1996) without definition. We think it covers the immediate surrounds of the buildings, including decks and gardens, whether or not they are fenced or enclosed.

- 11.74 In paragraph 11.70 above we noted that our definition of “private activity” would require a number of qualifications. The first qualification is that if the activity in question is carried on in circumstances in which the parties to the activity ought reasonably to expect that the activity may be observed by means of a surveillance device, then it is not a “private activity” even though it occurs within a private building or the curtilage of a private building. In that regard, in our view any definition based on our proposals ought to explicitly state that an enforcement officer who is lawfully within a private building or its curtilage can, so long as he or she remains lawfully within the private building or curtilage, use a visual surveillance device without warrant to record the activities that he or she sees within that building or its curtilage. The second qualification we propose is that, where enforcement officers have been given the consent of one of the parties to the activity to visually observe the activity, the activity is not to be regarded as private.

RECOMMENDATION

11.5 The proposed surveillance device regime should:

- require that enforcement officers obtain a warrant for the use of interception and tracking devices, as currently defined in legislation;
- require that enforcement officers obtain a warrant in order to observe any activity in a private building by means of a visual surveillance device, where in the circumstances any of the parties to the activity ought to have a reasonable expectation that they are being observed only by themselves;
- require that enforcement officers obtain a warrant to observe any activity in the curtilage of a private building for more than three hours in a 24-hour period or more than eight hours in aggregate, where any part of that observation involves the use of a visual surveillance device and in the circumstances any of the parties to the activity ought to have a reasonable expectation that they are being observed only by themselves;
- as an exception to these requirements, permit an enforcement officer to record with a visual surveillance device any activity that he or she sees in a private building or its curtilage, where he or she is lawfully within the building or curtilage or has the consent of one of the parties to the activity to observe it.

Activities not requiring warrant authorisation

- 11.75 There is, in our view, value in delineating those uses of audio, visual and tracking devices that either do *not* amount to intrusions on reasonable expectations of privacy or that amount to reasonable intrusions on such expectations and accordingly, do not need to be authorised by a warrant procedure. Some specific uses would probably not trigger the surveillance device regime in any event (for example, the use of visual surveillance devices in a Customs-controlled passenger arrival area at an international airport is unlikely to trigger the surveillance regime because that part of the airport would not be a private building), but where there is the potential for uncertainty an exception could be provided for in the relevant governing statute.

11.76 There are, however, some more generic examples of uses of surveillance devices that ought to be specifically addressed in our proposed search and search statute. In particular, we suggest that the following matters should be declared not to require authorisation by means of an audio, visual or tracking device surveillance warrant:

- surreptitious recording of a voluntary conversation, so long as one of the participants consents to the recording. (This would reflect the status quo as provided for in section 312M(4) of the Crimes Act 1961 dealing with the related issue of the admissibility of intercepted private communications);²⁵
- the audio recording of private communications or the visual recording of private activities where entry onto that land or premises is pursuant to lawful authority (including where entry is with the occupant's consent or under warrant) and that lawful authority covers the right to see or hear the things being recorded, regardless of whether the occupant is aware of the recording being made (unless non-recording is a condition of entry).²⁶

RECOMMENDATION

11.6 Certain specified uses of surveillance devices that either do not amount to intrusions on reasonable expectations of privacy or that are reasonable intrusions on such expectations should be excluded from the warrant requirement.

Warrant preference

11.77 Consistently with the approach we have taken in the rest of this report, use of surveillance devices should generally only occur when authorised under warrant. The reasons for warrant preference have been discussed earlier in chapter 2 at paragraphs 2.52-2.60.

RECOMMENDATION

11.7 For surveillance activities that do amount to an intrusion on reasonable expectations of privacy, a warrant should be required (except in the emergency situations discussed at paragraphs 11.104 to 11.113).

Range of offences

11.78 Under current New Zealand law, the use of interception devices is restricted to investigating serious violent offences, certain specified offences, terrorist offences and drugs-related offences. In contrast, the tracking device regime is available for investigating any offence. Overseas, the range of offences in respect of which surveillance devices can be used varies. Most of the Australian schemes permit the use of surveillance devices in respect of all offences, with the seriousness of the offending in any particular warrant application being a mandatory relevant

²⁵ See also *R v A*, above n 14; *R v Barlow* (1995) 14 CRNZ 9 (CA).

²⁶ This would reflect the approach of the Court of Appeal to this issue in *R v Smith (Malcolm)* above n 9, where the use of surveillance devices to record drug dealing transactions by a police informant who had a licence to be on the premises was held to be lawful and reasonable.

consideration.²⁷ In Canada, the so-called “general” warrant regime applies in respect of a broad range of stipulated offences that goes considerably beyond the range of offences in respect of which the New Zealand interception device regime applies.²⁸

- 11.79 Consistent with the general approach of this report, surveillance warrants ought to be available on the same basis as search warrants. The former are not intrinsically more intrusive than the latter; that depends entirely on their scope and manner of execution in the individual case. In circumstances where the exercise of coercive powers for the investigation of offending is justified, therefore, enforcement agencies should have the ability to apply for the type of warrant that will obtain the evidential material being sought most efficiently and effectively. We therefore recommend that, whenever a statutory search warrant power for law enforcement purposes (as distinct from regulatory purposes) exists,²⁹ it should be extended to include a surveillance device warrant power for the same range of offences as is covered by the search warrant power.

RECOMMENDATION

- 11.8 Whenever a statutory search warrant power for law enforcement purposes exists, it should be extended to include a surveillance device warrant power to obtain evidential material in respect of any offence covered by the search warrant power.

The agencies to which the regime should be available

- 11.80 It follows that the new regime should be available to any enforcement agency that has a search warrant power. It is unarguable that this should be the case in relation to visual surveillance. It would be nonsensical to regulate, and therefore restrict, the visual surveillance operations of agencies such as the Police and Customs, while leaving other agencies with the ability to lawfully undertake such surveillance in an unregulated manner unless the installation of the device entailed a trespass.
- 11.81 There is likely to be more concern about extending audio surveillance and tracking to a variety of non-police agencies that cannot currently undertake them because they would usually amount to an offence or a civil trespass. The police themselves expressed reservations to us about the desirability of this, believing that the activity might become too widespread and uncontrolled. However, there are four reasons why we think that visual surveillance should not be distinguished from audio surveillance and tracking.
- 11.82 First, visual surveillance is not intrinsically less intrusive than any other form of search and surveillance. In principle, therefore, there seems to be no good reason to treat it differently. The key question is whether there is good reason to undertake the proposed law enforcement activity, given the nature of the information sought and the seriousness of the suspected criminal offending. That question should be answered on a case-by-case basis; it does not make sense to preclude the availability

27 Surveillance Devices Act 1999 (Vic), s 15; Listening and Surveillance Devices Act 1972 (SA), s 6.

28 Criminal Code RSC 1985 c C-46 (Can), ss 183 and 186.

29 Chapter 4, paras 4.3-4.10.

of audio surveillance and tracking, when in the circumstances of individual cases they may sometimes be a more efficient and less intrusive way of obtaining the information than the physical search or visual surveillance.

- 11.83 Secondly, we do not anticipate that interception of communications would become a widespread practice amongst non-police agencies. There are significant resource implications in developing and maintaining an interception capability. The scale of the law enforcement activity of most non-police agencies, and the number of occasions on which an interception device might be used, would not justify the resource commitment.
- 11.84 Thirdly, we understand that, when non-police agencies wish to undertake an activity such as tracking, they sometimes ask the police to obtain a warrant on their behalf. This effectively requires the police to act as their proxy, so that the judicial officer is receiving and assessing applications from officers who do not have first-hand knowledge of the information upon which it is based. In our view, that is undesirable.
- 11.85 Finally, a distinction between visual and other forms of surveillance might increasingly become difficult to maintain as the availability and use of multi-function devices become more common. While it would be possible for the judicial officer to impose a warrant condition that only some functions could be activated, such a condition is likely to become increasingly difficult to maintain.
- 11.86 However, we acknowledge that the surveillance device warrant regime we propose is novel, and its extension to non-police agencies will raise concerns about the potential creep of state powers and the emergence of a “surveillance society”. We therefore propose that the legislation should incorporate a mandatory review after five years, so that Parliament can consider what changes might be desirable in the light of experience.

RECOMMENDATIONS

- 11.9 The surveillance device warrant regime should be available to any enforcement agency that has a search warrant power for law enforcement purposes.
- 11.10 The legislation establishing the regime should incorporate a mandatory review after five years.

Prerequisites to issuing a warrant

- 11.87 The prerequisites to issuing a surveillance device warrant should follow those discussed in chapter 4. As we have stated above, there is no reason to distinguish between ordinary search warrants and surveillance device warrants. In particular, we do not accept that a surveillance device warrant should only be used where evidence cannot be safely obtained through executing an ordinary search warrant. In our view different circumstances require different law enforcement responses. There will be circumstances where use of a surveillance device will be more consistent with privacy values than the execution of a search warrant.

RECOMMENDATIONS

- 11.11 The prerequisites to issuing a surveillance device warrant should, in principle, be the same as for the search warrant power to which it relates.
- 11.12 There should be no requirement that a surveillance device warrant should only be issued if evidential material cannot be obtained by execution of a search warrant.

Specifying the target of surveillance

- 11.88 Ordinary search warrants authorising entry into a particular premises or vehicle specify the place or vehicle to be searched and the objects that the enforcement officer is authorised to search for and seize. Similarly, a surveillance device warrant should generally specify a particular person, place or object that is to be subject to surveillance.
- 11.89 However, by its nature, surveillance work does not always lend itself to specificity on all aspects. For example, if a law enforcement agency wishes to undertake surveillance of premises in which a known drug supplier is located, it may not be possible to specify in advance all or even any of the likely target premises; the surveillance will need to focus on the specific offender and follow his or her movements from place to place. Sometimes, too, mobile surveillance may be in respect someone whose identity is not known at the time the warrant is obtained; there may be intelligence that a drug courier is to arrive on a particular international flight, and a warrant may need to be obtained to track the controlled drug that he or she is carrying to its destination, even though the identity of the courier and the precise nature of the package in which the drugs are contained are unknown. In other instances, it may not be possible to be specific as to the full range of offences in respect of which surveillance is intended; what commences as an investigation into the importation of a controlled drug can transform into the investigation of supplying drugs as a result of ongoing surveillance.
- 11.90 In our view, where it is not possible for the applicant for the warrant to specifically identify the person, place or object that is to be subject of the surveillance, the applicant should instead specify the circumstances in which the surveillance of people, places or objects (defined in a more general way) is to be undertaken. This should be done with sufficient particularity to enable the judge to be satisfied about the parameters for using the surveillance device. This would mean that the applicant should in every case specify what is to be achieved (in terms of material that is of substantial relevance to the investigation of the offending) by using the device.
- 11.91 We note that the Australian surveillance device regimes show a comparable level of pragmatism, with a number allowing surveillance warrants to be issued for people whose identities are unknown and authorising law enforcement officers to enter and install devices on premises where the target is reasonably believed to be or likely to be.³⁰

30 Surveillance Devices Act 2004 (Cth), s 17(1)(b)(viii); Surveillance Devices Act 1999 (Vic), ss 19(1)(c) and (2)(c); Surveillances Devices Act 1998 (WA), ss 13(8)(b), 13(8)(c), 13(8)(d).

- 11.92 We recommend that an applicant for a surveillance device warrant specify what is to be achieved by using the device (in terms of evidential material relating to particular offending). We also recommend that there be a general requirement that where possible a surveillance warrant should specify the people, places or communications that are to be subject to surveillance. Nonetheless, we also recommend that a warrant can be issued where operational circumstances mean that not all target people, premises, communications or places can be specified so long as the warrant can sufficiently describe the parameters of, and objectives to be achieved by, the use of the device.

RECOMMENDATION

11.13 A surveillance warrant should specify the people, places or objects that are to be the subject of the surveillance and the evidential material relating to a particular offence that is to be obtained by using the device. Where specificity is not practicable, the warrant should describe the circumstances in which the surveillance is to be undertaken with sufficient particularity to identify the parameters of, and objectives to be achieved by, the use of the device.

Anticipatory use of surveillance device warrant

- 11.93 In chapter 4 we recommended that a search warrant should be able to be anticipatory in nature;³¹ that is, it should be able to be issued in respect of evidential material that does not exist, or is not at the search location, when the warrant is issued, provided that there is a reasonable belief that the evidential material will be present at the search location when the warrant is executed.
- 11.94 A surveillance device warrant should also be able to be issued in anticipation that evidential material will exist where the surveillance is being carried out. However, unlike a search warrant, a reasonable belief that the evidential material exists when execution of the warrant commences should not be required. Surveillance (for example, by way of a stake-out of a “tinny house” or the interception of communications regarding an intended importation of drugs) necessarily involves ongoing monitoring so that evidential material can be obtained when it arises; it would be nonsensical to require that it exists when the surveillance commences.
- 11.95 We note that this is reflected in the current interception device regime, which permits a warrant to be issued to intercept communications in respect of a serious violent offence that “has been committed, or is being committed, or is about to be committed.”³² Oddly, however, in respect of a serious violent offence that has yet to be committed, the use of an interception device may only be authorised where it “is likely to prevent the commission of the offence”. In most cases, communications are in fact likely to provide information that will enable the offence to be detected while it is in progress, or the offender apprehended afterwards. We think that the surveillance device regime should reflect that reality.

31 Chapter 4, paras 4.127-4.129.

32 Crimes Act 1961, s 312CB(1)(a)(i).

RECOMMENDATION

11.14 A surveillance device warrant should be able to be issued in anticipation of the existence of the evidential material that is sought to be obtained.

Ongoing judicial supervision

- 11.96 Under the current interception device regime judicial supervision is provided for after the warrant expires. In particular, a report must be prepared for the judge who issues the warrant dealing with matters such as where the device was placed, how often interceptions were made and whether relevant evidential material was obtained.³³ There is no equivalent requirement in respect of either an ordinary search warrant or a tracking device warrant.
- 11.97 For the reasons outlined in chapter 15,³⁴ we do not recommend any reporting requirement in respect of the outcome of the execution of a search warrant or any ongoing post-execution judicial oversight. Consistently with our view that different types of warrants should be distinguished only where demonstrably necessary, we see no reason in principle why reports should be prepared on surveillance by interception but not after search of a person's dwelling. We therefore recommend that there be no reporting or supervisory requirement in the surveillance warrant regime. Accordingly, there will be a change to the current interception warrant regime in this respect.

RECOMMENDATION

11.15 Reporting requirements in relation to the execution of surveillance device warrants should be the same as those that apply in respect of search warrants. There should be no general requirement for ongoing judicial supervision of surveillance device warrants.

Maximum life of surveillance warrant

- 11.98 In chapter 4, we have recommended that a search warrant should generally expire no later than 14 days after being issued. Throughout this chapter we have sought to align the physical search warrant regime and the surveillance devices regime so that they are consistent and unnecessary differences between them are eliminated. Nonetheless, we believe that the nature of investigations that typically can be expected to employ surveillance devices is such that a longer period is justified. We recommend that a surveillance device warrant should have a standard life of 60 days, subject to a judicial discretion to fix a shorter period. This is in line with the maximum life of a tracking device warrant, though longer than the period currently permitted for ordinary search warrants and interception warrants. We also recommend that a judicial officer (upon proper application by a law enforcement officer) should be able to issue a further surveillance device warrant upon the expiry of an earlier warrant.

³³ Crimes Act 1961, s 312P; Misuse of Drugs Amendment Act 1978, s 28.

³⁴ Chapter 15, paras 15.38-15.43.

RECOMMENDATION

11.16 A surveillance device warrant should have a maximum life of 60 days. This does not preclude subsequent applications upon the expiry of an earlier warrant.

Who may issue surveillance device warrant

- 11.99 Under the current interception device warrant regime, only a High Court judge can issue an interception device warrant. Under the tracking device warrant regime, either a High Court judge or a District Court judge may issue a tracking device warrant. Ordinary (physical) search warrants can be issued by a District Court judge, JP, community magistrate or a court registrar. In practice, most section 198 warrants are issued by registrars.
- 11.100 In this report, we recommend that ordinary search warrants should be issued by court registrars and JPs only if they have been specifically appointed and trained to undertake the task, and that they should be supplemented by other appointees with the necessary competence.³⁵ In view of that and of the integrated nature of the search, seizure, interception and surveillance device regime that we propose, it makes little sense to split the authority to issue different types of warrant between different branches of the judicial hierarchy. In principle, the Commission does not believe that one form of intrusion on reasonable expectations of privacy is necessarily always so much more serious than the others as to justify the proposition that only certain judicial officers should be given the task of authorising their use. In turn, it is odd then that presently a JP is able to authorise forcible entry onto private premises, but not be able to authorise the covert use of a listening device (the use of the latter being in many instances less immediately intrusive for the citizen).
- 11.101 However, the Commission recognises that the surveillance device regime has its roots in the current interception and tracking device regimes, where authorisation by a professional judge is mandatory. It also recognises that this is an area where the increasingly intrusive nature of modern technologies gives rise to particular public concern. Accordingly, on balance, the Commission recommends that a surveillance device warrant should be issued only by a judge (whether of the District or High Court). The one exception to this is national security warrants. In those instances we propose that the current system of authorisation by the Prime Minister be continued.

RECOMMENDATION

11.17 A surveillance device warrant should be issuable by any judge, except for national security warrants.

Authority conferred by surveillance device warrant

- 11.102 Under the interception regime, the effect of an interception warrant is to “authorise the interception of private communications by means of an interception device”.³⁶

³⁵ Chapter 4, paras 4.93-4.122.

³⁶ Crimes Act 1961, s 312E.

A tracking device warrant authorises the installation, maintenance, monitoring and removal of a tracking device. In addition, where it is necessary to do so to install, maintain, remove or monitor a device, the warrant authorises an enforcement officer to enter onto any premises specified in the warrant, to break open or interfere with anything, or to temporarily remove anything from any place where it is found and to return the thing to that place. The use of necessary force is also authorised (section 200D of the Summary Proceedings Act 1957). As the Court of Appeal made clear in *Choudhry v Attorney-General*,³⁷ New Zealand courts will not lightly assume that powers of entry onto premises are implicitly conferred on law enforcement officers in order to execute a surveillance-type warrant. In our view, the surveillance device warrant regime should explicitly spell out the extent of authority which such a warrant confers.

- 11.103 We recommend that a provision similar to section 200D of the Summary Proceedings Act 1957 be drafted to detail the authority that a surveillance device warrant confers in respect of each type of device. For the sake of clarity, any such regime should make it clear that, where necessary, the warrant authorises entry into third party premises and vehicles. Following overseas precedents, the surveillance device warrant regime should also explicitly authorise enforcement officers to use electricity or other power sources already on the target premises in order to power the surveillance device.³⁸

RECOMMENDATION

11.18 A surveillance device warrant should authorise entry onto premises and into vehicles, if necessary using reasonable force, for the purposes of installing, maintaining or removing the device. It should also authorise the use of electricity to power the device.

Use of surveillance devices in emergency situations

- 11.104 The current interception regime permits police to use an interception device in two emergency situations. The first is when the emergency is one where there are reasonable grounds to believe that a suspect is threatening the life of, or serious injury to, any other person in his or her presence or immediate vicinity and a commissioned police officer, who reasonably believes that use of the interception device will facilitate the protection of the person being threatened by the suspect, has authorised the use of the device.³⁹
- 11.105 The second emergency situation is where a judge is satisfied that an interception warrant should be granted, but that the urgency of the situation requires that the interception should begin before it is practicable for a warrant to be obtained. In such a case the judge may issue an emergency permit which is valid for 48 hours. Within that period the police may apply for an interception warrant in place of the permit.⁴⁰

³⁷ *Choudry v Attorney-General* [1999] 2 NZLR 582 (CA).

³⁸ See, for example, Surveillance Devices Act 1998 (WA), s 13(6); Surveillance Devices Act 2004 (Cth), s 18(3)(e).

³⁹ Crimes Act 1961, s 216B(3).

⁴⁰ Crimes Act 1961, s 312G. See also Misuse of Drugs Amendment Act 1978, s 19 for a similar procedure in respect of interception warrants for drug dealing offences.

- 11.106 The tracking device regime also permits the use of tracking devices in emergency situations, although the word “emergency” is not used. In particular, section 200G of the Summary Proceedings Act 1957 permits an authorised enforcement officer to install, monitor and maintain a tracking device without a warrant, if it is not in all the circumstances reasonably practicable to obtain a tracking device warrant and the officer reasonably believes that a judge would issue a warrant if time permitted. Unless the device is removed within 72 hours, the officer must apply for a tracking device warrant.
- 11.107 Overseas surveillance regimes also contain emergency provisions. Some require as a minimum that there be internal law enforcement authorisation before a surveillance device can be used, combined with ex post facto judicial approval of the authorisation;⁴¹ some require judicial authorisation but relax the requirement for the application to be in writing, permitting it to be applied for and granted by way of telephone or similar means;⁴² and some permit the use of devices without any need for judicial or internal authorisation.⁴³
- 11.108 This review of current law in New Zealand and overseas gives rise to three issues: the offences for which surveillance without warrant ought to be available; the approval processes that should precede or follow its use; and the maximum period over which surveillance without warrant should be conducted.
- 11.109 Turning to the first issue, we consider that the circumstances in which surveillance devices may be used by enforcement officers pursuant to emergency powers should reflect those situations when a warrantless search power may be exercised. In chapter 5 we identified those situations as being:⁴⁴
- where there are reasonable grounds to believe specified drug offending and it is not practicable to obtain a warrant (section 18(2) of the Misuse of Drugs Act 1975 as we propose to amend it);
 - where there are reasonable grounds to suspect that circumstances exist that would justify a search under sections 60 to 61 of the Arms Act 1983;
 - in the course of a controlled delivery of drugs (section 12A of the Misuse of Drugs Amendment Act 1978);
 - where there are reasonable grounds to believe that an offence punishable by 14 years’ imprisonment or more is occurring or about to occur and the delay caused by obtaining a warrant would result in the loss or impairment of evidence;
 - where there is an emergency that may endanger the life or safety of any person.
- 11.110 In our view, surveillance devices ought to be able to be deployed in similar emergency situations, with some modifications to adopt them to the surveillance environment.
- 11.111 The next issue, then, is the extent to which a written or retrospective approval process for the use of the device should be provided for. Three options are available. The first would permit enforcement officers to use surveillance devices

41 Surveillance Devices Act 2004 (Cth), Part 3; Surveillance Devices Act 1998 (WA), Part 4, Division 2; Surveillance Devices Act 1999 (Vic), Part 4, Division 3.

42 New York State Consolidated Laws (Criminal Procedure), s 700.21; Listening and Surveillance Devices Act 1972 (SA), s 6A.

43 Criminal Code RSC 1985 c C-46 (Can), s 184.4.

44 Chapter 5, paras 5.43-5.79.

in urgent situations, but require them to obtain retrospective judicial approval for that use. The second would only allow surveillance devices to be used in an urgent situation if approval is granted by an internal authorisation process, such as authorisation by an enforcement officer of a particular rank. This is a system found in a number of overseas statutes and in section 216B(3) of the Crimes Act 1961. The third would permit an enforcement officer to use a surveillance device in an urgent situation without warrant or internal authorisation, leaving the question of the lawfulness of the warrantless use of the device for determination in later civil or criminal proceedings.

- 11.112 We recommend the third option. The first option appears to us to be somewhat pointless; it is not a satisfactory substitute for prior judicial sanction and it is unclear what consequences follow from a refusal to give retrospective approval. The second option creates unnecessary complication. If there is time to obtain internal approval then there ought to be sufficient time to obtain a telewarrant from a judicial officer to authorise use of a surveillance device and that avenue should be pursued. If there is an absolutely urgent situation, then an enforcement officer on the ground ought not to be deflected from using a surveillance device by the need to obtain internal approval.
- 11.113 The final issue is the maximum period for which the emergency use of a surveillance device should be permitted. The present emergency authorisations extend for 48 hours for interception devices,⁴⁵ and 72 hours for tracking devices.⁴⁶ Where the circumstances giving rise to the urgency require the use of surveillance devices on an ongoing basis, we believe that judicial sanction should be sought. We favour a 48-hour maximum which should provide ample time to deal with short-term exigencies and sufficient to obtain a warrant for an ongoing operation. Accordingly, we recommend that the use of a surveillance device in a situation of urgency should cease after 48 hours unless the enforcement officer has obtained a surveillance device warrant to allow it to continue.

RECOMMENDATIONS

> Continued next page

11.19 In a situation of urgency, an enforcement officer should be able to use a surveillance device without warrant or other authorisation in the following circumstances:

- where there are reasonable grounds to believe drug offending as specified in section 18(2) of the Misuse of Drugs Act 1975 (as we propose to amend it) and it is not practicable to obtain a warrant;
- where there is reasonable suspicion justifying a search under sections 60 to 61 of the Arms Act 1983;
- in the course of a controlled delivery of drugs under section 12A of the Misuse of Drugs Amendment Act 1978;
- where there are reasonable grounds to believe that an offence punishable by 14 years' imprisonment or more is occurring or about to occur and the delay caused by obtaining an interception warrant will prevent the evidence from being obtained;

⁴⁵ Crimes Act 1961, s 312G(6); Misuse of Drugs Amendment Act 1978, s 19(6).

⁴⁶ Summary Proceedings Act 1958, s 200G(2).

RECOMMENDATIONS

- where there are reasonable grounds to suspect that:
 - an offence is occurring or about to occur, which would be likely to cause injury to any person, or damage to or loss of any property; or
 - there is an emergency that may endanger the life or safety of any person.

11.20 The emergency use of a surveillance device without warrant should not extend beyond 48 hours.

Notice of surveillance

11.114 In chapter 6,⁴⁷ we recommended that if a search power is exercised when the occupier of a place is absent, the enforcement officer must give the occupier notice of the search and the authority for it. So far as surveillance is concerned, some overseas regimes require that anyone who has been the subject of judicially authorised surveillance be notified of that fact at an appropriate time. For example, in New York, a person subject to audio or visual surveillance must be given notice after the execution of the surveillance warrant within a reasonable time and no later than 90 days after the expiry of the warrant.⁴⁸ In Canada, notice must be given to the target of a so-called “general” warrant within a reasonable time of its execution.⁴⁹

11.115 The notice requirement is to inform the subjects that a surveillance operation has taken place and of the purported authority for the surveillance. It also provides the targets with the opportunity to challenge the lawfulness of the surveillance operation without having to wait for criminal proceedings to be taken against them.

11.116 There is no equivalent provision under the current interception and tracking devices regimes in New Zealand. Rather, where it is proposed to adduce evidence obtained through the use of such warrants at a subsequent trial, notice of intention to produce evidence of the intercepted private communication must be given.⁵⁰ Similar “notice of intended use” provisions are found in overseas surveillance legislation.⁵¹

11.117 We initially considered that the notice requirements recommended in chapter 6 with respect to the exercise of search powers should, with some minor modifications, apply to the exercise of surveillance powers. However, enforcement agencies pointed out that this had the potential to seriously compromise ongoing or future enforcement operations. Surveillance by enforcement officers, particularly customs, police and fishery officers, to gather

⁴⁷ Chapter 6, recommendation 6.31.

⁴⁸ New York State Consolidated Laws (Criminal Procedure), s 700.50.3.

⁴⁹ Criminal Code RSC 1985 c C-46 (Can), s 487.01(5.1).

⁵⁰ Crimes Act 1961, s 312L.

⁵¹ See, for example, Canadian Criminal Code, s 189(5) and New York State Consolidated Laws (Criminal Procedure), s 700.70. The Australian surveillance device warrant regimes do not contain an equivalent “notice” requirement, although some do have a requirement that notice of intended use of evidence derived from the use of such a device be given.

valuable evidential material is a common investigative strategy. On occasions, however, the surveillance may not yield any evidential material at all and in other instances the information gained may be insufficient to support a prosecution at that stage of the investigation. Notwithstanding this, the fruits of the surveillance may become relevant to a prosecution months, or, in the case of a substantial criminal operation, even years later. Alerting the suspect to the exercise of a surveillance power thus carries the potential to compromise continuing or future investigations. However, the difficulty is that this will often be unknown at the time; it is in the nature of surveillance that its relevance may not emerge until a later date.

- 11.118 In the light of this, we agree that the notification requirement recommended in chapter 6 would be inappropriate and that a different approach is required. Nevertheless, we do not accept the view, put to us by some enforcement agencies, that they should never be required to notify the subject that he or she has been under surveillance. There will be instances where disclosure would not raise any risk of prejudice to ongoing or future investigations – for example, where the use of a surveillance device has resulted in the arrest and prosecution of the target of the operation. In such cases notification should be given unless a judge postpones or dispenses with the requirement. If necessary, directions should be sought as to the person or persons to be given notice.
- 11.119 We think the right balance is achieved by reversing the presumptive approach to notification that we recommended following the exercise of a search power. Thus we recommend that when an enforcement officer seeks postponement or dispensation from the notification requirement after a surveillance power has been exercised, the judge should grant the application unless the judge is satisfied that there is no risk of prejudice to ongoing or future investigations by the relevant enforcement agency. In many cases an application for postponement or dispensation from the notification requirement should be able to be included in the application for the warrant. Where it is not, or where a warrantless power is exercised, directions should be sought from a judge after the power is exercised.
- 11.120 We note that there will be details of a practical nature to be resolved where notification of the exercise of a surveillance power is to be given. Unlike a search warrant, where the person to be notified of the execution of the warrant can be fairly readily defined in statute, those affected by the execution of a surveillance device warrant will vary depending on the nature of the surveillance. Clearly, notification should not extend to everybody whose conversations have been recorded, or who may have visited a house that is under visual surveillance. It may often be possible, however, for the judge issuing the warrant to include in it a direction about who is to be notified within a reasonable period once execution has been completed. Where no such person is specified, the enforcement officer should obtain a direction from the judge as to the identity of the person or people to whom notice is to be given within seven days of the completion of the surveillance.

RECOMMENDATIONS

- 11.21 Notification of surveillance should be given within seven days of the conclusion of the surveillance unless postponement or dispensation is granted by a judge.
- 11.22 Where an enforcement officer applies to a judge for postponement of or dispensation from the notification requirement at the time of the application or following the exercise of a surveillance power, the application should be granted unless the judge is satisfied that notification would not prejudice ongoing or subsequent law enforcement investigations and would not endanger the safety of any person.
- 11.23 When notification of the exercise of a surveillance power is to be given, a judge should be able to give directions to the enforcement officer as to the person or people to be notified.

A RESIDUAL REGIME FOR OTHER FORMS OF OTHERWISE UNREGULATED SURVEILLANCE?

- 11.121 The audio, visual and tracking device surveillance regime outlined in the preceding section of this chapter should significantly strengthen the statutory regulation of law enforcement surveillance in New Zealand. It is not, however, a comprehensive regime. First, it is confined to surveillance conducted by means of devices. Secondly, regulation is based on the function of those devices, namely to hear, to observe and to track (and to record each of these activities). Any other functions that a device may have are not covered by the scheme we have proposed. So, for example, surveillance by smelling is not covered.
- 11.122 Accordingly, the question that we address in this section of the chapter is whether to recommend the adoption of a residual regime of the type found in the Canadian Criminal Code. For reasons outlined below we recommend this option, although we suggest a provision that is somewhat different from section 487.01 of the Canadian Criminal Code.

Canadian Criminal Code, section 487.01: analysis and critique

- 11.123 Section 487.01 of the Canadian Criminal Code provides a residual regime for those law enforcement activities which interfere with “reasonable expectations of privacy” (expressed in this broad manner) but which are not otherwise regulated by specific statutory regimes. We drew attention to section 487.01 in our Preliminary Paper 50, *Entry, Search and Seizure*.⁵²

Section 487.01

- 11.124 Inserted into the Criminal Code in 1993, section 487.01 provides for a judicial warrant to be issued for the use of any device or investigative technique or procedure or for doing anything described in the warrant that, if not authorised, would constitute an unreasonable search or seizure in respect of a person or a person’s property. Before issuing the warrant, the judicial officer must be satisfied that there are reasonable grounds to believe that an offence has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or other proposed

52 New Zealand Law Commission *Entry, Search and Seizure* (NZLC PP50 Wellington, 2002) para 30.

action. Further, the judicial officer must also be satisfied that it is in the best interests of the administration of justice to issue the warrant. There must be no other statutory provision that would provide for a warrant, authorisation or order permitting the technique, procedure or device to be used or the thing to be done. Section 487.01(2) specifically provides that a general warrant cannot be issued to the extent that it permits interference with bodily integrity.

Advantages

11.125 There are several advantages with this regime. From a human rights perspective section 487.01 serves a number of purposes. First, it reinforces the point that in general any intrusion on reasonable expectations of privacy by law enforcement officers can only take place pursuant to warrant. Secondly, by allowing for the specific authorisation of the use of surveillance techniques and devices that are not the subject of some other search or surveillance regime, section 487.01 reinforces the basic rule of law principle that coercive or intrusive state action should only occur pursuant to a positive law. Thirdly, by ruling out the use of a general warrant for intrusions on bodily integrity, section 487.01(2) affirms the necessity for specific legislative authority for any interference of that type. Fourthly, the fact that section 487.01 can only be invoked where the technique or procedure is not regulated by other legislation means that it cannot be used as a means of evading compliance with other, more detailed, legislation.

11.126 From a law enforcement perspective, section 487.01 also offers advantages. First, it provides a mechanism that empowers police to undertake activities that are not otherwise regulated by law, but that police fear may amount to interferences with reasonable expectations of privacy. In such cases the fact that a judicial officer authorised the activities would provide a strong argument in favour of the admissibility of any evidence obtained as a result of action taken under the warrant.⁵³ Secondly, and in turn, because it creates a statutory framework for authorising otherwise unregulated activities, it probably reduces the number of challenges to such activities during subsequent criminal trials. Thirdly, it strengthens a culture of independent oversight and prior authorisation, which accords with the human rights consistency principle discussed in chapter 2. Fourthly, to the extent that judges take the opportunity to place conditions on general warrants and thereby place limits with some exactitude on the way in which novel techniques and devices can be employed, they will contribute to a sense of certainty around law enforcement operations.

Flaws

11.127 On the other hand, there are a number of flaws in the Canadian legislation.

53 See, for example, *R v Brooks* (2003) 178 CCC (3d) 361 (Ont CA) where the Court held admissible evidence that had been obtained pursuant to a s 487.01 warrant that had been improperly issued (another statutory search or surveillance regime ought to have been used). See also *R v Grayson* [1997] 1 NZLR 399 (CA), where the Court of Appeal held that the fact that police acted pursuant to a warrant in good faith (albeit that the warrant may have been improperly issued) was a factor going towards the admissibility of evidence obtained through a search and seizure conducted pursuant to it. We note that in line with our proposals on remedies (see chapter 14 below) the fact that a search or seizure was conducted pursuant to an improperly issued warrant would not result in automatic exclusion of evidence.

- 11.128 First, section 487.01 provides little by way of guidance as to when it is to be invoked and what it empowers an official to do (other than not interfere with bodily integrity) once the warrant has been issued. As a result it vests a significant amount of discretion in a judicial officer.
- 11.129 Secondly, aspects of the Canadian regime are not straightforward from a law enforcement perspective. For example, the Canadian scheme stipulates that residual warrants may only be obtained as a last resort when there is no warrant available under any other regime. While one can understand that protections put in place in more specific search and surveillance regimes should not be bypassed, nonetheless that can create problems where there is uncertainty around the coverage and interpretation of other search or surveillance statutes. For example, in *R v Brooks*,⁵⁴ the Ontario Court of Appeal held that there was non-compliance with section 487.01 when an application for a general warrant was made so as to put a suspected drug trafficker under surveillance and enter her residence in order to search for and seize drugs. The Court held that the Crown had failed to convince the Court that the more normal search and seizure powers under the drugs legislation could not have been used to undertake the search and seizure. (As it happened the Court declined to exclude the evidence, notwithstanding the breach of section 8 of the Charter.)

Discussion and recommendations

- 11.130 We believe that a provision similar to s 487.01, with modifications to deal with the flaws identified above, should be adopted. The reasons in favour of a generic regime of the type embodied in section 487.01 flow out of the advantages already identified.
- 11.131 In summary, those advantages are that it reinforces the presumptive requirement that all search, seizure, interception and surveillance activity be conducted pursuant to warrant, with the protections that attend warrants; it reinforces the rule of law; it provides enforcement officers with a means to seek authorisation for proposed law enforcement activities; it would in all likelihood reduce the number of challenges to such activities during subsequent criminal trials; it reinforces the human rights consistency principle that is central to law enforcement relationships with the wider community; and it provides enforcement officers with a measure of certainty as to the lawfulness of deploying novel techniques and devices.
- 11.132 If a generic regime such as section 487.01 is not enacted, those activities not regulated by more particularistic regimes would be subject to judicial scrutiny under section 21 of the Bill of Rights Act in any event. But regulation through section 21 has a number of distinct disadvantages. In particular, it can only be used on an ex post facto basis: it does not empower search and seizure as such, but merely permits an assessment of the reasonableness of a search or seizure that has already occurred. In turn, reliance on section 21 does not fulfil the preventive purpose that equivalent provisions perform overseas and internationally. Further, section 21 is a very generally expressed standard: it does not offer the sort of detail as to process and as to what activity is authorised that enforcement officers prefer and have a right to expect.

⁵⁴ *R v Brooks*, above n 53.

- 11.133 Below we set out in more detail an outline of the residual regime that we recommend.

The elements of the proposed regime

- 11.134 The elements of our proposed residual regime would largely reflect the elements of the surveillance device regime. There would, however, be a number of differences.
- 11.135 First, while we have proposed elsewhere in this Report that warrants (except for the new surveillance device warrant) be issued by approved issuing officers, we recommend that the residual search warrant only be issuable by a High Court or District Court judge. In our view, the residual warrant regime requires a higher degree of experience in legal analysis and judgment than standard search warrant regimes. Whereas under our proposals for search warrants, clear criteria will have to be met before the warrant can be issued, the nature of a residual warrant is much more open-ended. The judicial officer who is asked to issue a residual warrant will need to have a good understanding of the concept of reasonable expectations of privacy as developed under section 21 of the Bill of Rights Act. This understanding will be necessary to determine whether a warrant should be granted at all, and, if so, the terms and conditions upon which it should be issued. In our view, the nature of the enquiry that lies at the heart of considering a residual warrant application is such that it needs to be undertaken by a professional judge.
- 11.136 Secondly, because the regime is designed to authorise the use of things or procedures that are not defined in the statute itself, it should be incumbent on the applicant, and more particularly the issuing judge, to describe as fully as the circumstances allow what can be done under the authority of the warrant and against whom/what the law enforcement activity is to be directed. A provision that emphasises the importance of close definition is necessary, if the residual warrant regime is to achieve its purpose of clearly outlining what enforcement officers are authorised to do.
- 11.137 Thirdly, one of the flaws in the Canadian “general” warrant regime is that a warrant cannot be issued if the technique or procedure is authorised by some other law. As noted at paragraph 11.129 above, while the reason for the provision is understandable, it is unhelpful in cases at the margin. We recommend a provision that requires a judge who is considering an application for a residual warrant to have regard to the availability of any specific statutory search or available regimes that would suit the purpose (if applicable). We also recommend that a residual warrant should not be invalid simply by reason of the fact that the technique or procedure that it purports to authorise is one that is governed by other legislation. These provisions would be consistent with the thrust of our proposals throughout this Report – to reduce as far as possible the procedural and substantive differences between the different regimes, precisely because it is unlikely that a warrant issued under the residual warrant provisions would have the effect of undermining protection found in other legislation.
- 11.138 Fourthly, the treatment of emergencies under the residual warrant regime cannot be the same as under the other regimes. For the other regimes we have recommended that law enforcement officers be empowered in specified situations of urgency to conduct a search or a seizure without warrant where there is

insufficient time to obtain a warrant prior to search or seizure. In respect of those regimes, a warrantless search or seizure in emergency situations is acceptable because the circumstances in which the power can be exercised (for example, reasonable belief in the commission of certain types of offences) are relatively clear and the conduct which is authorised (for example searching premises or people, using surveillance devices) is also relatively clear. In the case of the residual regime, however, that level of clarity is not present. While we have proposed that the residual regime be available in respect of all imprisonable offences, precisely because the power is residual it is not possible to define in legislation what activities could be engaged in under its authority.

11.139 Accordingly, we do not believe that it is appropriate to create a statutory *power* for enforcement officers to undertake warrantless searches or seizures of undefined type or scope in emergency situations. Where an emergency situation arises and the use of the particular technique, procedure or device or the action is authorised neither by a regime nor by a warrant issued under the residual regime, it is inappropriate for the residual regime to authorise emergency use of that technique, procedure or device or that action. Rather an enforcement officer should be subject to provisions of any other enactment or any rule of common law, including section 21 of the Bill of Rights Act. It may be that none of these prohibits the particular technique, procedure, device or action, but that is a matter which should be addressed in that direct way rather than by way of a broad statutory power conferring authorisation to act in an emergency without warrant.

11.140 Finally, because the provision is intended to be residual in nature, it is inherently difficult to closely define its coverage. In respect of the other regimes that have been discussed in this Report there is an easily definable act, which triggers the operation of the particular regime. For example, entry onto or into (private) land, premises or vehicles is the act that triggers the well-known trespass-based regimes discussed in earlier chapters. Interference with the person is the trigger to the operation of the personal search regime discussed in chapter 8, while the use of certain types of devices in particular ways triggers the audio, visual and tracking device surveillance regime outlined earlier in this chapter. In contrast, in the residual regime which is found in section 487.01 of the Canadian Criminal Code, the legislature has had to define the triggering act in the broadest of ways: the use of any device, investigative technique or procedure which, if not authorised by warrant, would amount to an unreasonable search or seizure of a person or a person's property. We recognise that a test as broad as this, without more, could lead to a level of uncertainty in respect of a range of law enforcement activity.

11.141 For example, olfactory surveillance (that is, surveillance through the detection of odours or smells) is not covered by our proposed audio, visual and tracking devices scheme. But as that technology advances it may well be that it will be possible to detect and distinguish between various types of smell. This could be used to detect drug cultivation or production from a distance. Whether the use of such olfactory devices ought to be regulated in the same manner as audio, visual and tracking devices is a matter best left for decision when the technology has evolved. In the meantime the residual regime should govern it. However, we would wish to make it clear that the use by a law enforcement officer of his or her ordinary powers of smell is legitimate and does not require authorisation under warrant; equally the use of an animal (such as a dog) to detect smells in situations that do not involve a trespass should also be clearly authorised without the need for a warrant.

11.142 Accordingly, we recommend that in addition to those audio, visual and tracking activities discussed in paragraph 11.76 above, Parliament should make it clear that the following activities do not unreasonably interfere with expectations of privacy, and hence do not require authorisation under the residual warrant:

- voluntary participation by person A in a conversation with person B, even if person B is a law enforcement officer or an agent of such an officer (and that identity is unknown to person A);
- unaided smelling of anything in public view, of activities conducted in public view, or of people in public view; smelling (whether by a device or animal or otherwise) of people, activities or things in private premises, where a law enforcement officer is lawfully on those premises; and smelling with a device that is used to correct the subnormal smell of the user to not better than normal smell. (This provision would mirror the similar provision we propose in respect of the audio, visual and tracking devices regime);
- unaided observation (visual or audio) of things in public view, of activities conducted in public view, or of people in public view.

11.143 We see considerable value in delineating those activities that do *not* amount to intrusions on reasonable expectations of privacy and setting those out in statutory form. It provides some certainty for law enforcement officers. It informs them as to which activities that are not otherwise the subject of a particularistic regime are not caught by the residual regime that we favour. Indeed, in many ways, we see the two as complementary. If no such list were provided, there is a risk that the courts might apply the residual regime to activities that would not previously have been regarded as intruding on reasonable expectations of privacy. A list that specifically excludes certain activities from the residual regime would eliminate this uncertainty and be a reasonable quid pro quo for a more open-ended generic warrant regime. In this way it would meet the law enforcement and human rights values of certainty.

RECOMMENDATIONS

> Continued next page

11.24 A residual regime should be enacted to authorise the use of devices that interfere with reasonable expectations of privacy, but which are not otherwise subject to regulation. In particular:

- the warrant should be issuable only by a judge;
- the issuing judge should prescribe in detail the scope of the action that may be taken pursuant to the warrant;
- as with other powers proposed in this report, the residual regime should contain a warrant preference, i.e. surveillance ought to be conducted pursuant to a warrant in the normal course of events:
 - it should only be granted on the judge being satisfied of the grounds that support the issuance of a surveillance device warrant;
 - it should be available to obtain evidential material relating to any offence in respect of which a search warrant could be obtained;
 - it should have a maximum life of 60 days;
 - notice of execution should be required.

RECOMMENDATIONS

- 11.25 A residual warrant is not invalid by reason only that it may authorise law enforcement activities that are governed by or authorised by another provision of the search and seizure code or by other legislation.
- 11.26 Certain activities that do not unreasonably interfere with expectations of privacy should be specified in statute as not requiring authorisation under the residual warrant regime.

CH 1

CH 2

CH 3

CH 4

CH 5

CH 6

CH 7

CH 8

CH 9

CH 10

CH 11

CH 12

CH 13

CH 14

CH 15

CH 16

Chapter 12

PRIVILEGED AND CONFIDENTIAL MATERIAL



Chapter 12

Privileged and confidential material

- INTRODUCTION** 12.1 The key issue addressed in this chapter is the manner in which privileged and confidential material should be protected from disclosure when enforcement powers of search and surveillance are being exercised. This is not a discrete topic. The law governing the protection of privileged and confidential material from compelled disclosure¹ covers a range of situations including court proceedings, regulatory investigations, pre-trial procedures such as discovery in civil proceedings, and the investigative stage of a criminal proceeding.
- 12.2 The protection afforded to privileged material recognises a heightened privacy interest in that information on particular policy grounds. The protection of material that is privileged is either absolute (for example, legal professional privilege) or qualified (for example, confidential information).² Qualified privilege requires the exercise of a judicial discretion to trigger or uphold protection of the material from disclosure. Where the protection is discretionary, competing public interests are subjected to a balancing exercise. But for absolute privileges, the balancing exercise has already been performed and there is no further balancing exercise for the court to engage in.³
- 12.3 It is well accepted in New Zealand and other jurisdictions that legal professional privilege is not limited to judicial or quasi-judicial proceedings but also applies in processes outside the courts, including the exercise of enforcement powers.⁴ To limit the application of the privilege, a clear statutory statement is required.⁵
- 12.4 We note the specific review of legal professional privilege as it applies to coercive information-gathering powers being undertaken by the Australian Law Reform

1 Privileged and confidential material is protected from compelled disclosure in certain circumstances, both by the common law and by statute, for example the Evidence Act 2006, ss 53-70.

2 Evidence Act 2006, s 54 (privilege for communications with legal advisers is absolute); s 69 (judicial discretion as to the disclosure of confidential information in court proceedings).

3 Hon J Bruce Robertson (ed) *Adams on Criminal Law* (loose-leaf, Brooker's, Wellington, 1992) Evidence, para 2.20.03 (last updated 28 July 2006).

4 In relation to lawyer-client privilege: *CIR v West-Walker* [1954] NZLR 191 (CA); *Baker v Campbell* (1983) 153 CLR 52 (HCA); *Descoteaux v Mierzwinski* [1982] 1 SCR 860 (SCC). In relation to litigation privilege: *Independent Fisheries Ltd v Ministry of Fisheries* [1999] NZAR 169 (HC).

5 *CIR v West-Walker*, above n 4; *Rosenberg v Jaine* [1983] NZLR 1 (HC); *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC); *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561 (HCA).



Commission:⁶ “the essence of which will be to determine if there are circumstances in which maintaining client legal privilege must bend to the broader public interest.”⁷ However, it is beyond the scope of this report to review the substantive application of the privilege with respect to enforcement powers.

12.5 Our examination of this topic has covered the following issues:

- whether legal privileges available when enforcement powers are exercised should be codified, or whether the common law should continue to govern how privilege operates in these instances;
- whether the existing non-statutory procedures for dealing with privilege claims made when enforcement powers are exercised are working adequately or whether statutory procedures need to be introduced;
- whether other absolute statutory privileges⁸ that limit the admissibility of certain communications should be available when enforcement powers are exercised and, if so, what procedures should apply;
- whether qualified statutory protections for confidential information should be available when enforcement powers are exercised and, if so, what procedures should apply.

12.6 We do not make any recommendations on how parliamentary privilege operates in relation to the exercise of enforcement powers, as we are aware of the work undertaken by the Clerk of the House of Representatives in conjunction with the Police. This has resulted in a protocol that clarifies the applicable procedure in this context.⁹

12.7 In this chapter we discuss searches of premises under search warrant in particular; however, our recommendations are also intended to apply to searches of other places such as vehicles, to searches of individuals, and to warrantless searches, as applicable.¹⁰ We also specifically consider the application of the privileges when surveillance powers are exercised.¹¹

6 The review will concentrate on the application of legal professional privilege to the coercive information gathering powers of Commonwealth bodies such as the Australian Federal Police, the Australian Crime Commission, the Australian Securities and Investments Commission, the Australian Taxation Office and federal royal commissions.

7 Australian Law Reform Commission “Lawyer-Client Relationships Put Under ALRC Microscope” (30 November 2006) Press Release < <http://www.alrc.gov.au> > (last accessed 4 December 2006). The Commission has produced an Issues Paper (*Client Legal Privilege and Federal Investigatory Bodies* ALRC Issues Paper 33, April 2007) and is due to report by December 2007.

8 See Evidence Act 2006, s 54, ss 56-59.

9 *Execution of Search Warrants on Premises Occupied or Used by Members of Parliament: An Agreement between the Speaker of the House of Representatives of New Zealand and the Commissioner of the New Zealand Police*, October 2006, available from the Office of the Speaker. The protocol has been referred to the Privileges Committee for consideration. It is based on the New South Wales model, *Protocol for Execution of Search Warrants on Members’ Offices*, recommended for adoption by the Legislative Council Privileges Committee (NSW) (Report 33, 2006) < <http://www.parliament.nsw.gov.au> > (last accessed 30 October 2006).

10 However, recommendations 12.4 and 12.6 are not applicable to warrantless searches.

11 Recommendations 12.20 and 12.21.

- 12.8 The Evidence Act 2006 introduces significant changes to how privileged material is protected in court proceedings,¹² including the codification of lawyer-client privilege,¹³ litigation privilege,¹⁴ privilege for settlement negotiations or mediation¹⁵ (each as an absolute privilege) and public interest immunity¹⁶ (as a qualified privilege) and the introduction of a statutory qualified privilege for material identifying journalists' sources.¹⁷ The Act continues the statutory privileges for confidential communications with ministers of religion¹⁸ and communications with a medical practitioner or a registered clinical psychologist necessary to treat drug dependency or another condition that manifests itself in criminal conduct.¹⁹ Spousal privilege has not been continued on the basis that protection of marital communications should be considered under the discretionary protection available for confidential information under section 69 of the Act.²⁰ The qualified privilege for confidential information has also been continued, although it has been restructured.²¹ The net effect of the enactment of sub-part 8 of Part 2 of the Act is the codification in statute for the purpose of court proceedings of each of the significant privileges under discussion.
- 12.9 We propose that for each of the privileges that are available on the exercise of enforcement powers, this part of the Evidence Act 2006 should be adopted as a framework. As far as possible, the substance of the privileges as they apply in each context should be aligned, unless there is a clear justification for a departure.
- 12.10 The advantage of this approach is greater consistency in applying the privileges. Otherwise, if the privileges are codified in statute for the purpose of court proceedings, with the common law continuing to apply for the purposes of search and surveillance, there is the potential for mismatch in applying the privilege at each stage.²² It is clearly undesirable to have two sets of privilege rules.²³

LEGAL PRIVILEGE

Background

Description of legal privilege

- 12.11 The most significant and far-reaching privilege in the context of search and surveillance powers is legal professional privilege. This privilege is seen as an

12 Evidence Act 2006, Part 2, Subpart 8.

13 Evidence Act 2006, s 54.

14 Evidence Act 2006, s 56.

15 Evidence Act 2006, s 57.

16 Evidence Act 2006, s 69.

17 Evidence Act 2006, s 68.

18 Evidence Act 2006, s 58.

19 Evidence Act 2006, s 59. The privilege applies only in criminal proceedings.

20 Compare with Evidence Amendment Act (No 2) 1980, s 29.

21 Evidence Act 2006, s 69.

22 For example, the Evidence Act 2006, s 53(5) provides that the general law governing legal professional privilege is not affected in relation to privilege claims not made in the course of or for the purpose of a proceeding.

23 In New Zealand Law Commission *Evidence Law: Privilege* (NZLC PP23, Wellington, 1994) para 30, the Commission noted that information that cannot be obtained in court proceedings should not be available in government inquiries either (by compulsion), unless the government is relying on the same strong and compelling circumstances which would impel a court to override the privilege. Any obvious discrepancy between the two systems can have serious effects on public perception of the law. No matter how well justified a claim to privilege may be, if it is effective in court proceedings but not in routine government investigations, serious questions will be raised in the public's mind about its validity.

important safeguard of legal rights,²⁴ but is also regarded as having wider implications as a “fundamental condition on which the administration of justice as a whole rests”.²⁵ “The wisdom of the centuries is that the existence of the privilege encourages resort to those skilled in the law and this makes for a better legal system.”²⁶ The Bill of Rights Act does not expressly provide for the privilege, although it is supported indirectly through the right of access to a lawyer and the right to representation.²⁷

- 12.12 Legal privilege has been criticised as conflicting with another principle of equal importance, namely that all evidence which reveals the truth should be available for presentation to the court,²⁸ and as a discriminatory legal principle that does not apply to other professions in which at least equal confidence is reposed.²⁹ The judicial response to the tension between the competing public policy interests has been to uphold the absolute nature of the privilege, while at the same time expanding its qualifications and exceptions and the doctrine of waiver, whereby privilege is lost.³⁰ This has resulted in a complex set of rules surrounding the doctrine.
- 12.13 There are two limbs to legal professional privilege: lawyer-client privilege; and litigation privilege.³¹ To fall within lawyer-client privilege, the communication must bear the characteristics enunciated in *Rosenberg v Jaine*³² and thus be referable to the lawyer-client relationship; be intended to be confidential; and come into existence for the purpose of obtaining legal advice.³³ Litigation privilege protects communications between the lawyer (or agent) and third parties if made because of pending or contemplated litigation and, in relation to communications made between the client (or agent) and third parties, if made so that information can be submitted to the legal advisor for purposes of advice on pending or contemplated litigation.³⁴

Codifying legal privilege

- 12.14 The Evidence Act 2006 has codified legal professional privilege (both lawyer-client privilege and litigation privilege) as well as privilege for settlement negotiations and mediation. In each case this has been for the purposes of compelled disclosure in court proceedings. However, legal privilege continues to be governed by the common law for pre-trial purposes. The difficulties to which

24 The privilege has been described as a “fundamental human right”: *R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 3 All ER 1, para 7 (HL).

25 *R v Derby Magistrates’ Court, ex parte B* [1996] AC 487, 507 (HL).

26 *Waterford v Commonwealth* (1987) 163 CLR 54, 64.

27 Jonathan Auburn *Legal Professional Privilege: Law and Theory* (Hart Publishing, Oxford – Portland Oregon, 2000) 24.

28 *Baker v Campbell*, above n 4, 69.

29 Dr Ronald J Desiatnik *Legal Professional Privilege in Australia* (2ed, LexisNexis Butterworths Chatswood – NSW, 2005) 16.

30 Desiatnik, above n 29, 224.

31 Litigation privilege has been held to exist in criminal proceedings: *Independent Fisheries Ltd v Ministry of Fisheries*, above n 4.

32 *Rosenberg v Jaine*, above n 5.

33 Judge David Harvey (ed) *Electronic Business and Technology Law* (loose leaf, LexisNexis, Wellington) Evidentiary issues, para 38.12.2 (last updated March 2005) < <http://www.lexisnexis.com/nz> > (last accessed 11 April 2006).

34 *Electronic Business and Technology Law*, above n 33, para 38.13.3.

this gives rise have been considered in a number of recent Australian reports.³⁵ In particular, in their report on Uniform Evidence Law,³⁶ the Law Reform Commissions noted that the introduction of the uniform Evidence Acts (that govern the admissibility of privileged material) has created a situation in which two sets of laws operate in the area of privilege. This has a number of undesirable consequences.³⁷ The Law Reform Commissions therefore recommended that in the interests of clarity and uniformity, the client legal privilege sections of the uniform Evidence Acts should be extended to apply to pre-trial contexts, including search and seizure.³⁸

- 12.15 We agree that general uniformity in applying legal privilege across the broader range of situations in which it may arise is desirable. In the particular context of exercising enforcement powers, we think that this is best achieved by codifying legal privilege for this purpose, consistently with the codification of legal privilege for evidentiary purposes.³⁹ We recommend accordingly. The essential elements of codification of lawyer-client privilege would make the privilege available to certain communications⁴⁰ with a legal adviser⁴¹ (including documents containing those communications)⁴² that meet certain criteria,⁴³ subject to the exceptions of “dishonest purpose” and enabling or assisting in the planning or commission of an offence (discussed further below).⁴⁴ We also recommend that the availability of litigation privilege and the privilege for settlement negotiations or mediation when enforcement powers are exercised be codified. This should also track the respective provisions of the Evidence Act 2006.
- 12.16 We further recommend that existing codification provisions that apply to enforcement agencies should be amended for consistency.⁴⁵

Dishonest purpose/ crime exceptions

- 12.17 Section 67(1) of the Evidence Act 2006 provides that a judge must disallow a claim of privilege if satisfied that there is a *prima facie* case that the communication or information claimed to be privileged involved a dishonest purpose or enabled or assisted anyone to commit an offence. This section adopts the existing law, which excludes a claim of legal professional privilege for a communication intended to further the commission of a crime or fraud, and extends it to all privileges.⁴⁶

35 Victorian Parliament Law Reform Committee *Warrant Powers and Procedures: Final Report* (No 170 of Session 2003-2005, Melbourne, 2005) 213-223; Queensland Law Reform Commission *Review of the Uniform Evidence Acts* (QLRC R60, Brisbane, 2005); Joint Law Commissions *Uniform Evidence Law* (ALRC R102; NSWLRC R112; VLRC Final Report, Sydney, 2005) 455-493; Victorian Law Reform Commission *Implementing the Uniform Evidence Act* (VLRC Report, Melbourne, 2006).

36 Joint Law Commissions, above n 35.

37 See Joint Law Commissions, above n 35, para 14.9.

38 Joint Law Commission, above n 35, recommendation 14-1.

39 Evidence Act 2006, ss 54-57.

40 The meaning of the term “communication” is amplified by the Evidence Act 2006, s 51(4).

41 “Legal adviser” is defined in the Evidence Act 2006, section 51(1).

42 The Evidence Act 2006, s 51(2) provides that a privileged communication or information includes a communication or information contained in a document, with “document” being broadly defined in s 4(1).

43 Evidence Act 2006, ss 54-57.

44 Evidence Act 2006, s 67(1).

45 Serious Fraud Office Act 1990, s 24; Proceeds of Crime Act 1991, s 74; Customs and Excise Act 1996, s 162.

46 New Zealand Law Commission *Evidence: Reform of the Law* (NZLC R55, Vol 1, Wellington, 1999) para 321.

- 12.18 There is an issue, however, as to how the exception should be applied when enforcement powers are exercised. At common law, there is no privilege where the lawyer-client communication is undertaken to assist the commission of a crime or fraud.⁴⁷ Enforcement officers are therefore entitled to disregard the privilege where the crime/fraud exception applies.
- 12.19 We recommend that codification of legal privilege for purposes of the exercise of enforcement powers should make clear that material involving a dishonest purpose or enabling or assisting in the commission of an offence is not privileged. If the exception does not apply until activated by a judge, as provided under section 67(1) of the Evidence Act for admissibility purposes, there is a risk that at the investigative stage, this could encourage fruitless privilege claims, as a delaying tactic. Claims of privilege raised on the exercise of enforcement powers (including the applicability of the dishonest purpose exception) will be determined by the court in accordance with the recommendations that follow in this chapter. However, clarity on the unavailability of the privilege in circumstances where the exception applies should reduce the scope for unmeritorious privilege claims to be raised.

RECOMMENDATIONS

- 12.1 The legal privileges (lawyer-client privilege and litigation privilege) available when law enforcement search and surveillance powers are exercised should be codified. Codification should be consistent with that contained in the Evidence Act 2006 and should include the privilege for settlement negotiations or mediation.
- 12.2 The legal privileges should not be available for a communication or information if made or received, or compiled or prepared, for a dishonest purpose or to enable anyone to plan what the person claiming the privilege knew, or ought reasonably to have known, to be an offence.

Application of legal privilege when enforcement powers are exercised

- 12.20 A key issue we have considered is how the privilege can be preserved in practice when enforcement powers are exercised. Potentially, any search for information, including a computer search, could involve an enforcement officer viewing or seizing privileged material. The impact of legal professional privilege is that “the search must be suspended in relation to the documents that are subject to a claim of privilege.”⁴⁸
- 12.21 Preserving privilege when exercising enforcement powers is more difficult to achieve than in other contexts. In court proceedings or civil discovery, the privilege claimant will usually be legally advised and will have greater control over the disclosure. But on the exercise of search and seizure powers (as such powers can be exercised without notice), the person eligible to claim privilege, even if present at the time of the search, may be insufficiently informed to be able to raise a claim. Where interception powers are used, the potential privilege

⁴⁷ *Adams on Criminal Law*, above n 3, para 2.20.09(11).

⁴⁸ Victorian Parliament Law Reform Committee, above n 35, 214.

claimant will be entirely unaware that information that would otherwise be eligible for protection has been intercepted. Protecting the availability of privilege on the exercise of enforcement powers has therefore resulted in responsibility for its preservation resting with enforcement agencies (in the manner in which enforcement powers are exercised) and, in searches of lawyers' offices, with lawyers (asserting the privilege on behalf of their clients).

- 12.22 The practical difficulties in recognising the common law privileges on the exercise of enforcement powers was predicted by Brennan J, who issued a dissenting judgement in *Baker v Campbell*.⁴⁹

If the privileges which affect the obligation to testify or to produce documents in judicial proceedings are to be engrafted upon and to modify powers conferred on investigative agencies, some procedure for determining the validity of a claim of privilege has to be devised.

Subsequent cases have also recognised the need for a procedure:⁵⁰

For the prohibition against the examination and seizure of privileged documents to be of any value, there must be some method by which the existence of any claimed privilege can be tested before the documents are read.

Current common law protection of legal privilege in the execution of search warrants

- 12.23 In the absence of any statutory procedure,⁵¹ the courts have developed requirements for issuing and executing search warrants. Firstly, on the issue of a warrant:
- a warrant may not be issued in respect of material that is known or thought likely to be privileged;⁵²
 - the warrant must be sufficiently specific to exclude privileged material and any warrant issued should clearly identify the client if possible and the material sought to be seized;⁵³
 - the enforcement agency is required to assess whether any material is likely to be privileged, alert the judicial officer to problems that might arise in executing the warrant and propose appropriate conditions in the warrant to protect the privilege and to provide a mechanism to sift privileged documents

49 *Baker v Campbell*, above n 4, 105 – the “high watermark” Australian decision applying legal professional privilege to search and seizure.

50 *JMA Accounting Pty Ltd v Commissioner of Taxation* [2004] 211 ALR 380, para 6 (FCA). See also *A Ltd v The Director of the Serious Fraud Office* (28 March 2007) HC AK CIV-2005-404-6833, paras 85-86.

51 The Summary Proceedings Act 1957 does not contain any procedure for adjudicating on claims to privilege, apart from the s 198A procedure (governing the seizure of certain non-privileged documents from solicitors' offices). A mechanism is contained in the Serious Fraud Office Act 1990, s 24(5), whereby the director or a person claiming privilege may apply to a District Court judge for an order determining whether or not the claim of privilege is valid. Similar procedures are found in the Proceeds of Crime Act 1991, s 74(4); the Customs and Excise Act 1996, s 162(4); and the Tax Administration Act 1994, s 20(5).

52 *Calver v District Court at Palmerston North* (2004) 21 CRNZ 371 (HC), para 39; *Rosenberg v Jaine*, above n 5, 14.

53 *Calver v District Court at Palmerston North*, above n 52, para 84.

from those which the agency is entitled to search;⁵⁴

- the judicial officer is required to impose any conditions on search and seizure that are considered necessary on the basis of the warrant application, in order to protect privileged material.⁵⁵

12.24 Secondly, legal professional privilege should be protected during the search by:

- the enforcement officer initially inspecting the search material to check whether it may be privileged before searching the material in detail;
- allowing the search subject to claim the privilege;⁵⁶
- either reaching agreement between the search subject and the enforcement agency that, to protect privilege, certain material will not be searched or, where there is a dispute as to whether the material is privileged, referring it to the court for determination;
- ensuring that no material believed to be privileged is seized.⁵⁷

Problems with the status quo

12.25 We have identified a number of problems with the way in which legal professional privilege is currently observed when search and seizure powers are exercised.

12.26 First, given the fundamental role of enforcement agencies to search for evidential material in order to prosecute criminal offending, there is an inbuilt conflict of interest in requiring agencies to propose the terms on which searches should be carried out in order to protect privileged information. A failure to propose appropriate terms may render warrants vulnerable to challenge.

12.27 Secondly, the protection of legal professional privilege is somewhat patchy and depends largely upon either a preliminary assessment at the time of the issue of the warrant as to whether privileged material is likely to be present or a claim of privilege being asserted by the search subject. Where privileged material is known or expected to be present, the judicial officer issuing the warrant can impose protective conditions. A practical difficulty is that in a great number of cases, it is impossible to tell whether privileged material is likely to be present.⁵⁸

12.28 Thirdly, current procedure requires an enforcement agency, in the absence of a privilege claim, to examine potentially privileged material for the purposes of determining whether seizure is justified.⁵⁹

54 *A Firm of Solicitors v District Court at Auckland* [2006] 1 NZLR 586 (CA), paras 107, 138; *Calver v District Court at Palmerston North*, above n 52, para 48. In *A Firm of Solicitors*, the Court of Appeal held that search warrants for lawyers' offices require extensive conditions to ensure the protection of privileged material.

55 The person issuing the warrant should attach methods to the execution of the warrant that are suitable to safeguard to the maximum the right to confidentiality of a solicitor's client: *Rosenberg v Jaine*, above n 5, 14.

56 In particular, the solicitor should be given the opportunity to claim the privilege where the solicitor considers on reasonable grounds that it exists and if necessary to test their claim for privilege before an appropriate Court: *Rosenberg v Jaine*, above n 5, 14.

57 *Calver v District Court at Palmerston North*, above n 52, paras 46, 47.

58 Before the development of information technology, it could be assumed that privileged material was largely confined to lawyers' offices. The presence of privileged material elsewhere would have been limited to a number of tangible documents which could be separated from non-privileged material relatively easily. Developments in information technology have enabled far greater dissemination of privileged material, diluting this assumption.

59 K Tronc, C Crawford, D Smith *Search and Seizure in Australia and New Zealand* (LBC Information Services, Sydney, 1996) 184.

The dilemma which arises is that mere inspection of documents during execution of a warrant does not amount to seizure per se, but such inspection would nevertheless cause the privilege to be lost. Yet proper execution of a search warrant often requires a period of temporary possession before seizure, for the purposes of examination.

A preliminary assessment of potentially privileged material is counter to the policy behind the privilege. Any possibility that the agency may view privileged material is likely to create a perception that the material will inform the investigation and therefore potentially discourages free and frank communications between lawyer and client. The resulting situation is something of a Catch 22: an agency cannot tell whether information is privileged without looking at it, but by looking at it, may undermine the privilege.⁶⁰

- 12.29 Fourthly, enforcement agencies may not have sufficient technical expertise to assess the privileged status of a document, given the complexity and detail of the law in this area.⁶¹
- 12.30 Fifthly, there is currently no duty on enforcement agencies to advise search subjects of their right to claim the privilege, other than the obligation to provide an opportunity for lawyers to claim the privilege on behalf of clients where this is a required condition of the warrant. The ability of a search subject (other than a lawyer) to assert the privilege is limited, given the lack of awareness of the privilege and its technical nature. The ability to claim the privilege is also negated where the search subject is not present during the search.
- 12.31 We have also identified particular difficulties for enforcement agencies in observing the requirements for search warrant applications and their execution where the search involves intangible material that may be privileged, as highlighted in recent case law.
- 12.32 First, the authority for enforcement agencies to make forensic copies of intangible material that may include privileged material is at best uncertain. In *Calver v District Court at Palmerston North*,⁶² Miller J determined that a search warrant issued under section 198 of the Summary Proceedings Act 1957 could not authorise the removing and forensic copying of a hard drive known to contain privileged material. Conversely, in *JMA Accounting Pty Ltd v Federal Commissioner of Taxation*,⁶³ it was held that merely seizing a document without reading it would not infringe the privilege. In *A Firm of Solicitors v District Court at Auckland*,⁶⁴ the Court of Appeal considered that, subject to appropriate safeguards, a computer hard drive could be forensically copied under a Serious Fraud Office Act search warrant, so long as the officers did not access the hard drive until privilege claims could be made and, if necessary, resolved. However, the Court of Appeal expressed no view on how its decision might apply to searches under other statutory provisions.

60 The dilemma is noted in *A Ltd v The Director of the Serious Fraud Office*, above n 50, para 87. Nevertheless, in *JMA Accounting Pty Ltd v Commissioner of Taxation*, above n 50, paras 14-15, it was held that it may be proper for an officer to assess privileged or potentially privileged information, described as a “lawful violation” of the privilege.

61 *Baker v Campbell*, above n 4, 83.

62 *Calver v District Court at Palmerston North*, above n 52, paras 59, 82.

63 *JMA Accounting Pty Ltd v Federal Commissioner of Taxation*, above n 50, paras 13 and 23.

64 *A Firm of Solicitors v District Court at Auckland*, above n 54, para 111.

- 12.33 Secondly, even if enforcement agencies were clearly permitted to make forensic copies of intangible material, compliance with one of the warrant conditions suggested by the Court of Appeal in *A Firm of Solicitors* (the deletion of any irrelevant material)⁶⁵ would prove problematic, as it would risk compromising the evidential integrity of the copied material, an issue we discuss in chapter 7.⁶⁶
- 12.34 Thirdly, the vast amount of intangible material removed through the forensic copying process may make it difficult for the person claiming privilege to identify the specific privileged material. The response is often to assert a blanket claim to privilege over all the copied material.⁶⁷ This invariably results in significant delays to an investigation.⁶⁸
- 12.35 Finally, the requirement discussed by the Court of Appeal in *A Firm of Solicitors* that the forensic copying and the subsequent extraction of evidential material should be undertaken by an appropriately qualified, independent expert and subject to the supervision of the issuing officer, or a person appointed by the issuing officer for that purpose, raises significant operational issues for the enforcement agency concerned.⁶⁹

Option for reform

- 12.36 From the issues we have identified, we consider that a clear set of objective statutory procedures to govern the preservation of legal professional privilege in the exercise of search and surveillance powers is needed. Such an approach would establish a standard process and would reduce the need for agencies to craft detailed conditions to protect privilege in warrant applications on a case-by-case basis, although it would remain open for an issuing officer to impose specific conditions as needed on the

65 *A Firm of Solicitors v District Court at Auckland*, above n 54, para 107.

66 Chapter 7, para 7.148.

67 It was argued for the solicitors in *Calver v District Court at Palmerston North*, above n 52, para 54, that almost every solicitor-client communication is privileged. However, Miller J noted that it was unlikely that the blanket claim to privilege could be sustained, as the files contained material such as correspondence to and from third parties, conveyancing records, copies of the client's own documents, and material owned by the solicitors that was unlikely to be privileged.

68 See the difficulties noted by Inland Revenue in conducting large corporate investigations including claims of blanket privilege as summarised in the minority view of Paul Heath QC in New Zealand Law Commission *Tax and Privilege* (NZLC R67, Wellington, 2000) paras 43-45 and in *Tax Compliance: Report to the Treasurer and Minister of Revenue by a Committee of Experts on Tax Compliance* (New Zealand Government, Wellington, 1998) para 9.47. See also the difficulties noted by the Serious Fraud Office in the *2004/05 Financial Review of the Serious Fraud Office* (New Zealand House of Representatives, Report of the Law and Order Committee, Wellington, 2006) 5:

"The office has observed an increasing number of investigations hampered by blanket claims of legal professional privilege over a wide variety of documents, which may prevent the office from uncovering particular cases of offending...The director suggested that consideration needs to be given to finding the appropriate balance between protecting the suspect's right to legitimate legal professional privilege and the office's need to obtain documents to which no legitimate privilege attaches. The director does not consider that this balance is being reached at the moment. While the office would be satisfied with a process that would allow a judge to make a determination on whether privilege attaches to particular documents, the complexity of the cases investigated by the office means that it would be unreasonable to simply provide judges with large piles of documents [or computer data] and expect them to quickly understand the case and determine which documents were privileged."

69 See further, paras 12.95-12.108 below.

basis of the information disclosed in the warrant application.⁷⁰ This approach would also address the current difficulties faced by enforcement agencies carrying out computer searches where claims of privilege are made.

Jurisdictional review of privilege procedures

- 12.37 In formulating statutory procedures we have reviewed practices and procedures operating in various jurisdictions.

Section 198A Summary Proceedings Act 1957

- 12.38 A procedure for seizing books of account and accounting records kept by a solicitor in relation to trust account money or their nominee company is set out in section 198A of the Summary Proceedings Act 1957.⁷¹ The accounting records to which that section applies are not normally privileged.⁷²
- 12.39 The section 198A procedure contemplates a police officer preparing an inventory of the seized documents that is to be checked by the solicitor who possesses the documents at the time the warrant is executed. The solicitor can mark the inventory to indicate an objection to a particular document being seized. The method of resolving any issues concerning the seizure of any particular documents is for such issues to be resolved by a District Court judge, in accordance with the process set out in s 198A(2).⁷³

Particularising privilege claims

- 12.40 As a means of dealing with privilege disputes, the New Zealand courts have adopted the particularisation approach. In *Rosenberg v Jaine*,⁷⁴ Davison CJ contemplated a process where privilege would be considered on an item by item basis, and protected by sealing any item for which privilege was claimed for a court's later determination.⁷⁵
- 12.41 "Particularisation" was also considered in *Durie-Hall v District Court at Wellington*.⁷⁶

70 The New Zealand Law Society Criminal Law Committee submitted that a specific procedure should be followed for privilege issues at the application stage, to ensure that the judicial officer has all the relevant information. While we have considered the proposals, we have resisted making specific recommendations on the application process on the basis that if the regime is too detailed, accidental non-compliance will be commonplace, and challenges to the validity of searches will be rife. Recent judicial decisions have made clear that full disclosure of all relevant matters must accompany the application for a search warrant. We believe that is sufficient protection.

71 Section 198A was introduced following the Richardson Committee of Inquiry into Solicitors' Nominee Companies (Wellington, 1983), which found that solicitors' trust accounts were being used to conceal the proceeds of drug dealing and that privilege claims were hindering the detection of these offences. By virtue of the Evidence Act 2006, s 55, lawyer-client privilege (as codified in section 54 of the Act) does not prevent, limit or affect the issue of a search warrant under s 198 of the Summary Proceedings Act 1957 in respect of any books of account or accounting records kept by a solicitor in relation to trust account money or any solicitor nominee company.

72 *Calver v District Court at Palmerston North*, above n 52, para 80.

73 *A Firm of Solicitors v District Court at Auckland (No 1)* [2004] 3 NZLR 748 (HC), para 64.

74 *Rosenberg v Jaine*, above n 5, 12.

75 *A Firm of Solicitors v District Court at Auckland*, above n 54, para 90.

76 *Durie-Hall v District Court at Wellington* (25 September 1998) HC WN CP 256/98 and CP 313/98, 14 Gallen J.

Assertions whether of privilege or of a right of search, must relate to individual documents and individual relations and situations. It follows that in respect of each document, there must be an established assertion by the defendants that the document concerned comes within the category identified by the warrant. If the defendants can establish that but the plaintiffs wish to rely on legal professional privilege, then there must be an established assertion by the plaintiffs that any particular document or category of documents so identified is entitled to the protection of legal professional privilege in one category or another. The difficulties which are referred to by both sides would disappear if such an approach was adopted and the documents considered document by document or category by category. I appreciate that that might impose major difficulties on all concerned but I think that in the end there is no escape from following such a procedure if the matter were to proceed.

The consequence is that before the second defendant can execute the warrant in respect of any particular document, it must establish that it comes within the ambit of the warrant as worded. The plaintiffs may still however establish that privilege applies in respect of any such document in one category or another.

- 12.42 In an earlier report, the Law Commission noted that particularisation would equate with the present procedural requirements where privilege is claimed as part of the discovery process in a civil action, and recommended that a privilege claimant in the context of tax investigations be required to particularise the documents in respect of which the privilege is claimed, subject to a right to apply for relief to a District Court judge where the volume of papers would make particularisation oppressive.⁷⁷

New Zealand protocol relating to claims of parliamentary privilege

- 12.43 An interim protocol has been agreed between the Speaker of the House of Representatives and the Police Commissioner⁷⁸ that sets out a procedure to be followed where the police propose to execute a search warrant on the parliamentary or electorate office or home of a member of parliament. The intention is to ensure that warrants can be executed without improperly interfering with the functioning of Parliament and that claims of parliamentary privilege can be raised and resolved. The procedure provides that:

- where practicable the search warrant should be executed when the member or their authorised representative is present and, when the search takes place within the precincts of Parliament, the Clerk of the House or their representative should be present (unless compliance would affect the integrity of the investigation);
- where the member or their representative is present, the executing officer should ensure that he or she is provided with a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things on the premises being searched;
- the member is to have a 24-hour period to seek legal advice once premises within the precincts of Parliament have been satisfactorily secured;

⁷⁷ *Tax and Privilege*, above n 68, para 23. At para 22 the Law Commission considered that without such a requirement it is too easy to cheat. This recommendation has not been implemented to date. See also the recommendation of the Committee of Experts on Tax Compliance, above n 68, para 9.63, requiring the identification of documents for which privilege is being claimed as a condition of obtaining privilege.

⁷⁸ *Execution of Search Warrants on Premises Occupied or Used by Members of Parliament*, above n 9.

- the executing officer is to take all reasonable steps to minimise the extent to which documents that may attract parliamentary privilege are examined or seized and to limit the amount of material that is examined in the course of the search;
- where a claim of parliamentary privilege is made, the claimant is to provide a basis for the claim and, where the executing officer considers that claim has a reasonable basis, unless the member and the executing officer agree to an alternative procedure, the relevant documents are to be placed in exhibit bags and placed in the safe custody of the Clerk of the House or an agreed third party, following which the member has five working days to seek a ruling.

Australian protocol relating to claims of legal professional privilege

- 12.44 In 1990, the Australian Federal Police and the Law Council of Australia adopted procedures to govern searches of lawyers' offices.⁷⁹ These are intended to operate where the lawyer is prepared to co-operate with the police search team.⁸⁰ The procedures include an opportunity for the lawyer to claim legal professional privilege prior to the search warrant being executed; deferral of execution if the lawyer is absent; the sealing of documents claimed to be privileged; the creation of a list of documents claimed to be privileged; the transfer of the sealed documents to the court or an independent third party; and a requirement that proceedings be initiated by the lawyer to determine the privilege claim within a fixed time period.
- 12.45 The guidelines have been criticised for failing to preserve legal professional privilege, as they permit warrants to be issued that encompass privileged documents and permit their handing over.⁸¹ Generally, however, the Australian courts have accepted the guidelines as providing a useful procedure.
- 12.46 The procedures contained in the protocol are not rules of law.⁸² The Victorian Parliament Law Reform Committee review of warrant powers and procedures considered that legislative privilege procedures were needed and received submissions in support. The report noted that a legislative process would enable broader community awareness of and participation in the operation of the privilege, and recommended codification of procedures for claims of privilege in relation to all search warrants and all agencies empowered to execute them.⁸³
- 12.47 A subsequent report of the Victorian Law Reform Commission agreed with the recommendation of the Victorian Parliament Law Reform Committee, noting that the privilege procedure for search warrants needs to be given greater

79 These procedures were updated in 1997. The protocol is available at < <http://www.lawcouncil.asn.au> > (last accessed 1 September 2006). Similar protocols are in place in Victoria, New South Wales and Western Australia: Victorian Parliament Law Reform Committee, Final Report, above n 35, 215. Guidelines dated September 1991 have also been agreed between the Commissioner of Taxation and the Law Council of Australia in relation to the exercise of access powers provided under taxation legislation at lawyers' premises in circumstances where a claim of legal professional privilege is made. The guidelines are available at < <http://www.lawcouncil.asn.au> > (last accessed 1 September 2006).

80 Where the lawyer refuses to give co-operation, Guideline 34 provides that the executing officer should advise that the search will proceed in any event and that this may entail a search of all files and documents in the lawyer's office so the authority conferred by the warrant can be given full effect.

81 Suzanne B McNichol "Unresolved Issues Arising from the General Guidelines between the AFP and the Law Council of Australia" (1998) 72 ALJ 137.

82 McNichol, above n 81, 139.

83 Victorian Parliament Law Reform Committee, Final Report, above n 35, 221, recommendation 65.

certainty, whether or not the privilege is claimed under statute or at common law.⁸⁴ The Commission recommended changes including:

- a form of warrant that advises of the right to claim privilege and how to do so;
- the return of documents over which there is a disputed privilege claim in a sealed envelope or box to the relevant court for determination;
- time limits for an application to be made to the court for determination of the privilege claim.

Canada⁸⁵

12.48 Section 488.1 of the Canadian Criminal Code 1985 established a procedure for law office searches and a sealing procedure to ensure the solicitor-client privilege is protected. It was a legislative response to a series of cases in which solicitor-client privilege was recognised as having been elevated to a fundamental civil and legal right.⁸⁶ The goal was to balance the public interest in the ability of the police to search a lawyer's office as part of their investigation of crime, with the interest in maintaining and only minimally intruding upon solicitor-client privilege. After hearing three cases,⁸⁷ the Supreme Court found significant defects in section 488.1, rendering the procedure unconstitutional for infringing section 8 of the Canadian Charter of Rights and Freedoms relating to unreasonable search and seizure.

12.49 The court listed a number of principles for Parliament to bear in mind in rewriting the section, but the Canadian Parliament has not yet passed amendments to the Criminal Code.

United Kingdom

12.50 The Police and Criminal Evidence Act 1984 contains provisions protecting legal professional privilege in the context of search and seizure. The privilege is defined in section 10, and information falling within it receives the highest protection provided by the Act. Underlying the protection is Article 8 of the European Convention of Human Rights.⁸⁸

12.51 A Code of Practice applies to searches by police.⁸⁹ This reiterates that no item that an officer has reasonable grounds for believing to be subject to legal privilege may be seized, other than under seize and sift powers in Part 2 of the Criminal Justice and Police Act 2001.⁹⁰ Where a claim of privilege is asserted in the course

84 Victoria Law Reform Commission, *Implementing the Uniform Evidence Act*, above n 35, para 2.84.

85 This summary of the position in Canada is taken from Robert W Hubbard, Susan Magotiaux and Suzanne M Duncan *The Law of Privilege in Canada* (loose-leaf, Canada Law Book, Ontario) Solicitor-client privilege, para 11.300 (last updated May 2006).

86 Culminating in *Solosky v The Queen* (1979) 105 DLR (3d) 745 (SCC) and *Descoteaux v Mierszwinski*, above n 4.

87 *Lavallee, Rachel & Heinz v Canada (Attorney General)*; *White, Ottenheimer & Baker v Canada (Attorney General)* and *R v Fink* (2002) 216 DLR (4th) 257 (SCC).

88 See *R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*, above n 24, para 7.

89 "Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises", in force from 1 January 2006, reproduced in P J Richardson (ed) *Archbold Criminal Pleading, Evidence and Practice* (Sweet & Maxwell, London, 2006) Supplement No 2 March 2006 at A19 and following.

90 The Criminal Justice and Police Act 2001 (UK), Part 2, gives officers limited powers to seize property from premises or persons so they can examine it elsewhere: "Code of Practice for Searches of Premises", above n 89.

of executing a search warrant, the searchers will usually be entitled to test it by undertaking a preliminary inspection of the materials concerned.⁹¹ It has been suggested that the searching party should exclude any officer engaged to any significant extent in any enquiry to which that material may relate.⁹² The courts have encouraged enforcing officers to involve independent counsel in searches to review claims of privilege on the premises.⁹³

United States

- 12.52 In the United States, the federal courts have required government agents searching law offices to take precautions to minimise their exposure to privileged documents.⁹⁴ The US Attorney's Manual⁹⁵ provides that for all searches of attorneys' offices, a prosecutor must use adequate precautions to ensure that the materials are reviewed for privilege claims. To ensure that the investigation is not compromised by exposing privileged material relating to the investigation or to defence strategy, a privilege team should be designated, consisting of lawyers and agents not involved in the underlying investigation.
- 12.53 The United States Department of Justice manual for computer searches requires agents contemplating a search that may result in legally privileged computer files being seized to devise a post-seizure strategy for screening out the privileged files and to describe the strategy in the affidavit.⁹⁶ It is suggested that when agents seize a computer that contains legally privileged files, a trustworthy third party must comb through the files to separate files within the scope of the warrant from those that contain privileged material. The three options identified are: firstly, for the judge to review the files (although this will be rare in computer searches, given the amount of data involved); secondly, for the judge to appoint a neutral third party known as a "special master" to review the files (this process can be very time-consuming and expensive); or thirdly, for a team of prosecutors or agents not working on the case to form a taint team or privilege team to execute the search, with a Chinese wall between the evidence and prosecution team (preferred by prosecutors as a quicker procedure although some courts have expressed discomfort with this procedure). The manual notes that in any event:⁹⁷

The reviewing authority will almost certainly need a skilled and neutral technical expert to assist in sorting, identifying, and analyzing digital evidence for the reviewing process.

- 12.54 Another approach to minimisation in document searches is the American Law Institute Model Code.⁹⁸ This requires agents who seize a large number of documents to refrain from searching them until after an adversarial hearing is

91 Colin Passmore "Search Warrants and Privilege" (February 18 2000) *NLJ Practitioner* 219, 221.

92 Passmore, above n 91.

93 Passmore, above n 91.

94 Eric D McArthur "The Search and Seizure of Privileged Attorney-Client Communications" (2005) *U Chi L Rev* 729, 741.

95 United States Department of Justice *United States Attorneys' Manual* Part 9-13.420 (May 2005) < <http://www.usdoj.gov> > (last accessed 1 September 2006).

96 Computer Crime and Intellectual Property Section, Criminal Division, United States Department of Justice *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* (United States Department of Justice, July 2002) Part II B7(b) < <http://www.usdoj.gov/criminal/cybercrime/s&smanual2002.htm> > (last accessed 9 October 2006).

97 Above n 96.

98 American Law Institute *Model Code of Pre-Arrest Procedure* (American Law Institute, Philadelphia, 1975) § 220.5.

held at which both parties have an opportunity to suggest the minimisation procedures appropriate to the case.⁹⁹

- 12.55 McArthur¹⁰⁰ suggests that an alternative way to streamline the sorting process is to give the defendant supervised access to the seized documents or copies of them and require him to present a privilege log within a reasonable period of time.

Civil procedure rules

- 12.56 Civil procedure rules and practice directions developed in relation to the execution of search orders¹⁰¹ permit a party to a civil proceeding to apply for an order to enter premises and search for relevant evidentiary material.¹⁰²
- 12.57 Rules of court and a practice note for freezing and search orders have recently been proposed by a committee appointed by the Council of Chief Justices of Australia and New Zealand. The New Zealand Rules Committee expects to incorporate the drafts into the new High Court Rules.¹⁰³ The draft rules provide that where the court makes a search order, it must appoint an independent solicitor to supervise the execution of the order.¹⁰⁴
- 12.58 The example form of search order provides that the premises may not be searched unless the respondent or another person acting on their behalf is present. However, if complying with this requirement is not reasonably practicable, the independent solicitor may permit the search to proceed. In relation to claims of privilege, the example form of search order provides that the respondent have at least a two-hour period prior to entry by the search team other than the independent solicitor to:
- seek legal advice;
 - request a variation or discharge of the order by the court;
 - gather together and seal any documents that are claimed to be subject to legal professional privilege (which may not be inspected by the independent solicitor or anyone else).¹⁰⁵
- 12.59 The accompanying practice note advises that, where it is envisaged that specialised computer expertise may be required to search the respondent's computers, or where the respondent's computers are to be forensically copied, special provision will need to be made, and an independent computer specialist should be appointed and required to give undertakings to the court.

99 See McArthur, above n 94, 750.

100 McArthur, above n 94, 751-752.

101 Also known as Anton Piller orders after *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 Ch 55.

102 In *A Firm of Solicitors v District Court at Auckland*, above n 54, paras 140-141, the Court of Appeal referred to the UK Practice Direction – Interim Injunctions (supplementing Part 25 of the Civil Procedure Rules) as offering useful guidance in the development of appropriate procedures for the execution of search warrants. The Court of Appeal considered that there are a number of parallels between situations which arise in the context of Anton Piller orders and claims of privilege that arise on the execution of search warrants, and that the requirement that the execution of an Anton Piller order be supervised by an independent solicitor may be a useful model.

103 Bernice Ng “Rules Committee: Harmonising Freezing and Searching Orders” (2006) 667 *Law Talk* 7.

104 The responsibilities of the independent solicitor are set out in the accompanying practice note.

105 The UK Practice Direction, above n 102, provides that documents which are claimed to be privileged should be handed to the supervising solicitor for assessment.

Content of recommended statutory procedures

Aims

12.60 We recommend that statutory procedures to regulate the application of legal privilege when enforcement powers are exercised should be enacted. The aims of these statutory procedures should be to:

- ensure that legal privilege is preserved to the greatest extent possible without unduly hampering investigative operations;
- ensure that material and information within the scope of the search power is secure from interference or destruction pending the making or determination of a privilege claim;
- limit the scope for blanket claims of privilege that unduly delay the determination of the privilege claim and the underlying investigation;
- clarify the procedures that should apply to the exercise of search and seizure powers both where privilege claims are made and where material that is potentially privileged is discovered in the exercise of a search power;
- clarify the procedures that should apply where privileged material is intermingled with non-privileged material and cannot easily be separated for search purposes, for example, searches of computer data;
- clarify the procedures that should apply to the exercise of surveillance powers in relation to privileged communications;
- specify a mechanism for the determination of privilege claims.

Key elements of the recommended procedures

12.61 Statutory privilege procedures should set out a process:

- to require enforcement agencies to provide a lawyer¹⁰⁶ with an explicit opportunity to claim privilege (on behalf of his or her clients) in any confidential client communications, information or documents held by the lawyer that fall within the scope of the search warrant;
- in other searches, to require enforcement officers to offer an opportunity to claim privilege over any search material where there are reasonable grounds to believe that the material may attract legal professional privilege;
- in providing an opportunity to claim privilege, to permit the enforcement agency, without inspection, to secure material (including forensic copies of intangible material) that the agency is entitled to search, until the status of the material has been determined;
- to require privilege claims to be particularised, subject to the right of the privilege claimant to apply to the court for relief or directions where particular circumstances preclude adequate particularisation;
- to require the enforcement agency to extract and secure any record of privileged material contained in any communication intercepted pursuant to a surveillance device warrant.

¹⁰⁶ In this chapter, references to a “lawyer” should be construed in accordance with the definition of legal adviser in s 51(1) of the Evidence Act 2006.

RECOMMENDATION

- 12.3 Statutory procedures to regulate the application of legal privilege when law enforcement search and surveillance powers are exercised should be enacted.

Restriction on issuing warrants for privileged material

- 12.62 Currently, the law does not allow for a warrant to be issued under section 198 of the Summary Proceedings Act 1957 in respect of material that appears to the issuer to be privileged. In *Calver v District Court at Palmerston North*, Miller J held that the issuer of the warrant has to believe on reasonable grounds that all of the material sought to be seized would be evidence of the offence, and that where the material is known to be privileged or thought likely to be privileged (and if so would not be admissible as evidence), the issuer cannot form the necessary belief to authorise the issue of the warrant for that material.¹⁰⁷ Miller J therefore found that section 198 of the Summary Proceedings Act 1957 does not provide jurisdiction to issue a warrant that authorises searching and seizing material that appears to the issuer to be privileged, whether or not it is sealed for later review by a judge.
- 12.63 We agree that material that is clearly privileged should be excluded from the scope of the warrant. However, at the point the warrant is issued, it may not be possible to ascertain definitively whether the material sought in the application is privileged or not. Even material that appears to be privileged may on further investigation be found to fall within an exception to the privilege. Where material appears or is thought likely to be privileged, it may be appropriate for the status of that material to be determined and independently verified by the court in accordance with the recommendations set out in this chapter. Therefore, we recommend that the warrant restriction should be limited to material that is known to be privileged.

RECOMMENDATION

- 12.4 A search warrant should not be approved by an issuing officer for any material held by a lawyer that is known to be privileged.

Searches of confidential client material held by lawyers vs other searches

- 12.64 The procedures we propose would essentially create a two-tier regime to protect legal privilege on the exercise of search powers. Searches under warrant of confidential client material held by lawyers¹⁰⁸ would be subject to restrictions designed to protect legally privileged material from search from the outset. Other searches would be subject to restrictions designed to protect legally privileged material from search from the point at which such material is identified as being potentially privileged, either by the enforcement officer or by the search subject.

¹⁰⁷ *Calver v District Court at Palmerston North*, above n 52, paras 49-50.

¹⁰⁸ This is intended to cover searches of lawyers' professional offices, but acknowledging the portability of information, may extend to lawyers' homes, vehicles or hotel rooms, if confidential client material is present and falls within the scope of the search warrant.

- 12.65 The reason we propose stricter procedures for searches of confidential client material held by lawyers is the greater certainty that privileged information will be present. In searches of material held by non-lawyers there may be no way for the enforcement officer to anticipate whether privileged information will be present or not. The greater certainty that privileged information will be present also exists in relation to warrantless searches of confidential client material held by lawyers; however, the exceptional nature of warrantless powers that arise in circumstances of urgency overrides the rationale for the stricter privilege procedures proposed (such as prior notice of the search) where such material is searched under warrant. Nevertheless, the second-tier protections proposed should apply to warrantless searches of confidential client material held by lawyers.
- 12.66 We recommend that in searches (under warrant) of confidential client material held by lawyers, the enforcement agency should provide the lawyer with the opportunity to contact the client to seek instructions as to whether a claim of privilege should be raised before the search commences. Where the lawyer is unable to contact the client within a reasonable period and where the lawyer considers that the search may result in the disclosure of privileged material, he or she should have the authority to make an interim privilege claim until the client's instructions are obtained.
- 12.67 A necessary corollary of these procedures is that a search warrant may not be executed when the lawyer (or representative) is absent. If the lawyer is not at the search premises, the enforcement agency should take all reasonable steps to contact him or her or someone else responsible and provide them with a reasonable opportunity to be there. If the enforcement agency, after making a reasonable attempt, is unable to contact the lawyer or any other responsible person, or they fail to attend the premises as requested, the agency should request the appointment of a Law Society representative to act for the lawyer's clients (in respect of the search) so the search can be executed.¹⁰⁹
- 12.68 We have considered whether these requirements should apply to searches of material held by non-lawyers. Arguably it is necessary to provide all search subjects with an opportunity to seek legal advice in order to exercise their legal right to claim privilege. But although the privilege deserves protection regardless of whose information or property is being searched, the same level of protection for all searches would require enforcement agencies to provide an opportunity to claim privilege prior to the search in every case.
- 12.69 This would have significant implications. To broaden the initial opportunity to claim privilege to all searches would create potential for delay in exercising enforcement powers. We do not consider that such a significant impact would be justified, given that in the vast majority of searches, no privileged material is or is likely to be present. To provide the opportunity would also require an occupier to be present at the premises at the time of the search.¹¹⁰ On this basis, we do not recommend that providing opportunities to claim privilege be mandatory, except for warranted searches of confidential client material held by a lawyer. However, it may be appropriate in any particular case for the issuing officer to consider

109 The costs of appointing an independent lawyer should be met by the lawyer who is unavailable to attend the search.

110 See chapter 6, para 6.36.

stipulating that execution of a search warrant (that authorises, for example, a search of commercial or other premises where there is reason to believe that privileged information could be put at risk of disclosure by the execution of the search) is conditional on providing a prior opportunity to claim privilege (thereby requiring the search to be carried out when an occupier is present).

- 12.70 We accept that the stricter procedures recommended for warranted searches of confidential client material held by lawyers mean that there is a greater likelihood that the privilege will be preserved in that context. However, we consider that this approach is the most practicable option to balance the operation of the privilege against law enforcement objectives. We are satisfied that the ability of the judicial officer to impose additional conditions in any particular case provides sufficient flexibility to limit erosion of the privilege.
- 12.71 We propose that, in other searches,¹¹¹ the search subject would retain the right to claim privilege in relation to particular communications, information or documents. The standard form of warrant should include a notice on the availability of the privilege and how a claim may be made: either during the search by identifying any particular material, or, following the search, by delivering a list of material for which privilege is claimed to the enforcement agency. For warrantless searches, this note should be included in the inventory provided to the search subject following exercise of the search power.¹¹²
- 12.72 Further, where an enforcement officer has reasonable grounds to believe that a communication, any information or a document may be privileged, the officer must ring-fence that material from further inspection until the person who may be entitled to claim privilege has been given an opportunity to do so.¹¹³
- 12.73 Where the enforcement agency is unable to identify or contact the potential privilege claimant or their lawyer within a reasonable timeframe, the agency should be entitled to seek a determination of the status of the material by the court in the absence of a claim being raised by the privilege claimant.
- 12.74 Finally, we have considered the effect of section 53(4) of the Evidence Act 2006 (that allows a judge to order the non-disclosure in a court proceeding of privileged material in the possession of a third party) and how this provision should be reflected in the context of enforcement powers. It will not generally be feasible for a privilege claim to be raised by a claimant at the time of a third party search (because the claimant is not likely to be present), except for a search of the claimant's lawyer's office and the lawyer is given an opportunity to claim privilege. However, in other third party searches, the enforcement officer should be required to provide an opportunity to the person entitled to claim privilege where he or she has reasonable grounds to believe that the material is privileged

111 For example, (i) warrantless searches of confidential client material held by lawyers; and (ii) searches of confidential legal material held by non-lawyers.

112 As discussed in chapter 6, para 6.124. See also chapter 6, recommendations 6.29-6.30.

113 Customs submitted that there would be difficulties associated with imposing this requirement on enforcement agencies, since officers cannot be expected to know the intricacies of the law relating to privilege. We acknowledge that this is a difficult area, however, we think that it is incumbent on enforcement agencies to ensure that officers receive adequate training. We also note that the objective reasonable grounds to believe test sets a higher threshold than the alternative reasonable suspicion test, thus reducing the risk of challenges to the exercise of search powers where the opportunity to claim privilege is not provided.

(as discussed above). This duty should apply regardless of whether the material is in the possession of the potential privilege claimant or a third party at the time of the search (although possession may be relevant to whether privilege has been waived). In addition, once aware of the search, the privilege claimant should be entitled to raise a privilege claim, regardless of whether the material claimed to be privileged was seized from the privilege claimant or from a third party.

RECOMMENDATIONS

- 12.5 The standard form of search warrant should contain a notice on the availability of each legal privilege (lawyer-client privilege, litigation privilege, and privilege for settlement negotiations or mediation) and outline how a privilege claim may be made. For warrantless searches, this note should be included in the inventory provided to the search subject following the exercise of the search power.
- 12.6 Where the scope of a search warrant includes confidential client material held by a lawyer:
- the search warrant should not be executed in the absence of the lawyer, or his or her representative. Where the enforcement officer is unable to contact the lawyer or his or her representative or the lawyer fails to attend the search having been asked to do so, the enforcement officer should request the appointment of a Law Society representative to act for the lawyer's clients in respect of the search;
 - the enforcement officer should give the lawyer an opportunity to claim legal privilege on behalf of any client before the search begins. Where the lawyer is unable to contact the client within a reasonable time period, the lawyer should have the authority to make an interim privilege claim until the client's instructions are obtained.
- 12.7 The legal privileges should be available for searches other than those executed against lawyers under warrant, but the enforcement officer should not have to provide an opportunity to claim privilege, except where he or she has reasonable grounds to believe that any search material may be privileged, or unless that is an express condition of the search. In either such case, the officer should provide an opportunity for the person who may have the benefit of the privilege to claim it.
- 12.8 Where the enforcement officer is unable to identify or contact the potential privilege claimant or his or her lawyer within a reasonable timeframe, the officer should be entitled to ask the court to determine the status of the material.

Securing search material

- 12.75 We recommend that enforcement officers should have clear powers to secure material (without inspection) that falls within the scope of the search power, pending the attendance of the search subject (where required), or a privilege claim being made (where the requirement to provide an opportunity to make a claim arises). The lawyer or potential privilege claimant should be entitled to request copies of or supervised access to secured material.

- 12.76 The power to secure search material should encompass material secured on or removed from the search premises. We acknowledge that moving material from the search premises will constitute its seizure. However, the authority to seize in order to secure should not be regarded as authorising the search of that material, unless its status has been determined not to be privileged.
- 12.77 We propose that enforcement agencies should be empowered to secure intangible material by making forensic copies of it either at the search premises, or following removal of the data storage device from the premises.¹¹⁴
- 12.78 We have considered whether secured material that is removed from the search premises should be held by the enforcement agency, or by an independent stakeholder. There may be a perception that seized material would be more secure from inspection if held independently. While material claimed to be privileged should be held by the court, it is inappropriate for the court to be required to hold the secured material before a privilege claim is actually made. Other potential candidates who could act in this capacity include an independent lawyer¹¹⁵ or the Law Society.
- 12.79 On balance, we consider that the benefits of involving an independent stakeholder to protect potentially privileged material from search are not sufficiently compelling to justify the additional costs that would result. We consider that enforcement agencies should take responsibility for ensuring that secured material is held in accordance with the privilege procedures proposed.
- 12.80 We have considered whether there should be a specific offence for the search or inspection of secured material in breach of the privilege procedures. However, we are satisfied that recommendation 14.5 (that it should be an offence for an enforcement officer to disclose information acquired through exercising a search or surveillance power, otherwise than in the performance of his or her duty) is sufficient.

RECOMMENDATIONS

- 12.9 An enforcement officer should be authorised to secure any material within the scope of the search power, either on the search premises or by seizing that material, in any circumstances where the privilege procedures delay the search of that material.
- 12.10 Where any material within the scope of the search power is intangible, such as computer data, and the privilege procedures delay its search, the enforcement officer should be authorised to secure that material by making forensic copies.
- 12.11 The lawyer or potential privilege claimant should be entitled to request copies of or supervised access to any secured material.
- 12.12 Material that has been secured may not be searched, unless its status has been determined not to be privileged.

¹¹⁴ This power to secure intangible material is additional to the power to make forensic copies for search purposes discussed in chapter 7, recommendations 7.4-7.5.

¹¹⁵ An independent lawyer could be selected from the list of lawyers to be compiled for the purpose of executing search orders in the civil jurisdiction.

Independent supervision of the search

- 12.81 The Court of Appeal has suggested that Anton Piller jurisprudence, including the requirement for independent supervision, could provide useful guidance in developing appropriate procedures for searches of confidential client material held by lawyers.¹¹⁶ Members of the Criminal Practice Committee submitted that such searches, as they are inherently sensitive, should be supervised by an independent lawyer, along the lines that civil searches are to be independently supervised.¹¹⁷
- 12.82 Independent supervision of civil searches is necessary because such searches are undertaken by private parties. In the criminal jurisdiction however, the search function is a key law enforcement role. There is no suggestion that criminal searches generally should be independently supervised. The question is whether independent supervision is necessary for searches of confidential client material held by lawyers in particular, given the likely presence of privileged material.
- 12.83 We accept that independent supervision of these searches may have some positive advantages. The independent lawyer may be a useful intermediary between the enforcement agency and the search subject, and this may facilitate the search and reduce the opportunity for dispute over how the search is conducted. Where the lawyer whose office is to be searched is unavailable, the independent lawyer could liaise with the Law Society to arrange for another legal professional to be present. The independent lawyer could relieve the enforcement agency of the responsibility for ensuring that the special procedural steps to protect privilege are observed. In that role, the independent lawyer could explain both the warrant and the opportunity to claim privilege to the lawyer subjected to the search. The independent lawyer could also act as an independent stakeholder in holding material that is secured (while the privilege claim is being made) and take responsibility for activating the privilege determination process. This would include sealing material claimed to be privileged and delivering it to the court.
- 12.84 The presence of a neutral expert may therefore assist the enforcement agency to facilitate and conduct the search efficiently, while also providing assurance to the lawyer subjected to the search that the search will be conducted in a manner that does not impact unduly on legal privilege.
- 12.85 Independent supervision is unlikely to impact negatively on the search process. With or without independent supervision, we have recommended that the search must take place in the presence of the lawyer (or a representative), and that the search may not proceed until an opportunity to claim privilege has been given. In view of those constraints, independent supervision is unlikely to add significant delays or impediments to the search once it has started. Nevertheless, requiring independent supervision could have significant potential to delay starting the search.
- 12.86 We have considered the additional costs that independent supervision would entail. But given the small number of searches carried out by enforcement agencies on lawyers' offices, the likely cost of the measure has not been a significant factor in our deliberations.

116 *A Firm of Solicitors v District Court at Auckland*, above n 54, para 140. The use of special counsel was also endorsed in *A Ltd v The Director of the Serious Fraud Office*, above n 50, paras 92-93.

117 See above, paras 12.56-12.59.

- 12.87 We have concluded, however, that it is not necessary or appropriate to recommend a generic requirement that law enforcement searches of confidential client material held by lawyers be independently supervised. We accept that searching lawyers' premises requires a special approach to adequately take account of the likely presence of privileged material. We have therefore recommended above that enforcement agencies be subject to particular requirements when conducting such searches. In the absence of such requirements, a mechanism such as independent supervision might be a necessary safeguard for legal privilege. However, we are satisfied that if the special procedures we recommend are adopted, legally privileged material held by lawyers will be sufficiently protected, and the need for any additional procedure such as independent supervision is obviated.
- 12.88 Independent supervision may be warranted in particular cases as an additional safeguard,¹¹⁸ but in that event the issuing officer can require it as a condition of the warrant. Any need for independent supervision should therefore be considered on a case-by-case basis, along with other matters that may be the subject of particular conditions.
- 12.89 We are aware that consistency of measures to protect the various privileges is desirable. Any requirement for independent supervision imposed for searches of material held by lawyers would also need to apply to searches involving other professionals where matters of absolute privilege could potentially arise (such as ministers of religion, medical practitioners and registered clinical psychologists),¹¹⁹ unless an exception can be justified.
- 12.90 We also note that requiring searches of lawyers to be independently supervised would be a further differentiation between the level of protection for legal privilege proposed for those searches and the level of protection afforded to legal privilege in other searches. While we accept that some distinction in the level of protection is unavoidable for practical reasons, additional measures to protect legal privilege in searches of material held by lawyers should only be required if strictly necessary.
- 12.91 The other key supervisory feature of the proposed regime for civil search orders is using an independent computer expert to search computer data. We discuss this issue further below (paragraphs 12.95 to 12.108).

RECOMMENDATION

12.13 A generic requirement that law enforcement searches of confidential client material held by lawyers be independently supervised is not recommended. Independent supervision should be considered on a case-by-case basis and should only be a warrant condition where considered necessary by the issuing officer.

¹¹⁸ For example, see para 12.110 below.

¹¹⁹ The proposed application of these privileges to the exercise of enforcement powers is discussed at paras 12.121-12.123 below.

Particularisation of privilege claim

- 12.92 We recommend that the current particularisation approach to issues of privilege should be retained and codified in the procedures that apply to searches involving potentially privileged material. Enforcement agencies should allow privilege claims to be made over particular communications, information or documents and should remove such material from the scope of the search, until the claim has been resolved. A privilege claim should be made by producing a list of material over which the privilege is claimed or, where the claim is raised during the search, by indicating what communications, information or documents are claimed to be privileged. The privilege claim should trigger a process involving the sealing of the listed material, and delivering the list, the listed material and the application for determining the privilege claim to the court. Where the privilege claim appears to have no substantive basis, the enforcement agency should be able to accelerate the process by applying to the court for the determination of the privilege claim as soon as is reasonably practicable.
- 12.93 The particularisation approach highlights the importance of the specificity requirement. If search warrants are not framed with sufficient specificity, it will be difficult to particularise the privilege claim. Where the particularisation requirement proves to be oppressive (whether for lack of warrant specificity or for other reasons such as volume of material), the claimant should be able to apply to the court for relief or directions.

Privilege claims in relation to plain view material

- 12.94 We have considered the implications of the plain view doctrine discussed in chapter 3 under which evidential material discovered that is unrelated to the search power being exercised may nevertheless be seized where it is in plain view.¹²⁰ However, we are satisfied that the privilege claim potentially protects plain view material, as a privilege claim can be raised in relation to any searchable material.

RECOMMENDATIONS

- 12.14 A privilege claim should be particularised by the person making the claim, either by identifying the particular material or by providing the enforcement officer with an itemised list of the material that is claimed to be privileged. Where the circumstances preclude adequate particularisation, the claimant may apply to the court for relief or directions.
- 12.15 Material claimed to be privileged may not be searched unless that material has been determined not to be privileged. Material claimed to be privileged should be removed from the scope of the search and sealed. The sealed material should be delivered to the court, together with an application for the claim to be determined.
- 12.16 Where the enforcement agency considers that the privilege claim is unlikely to have any substantive basis, it should be able to accelerate the process by applying to the court for determination of the privilege claim as soon as is reasonably practicable.

¹²⁰ Chapter 3, paras 3.119-3.148. The plain view doctrine is also discussed in chapter 7, paras 7.68-7.73.

Computer searches

12.95 We have considered whether special procedures are necessary to preserve privilege in relation to computer searches. In particular, we have considered whether the forensic copying of confidential client material held by lawyers or the searching of that material should be conducted by a computer expert who is independent of the enforcement agency. We note that the proposed approach to executing searches in the civil jurisdiction would require an independent computer expert to be involved. We also note the comments of the Court of Appeal in *A Firm of Solicitors* that it would be necessary for an appropriately qualified and independent expert to search forensically copied material taken from a law firm, and possibly also supervised by the issuing judge or an independent lawyer appointed by the judge.¹²¹

12.96 The issue is whether there is a greater risk that privileged information will be disclosed to the enforcement agency, either during the forensic copying process, or during the search of the copied material, than in the search of tangible material.

12.97 Firstly, as to the forensic copying process, we note that this is a copying rather than a search technique. As noted by the Court of Appeal:¹²²

Although the privileged information on the hard drive is “removed” from the law firm’s premises, the protection of privilege under s 24 is preserved: no “disclosure” occurs or is required. The SFO and the law firm can then engage in a process (under the supervision of the issuing Judge or his or her delegate, if necessary) to permit claims of privilege to be made and to avoid disclosure to the SFO officers of privileged material. That would preserve the protection in s 24 of the SFO Act, and ensure that the warrant did not abrogate legal professional privilege.

12.98 On this basis, we accept that requiring the forensic copying of intangible material held by a lawyer to be carried out by an independent computer expert is not sufficiently justified.

12.99 Secondly, as to searches of forensically copied material, we propose that the risk of disclosure of privileged material during a computer search can be managed by applying the recommended privilege procedures (for example, providing the lawyer with the prior opportunity to claim the privilege).

12.100 We acknowledge that permitting the computer search to be conducted by the enforcement agency where the search material includes privileged material relies on the integrity of the agency to observe the search restrictions imposed by the procedures. Unlike claims of privilege over information in tangible form, for forensic reasons, it is impossible to physically separate intangible material that is privileged from other intangible material. Any step to delete or extract privileged information would impact on the forensic integrity of the data as a whole.¹²³ While it is possible to categorise certain data as subject to a claim of privilege by electronic tagging, the security of this procedure relies on the enforcement agency observing the categorisation and refraining from

121 *A Firm of Solicitors v District Court at Auckland*, above n 54, para 108.

122 *A Firm of Solicitors v District Court at Auckland*, above n 54, para 112.

123 Forensic issues associated with computer searches are discussed in chapter 7, paras 7.31-7.52 and para 7.147.

surreptitiously accessing that data. However, we note that there are adequate disincentives against surreptitious searches such as the risk to the investigation that the illegality of such an act would raise.

- 12.101 We have nevertheless considered the option of adapting the role of the independent computer expert from civil searches to the execution of law enforcement searches. However, we note that there are some key differences between civil searches and law enforcement searches in this context.
- 12.102 In civil searches, the independent expert is used to facilitate the computer search, as it cannot be assumed that the private party to whom the search order is granted will have the necessary technical expertise. This can be contrasted with law enforcement agencies who can be expected to have significant computer forensic capability to support their law enforcement functions.
- 12.103 Civil searches involve searching for specific listed items, a task easily delegated to an independent expert. As well, the person against whom a search order is made is subject to a greater duty to assist the search party than the subject of a law enforcement search power. In contrast, computer searches conducted by enforcement agencies are likely to be complex and vary in the extent to which the information sought under a search can be specified. For example, because of the complexity and variety of computer searches conducted by the Serious Fraud Office in furthering the detection and prosecution of serious fraud, the processes that agency uses to carry out computer searches are as much an art as a science. It is not a purely technical or automatic process that can easily be delegated to an expert. From experience, the Serious Fraud Office has found that computer searches are most effectively and efficiently performed by the responsible investigating officer, rather than by an independent third party. This is because an intimate knowledge of the investigation and specific training and experience in computer interrogation techniques to detect serious fraud is needed to search for relevant material effectively, together with experience and training in presenting evidential material for purposes of prosecuting these offences. A search of forensically copied material requires the officer conducting the search to assess material visually for relevance to the investigation and to pursue lines of enquiry while examining the data.¹²⁴ The Serious Fraud Office considers that a person without a detailed knowledge of the investigation is likely to fail to find relevant material, to miss the significance of material that is found, or to fail to realise that material which may appear to be privileged is subject to the illegal purpose exception to the privilege.
- 12.104 We agree with the Serious Fraud Office concerns and accept that a requirement that lawyers' computers be searched by an independent computer expert may significantly impact on the effectiveness of the search and therefore unduly impede law enforcement.
- 12.105 Another procedure we have considered is whether the search of a lawyer's computer should be preceded by an initial inspection in order to limit the scope

124 The Serious Fraud Office considers that a critical aspect of the examination process is the investigative ability to follow leads obtained as the examination occurs. This relies on the ability to make connections between information discovered from the examination with information previously obtained from the investigation, such as from interviews or documents. In this way the examination of data builds on itself as it is conducted. It is considered essential to have an in-depth knowledge of the investigation in order to make these connections.

of the computer search and the scope of the privilege determination. This procedure has been used by the Serious Fraud Office (with consent) in order to identify relevant material, without further inspection or review of the material, to allow issues of privilege to be addressed in respect of the relevant material identified. It is considered far more practical to identify the relevant material that the SFO investigator wishes to search (usually a very small percentage of the total) rather than to identify all the legally privileged material that the investigator may not search. Material over which a privilege claim is made can then be quarantined from search.¹²⁵ We have considered whether it would be useful to mandate this mechanism in searches of law firm computers, given the enormous amount of intangible material seized through the forensic copying process and the potential difficulties in identifying the privileged information for the purpose of making a privilege claim.¹²⁶

12.106 However, we consider that requiring the enforcement agency to provide the lawyer with an opportunity to claim privilege prior to any inspection of the data is a better approach. The specificity requirement should assist to define the scope of the search in order to allow the privilege claim to be particularised.¹²⁷ However, for the privilege process to be kept manageable, enforcement agencies may need to consider executing a computer search in stages, providing a separate opportunity to claim privilege in respect of each stage of the search. Where particularisation nevertheless proves to be oppressive in any particular case, the lawyer can consent to an initial inspection of the computer data or apply to the court for relief or directions. A means of providing relief may be for the court to authorise an initial inspection of the data by the enforcement agency to isolate the data in issue, under supervision if considered necessary. It should also be open for the enforcement agency to apply to the court for authority to perform an initial inspection of data where, in the circumstances of the investigation, the agency is unable to balance the need to perform an effective search against the requirement to offer a prior opportunity to claim privilege.

12.107 We have also considered the fact that computer searches may involve accessing both foreground data (such as text or images) and background data or metadata.¹²⁸ Privilege claims will generally be limited to material contained in foreground data. This is because metadata, while possibly pertaining to a privileged communication, does not usually disclose the substance or content of the communication. Nevertheless, in certain circumstances, metadata has the potential to disclose privileged information¹²⁹ and may therefore be the subject of a privilege claim. We have concluded that where an enforcement agency is

125 Specific data that is subject to a privilege claim can be bookmarked (including the text of deleted material still viewable in unallocated space). Forensic investigators can then conduct a search of the data while undertaking not to review the bookmarked items pending resolution of the privilege claim.

126 See, for example, *Kennedy v Baker* [2004] FCA 562, para 97 (FCA) where Branson J noted the enormity of the task in reviewing the imaged hard drive in order to make a privilege claim.

127 We note that the Court of Appeal decision in *A Firm of Solicitors*, above n 54, has clarified that the specificity requirement applies to search warrants issued under the Serious Fraud Office Act 1990 (para 75). Prior to this, an initial inspection of data would have been necessary to help define the scope of the search for warrants that were broadly drawn.

128 See the glossary for a description of metadata.

129 See, for example, The Sedona Conference *The Sedona Guidelines for Managing Information and Records in the Electronic Age* (WGS, Sedona, Arizona, 2005) Appendix E < http://www.thesedonaconference.org/publications_html > (last accessed 19 February 2006); *Williams v Sprint/United Management Company* 230 FRD 640, 647.

authorised to conduct a computer search, subject to any privilege claim in respect of any particular metadata, the agency should be authorised to search metadata pertaining to privileged material, and to seize or retain metadata where it constitutes evidential material.¹³⁰

- 12.108 Finally, we note that care will need to be taken when executing computer searches that involve remote access.¹³¹ Procedures to protect privileged material held by lawyers are not confined to searches involving physical entry to the lawyer's premises. Confidential lawyer-client communications, information or documents (including, for example, data accessible from a portable data storage device) should not be remotely accessed without following the appropriate procedures that require providing a prior opportunity to claim privilege.

RECOMMENDATIONS

12.17 Where a search warrant authorises the search of confidential client material held by a lawyer in intangible form (such as computer data), the enforcement officer should provide the lawyer with an opportunity to claim privilege on behalf of any client in any intangible material sought under the search warrant, prior to that material being searched.

12.18 Subject to any privilege claim in respect of any particular metadata, an enforcement officer should be authorised to search metadata that pertains to privileged material where that metadata falls within the scope of the search power, and to seize or retain such metadata where it constitutes evidential material.

Role of legal profession in protection of legal privilege

- 12.109 The proposed procedures rely on the lawyer fulfilling his or her professional obligations to the client with respect to the privilege claim. We accept that there is the potential for breach of privilege where lawyers fail to adequately protect the rights of their clients.¹³² However, given lawyers' ethical responsibilities to their clients and to the court, and the technical nature of the privilege, it is appropriate for the legal profession to bear the responsibility for protecting clients' rights under the privilege. Recommendation 12.6 would ensure the appointment of another legal professional to act on behalf of the lawyer where he or she is unavailable or absent.
- 12.110 Where the lawyer is under investigation and the issuing officer considers that there is a potential conflict of interest if that lawyer were to be responsible for protecting the legal privilege of his or her clients, it may be appropriate for the officer to make execution of the search conditional on an independent lawyer attending in a supervisory role.

¹³⁰ See chapter 7, paras 7.147-7.152, as to the retention of data by law enforcement agencies.

¹³¹ Discussed in chapter 7, paras 7.74-7.127.

¹³² See, for example, *Kennedy v Baker*, above n 126.

Limitations on using privileged material

- 12.111 We accept that there may be circumstances in which the recommended privilege procedures will not prevent privileged information being disclosed to an enforcement agency. Section 54(2) of the Evidence Act 2006 provides a discretion for the judge to give directions protecting the confidentiality of or limiting the use that may be made of any privileged material that is disclosed in compliance with a judicial or administrative order.
- 12.112 We recommend that a judicial discretion should also apply to privileged material that is obtained from exercising an enforcement power. This would provide a means of restricting the inappropriate use of derivative material by enforcement agencies; that is, information derived from privileged material obtained during searches or surveillance.

RECOMMENDATION

12.19 The court should have the discretion to give directions that are necessary to limit the use made of any privileged material that is obtained as a result of the exercise of an enforcement power.

Surveillance

- 12.113 Section 312D(2) of the Crimes Act 1961 provides that where an interception device is to be placed in the residence or business premises of a lawyer, clergyman or medical practitioner, the judge is to prescribe conditions to avoid communications of a professional character being intercepted. In chapter 11 we have recommended the current interception regime be replaced with a generic surveillance device warrant regime.¹³³
- 12.114 In assessing appropriate procedures to preserve legal privilege to the extent possible on the execution of a surveillance device warrant, we have considered practices in other jurisdictions.
- 12.115 Under the Police Act 1997 (UK), an authorising officer and a Surveillance Commissioner must give prior authorisation if the surveillance is likely to result in acquiring knowledge of matters subject to legal professional privilege. Provided that the police obtain the necessary permissions, they can lawfully use surveillance to detect the content of legally privileged material for which they could not have obtained a search warrant under the Police and Criminal Evidence Act 1984.¹³⁴
- 12.116 Certain forms of interception are regulated under the Regulation of Investigatory Powers Act 2000 (UK). This Act does not prohibit sensitive confidential personal information or legally privileged communications being intercepted.¹³⁵ Interference with legally privileged material is acceptable, provided that it is proportionate to

¹³³ Chapter 11, recommendation 11.3.

¹³⁴ Rosemary Pattenden *The Law of Professional-Client Confidentiality: Regulating the Disclosure of Confidential Personal Information* (Oxford University Press, Oxford, New York, 2003) paras 14.73, 14.74.

¹³⁵ Pattenden, above n 134, para 14.96.

a legitimate aim and subject to adequate safeguards.¹³⁶ A Code of Practice for the Interception of Communications has been issued under section 71 of the Act.¹³⁷

- 12.117 In its review of Warrant Powers and Procedures, the Victorian Parliament Law Reform Committee¹³⁸ noted that the potential loss of legal professional privilege in the context of interception could be resolved by an independent person auditing the material to determine what material is irrelevant or private and what should be excluded as privileged. However, the Committee considered that for this to be done properly it would need to be done by a judicial officer. There would be obvious and significant resource implications in establishing such a system of audit. Consequently, the Committee did not consider that the very intensive resource requirement for all material to be fully audited by a judicial officer was currently justified, but it did recommend that further consultation and assessment should be undertaken.
- 12.118 Commenting on the United States context, McArthur¹³⁹ suggests that it is straightforward to minimise the intrusion on privilege in electronic surveillance: agents can simply stop listening to non-pertinent and privileged conversations. However, even this leaves significant room for disputes; for example, how long it is appropriate to listen to a particular conversation that appears to be privileged, and how often conversations may be spot-checked to ensure they remain privileged. McArthur therefore argues that attorney-client conversations should be submitted to a judicial officer for a privilege determination before listening to them.
- 12.119 In New Zealand, police interception of communications is conducted by a centralised monitoring unit, rather than directly by enforcement officers. This allows intercepted communications to be filtered and privileged material extracted, before intercepted material is passed on to enforcement officers. We recommend that this model should be utilised by law enforcement agencies exercising interception powers. We recommend that as a mandatory condition of the proposed surveillance device warrant regime discussed in chapter 11, where a centralised monitoring unit has reasonable grounds for believing that any communication may be privileged, it must not pass on that communication to the enforcement officer, but must secure it until any potential claim of privilege is resolved.

RECOMMENDATIONS

- 12.20 Law enforcement interception of communications should be conducted by a centralised monitoring unit within the relevant enforcement agency.
- 12.21 It should be a mandatory condition in every surveillance device warrant to intercept communications that where the monitoring officer has reasonable grounds to believe any intercepted communication may be privileged, it must be extracted from the information that is accessible to enforcement officers and secured until any potential claim of privilege is resolved.

¹³⁶ Pattenden, above n 134, para 14.117.

¹³⁷ Available at < <http://www.security.homeoffice.gov.uk> > (last accessed 24 July 2006).

¹³⁸ Victorian Parliament Law Reform Committee, Final Report, above n 35, 362.

¹³⁹ McArthur, above n 94, 749-750.

Section 198A Summary Proceedings Act 1957

- 12.120 Provided that the recommended privilege procedures are adopted so that there is a legislative procedure that regulates seizure of confidential client material held by lawyers, we do not think that it is necessary to retain section 198A of the Summary Proceedings Act 1957 to regulate seizure of accounting records where it is claimed that the seizure is outside the scope of the warrant.¹⁴⁰ We recommend that the provision should be repealed, provided that the substance of section 198A(3) (relating to the court's discretion as to the admissibility of evidence) is retained and made applicable to the generic procedures proposed.

RECOMMENDATION

12.22 Section 198A of the Summary Proceedings Act 1957 should be repealed, provided that the substance of section 198A(3) is retained and made applicable to the generic procedures proposed.

RELIGIOUS AND MEDICAL PRIVILEGES

- 12.121 The Australian Law Reform Commissions in their report on Uniform Evidence Law concluded that a relationship between a cleric and a member of a church should fall within the broader confidential relationships privilege and not be treated separately.¹⁴¹ However, that is not the New Zealand approach. Under section 58 of the Evidence Act 2006, an absolute privilege for confidential religious communications with a minister of religion is recognised for the purpose of court proceedings. The Justice and Electoral Committee harboured reservations about the continued relevance of this privilege, but as no submissions opposing its continuation were received, the Committee did not consider that it had authority to repeal it. The privilege has therefore been continued and broadened to protect all confidential communications made for the purpose of obtaining spiritual advice, benefit or comfort, not just confessions.¹⁴²
- 12.122 Under section 59 of the Evidence Act 2006, absolute protection in criminal proceedings is available for communications made to a medical practitioner or clinical psychologist by a patient who believes that the communication is necessary to enable the practitioner to treat him or her for drug dependency or any other conditions that manifest themselves in criminal offending. Protection is also available for information that the medical practitioner or the clinical psychologist obtains as a result of consulting with or examining the person, and for information consisting of a prescription for treatment.
- 12.123 If such religious or medical communications and information are subject to absolute privilege for the purpose of court proceedings, we recommend that they should also be protected when enforcement powers are exercised, to ensure the privilege is consistently applied. We recommend that this be achieved by adapting and applying the procedures recommended to protect legal privilege. In particular, this would mean that in warrant searches of confidential information held by ministers and medical professionals (including registered clinical psychologists), enforcement agencies should provide an opportunity for the relevant privilege

¹⁴⁰ See discussion of this provision at paras 12.38-12.39 above.

¹⁴¹ Joint Law Commissions, above n 35.

¹⁴² The predecessor to the new section is the Evidence Amendment Act (No. 2) 1980, s 31.

to be claimed before the search proceeds. This would require these searches to be conducted in the presence of the minister or medical professional, or their representative. In addition, in other searches,¹⁴³ enforcement officers should offer an opportunity to claim the relevant privilege where the officer has reasonable grounds to believe that any search material may be privileged or where this is an express condition of the warrant.

RECOMMENDATIONS

12.23 The codified privileges for communications with ministers of religion, medical practitioners, and registered clinical psychologists contained in the Evidence Act 2006 should be available when enforcement powers are exercised.

12.24 The procedures recommended for protecting legal privilege in recommendations 12.2 to 12.12 and 12.14 to 12.21 should be adapted to protect religious and medical privilege, including:

- in warrant searches of confidential professional material held by ministers of religion, medical practitioners, or clinical psychologists, by the enforcement officer providing an opportunity for the minister, medical practitioner or psychologist to claim the relevant privilege on behalf of the entitled person, before the search begins;
- in other searches, by the enforcement officer providing the search subject with an opportunity to claim the relevant privilege where there are reasonable grounds to believe that any search material may be privileged, or where this is an express condition of the warrant.

CONFIDENTIALITY Confidential material generally

12.124 Under section 69 of the Evidence Act 2006, confidential information may be protected from disclosure for the purpose of court proceedings.¹⁴⁴ The presumption is that confidential information is to be disclosed, subject to a judicial discretion to make an order against disclosure on the basis of certain public interest criteria. Currently, no consideration is given to protecting confidential information from disclosure resulting from the exercise of an enforcement power. Any consideration of the qualified protection is reserved for the enquiry into admissibility for purposes of court proceedings.

12.125 Extending this qualified protection to contexts other than court proceedings was considered in the Australian Law Reform Commissions' report on Uniform Evidence Law.¹⁴⁵ The Commissions considered a range of opinions in submissions, including concerns that extending qualified protection to the investigatory stage could adversely impact upon investigatory agencies' ability to gather relevant material and identify leads for investigation. They concluded that the qualified protection should apply to any compulsory process for disclosure, including non-

¹⁴³ For example, (i) warrantless searches of confidential professional material held by a minister of religion, a medical practitioner or a clinical psychologist; or (ii) searches of confidential religious or medical material held by the person to whom the material relates.

¹⁴⁴ Section 69 potentially protects a confidential communication, any confidential information and any information that would or might reveal a confidential source of information.

¹⁴⁵ Joint Law Commissions, above n 35, chapter 15.

court contexts such as the execution of search warrants,¹⁴⁶ but did not recommend how this should be implemented.

12.126 We have considered whether the qualified protection for confidential information should be available when enforcement powers are exercised (as recommended by the Australian Commissions), or whether it should continue to be dealt with as a matter of admissibility. On the one hand, it may be argued that a qualified protection that only pertains to information protected by a court order should not limit the scope of an investigation, since that would unduly impede access to many documents that would, if there were a privilege claim, not be subject to such an order. On the other hand, there is some force in the view that if the protection is not available at the investigative stage, it will often be rendered meaningless.

12.127 In our analysis, the key rationale for qualified protection is ensuring that the confidentiality of information is maintained where the greater public interest lies in keeping it confidential than disclosing it. Disclosing certain information in court proceedings may destroy any confidentiality in that information (given the presumption in favour of open justice). Disclosing information to an enforcement agency, however, would have less impact on its confidentiality, given it is proposed that enforcement officers keep all information obtained in exercising enforcement powers confidential.¹⁴⁷

12.128 If the qualified protection for confidential information was available to anybody responding to the exercise of an enforcement power, the communication or information for which protection is claimed could be quarantined and referred to the court for determination on the public policy grounds set out in section 69(2) to (5) of the Evidence Act. However, we have concluded that such an approach would place the qualified protection for confidential information on a similar footing to the recommended procedures for the observance of the legal and other absolute privileges. This level of protection cannot be justified, given the lesser status of the qualified protection for confidential information. We also note that such an approach would be problematic in relation to surveillance for practical reasons, as the search subject will be unable to raise a claim where they are unaware of the surveillance.

12.129 An alternative approach would allow confidentiality to be raised as a basis for objecting to the retention of seized material by an enforcement agency. This approach would reflect the presumption in favour of disclosure (as it does not impact on the power to seize), while allowing for particular confidentiality issues to be considered by way of challenge to retention by the agency, i.e. at an earlier stage than the point at which admissibility is determined. In the context of surveillance, any application for the return of confidential material could be dealt with following disclosure that the surveillance occurred.

12.130 However, the qualified protection of confidential information involves a structural issue that makes it difficult to shift the timing of the balancing exercise to be performed. Practically speaking, the enforcement agency wanting to mount a public policy argument to justify its retention, may not be able to assess the significance of the material in question when the investigation is in its preliminary stages.

¹⁴⁶ Joint Law Commissions, above n 35, recommendation 15-3.

¹⁴⁷ Chapter 14, recommendation 14.5.

- 12.131 As well as this practical difficulty, we are not convinced that there is sufficient value in introducing a statutory procedure to facilitate an earlier determination of the question of whether confidential information should be protected from disclosure. The potential for the return of seized material is already provided for, as discussed in chapter 13. As noted, we propose that enforcement agencies should be obliged to maintain the confidentiality of seized material. We are therefore not convinced that a procedure that would allow the status of confidential information to be settled earlier would be of sufficient value, given the inherent difficulties. We recommend that qualified protection for confidential information should continue to be dealt with solely as a matter of admissibility in accordance with the Evidence Act 2006.

RECOMMENDATION

12.25 The qualified protection for confidential information should continue to be dealt with solely as a matter of admissibility in accordance with section 69 of the Evidence Act 2006 and should not be available when enforcement powers are exercised.

Matters of state

- 12.132 Section 70 of the Evidence Act 2006 puts the present doctrine of public interest immunity (also known as Crown privilege) into statutory form.¹⁴⁸ The presumption is that matters of state are to be disclosed, subject to a judicial discretion to make an order against disclosure on the basis of certain public interest criteria. The clause is a counterpart to section 69: whereas section 69 applies to private confidential information, section 70 applies to information whose confidentiality is important to the state or to the effective conduct of public affairs.
- 12.133 In Australia, public interest immunity is not limited to court proceedings: the question commonly arises in other contexts including resistance by the Crown to seizure of documents under a search warrant.¹⁴⁹ The High Court of Australia considered whether public interest immunity is available as a defence to a search warrant in *Jacobsen v Rogers*.¹⁵⁰ The majority applied the *Baker v Campbell* approach to legal professional privilege¹⁵¹ in the context of public interest immunity and considered that it is open to the Crown to resist the seizure under a warrant of documents to which public interest immunity attaches, notwithstanding the practical difficulties in giving effect to the immunity in that context.¹⁵²
- 12.134 The Australian Law Reform Commissions in their report on Uniform Evidence Law¹⁵³ recommended that section 130 of the Uniform Evidence Acts 1995 (Cth and NSW) (codifying public interest immunity) should apply in non-court

148 New Zealand Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55, Vol 2, Wellington, 1999) 179.

149 J D Heydon *Cross on Evidence* (7th Australian ed, LexisNexis Butterworths, Sydney, 2004) para 27035.

150 *Jacobsen v Rogers* (1995) 182 CLR 572 (HCA).

151 *Baker v Campbell*, above n 4.

152 In minority decisions, Brennan J and McHugh J considered that the practical difficulties were such that the immunity should only apply in court proceedings.

153 Joint Law Commissions, above n 35.

contexts such as search warrants,¹⁵⁴ although the Commissions did not recommend how this should be implemented.

- 12.135 Whether public interest immunity has any bearing on the issue of a search warrant was considered by the Court of Appeal in *New Zealand Air Line Pilots' Association Inc v Attorney-General*.¹⁵⁵ In the High Court,¹⁵⁶ Panckhurst J held that the power of a judicial officer to issue a search warrant to obtain a cockpit voice-recorder recovered from an aircraft crash-site and the transcript taken from the recorder could not be exercised without regard to public interest immunity. The Court of Appeal disagreed and issued a declaration that the power to issue a search warrant is not confined by public interest immunity.¹⁵⁷

The judicial officer, considering an application for a search warrant, is not in a position which permits the proper assessment of the competing interests in protecting the information and in facilitating a particular legal investigation and proceeding. Again, if the assessment of those matters is to be made, the appropriate time is immediately before or in the course of trial.

- 12.136 Due to this timing issue, we do not recommend that a statutory procedure making public interest immunity available as a defence to the exercise of a search power be introduced. We consider that public interest immunity should continue to be dealt with as a matter of admissibility under the Evidence Act 2006. There is a structural difficulty in performing the required balancing exercise much earlier than at the admissibility stage,¹⁵⁸ while the value in shifting the timing of this exercise forward is not demonstrable. It is also desirable for the qualified protections to be treated consistently, necessitating a common approach to both public interest immunity and the protection of confidential information in the context of enforcement powers.

RECOMMENDATION

12.26 Public interest immunity should continue to be dealt with solely as a matter of admissibility in accordance with section 70 of the Evidence Act 2006 and should not be available when enforcement powers are exercised.

Confidential journalistic sources

- 12.137 Section 68(1) of the Evidence Act 2006 introduces a qualified protection for the identity of confidential journalists' sources.¹⁵⁹ Under section 68(2), however, the court may order disclosure of material that would disclose or enable the identity of the source to be discovered, where it would be in the public interest to do so.

- 12.138 Section 68 does not create a privilege but merely protects the identity of journalists' sources by granting limited non-compellability to journalists and

¹⁵⁴ Joint Law Commissions, above n 35, recommendation 15-11.

¹⁵⁵ *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA).

¹⁵⁶ *Attorney-General v the Transport Accident Investigation Commission and Others* (18 December 1996) HC WN CP 164/96.

¹⁵⁷ *New Zealand Air Line Pilots' Association Inc v Attorney-General*, above n 155, 293.

¹⁵⁸ *New Zealand Air Line Pilots' Association Inc v Attorney-General*, above n 155.

¹⁵⁹ The protection does not extend to journalistic material generally, although there may be other grounds for the protection of other journalistic material, for example, under the Evidence Act 2006, s 69.

their employers.¹⁶⁰ In our analysis, the protection of the identity of journalistic sources sits somewhere between the protection of privileged material (legal, religious and medical) on the one hand, and the qualified protection for confidential information and matters of state on the other hand. Unlike the absolute privileges, protection of the identity of journalistic sources is qualified, in that it can be overridden where required in the public interest.¹⁶¹ Unlike the other qualified protections, however, the presumption is against disclosure.

- 12.139 In determining whether the identity of journalistic sources should be protected on the exercise of enforcement powers under our proposed regime, we have considered the underlying policy rationale expressed by the Law Commission in its review of Evidence:¹⁶²

In recognition of the public interest in press freedom, this section protects the identity of a journalist's informant from disclosure if the journalist has promised the informant that his or her identity will not be disclosed.

The protection of journalists' confidential sources of information is justified by the need to promote the free flow of information, a vital component of any democracy.

- 12.140 This policy interest applies equally when enforcement powers are exercised:¹⁶³

A promise of confidentiality made by a journalist to a particular source becomes meaningless in the face of a police officer armed with a search warrant that entitles him or her to look through the entire contents of the newsroom without prior warning. Sources of information will also dry up due to fears that journalists' files will be readily available to the police.

- 12.141 We have considered how journalistic privilege is treated in other jurisdictions. In some cases, protection is afforded to the identity of journalistic sources, and, in other cases, the substance of the journalistic material may also be protected. In the United States, the Privacy Protection Act 1980 specifically regulates searches of journalistic materials. The Act does not immunise the press from searches; but by requiring that searches be conducted by subpoena rather than by search warrant, it mandates that searches be conducted by a relatively unintrusive method.¹⁶⁴ In the United Kingdom, the Police and Criminal Evidence Act 1984 includes certain safeguards for journalistic material. In practice, the Act has not been the basis for a search warrant in relation to journalistic material; instead, police have used production orders as the main device for access to journalistic material.¹⁶⁵ The law in Hong Kong provides special protection for journalistic material, creating a three-tier regime that provides a series of hurdles to be overcome before journalistic material may be searched for or seized.¹⁶⁶ The European Court of Human Rights has ruled that limitations on the confidentiality of journalistic sources (including the exercise of law enforcement powers) call for the most careful scrutiny by the

160 *Evidence*, Vol 2, above n 148, para C243.

161 This can be contrasted with the privilege afforded to police informers under the Evidence Act 2006, s 64.

162 *Evidence*, Vol 2, above n 148, para C271, and *Evidence*, Vol 1, above n 46, para 301.

163 Sanette Nel "Journalistic Privilege: Does it Merit Legal Protection" (2005) XXXVIII CILSA 99, 111.

164 Raphael Winick "Searches and Seizures of Computers and Computer Data" (1994) 8 Harv J Law & Tec 75, 99.

165 Yan Mei Ning "Search Warrant Versus Production Order – the Hong Kong Experience in Protecting Journalists' Material" (2005) 10(2) Media and Arts Law Review 117, 125-126.

166 Yan Mei Ning, above n 165, 118-119.

court. From such rulings, it is clear that the European Court attaches great importance to the potentially chilling effect on media freedom arising from any coercive disclosure of sources or coercive access to material held by journalists.¹⁶⁷

12.142 In assessing the appropriate level of protection for journalistic material in New Zealand, we propose that the Evidence Act 2006 protection for material identifying journalistic sources should be available when enforcement powers are exercised. The underlying policy grounds justifying the presumption against disclosure in court proceedings (freedom of expression, including freedom of the press), apply equally in our view to the exercise of enforcement powers. This approach is consistent with the protection afforded to such material under the Act which, in section 68, identifies the identity of journalistic sources as a specific, rather than generic, category of confidential information. Section 68 of the Evidence Act also affords greater protection to material identifying journalistic sources than to other non-privileged confidential information by specifying a presumption against disclosure.

12.143 We propose that the recommended privilege procedures form the basis of protection for material identifying journalistic sources on the exercise of enforcement powers. The procedures we propose for the protection of privileged material would essentially create a two-tier regime with stricter procedures for searches of material held by the lawyers, ministers of religion, medical practitioners and clinical psychologists (protecting material from search from the outset by providing a prior opportunity to claim privilege). We propose that material identifying journalistic sources be subject to the lower level of privilege protection under which material is protected from search at the point at which it is identified as being potentially privileged, either by the enforcement officer or by the search subject. The scope of the protection should be consistent with that set out in section 68 of the Evidence Act 2006, including the definitions of “informant”, “journalist”, “news medium” and “public interest” in section 68(5).

12.144 The level of protection proposed would allow a journalist to claim protection for material that identifies a source at any point prior to, during or following a search. The proposed protection would also require the enforcement officer who has reasonable grounds to believe that material includes the identification of journalistic sources, not to search that material until an opportunity has been given to the journalist to claim protection for that material.

12.145 The protection of material identifying journalistic sources is qualified. The presumption against disclosure can be overturned if any likely adverse effect of the disclosure on the informant or any other person is outweighed by the public interest in disclosure, and in particular in the communication of facts and opinion to the public by the news media, and accordingly also in the ability of the news media to access sources of facts.¹⁶⁸

12.146 The qualified nature of the protection should therefore be reflected in the enforcement power regime. First, where an enforcement agency seeks to search a journalist’s

167 Yan Mei Ning, above n 165, 127. For further discussion of the “chilling effect,” see also Jeffrey S Nestler “The Underprivileged Profession: the Case for Supreme Court Recognition of the Journalist’s Privilege” (2005) 154 UPALR 201, 239; Janice Brabyn “Protection Against Judicially Compelled Disclosure of the Identity of News Gatherers’ Confidential Sources in Common Law Jurisdictions” (2006) 69(6) MLR 895, 926.

168 Evidence Act 2006, s 68(2).

premises for confidential material identifying sources, and the agency can make a sufficient case on public policy grounds to satisfy the issuing officer that the presumption against disclosure should be overturned, the issuing officer could authorise the search and seizure of the material on approving of the warrant, subject to any terms and conditions that the issuing officer thinks appropriate.¹⁶⁹

- 12.147 Secondly, where the presumption against disclosure is not overturned on the issue of a warrant, the enforcement agency should be entitled to challenge any claim for protection made by a journalist on or following exercise of a law enforcement power, on the specified public policy grounds.
- 12.148 It is not intended that these measures should constitute the sole regulation of the exercise of enforcement powers involving journalistic material. Searches of the media have been recognised by the courts as a special category.¹⁷⁰

RECOMMENDATIONS

12.27 The qualified protection for material identifying journalistic sources in section 68 of the Evidence Act 2006 should be available when enforcement powers are exercised.

12.28 Recommendations 12.5, 12.7 to 12.12, 12.14 to 12.16 and 12.19 to 12.21 should be extended to protect material identifying journalistic sources, provided that the enforcement agency may apply to the court for disclosure of the information on the grounds specified in section 68(2) of the Evidence Act 2006.

Protecting third party confidentiality and privacy

- 12.149 A related issue is the extent to which confidential third-party information should be protected when enforcement powers are exercised.¹⁷¹
- 12.150 We note that police protocols and undertakings to preserve third-party confidentiality were discussed in *N v Attorney-General and the Auckland District Court*.¹⁷² An independent medical practitioner was appointed to be present during the search of computer data and to adjudicate on the search to ensure the preservation of the confidentiality of unrelated patient information. The court was satisfied that the applicant was entitled to take steps to preserve confidentiality and his concerns about privacy issues were justified so far as they related to unrelated third parties.

¹⁶⁹ Evidence Act 2006, s 68(3).

¹⁷⁰ In *TVNZ v Attorney-General* [1995] 2 NZLR 641, 646 (CA), Cooke P considered the freedom of the press to be an important adjunct of the rights concerning freedom of expression affirmed by section 14 of the Bill of Rights Act. The judgment confirmed that warrants against the media should only be issued in exceptional circumstances where it was “truly essential in the interests of justice” and that a warrant should not be granted or executed in a manner which impairs public dissemination of the news. For discussion of issues relating to compelled disclosure of evidence from journalists, see B D Gray “Journalists Compelled to be Witnesses – Time for a Re-evaluation” (Paper presented to Legal Research Foundation Media Law Seminar, 15 June 2006).

¹⁷¹ *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728, 742 (CA) Richmond J: “the appellant has suffered ... a natural concern that the confidential medical records of a great number of women patients should be taken out of the custody of the clinic and to some extent lose their confidential nature.”

¹⁷² *N v Attorney-General and the Auckland District Court* (19 March 2003) HC AK, M1600-02, Randerson J.

12.151 In *J v Hastings District Court and the Attorney-General*,¹⁷³ France J considered the confidentiality of patient/doctor communications to be an important value, while noting differences between legally privileged material and patient/doctor information. Commenting on the circumstances where the granting of the warrant involved the search and seizure of information with a strong privacy value, France J concluded that the warrant should have had a condition limiting police access to the non-patient information, noting the Canadian decision in *Regina v Serendip Physiotherapy Clinic*.¹⁷⁴

12.152 We agree that, where practicable, enforcement officers should protect privacy. The enforcement officer and the search subject may often be able to agree a search protocol on how the search will be conducted to limit access to confidential material without impacting on the effective execution of the search power.

12.153 However, we do not recommend any special statutory provisions regulating measures that should be taken to protect third-party confidential information. We consider that it is preferable for:

- protective measures to be considered on a case-by-case basis, with judicial officers dealing with privacy issues by way of search conditions, as necessary;¹⁷⁵
- the enactment of a specific offence to protect the confidentiality of information acquired by enforcement officers in the course of exercising an enforcement power.¹⁷⁶

In the event that confidential information is seized by an enforcement officer, the question of its admissibility would need to be determined in subsequent proceedings.¹⁷⁷

PRODUCTION ORDERS

12.154 In chapter 10, we recommend that a production order regime should be available to enforcement agencies for the investigation of offences.¹⁷⁸ As noted in chapter 10, our proposals for dealing with privileged material readily apply to evidence that is the subject of a production order.¹⁷⁹ The procedures can be somewhat simplified, given that control of the material claimed to be privileged remains with the recipient of the production order.

12.155 The key elements of a privilege procedure in this context should include the following:

- the production order should contain a notice on the availability of each

¹⁷³ *J v Hastings District Court and the Attorney-General* (16 December 2004) HC WN, CIV-2004-441-93, France J, paras 50, 70, 86-93, 99.

¹⁷⁴ *Regina v Serendip Physiotherapy Clinic* (2003) 227 DLR (4th) 520. The Ontario Superior Court of Justice concluded that a procedure should be read into the equivalent of s 198 of the Summary Proceedings Act 1957 to protect patients' privacy interests. The court judge accepted that the warrant was invalid because it did not include conditions in it to protect the privacy interests of patients. The basis for including such conditions is the interrelationship between the search power and s 8 of the Canadian Charter of Rights and Freedoms which protects the right to a reasonable search and seizure.

¹⁷⁵ However, the failure to attach appropriate conditions to a search power in this context should not be grounds for challenge to the validity of the search power.

¹⁷⁶ Chapter 14, recommendation 14.5. The proposed offence would make it unlawful for an enforcement officer to disclose any information acquired or gained through the execution of a warrant or the exercise of a warrantless power except in the performance of the officer's duty: chapter 14, para 14.18.

¹⁷⁷ In accordance with the Evidence Act, s 69.

¹⁷⁸ Chapter 10, recommendation 10.1.

¹⁷⁹ Chapter 10, para 10.27.

privilege and outline how a privilege claim may be made;¹⁸⁰

- where the production order includes confidential legal, religious or medical information held by the relevant professional, the enforcement agency should provide the recipient of the notice with a reasonable opportunity to claim privilege in any material to which the production order relates, on behalf of the entitled person;¹⁸¹
- a privilege claim should be particularised by the person making the claim, by providing the enforcement agency with an itemised list of the material specified in the production order that is claimed to be privileged;¹⁸²
- where a privilege claim is made, the recipient of the production notice must produce the material claimed to be privileged to the court for purposes of determination of the privilege claim;
- where the enforcement agency considers that the privilege claim is unlikely to have any substantive basis, the enforcement agency should be able to accelerate the process by applying to the court for determination of the privilege claim as soon as reasonably practicable;¹⁸³
- where a privilege claim is upheld by the court, the material determined to be privileged should be returned to the recipient of the production order;
- where a privilege claim is not upheld by the court, the court should order that the material in question be delivered to the enforcement agency.

RECOMMENDATION

> Continued next page

12.29 The privilege procedures recommended for the exercise of enforcement powers should be adapted for the proposed production order regime, including the following key elements:

- the production order should contain a notice on the availability of each privilege and outline how a privilege claim may be made;
- where the production order includes confidential legal, religious or medical information held by the relevant professional, the enforcement agency should provide the recipient of the notice with a reasonable opportunity to claim privilege in any material to which the production order relates, on behalf of the entitled person;
- a privilege claim should be particularised by the person making the claim, by providing the enforcement agency with an itemised list of the material specified in the production order that is claimed to be privileged;
- where a privilege claim is made, the recipient of the production notice must produce the material claimed to be privileged to the court for purposes of determination of the privilege claim;
- where the enforcement agency considers that the privilege claim is unlikely to have any substantive basis, the enforcement agency should be able to accelerate the process by applying to the court for determination of the privilege claim as soon as reasonably practicable;

180 Compare with recommendation 12.5.

181 Compare with recommendation 12.6.

182 Compare with recommendation 12.14 Where the circumstances preclude adequate particularisation, the claimant should be able to apply to the court for relief or directions.

183 Compare with recommendation 12.16.

RECOMMENDATION

- where a privilege claim is upheld by the court, the material determined to be privileged should be returned to the recipient of the production order;
- where a privilege claim is not upheld by the court, the court should order that the material in question be delivered to the enforcement agency.

CH 1

CH 2

CH 3

CH 4

CH 5

CH 6

CH 7

CH 8

CH 9

CH 10

CH 11

CH 12

CH 13

CH 14

CH 15

CH 16

Chapter 13

POST-EXECUTION PROCEDURES



Chapter 13

Post-execution procedures

INTRODUCTION 13.1 Where the exercise of a search power by an enforcement officer results in the seizure of evidential material, a number of issues relating to the seized item fall for consideration. In chapter 6 we dealt with those matters that arise during the execution of a search power. We recommended that the enforcement officer should give an inventory of items seized to the occupier of the place searched and that provision should be made for notifying the occupier of the exercise of a search power if he or she was not present at the time.¹

13.2 This chapter is concerned with three particular issues that arise after the search power has been exercised:

- access to items seized in the course of the exercise of the search power;
- retention, return or disposal of evidential material;
- access to documentation relating to the application for a search warrant or the exercise of a warrantless search power.

We do not include discussion of these issues as they relate to things seized and retained for safekeeping when a person is held in police custody,² or the seizure of articles for the purposes of forfeiture under specific statutory provisions – for example, Part 14 of the Customs and Excise Act 1996, sections 255 to 256 of the Fisheries Act 1996 and section 134(3) of the Biosecurity Act 1993. Forfeiture under those regimes should continue to be dealt with by way of discrete procedures and not be subject to the generic regime proposed in this chapter.

ACCESS TO SEIZED ITEMS THAT ARE RETAINED

Current law

13.3 Access to property that has been seized pursuant to the exercise of a search power is generally confined to the relevant enforcement officers and others associated with an investigation, such as forensic experts. Most search and seizure regimes make no provision for access to seized items by the person from whom the property was taken, though the Proceeds of Crimes Act permits the person to whom a production order is addressed to inspect and copy items retained by the police.³

¹ See chapter 6, recommendation 6.31.

² Police Act 1958, s 57A contains its own code for the return or disposition of such property.

³ See, for example, Proceeds of Crime Act 1991, s 71(2).



- 13.4 With some exceptions, legislation in other jurisdictions is also largely silent on the issue of access to items seized under a search power. In the United Kingdom, where a seized item is retained by the police, the person from whom it is seized or someone acting on his or her behalf is to be permitted access to it under police supervision unless there are reasonable grounds for believing that to allow such access would be to prejudice that investigation or any other investigation.⁴ The legislation also provides for the police to photograph or copy the thing seized and to provide a copy to the person who had custody of it upon request.⁵ In Canada, a person seeking access to seized material must apply to the court for permission to examine the detained item.⁶
- 13.5 The person from whom an item has been seized pursuant to a search power may have good reason for seeking access to it while it is retained by the enforcement agency. For example, the item seized may be a computer or a record that is required for legitimate business purposes; or it may consist of documents that relate to the matter an enforcement officer is enquiring into, and access is necessary to enable the person to recall their contents so as to be able to answer the enforcement officer's questions. While it may be argued that providing access to documents for the purpose of refreshing the person's memory provides the opportunity for him or her to concoct a story that may hamper the investigation or subsequent trial, that is not, in itself, a reason to deny access to documents in which he or she may have had a role in creating or some other legitimate interest.
- 13.6 The absence of statutory provisions dealing with the issue does not mean that the person from whom items are seized is unable to gain access to them. Arrangements made between the enforcement agency and the person concerned are not uncommon; the agency may be satisfied with retaining a copy of seized documents and returning the original, or providing the person with a copy, or allowing him or her to inspect the items seized for the purpose of refreshing memory.
- 13.7 Whilst working arrangements may generally suffice to provide access to seized items, we do not believe that the matter should be simply left to the parties to resolve. There should be a simple process governing access that recognises the needs of the person from whom the material was seized and the enforcement agency's interest in that material. Following seizure and up until the commencement of criminal proceedings, the process should include the following elements:
- the person from whom an item is seized should be able to apply to the enforcement agency holding the seized item for reasonable access to it; such access should include the right to copy a document or other information;
 - the enforcement agency may agree to the access on suitable conditions, or it may refuse access on the grounds that to permit it would be likely to prejudice the maintenance of the law, including the prevention, investigation and detection of offences;

4 Police and Criminal Evidence Act 1984 (UK), s 21.

5 Police and Criminal Evidence Act 1984 (UK), s 21(4)-(8).

6 Criminal Code RSC 1985 c C-46 (Can), s 490(15).

- where the enforcement agency refuses access, or the person from whom the item was seized does not accept the conditions imposed, that person should be able to apply to the court for an order permitting access.
- 13.8 We consider, however, that any regime permitting access to seized items should apply only to those from whom the items were seized, or someone with an interest in the property that would otherwise entitle them to possess it. Access to a seized item should not otherwise be available to a person who has no recognisable interest in or entitlement to the property, because of the potential to prejudice ongoing law enforcement investigations.
- 13.9 Once a prosecution has been commenced with the laying of an information, access to seized items that may be used in evidence should be determined under the rules relating to criminal disclosure. The Criminal Procedure Bill, currently before Parliament, codifies those rules. Of particular relevance are clauses 34 and 46 which provide:
- the prosecutor must allow the defendant to inspect any exhibit in the case that is in the possession or under the control of the prosecutor;
 - if the exhibit is reasonably capable of reproduction, the prosecutor is to provide a copy to the defendant;
 - the defendant's inspection of the exhibit is subject to conditions which the prosecutor or the court imposes;
 - any conditions imposed by the prosecutor are confined to those considered necessary to ensure the exhibit's security and integrity and, where it is needed for ongoing use for law enforcement purposes, ensuring it can continue to be used for those purposes;
 - where the exhibit is needed on an ongoing basis for enforcement purposes and imposing conditions would not enable the inspection to take place without prejudicing ongoing law enforcement, the prosecutor may refuse to allow the defendant to inspect the exhibit;
 - either the defendant or the prosecutor may apply to the court for an order as to whether the exhibit may be inspected and any conditions that will apply to the inspection.
- 13.10 In terms of the rules, an inspection no doubt includes forensic examination and analysis, subject to any reasonable conditions imposed by the prosecution to preserve the evidential integrity of the item.
- 13.11 In our view, the Criminal Procedure Bill provides an appropriate procedure for a defendant's access to seized items that are prosecution exhibits, with adequate safeguards for the legitimate interests of both the prosecution and the defence. We do not think that anything further is required.

RECOMMENDATIONS

> Continued next page

- 13.1 The person from whom an item is seized pursuant to a search power, and anyone else claiming to be entitled to it, should be able to apply to the enforcement agency that is holding the item for reasonable access to it at any time before an information has been laid.

RECOMMENDATIONS

- 13.2 The enforcement agency should be able to impose conditions on access or refuse access if it would be likely to prejudice the maintenance of the law.
- 13.3 The applicant may apply to the court for an order permitting access where the applicant does not accept the conditions imposed, or where the enforcement agency refuses the request for access.
- 13.4 Access to seized items once an information has been laid should be determined under the rules relating to criminal disclosure.

RETENTION, RETURN OR DISPOSAL OF SEIZED MATERIAL

Current law

- 13.12 For most police investigations, the disposition of items seized under a search warrant is governed by section 199 of the Summary Proceedings Act 1957. That provision applies to things seized upon the execution of a search warrant issued under s 198:
 - anything seized is to be retained in the police officer's custody until disposed of under the section, except when it is being used in evidence or is in the custody of the court (subsection (1));
 - where a forged bank note, counterfeit coin or other associated thing is seized, an application is to be made to the court for an order that it be "forfeited, defaced, or destroyed" (subsection (2));
 - following proceedings for an offence relating to the thing seized, the court may order that it be "delivered to the person appearing to the court to be entitled to it, or that it be otherwise disposed of in such manner as the court thinks fit" (subsection (3)(a));
 - the police officer may, at any time, return the item to the person from whom it was seized, or apply to the court for an order as to its disposal (subsection (3)(b));
 - if proceedings for an offence relating to the item are not brought within a period of three months from the date of seizure, any person claiming to be entitled to the item may apply to the court for an order that it be delivered to him or her (subsection (3)(c));
 - the operation of an order made under the section is suspended until the time for an appeal has expired, or until any appeal is determined (subsection (4)).
- 13.13 The restitution of property other than items seized under a search warrant is dealt with separately. Where property is found in the possession of someone who is subsequently convicted of an offence, the court may order its delivery "to the person who appears to the court to be entitled thereto."⁷
- 13.14 The disposal of property that is in the possession of a police officer – for example, abandoned or found property – that is not the subject of either of the above provisions is dealt with under the Police Act 1958. Where there is doubt about entitlement, or where two or more people claim to be entitled to possession, a police officer may apply to the court for an order as to its disposal. The court may either order its delivery to the person or persons entitled to possession, or

⁷ Crimes Act 1961, s 404(1).

if neither can be ascertained, the court “may make such order with respect to possession of the property as [it] thinks fit.”⁸ Finally, property that has come into the possession of a police officer and is unclaimed after three months may, by direction of the Commissioner, be sold by public auction.⁹

- 13.15 There are a number of provisions in other search warrant regimes relating to the disposal of seized property. Some simply apply or incorporate the provisions of section 199 of the Summary Proceedings Act 1957;¹⁰ other regimes have separate provisions, elements of which appear to have been drawn from the Summary Proceedings Act model.¹¹ The Summary Proceedings Act regime has also been applied to warrantless seizure powers.¹²

Problems with the current law

- 13.16 The present legislation relating to the disposal of seized items is couched in largely permissive and discretionary terms. This has provided a generally workable framework for day-to-day operational law enforcement and for the courts. However, its vagueness and permissiveness does not provide clear guidance to enforcement agencies on their obligations with respect to seized property and there are also several problem areas with the present law.
- 13.17 First, pursuant to section 21 of the Bill of Rights Act, enforcement agencies are obliged to make reasonable inquiries to ascertain whether retaining a seized item is justified, and to return such items forthwith when it is clear that it is not.¹³ However, neither section 199 nor the other enactments is drafted in those terms: in the absence of a court order, it appears to be left to the discretion of the enforcement officer whether to return an item, and it places the onus on a person claiming to be entitled to the property to apply to the court for its return.
- 13.18 Secondly, existing provisions are silent as to the grounds upon which an application for return may be made, or the basis upon which the court may make the order. In particular, there is no distinction drawn between an application made before charges are laid and an application made after charges are laid; nor is there a distinction between disposal prior to conviction and disposal at the end of proceedings resulting in a conviction or acquittal.
- 13.19 Thirdly, there is no consistency between the provisions relating to post-seizure procedures following the execution of a warrant, and the procedures following the exercise of a statutory power of search and seizure without warrant. For the most part, legislation authorising the exercise of warrantless powers does not provide for post-seizure procedures.

8 Police Act 1958, s 58(1).

9 Police Act 1958, s 59(1). Unclaimed perishable goods may be disposed of at any time. A separate regime exists for the disposal of firearms; see Arms Act 1983, ss 65 and 70.

10 See, for example, Animal Products Act 1999, s 97; Human Assisted Reproductive Technology Act 2004, s 72; Wine Act 2003, s 68.

11 See, for example, Films, Videos, and Publications Classification Act 1993, s 118; Financial Transactions Reporting Act 1996, s 51; Gambling Act 2003, s 345; Motor Vehicle Sales Act 2003, s 139; Resource Management Act 1991, ss 336, 337.

12 See, for example, Climate Change Response Act 2002, s 45(b); Hazardous Substances and New Organisms Act 1996, s 120(a); Human Assisted Reproductive Technology Act 2004, s 72; International Energy Agreement Act 1976, s 9(3); Prostitution Reform Act 2003, s 28(4).

13 *Wilson v New Zealand Customs Service* (1999) 5 HRNZ 134.

- 13.20 Fourthly, there is no consistency between section 199 and a range of other statutory provisions. These other provisions vary in their detail, and many of the differences between them seem to be more the result of historical accident than deliberate policy choice. The result is that the law in this area (as in many other areas of entry, search and seizure) is diffused, inaccessible and incomplete.
- 13.21 A specific example of this is the overlap between section 199 of the Summary Proceedings Act 1957 and the related provisions of section 59 of the Police Act 1958 that outline the procedure governing the disposal of unclaimed property in the hands of the police. While section 59 is confined to unclaimed property and is arguably intended to apply only to lost or abandoned property, it is written in general terms and appears to extend to seized property as well. However, it is written in different terms from section 199(3). The overlap and inconsistency between the two sections needs to be addressed.
- 13.22 Finally, the inclusion in section 199(2) of the Summary Proceedings Act of a specific provision concerning the disposal of forged bank notes, counterfeit coin and associated paraphernalia is somewhat peculiar. Forfeiting or disposing of unlawful or prohibited items is generally dealt with elsewhere in the statute book in the context of the particular statutory provision, where it properly belongs.

Retention, return or disposal of property prior to conviction

- 13.23 Existing legislation with respect to returning and retaining seized property has to some extent been supplemented by the common law,¹⁴ but there is a dearth of authority as to the basis on which an enforcement agency should keep seized property for investigative purposes, the length of time it can be retained and how, in the absence of a conviction, it is to be disposed of or returned.

Overseas legislation

- 13.24 Legislation in overseas jurisdictions approaches the retention and disposition of items seized pursuant to a search power in a variety of ways. In Canada, there is a substantial measure of judicial control over most aspects of the disposal of seized property with detailed prescriptive procedures.¹⁵ In contrast, the United Kingdom legislation provides a very general framework for retention and disposition with limited court involvement.¹⁶ Other jurisdictions, however, codify certain general rules and provide for access to the court where required.
- 13.25 Overseas regimes generally provide more specific guidance as to required procedures than does New Zealand and a number of common features can be identified. The starting point in most enactments is that an enforcement officer who seizes an item may keep it for only so long as is necessary for investigative

14 For an enforcement agency's obligation to return seized property forthwith when it becomes clear that its retention is no longer justified, see *Wilson v New Zealand Customs Service*, above n 13. A person with an interest in seized property may take legal action through an application for judicial review of the issue or execution of a search warrant: see, for example, *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA); *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728 (CA), or through a remedy in tort or other proceeding: see, for example, *Williams v Attorney-General* [1990] 1 NZLR 646 (CA); *Wilson v New Zealand Customs Service*, above n 13.

15 Criminal Code RSC 1985 c C-46 (Can), ss 489, 489.1 and 490.

16 Police and Criminal Evidence Act 1984 (UK), s 22 which starts from the proposition that seized items may be retained "so long as is necessary in all the circumstances".

or evidential purposes and then it must be returned to the person from whom it was seized.¹⁷ Secondly, some jurisdictions require the seized items to be brought before, or a report made to, the issuing justice if the police officer seeks to retain them;¹⁸ in other jurisdictions a court order is to be sought if the item needs to be kept beyond a specified period for investigative purposes.¹⁹ Thirdly, where documents or other items (such as computer discs) that are capable of being copied are seized and retained, the enforcement agency is required to provide a copy on request.²⁰ Fourthly, where a seized item is retained beyond a prescribed period, usually a month, those claiming an entitlement to it may apply to the court for an order to deliver it to them;²¹ provision for access to the court where entitlement to the seized item is disputed is also commonly made.²² The retention of a copy of any document made by an enforcement officer is permitted.²³

Proposed approach to legislation on retention and disposition

- 13.26 We do not favour adopting the Canadian approach which places the responsibility for matters relating to retaining, returning or disposing of property seized under a warrant in the hands of the issuing justice or the court. First, this would be a significant change to the present procedure which, though it has a number of weaknesses, generally works well in practice. Secondly, we are unconvinced that the additional administrative processes required, and the likely added burden on court resources, would necessarily produce different or better results. It is also desirable to have similar procedures in respect of property seized without warrant; requiring a judicial officer to give directions as to the retention or disposition of such property when it is infrequently the subject of any dispute seems unnecessary.
- 13.27 In our view the principal responsibility for matters relating to the retention, return and disposition of seized items should remain with the relevant enforcement agency. That responsibility should be discharged in accordance with an enhanced legislative regime that provides guidance for day-to-day procedures supplemented by court orders when required. The court should retain the authority and the flexibility to deal with the diverse issues that arise, particularly with the disposal of seized items, and parties with an appropriate interest in the property should have recourse to a court process available to them.

17 Criminal Code RSC 1985 c C-46 (Can), s 489.1; Crimes Act 1914 (Cth), s 3ZV; Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 218; Police Powers and Responsibilities Act 2000 (Qld), s 691(1); Crimes Act 1900 (ACT), s 244(2); Search Warrants Act 1997 (Tas), s 20.

18 Criminal Code RSC 1985 c C-46 (Can), s 489.1(1)(b); Crimes Act 1958 (Vic), s 465B(1); Magistrates' Court Act 1989 (Vic), s 78(2).

19 Crimes Act 1914 (Cth), s 3ZW; Police Powers and Responsibilities Act 2000 (Qld), s 695 (unless a prosecution has been commenced, or in the case of particular types of evidence such as prohibited items); Crimes Act 1900 (ACT), s 245 (in respect of items seized without warrant in certain circumstances). In Canada, even if retention is initially authorised by the issuing justice, a further application must be made after three months, on notice, for an order authorising retention for a further period: Criminal Code RSC 1985 c C-46 (Can), s 490(2).

20 Police and Criminal Evidence Act 1984 (UK), s 21(4); Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 217 (police officer is required to permit inspection, or allow copy to be made of seized documents); Search Warrants Act 1997 (Tas), s 12; Crimes Act 1900 (ACT), s 202.

21 Criminal Code RSC 1985 c C-46 (Can), s 490(7), (10); Police Powers and Responsibilities Act 2000 (Qld), ss 692 and 693; Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 218.

22 Police (Property) Act 1897 (UK), s 1; Criminal Code RSC 1985 c C-46 (Can), s 489.1; Crimes Act 1914 (Cth), s 3ZV; Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 219 (application may be made at any time); Police Powers and Responsibilities Act 2000 (Qld), s 694; Crimes Act 1900 (ACT), s 244; Search Warrants Act 1997 (Tas), s 20.

23 Criminal Code RSC 1985 c C-46 (Can), s 490(13); a certified true copy is admissible as if it were the original: subs (14).

Retention for evidential or investigative purposes

- 13.28 Subject to any court order to the contrary, an enforcement agency should be able to retain any item seized under a search power where the item is required for the purposes of a criminal investigation, or for use in evidence. This authority is presently provided for in a number, but not all, search warrant regimes.²⁴

Return where photograph or copy would be sufficient

- 13.29 It is not, however, necessary to keep every seized item that may be evidential material. Often a photograph or a copy of that item will suffice to meet law enforcement and court purposes, enabling it to be returned. This proposition has been recognised in Queensland legislation, which imposes a duty on an enforcement officer to minimise the need to retain seized items required as evidence wherever possible.²⁵ Similarly, the Police and Criminal Evidence Act directs that a seized item may not be retained for use as evidence, or for examination or investigation, “if a photograph or copy would be sufficient for that purpose”.²⁶
- 13.30 Whilst it may be argued that this tends to infringe the best evidence principle, the formality of the best evidence rule has been substantially ameliorated to the point where it has now “lost its title to be regarded as a general principle of the law of evidence”.²⁷ Indeed, photographs of things that would otherwise be produced as exhibits and photocopies of documents are commonly received by our courts as evidence in criminal cases. We note that this development in the common law is implicitly recognised in the provisions of the recently enacted Evidence Act 2006.²⁸
- 13.31 Having an alternative to retaining an item has advantages for both the enforcement agency and the person from whom the item was seized. The enforcement agency is relieved of the responsibility for the care, custody and later disposal of the item and benefits from simpler procedures for its production in evidence; the person from whom it was seized benefits from its early return.
- 13.32 However, there will be cases where retaining the item will be necessary to preserve its evidential integrity, for forensic examination or analysis or simply because the agency considers that its return may prejudice a successful prosecution. A number of enforcement agencies with whom we have consulted

24 Animal Products Act 1999, s 97; Conservation Act 1987, s 46(1); Reserves Act 1977, s 95(1); Summary Proceedings Act 1957, s 199(1); Trade in Endangered Species Act 1989, s 39B(1); Wine Act 2003, s 68 all contain such a provision which is absent in other regimes.

25 Police Powers and Responsibilities Act 2000 (Qld), s 691(2) provides as follows:
“If the thing is evidence of the commission of an offence and a police officer considers it appropriate, the police officer must take the steps reasonably necessary to minimise the need to retain the thing as evidence by, as soon as reasonably practicable –
(a) photographing the thing or arranging for it to be photographed; or
(b) arranging for any necessary test or examination of the thing; or
(c) gathering any other available secondary evidence in relation to the thing.”

26 Police and Criminal Evidence Act 1984 (UK), s 22(4).

27 Donald L Mathieson (ed) *Cross on Evidence* (looseleaf, LexisNexis, Wellington, 1996) para 1.43 (last updated October 2006), referring to *Garton v Hunter* [1969] 1 All ER 451 and *Clifford v Commissioner of Inland Revenue* [1964] NZLR 229, 234 (CA).

28 Evidence Act 2006, s 7 (fundamental principle that relevant evidence admissible); s 130 (offering documents in evidence without calling witness); s 133 (evidence produced by machine, device, or technical process).

have given examples of cases where the item seized has been returned to the owner and the prosecution has subsequently run into difficulties because questions have been raised as to the accuracy, authenticity or veracity of a copy or photograph of the item in question. In those circumstances the enforcement agency should be able to keep the item itself for investigative and evidential purposes. We do not favour a provision such as section 22(4) of the Police and Criminal Evidence Act 1984 (UK) that places an obligation upon the enforcement agency holding the seized item to return it. In our view, it should be at the discretion of the agency to determine whether the original seized item should be retained for evidential purposes.

Return where retention is no longer required

- 13.33 Where the seized item is no longer reasonably needed for the purposes of an investigation or as evidence in a prosecution, there should be a general obligation on an enforcement officer to return it to the person who appears to be entitled to its possession (who will often, but not always, be the person from whom it was seized). Where that person cannot be traced, or there is some doubt about who is entitled to possession, the enforcement officer should be able to apply to the court for directions as to how the property is to be dealt with. The court should have the flexibility to make any order that it thinks is appropriate in the circumstances.
- 13.34 We do not recommend that the property be returned to the person from whom it was seized (which is required at present under section 199 of the Summary Proceedings Act 1957) as in many cases, such as those involving the theft of property, burglary or receiving, the seized item will belong to someone else and a police officer is unable to return it to the owner in the absence of a court order. Returning seized items to the person who appears to be entitled to possession will provide the enforcement officer with wider authority to return property without the need for a court order, while at the same time preserving the ability to have the court determine the matter when it is necessary.

Retention where charges laid

- 13.35 When a prosecution has been commenced, the enforcement agency should be able to keep those seized items that are relevant to a charge until the proceedings are finalised. Should any issue arise as to the retention of the items seized, or their production as evidence, it can be dealt with by the court.

Retention where charges not laid

- 13.36 A decision as to a prosecution is not always possible at the time of a seizure and may not be made for quite some time afterwards. The delay may be attributable to the complexity of the investigation, its incompleteness due to unavailability of a witness or a suspect, or a variety of other justifiable reasons. The delay may be lengthy. There is little existing statutory guidance as to how the seized property is to be dealt with, apart from a provision permitting an application to the court by a person who claims to be entitled to possession after three months from the date of the seizure.²⁹

²⁹ Summary Proceedings Act 1957, s 199(3)(c).

- 13.37 We believe that if, after a reasonable period, no prosecution is commenced, and the person appearing to be entitled to possess a seized item has requested its return, the onus should be on the enforcement agency either to return the seized item or to seek judicial authority for its continued retention. We recommend elsewhere that the ability of someone claiming an entitlement to possession of the item seized to apply to the court for its return should be retained.³⁰ Nevertheless, an enforcement officer should not hold seized items for a lengthy period when no proceedings are commenced simply by default, which the existing legislation permits. If an enforcement officer wishes to retain such an item that is relevant to an ongoing investigation for an extended period, there should be an independent review of why it should be retained when that is contrary to the property interests of the person entitled to claim possession of it.
- 13.38 Accordingly, we recommend that, if no prosecution has been commenced within six months of the seizure of an item and its return has been requested, the agency should be required to apply to a judge for authority to retain it. A six-month timeframe provides a reasonable time for an enforcement agency to advance its inquiries and to be able to satisfy the court if retention of the property seized is required for investigative or evidential purposes. It is also the period within which most summary prosecutions must be commenced.³¹
- 13.39 No obligation to apply to the court should arise unless a request for return has been made to and declined by the agency. It would be unduly onerous on enforcement agencies to require an application in the absence of a request, since the item's value may be such that the person has no interest in having it returned.
- 13.40 Nor should there be a requirement to seek a court order in respect of things other than the original item seized. For example, a court order should not be required for clones of computer hard drives, photographs taken, or video or audio recordings made by the enforcement agency.
- 13.41 We also do not think that the requirement should apply if the person entitled to possession of documents seized has a copy or clone of them. Should that person require the original item seized, he or she may apply to the court for its return, but the enforcement agency should not be obliged to do so.
- 13.42 Requiring judicial authority for keeping a seized item raises two issues: first, the criteria to be met before the authority can be given; and secondly, whether notice of the application for the authority should be given to a third party.
- 13.43 The stage an investigation will have reached by the time the authority needs to be sought will vary from case to case. In some instances an information may be about to be laid; in others, such as a police homicide investigation, inquiries may not have reached the point where a suspect has been identified. In such a case the relevance of a seized item to the outcome of the investigation may not be obvious. To provide for different types of investigation and to balance the ongoing law enforcement interest with that of a person claiming to be entitled to the seized item, the statutory threshold to be met before the authority can be given needs to be framed in general rather than prescriptive terms. Accordingly,

30 See recommendation 13.11.

31 Summary Proceedings Act 1957, s 14.

we recommend that the judge should simply be satisfied that retaining the seized item is reasonably required for investigative or evidential purposes.

- 13.44 The second issue is whether the application to the judge for an authority should be made on notice. To enable the judge to be satisfied that retention of the item is required, an applicant will have to disclose, in at least a general way, the current status of the investigation and its prospects. Disclosing the nature and progress of the investigation to the person from whom the item was seized, who may well be the subject of a future prosecution, would often prejudice law enforcement objectives. On the other hand, the alternative of withholding that information would render the notice largely meaningless. For those reasons we do not consider that any useful purpose would be served by a hearing on notice. Moreover, as we recommend below, the person claiming an entitlement to the seized property has the right to commence proceedings for its delivery or return at any time.
- 13.45 The judge considering the application should give a direction as to the retention or return of the item, and where authority to retain the item is given, the judge should be able to impose conditions, including a requirement to seek further directions if the enforcement agency wishes to retain the seized property beyond a future specified date.

Application to court by person with an interest for the return of seized property

- 13.46 The ability of a person claiming to be entitled to seized property to apply to the court for its return is an important safeguard against its unjustified retention. Thus, a person who claims to be entitled to possess an item seized under a search warrant issued under section 198 of the Summary Proceedings Act 1957 may apply to the court for its return or delivery not earlier than three months after the date of seizure. A similar provision exists in other enactments.³²
- 13.47 The Search and Search Warrants Committee recommended that the person from whom property has been seized, whether pursuant to a warrant or not, or any other person who claims to be entitled to it, should be able to apply to the court at any time for the immediate return of the property, subject to such conditions as the court may impose.³³ We have considered whether or not such an application should be permitted before the expiration of three months from the date of seizure, but like the Search and Search Warrant Committee we consider that the person from whom things are seized should not have to wait for a hearing or for a prescribed period to elapse before making such an application.
- 13.48 The person from whom articles were seized may have a legitimate and urgent need for their return – for example, where a firm's computer or records required for the running of the business have been taken. On the other hand, it is necessary to guard against applications being made for seized property to be returned that are designed to frustrate proper law enforcement investigations. To facilitate the first, but to prevent the second, the applicant should be required to meet a statutory threshold before an order for return should be made. Thus,

³² Summary Proceedings Act 1957, s 199(3)(c); Agricultural Compounds and Veterinary Medicines Act 1997, s 71(2); Films, Videos, and Publications Classification Act 1993, s 118(4); Financial Transactions Reporting Act 1996, s 51(4); Gambling Act 2003, s 345(4); Motor Vehicle Sales Act 2003, s 139(4); Resource Management Act 1991, s 337(4).

³³ Search and Search Warrants Committee *Search and Search Warrants: Final Report* (Wellington, 1988) 39.

the court should only be able to order the return of the item if it is satisfied that it would be contrary to the interests of justice for the enforcement agency to retain it, having regard to:

- the gravity of the alleged offence;
- any loss or damage to the applicant that is caused or likely to be caused by the retention of the item;
- the likely evidential value of the seized item having regard to any other evidential material held by the enforcement agency;
- whether the evidential value of the item can be adequately preserved by means other than its retention.

13.49 One qualification to this is required. There are some statutory provisions under which payment of a duty, tax or redemption payment may be demanded before a seized item is returned.³⁴ In these circumstances, the court would of course be precluded from ordering its return until such payment is made.

13.50 As to who should be able to make such an application, we see no need to depart from the statutory formulation that is presently used for this purpose, namely a person claiming to be entitled to possess the item.³⁵ This allows the person from whom the property was seized or any other person claiming an interest in it to apply to the court for the delivery of the item; in some cases this may result in more than one person being involved in the proceedings.

Competing or unsubstantiated claims

13.51 Where a seized item is not to be produced in evidence, but there are competing claims as to its ownership, or an enforcement officer has doubts that a person claiming the return of the item can substantiate that claim, the enforcement officer should be able to apply to the court for directions as to how it is to be dealt with. Such a procedure is presently available and we recommend it be retained; it permits an enforcement officer to initiate a simple process for the resolution of claims to the seized item.³⁶

13.52 A number of decisions dealing with applications of this type illustrate the range of circumstances that give rise to an application.³⁷ Existing legislation is open to the criticism that it does not specify the considerations the court is required to take into account in resolving the competing claims. While that would be desirable, we have concluded that given the diversity of the situations that come before the court, prescribing the criteria the court should consider in reaching a decision would often be limiting and in some cases unhelpful. The courts have

34 For example, duty payable under the Customs and Excise Act 1996, ss 222 and 229, redemption payments under the Conservation Act 1987, s 45(7); or payments to the Crown under the Fisheries Act 1996, s 256.

35 Summary Proceedings Act 1957, s 199(3)(c); Police Act 1958, s 58(1).

36 Films, Videos, and Publications Classification Act 1993, s 118(3); Financial Transactions Reporting Act 1996, s 51(3); Gambling Act 2003, s 345(2); Motor Vehicle Sales Act 2003, s 139(2); Resource Management Act 1991, s 337(2); Summary Proceedings Act 1957, s 199(3)(b).

37 See, for example, *Jury v Police* (1999) 17 CRNZ 644 (seized car claimed to be owned by the appellant bore only a superficial resemblance and contained parts from other vehicles); *Brunton v Darke* [2003] DCR 502 (sexual aids and paraphernalia in possession of person convicted of rape); *Police v Barker* [2004] DCR 63 (allegedly stolen items in possession of convicted receiver, but unrelated to charges on which he was convicted); *Iorns v Wang* [2004] DCR 830 (dispute between two parties as to ownership of car seized by the police); *R v Collis* (1990) 5 CRNZ 445 (CA) (claim by convicted drug offender that money found in his possession should be returned as it was not subject to forfeiture).

demonstrated the ability to determine applications of this type by recourse to general common law principle and we see no need to change that.³⁸

13.53 Where someone applies to the court for seized property to be returned, or an enforcement officer applies to keep or dispose of the item, the court should be able to make one of the following orders:

- that the item be destroyed or forfeited (where there is statutory authority to do so);
- that the item be delivered to the person appearing to the court to be entitled to it;
- that the item be treated as unclaimed and disposed of as the court directs.

While existing legislation (such as section 199 of the Summary Proceedings Act 1957) vests the court with a discretion to order that the seized property “be otherwise disposed of as the Court thinks fit”, it appears from the reported cases that the range of orders is confined to the above. Accordingly, we think that the orders the court can make should be described in specific rather than general terms, as an unfettered discretion is not required.

RECOMMENDATIONS

> Continued next page

- 13.5 An enforcement officer should be able to retain any seized item that is required for investigative or evidentiary purposes unless a court has ordered its delivery to a person entitled to possession.
- 13.6 When a copy or photograph of a seized item will suffice for investigative or evidentiary purposes, the enforcement agency may, at its discretion, return the item to the person entitled to possess it.
- 13.7 When a seized item is no longer required for investigative or evidentiary purposes, the enforcement agency should return it to whoever appears to be entitled to possession.
- 13.8 If no prosecution has been commenced within six months from the date an item is seized, the enforcement officer should, upon request, either return it to the person entitled to possess it or apply to a judge on an *ex parte* basis for an order authorising its continued retention.
- 13.9 Recommendation 13.8 should only apply to original items seized and not to clones of computer hard drives, photographs, or video or audio recordings made or held by the enforcement agency. Such items should be able to be held by the enforcement agency without the need to apply to the court for an order for their retention.
- 13.10 Where an application to retain a seized item is made, and the judge is satisfied that retaining the property is reasonably required for investigative or evidential purposes, the enforcement officer should be authorised to retain it, subject to such conditions as the judge thinks fit.

38 See, for example, *New Zealand Insurance Co Ltd v Jaine* (1989) 5 PRNZ 101 (HC); *R v Collis*, above n 37; *Jury v Police* (1999), above n 37.

RECOMMENDATIONS

13.11 Any person claiming to be entitled to possession of a seized item should be able to apply to the court at any time for an order for its return. The court should make such an order only where it is satisfied that it would be contrary to the interests of justice for the enforcement agency to retain it, having regard to:

- the gravity of the alleged offence;
- any loss or damage to the applicant that is caused or likely to be caused by retaining the item;
- the likely evidential value of the seized item having regard to any other evidential material held by the enforcement agency;
- whether the evidential value of the item can be adequately preserved by means other than keeping it.

13.12 When a seized item is not to be produced in evidence but there are competing claims as to its ownership, or for any other reason an enforcement officer is uncertain as to whom the item should be returned, the enforcement officer should be able to apply to the court for directions.

13.13 When the court is considering an application for the disposition of a seized item, it should be able to make one of the following orders:

- that the item be destroyed or forfeited (where there is statutory authority to do so);
- that the item be delivered to the person appearing to the court to be entitled to it;
- that the item be treated as unclaimed and disposed of as the court directs.

Retention, return or disposal after criminal proceedings

Forfeiture orders

13.54 As indicated at the beginning of this chapter, specific forfeiture regimes dealing with the disposition or destruction of items independently of criminal proceedings fall outside the scope of the following discussion.

13.55 Section 199(3) of the Summary Proceedings Act 1957 allows the court to order the disposal of property in any way it thinks fit, but this does not include an order for forfeiture. The courts have consistently held that forfeiture may only be ordered where that is explicitly provided for by the legislature and that section 199 is not explicit enough in this regard.³⁹ It follows that, upon conviction, the power to order property that has been seized to be forfeited and presented in evidence is limited to three situations.

13.56 First, forfeiture can be ordered in relation to the proceeds of crime or instruments used to commit or facilitate the commission of crime under the Proceeds of Crime Act 1991.⁴⁰

³⁹ *R v Collis*, above n 37; *Jury v Police*, above n 37; *R v Clark* (1982) 2 DCR 19.

⁴⁰ Proceeds of Crime Act 1991, s 15.

- 13.57 Secondly, forfeiture of prohibited or unlawfully possessed items can be ordered under a variety of statutory provisions, including:
- section 202B(3) of the Crimes Act 1961 – following conviction for an offence of possession of an offensive weapon, knife or disabling substance in a public place;
 - section 69(1) of the Arms Act 1983 – following conviction for possession or use of a firearm or other weapon in breach of the Act;
 - section 32(1) and (2) of the Misuse of Drugs Act 1975 – following conviction for an offence under the Act;
 - section 236 of the Customs and Excise Act 1996 – following conviction of an offence under the Act forfeited goods are treated as “condemned” and may be disposed of as the Chief Executive of Customs directs;⁴¹
 - section 136 of the Films, Videos, and Publications Classification Act 1993 – following conviction for an offence against the Act;
 - sections 255A to 255D of the Fisheries Act 1996 – fish and fishing gear in respect of which an infringement offence or an offence is admitted or conviction entered are forfeited unless the court for special reasons relating to the offence orders otherwise;
 - section 233(2) of the Crimes Act 1961 – following conviction for possession of instruments for burglary.
- 13.58 Thirdly, a substantial number of statutes enable the court, following conviction, to order the forfeiture of items “relating to the offence”.⁴² Furthermore, under some enactments, in addition to ordering articles in respect of which the offence was committed to be forfeited, the forfeiture power extends to other seized items that are not linked to charges before the court.⁴³
- 13.59 The present law relating to the forfeiture of seized items appears to be generally sound and we do not propose any amendments. In our view, the issue of forfeiture is best considered in the context of the provisions of the enactment creating an offence, rather than in a generic search and seizure statute. Moreover, forfeiture orders in respect of seized items should only be made following conviction or otherwise where it is expressly ordered by statute.

Other disposition where forfeiture not ordered

- 13.60 A seized item that has been produced as evidence in a prosecution and is not subject to a forfeiture order should be returned by the enforcement officer to the person entitled to possession. Alternatively, the item should be the subject of an application to the court by either the enforcement officer (in terms of recommendation 13.12), or a person claiming to be entitled to its possession (in terms of recommendation 13.11), in which case the court should be able to make one of the orders set out in recommendation 13.13.

41 See New Zealand Law Commission *Forfeiture under the Customs and Excise Act 1996* (NZLC R91, Wellington, 2006) for a discussion of a number of provisions in the Customs and Excise Act 1996 relating to forfeiture.

42 Animal Products Act 1999, s 97(d); Crimes Act 1961, s 216E; Gambling Act 2003, s 363; Local Government Act 2002, s 169; National Parks Act 1980, s 61; Reserves Act 1977, s 95(6); Sale of Liquor Act 1989, s 183; Trade in Endangered Species Act 1989, s 39D; Trespass Act 1980, s 12(4); Wildlife Act 1953, s 70(3); Wine Act 2003, s 68(d).

43 Food Act 1981, s 34; Medicines Act 1981, s 85(1); Motor Vehicle Sales Act 2003, s 119.

RECOMMENDATIONS

13.14 Forfeiture of a seized item should only be ordered by the court where there is a specific statutory power to do so.

13.15 If a seized item produced in evidence is not forfeited, the enforcement officer should return to the person entitled to its possession, or it should be the subject of an application to the court by either the enforcement officer or a person claiming to be entitled to possession.

Items that may not be lawfully possessed

- 13.61 Property seized pursuant to a search power may include things that it is illegal to possess (referred to in this section as unlawful items). These are items the possession of which is, either generally or in certain circumstances, an offence. They include such things as controlled drugs, objectionable material, firearms and other weapons. Following seizure, and until a prosecution is finalised, retaining those items as evidential material can be dealt with in the same way as other seized items. Where a conviction results, the relevant legislation makes provision for the forfeiture or other disposal of the particular item.⁴⁴
- 13.62 However, the seizure of unlawful items will not always result in prosecution and conviction. The person to whom the item belongs may not be able to be located, or for other reasons may not be able to be prosecuted for the offence. Prosecution may not necessarily result in a conviction. In these circumstances, there must be adequate powers to allow for the disposal of such items. There are already a number of provisions that allow for this:
- section 70 of the Arms Act 1983 – seized firearms that are not the subject of a court order may be disposed of, without notice, as directed by the commissioner after being held for not less than 12 months;
 - section 199(2) of the Summary Proceedings Act 1957 – following a court order, forged banknotes and counterfeit coins may be forfeited and destroyed, without notice to the person from whom they were seized;
 - sections 116-118 of the Films, Videos, and Publications Classification Act 1993 – following a court order, objectionable material may be destroyed after notifying the person from whom it was seized.
- 13.63 There is no similar explicit provision to deal with controlled drugs and offensive weapons without prosecution and conviction, but we understand problems rarely arise. In the case of the former, if there is no one with a legitimate claim to possession their destruction or disposal presents no difficulty in practice. In relation to offensive weapons, as their carriage is only unlawful in certain circumstances, their destruction is not generally justified in the absence of a prosecution and conviction.
- 13.64 While existing provisions cover much of the ground, they adopt an inconsistent approach; most of them do not require notice to the person concerned, and they vary in terms of whether they require a court order before destruction or disposal.

⁴⁴ See para 13.57 above.

Some rationalisation is desirable. The low value of many unlawful items and the infrequency with which people from whom they are taken have any interest in their return, indicates that unless proceedings are already before the court, an order for their destruction in every case seems unnecessary.

- 13.65 Accordingly, where there is no specific legislative regime governing disposal as part of court proceedings,⁴⁵ we propose that an enforcement agency should have the authority to destroy an unlawful item after giving the person from whom the item was seized appropriate notice, or if notice cannot be given, after reasonable enquiries have been made to locate that person. In the absence of any objection, the item would be destroyed. In any case where there is an objection, or where for any reason a court order is desirable, an application should be made to the court in terms of recommendations 13.11 or 13.12.

RECOMMENDATION

13.16 Where an unlawful item has been seized and there is no legislation governing its disposal, or no court order has been made as to its disposal, an enforcement agency should have the authority to destroy it if notice has been given to the person from whom it was seized and that person has not objected to its destruction or, if notice cannot be given, after reasonable enquiries have been made to locate that person.

Perishable goods and seized items of no value

- 13.66 The disposal of seized items that are either perishable or of little intrinsic value is specifically dealt with in a number of enactments.⁴⁶ Responsibility for decisions as to disposal (by sale, destruction or other means) is typically vested in the chief executive of the relevant enforcement agency, an approach that is also reflected in overseas legislation.⁴⁷
- 13.67 Treating the disposal of perishable items and items of little or no value as a matter to be dealt with administratively is, in the Commission's view, a sound approach. We recommend a general provision authorising the chief executive of an enforcement agency to determine how perishable goods and seized items of negligible value should be disposed of, with the proviso that an application to the court for an order as to disposal can be sought in any case in terms of recommendation 13.12.

RECOMMENDATION

13.17 The disposal of seized items that are either perishable or of little intrinsic value should be vested in the chief executive of the relevant enforcement agency.

⁴⁵ For example, Films, Videos, and Publications Classification Act 1993, s 116.

⁴⁶ Conservation Act 1987, s 46(3); Fisheries Act 1996, s 212; Forests Act 1949, s 67S(2); Police Act 1958, s 59; Trade in Endangered Species Act 1989, s 40.

⁴⁷ See, for example, Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), ss 219(4) and 220(3).

Unclaimed seized items

- 13.68 Where the enforcement agency does not wish to retain the seized item, but after reasonable inquiry it is unable to locate the owner or person from whom the property was seized, there should be a provision for disposing of the property. This should be written in much the same terms as the current section 59 of the Police Act 1958. In our view, section 59 of the Police Act should itself be amended, as part of the current review of the Police Act, so that it is explicitly confined to lost or abandoned property. The procedures governing the disposal of seized property that remains unclaimed should be contained in the search and seizure statute we propose.

RECOMMENDATION

- 13.18 There should be a procedure available, similar to section 59 of the Police Act 1958, to provide for the disposal of unclaimed seized property. Section 59 of the Police Act 1958 should be specifically confined to lost or unclaimed property.

Relief from forfeiture

- 13.69 Some enactments providing for forfeiture also have processes for redemption, and third party relief from the effects of a forfeiture order. In many, but not all, instances the forfeiture penalty is an adjunct to a regulatory regime.⁴⁸ These processes serve the ends of justice where the forfeited items are of substantial value,⁴⁹ but are not necessary in most search and seizure regimes where the nature of the things liable to forfeiture, such as controlled drugs or other unlawful items, does not require the interests of third parties to be taken into account. We have concluded, therefore, that the need for procedures for redemption and relief from forfeiture is best determined as part of the policy framework of specific legislation, rather than being included in a generic statute.

RECOMMENDATION

- 13.19 Procedures for redeeming forfeited goods or relief from forfeiture should be made in the context of specific enactments rather than by way of a general statutory provision.

Suspending forfeiture orders

- 13.70 Where an order is made forfeiting or disposing of seized items, statutory provisions that suspend the operation of the order until the time for an appeal has expired, or where an appeal is filed, until it is determined, are not uncommon.⁵⁰ Not all enactments containing forfeiture powers make specific

48 Fisheries Act 1996, s 256 (relief and redemption); Proceeds of Crime Act 1991, s 18 (third party relief from forfeiture).

49 Under the Fisheries Act 1996, ss 255A to 255D, fish, the proceeds of sale of fish, illegal fishing gear and quota may be forfeited; and under the Proceeds of Crime Act 1991, s 15, a forfeiture order may be made in respect of any property, including real property, which is either the proceeds of a serious or drug dealing offence, or which is used to facilitate the commission of the offence.

50 Summary Proceedings Act 1957, s 199(4).

provision for suspending the order pending any appeal. Where an appeal is filed in respect of either conviction or sentence, however, there is sometimes the possibility that the outcome will have consequences for a forfeiture or disposal order. We consider, therefore, that a standard provision should be enacted suspending the operation of the order until the relevant appeal period has expired, or if an appeal is filed, until it is determined.

RECOMMENDATION

13.20 Whenever there is a statutory provision for the court to make an order forfeiting or disposing of seized property, or where forfeiture results from a conviction, provision should also be made suspending the operation of the order or forfeiture until the time for appeal has expired, and if an appeal is filed, until it is determined.

Retention of copy by enforcement agency

- 13.71 An enforcement officer will often copy or photograph items seized under a search power. Often the copy will be used for working purposes. In some cases, such as a complex fraud investigation, a significant amount of documentation may be scanned or otherwise stored electronically. Where the original seized item is retained for investigative or evidential purposes, it is returned by the enforcement officer or disposed of by way of court order once the investigation has concluded. Photocopies of documents, photographs, or electronically stored images of seized items are routinely retained, however, even after the original has been returned or disposed of.
- 13.72 In our view, an enforcement agency should be permitted to keep and file copies of items seized under a search power after the investigation has concluded. The property interests of the person from whom the original item was seized are satisfied with its return or other disposition and it is reasonable for the enforcement agency to retain, and ultimately to archive, a copy as part of the official record of the investigation. Occasionally, access to the retained copy may be needed for other investigations by the enforcement agency or in some cases for appeals, subsequent official inquiries, or applications for the exercise of the prerogative of mercy. While it is possible that personal privacy interests may be implicated in some cases, overall the retention of a copy of seized objects by the enforcement agency is justified by the broader law enforcement and justice interests.
- 13.73 To the extent that privacy interests do arise, we consider that they are sufficiently protected by the recommendation later in this report that it should be an offence for a law enforcement officer to disclose information acquired through the exercise of a search power, otherwise than in the performance of his or her duty.⁵¹
- 13.74 Statutory provision authorising an enforcement agency to retain a copy or photograph of any item seized under a search power is not generally made in overseas jurisdictions, though we note that such a provision is contained in the

⁵¹ Chapter 14, recommendation 14.5.

Canadian Criminal Code in respect of documents.⁵² To avoid doubt, we recommend a provision be enacted authorising an enforcement agency to retain a copy, replication or photograph of any seized item.⁵³

RECOMMENDATION

13.21 For the avoidance of doubt, statutory provision should be made authorising an enforcement agency to retain a copy or photograph of any seized item for its official records (so that, for example, investigations of applications for the prerogative of mercy can be properly undertaken), even where the original has been returned or disposed of pursuant to a court order.

ACCESS TO WARRANT APPLICATIONS OR REPORTS

- 13.75 Search and seizure regimes do not generally make specific provision for access to warrant applications, or for access to a report on the exercise of a warrantless search power. There have been some recently enacted exceptions to this in the case of some interception and surveillance warrant powers,⁵⁴ but such documentation is accessible under the Official Information Act 1982 supplemented by the common law where criminal proceedings result.⁵⁵ Overseas, access to warrant applications is left largely to the common law,⁵⁶ with prosecution disclosure being governed by statute in the United Kingdom.⁵⁷
- 13.76 In New Zealand, access to warrant applications and reports on the exercise of warrantless powers will shortly be governed entirely by statute with the enactment of the regime providing for prosecution disclosure in the Criminal Procedure Bill presently before Parliament. The procedures in the Official Information Act 1982 and the Criminal Procedure Bill are straightforward and both seem to adequately balance the interests of the individual in gaining access to information relating to the exercise of search powers by enforcement officers with the relevant law enforcement interests.⁵⁸
- 13.77 With the existing and proposed regimes together providing a robust framework for access to warrant applications and reports on the exercise of warrantless powers, we do not see any reason to recommend the enactment of a separate code for that purpose.

52 Criminal Code RSC 1985 c C-46 (Can), s 490(13) and (14).

53 The provision should also make it clear that it overrides the Copyright Act 1994 with respect to infringement of copyright.

54 Crimes Act 1961, s 312H (interception warrant); Customs and Excise Act 1996, s 38M (search and viewing warrant); Misuse of Drugs Amendment Act 1978, s 20 (interception warrant); Summary Proceedings Act 1957, s 200M (tracking device warrant); Telecommunications (Residual Provisions) Act 1987, ss 10N and 10P (call data warrant).

55 Official Information Act 1982, s 12; *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA); *R v Mason* [1976] 2 NZLR 122 (CA); *Police v Nimmo* (1999) 16 CRNZ 491 (HC).

56 See, for example, *Attorney-General of Nova Scotia v MacIntyre* (1982) 65 CCC (2d) 129 (SCC).

57 Criminal Procedure and Investigations Act 1996 (UK), s 3.

58 The Official Information Act 1982, s 6(c), permits the withholding of information “likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences”. The Criminal Procedure Bill, cl 31 contains a similar provision for withholding information otherwise subject to prosecution disclosure.

RECOMMENDATION

13.22 Access to warrant applications and to reports on the exercise of warrantless search powers should be governed by the Official Information Act 1982 and the law relating to prosecution disclosure in criminal cases.



Chapter 14

REMEDIES AND IMMUNITIES

Chapter 14

Remedies and immunities

INTRODUCTION 14.1 “Ubi ius, ibi remedium”, the simple Latin aphorism, “where there’s a right there is a remedy”, is an important truism of the legal system. Rights are often meaningless if there are no remedies for their breach. Conversely, the existence of remedies for breaches of rights often encourages rights to be observed and on other occasions provides some measure of vindication if breaches have occurred. Since much of this report has been centred on designing a scheme to protect the right against unreasonable search and seizure entrenched in section 21 of the Bill of Rights Act, the question of remedies requires attention. In this chapter we briefly consider existing remedies where law enforcement officers carry out unlawful forms of search, seizure, and surveillance and provide our recommendations on how remedies ought to be dealt with in our proposed statute.

14.2 In summary, our views are that:

- the statute that we propose should say as little as possible about remedies, leaving it to the courts to respond to breaches of common law, the Bill of Rights Act, and our proposed statute through currently available remedial techniques;
- the current statutory exclusionary rules in respect of evidence gathered through unlawful interceptions should be repealed, with all questions of admissibility to be determined in accordance with the Evidence Act 2006;
- consideration should be given to whether it is desirable to extend criminal sanctions to cover unlawfully possessing and using tracking and visual surveillance devices – in this report we express no definitive view on this issue;
- consideration should be given to providing immunity to judicial officers and enforcement officers (and others) who authorise or undertake unlawful search or seizure, yet do so in good faith.

REMEDIES FOR UNLAWFUL CONDUCT: THE CURRENT POSITION

14.3 At present, where enforcement officers carrying out search, seizure and surveillance activities breach a person’s privacy rights, several types of remedy may be available:

- criminal proceedings;
- monetary compensation (a range of torts and Bill of Rights Act compensation);
- exclusion of evidence;

- injunction, declaration and/or order for return;
- accident compensation.

Criminal law

- 14.4 A number of enactments criminalise unlawful interferences with privacy. Among others, there are prohibitions on intercepting of private communications by using an interception device; trespass onto land, or remaining on land, after having been warned off by the occupier; and harassment. Most of these criminal prohibitions are accompanied by an exception for enforcement officers, permitting them to undertake the prohibited conduct in certain well-defined circumstances and subject to conditions. If enforcement officers do not act in accordance with these conditions, they are open to criminal prosecution unless some relevant immunity applies.

Monetary compensation

- 14.5 Interferences with privacy can be remedied through the award of monetary compensation. At common law, numerous torts – largely centred on the vindication of bodily integrity or private property rights – provide compensatory relief. Among these are the torts of trespass (to person, land and property), assault, battery, conversion and the relatively new tort of invasion of privacy. Where a relevant tort has been established it can be remedied through the award of general, special and exemplary damages. Special damages are awarded where specific harm has arisen out of the tort and a specific quantifiable sum to repair that harm is calculable. General damages are awarded to recognise damage to the right itself, or the shock, distress, annoyance of the rightholder. Exemplary damages are awarded where the wrongdoer's actions were high-handed or deserving special condemnation.
- 14.6 Interferences with privacy that amount to a breach of section 21 of the Bill of Rights Act can also be vindicated through a claim for compensation. Where breach of section 21 involves an interference with a person's land, chattels or body, the breach will probably be compensable by a tort claim as well. Where both the Bill of Rights Act and a common law tort are relied on, the courts will not allow double recovery. Nevertheless, there is still some controversy as to whether the purpose of Bill of Rights Act compensation is different from that of tort law and whether, in consequence, there should be some extra amount awarded to mark the breach of the section 21 right.

Exclusion of evidence

- 14.7 At common law, a court has a discretion to exclude unlawfully obtained evidence (including evidence obtained pursuant to unlawful search and seizure activities) for unfairness. Exclusion for unfairness rarely occurs where unlawful search and seizure is in issue, because the courts have traditionally taken the view that real evidence (that is, evidence consisting of physical things such as a weapon,

drugs, or documents) of crime should almost always be admitted because its probative value is strong.

- 14.8 Some statutory provisions govern the admissibility of certain types of unlawfully seized evidence. In particular section 312M of the Crimes Act 1961 and section 25 of the Misuse of Drugs Amendment Act 1978 provide that (subject to some minor exceptions) evidence that has been directly or indirectly obtained through unlawfully intercepted private communication cannot be admitted at trial.
- 14.9 An interference with privacy that breaches section 21 of the Bill of Rights Act can result in evidence (including real evidence) obtained in consequence of that breach being excluded. Until 2002, the courts applied the so-called *prima facie* exclusionary rule, under which evidence obtained in breach of section 21 was presumptively excluded unless there was good reason to admit it. In 2002, the Court of Appeal abandoned this approach for the so-called *Shaheed* balancing approach,¹ under which exclusion is determined by reference to an open-ended set of factors, great weight being given to the seriousness of a breach of section 21. There are many cases both before and after *Shaheed* in which unlawfully obtained evidence has been held to have been obtained unreasonably for Bill of Rights purposes and excluded. A *Shaheed*-type approach was foreshadowed in the Law Commission's proposed Evidence Code, and is now given statutory force in section 30 of the Evidence Act 2006.

Injunction or declaration or order for return

- 14.10 A threatened or ongoing breach of privacy by enforcement officers can be restrained through injunction, or identified by a declaration, or reversed by an order for return of the unlawfully seized item(s). This remedy is particularly useful where a person is notified that a search is to occur or where a seizure has taken place of material that will take time to analyse, for instance when, say, documents or a computer is seized.

Accident compensation

- 14.11 Where a search or seizure causes physical injury to a person, the victim is entitled to claim compensation under the accident compensation legislation. A tort or Bill of Rights compensation claim seeking compensation for the physical injury will be barred, but a claim for exemplary damages will not be.

REMEDIES: RECOMMEND- ATIONS

- 14.12 In our view, the courts have shown themselves to be up to the task of developing and applying remedies where enforcement officers wrongfully interfere with a person's privacy. The courts' powers under common law and the Bill of Rights Act are more than adequate to provide sufficient vindication on a case-by-case basis, and also at a systemic level. Judges have also demonstrated a willingness to tailor a remedy to meet the circumstances of the particular case, and have identified a number of factors, such as the nature of the right, the seriousness and consequences of the breach, and any evidence of bad faith to assist in determining the appropriate remedy. Other than where it is necessary as part of

1 *R v Shaheed* [2002] 2 NZLR 377 (CA). The *Shaheed* approach has subsequently been refined by the Court of Appeal in *R v Williams* [2007] NZCA 52, with the Court emphasising that an unlawful search will normally be unreasonable.

a statutory reform package,² we recommend that remedies for unlawful search, seizure, interception or surveillance should continue to be developed by the courts and not incorporated into statute.

General approach

14.13 Consistent with a central theme of our report – that no one form of interference with privacy is necessarily more objectionable than another – we recommend that the framework for the granting of remedies for unlawful search and seizure should not differ depending on the type of law enforcement activity in issue. In each instance there should be a case-by-case assessment that concentrates on the seriousness of the interference, the purpose of the interference, the good (or bad) faith of the officials in question, the extent of the departure from the relevant statutory provisions, and the nature of the privacy interest interfered with. In light of the streamlining of core elements of the regimes which this report proposes (for example, a standardised approach to warrant requirements and the use of force), courts should be able to achieve a reasonable degree of consistency where remedies for unlawful search and seizure are sought, regardless of the type of search, seizure or surveillance in issue.

RECOMMENDATIONS

14.1

Remedies for unlawful acts arising from search, seizure and surveillance should continue to be developed by the courts and not incorporated into statute.

14.2

Remedies for unlawful search, seizure and surveillance should not differ depending merely on the type of search, seizure or surveillance in issue.

Repeal of section 312M Crimes Act 1961 and section 25 Misuse of Drugs Amendment Act 1978

14.14 In accordance with recommendation 14.2 above, we recommend the repeal of section 312M of the Crimes Act 1961 and section 25 of the Misuse of Drugs Amendment Act 1978. These provisions are anomalous. While perhaps seen as politically necessary in 1978 when the interception regime (then referred to as the listening device regime) was first introduced, it is hard to justify an inflexible strict exclusionary approach for unlawfully intercepted private communications, when for all other types of illegally obtained evidence admissibility is the subject of judicial discretion.³ We can see no principled difference between evidence obtained by way of unlawful interception on the one hand and evidence obtained through other forms of illegal search or seizure such as strip searches in public, forcible entry to private dwellings, and the use of tracking devices. In our view, like all unlawfully obtained evidence, the admissibility of evidence obtained through unlawful interception should be determined by application of the *Shaheed* balancing approach and/or the fairness discretion.⁴

2

For example, the Evidence Act 2006 which contains a code for evidence law and necessarily needed to address the proper approach to excluding unlawfully obtained evidence.

3

See Sentencing Act 2002, s 30.

4

R v Shaheed, above n 1; *R v Williams*, above n 1.

RECOMMENDATION

14.3 Section 312M of the Crimes Act 1961 and section 25 of the Misuse of Drugs Amendment Act 1978 should be repealed.

Use of criminal law to vindicate privacy?

- 14.15 As noted earlier, statute vindicates a number of aspects of privacy by criminalising unreasonable interference with it. Again, however, the statute book is inconsistent in this respect. In the field of surveillance, for example, Part 9A of the Crimes Act prohibits the use of interception devices to intercept private communications, while also providing special law enforcement exceptions. In contrast, the tracking device regime creates no criminal offences for unlawfully affixing, monitoring or removing a tracking device. It simply regulates some law enforcement agencies' use of such devices.
- 14.16 The protection of privacy through creating criminal offences is a significant topic that goes well beyond our terms of reference. It raises difficult issues affecting the relations between private citizens. Whether it should be an offence for one citizen to use new forms of surveillance on another, such as tracking devices and video surveillance, is not within the scope of this report.
- 14.17 We note that the desirability of criminalisation in this area is affected by the extent to which the objectionable conduct can be readily defined. It is a cardinal principle of criminal law that any offence be defined in terms that permit citizens to know the extent of their liability. In that regard, we believe that if wider criminalisation were considered appropriate, it would be reasonably straightforward to criminalise the use of tracking devices and visual surveillance devices so as to mirror the current interception devices prohibition. We doubt, however, that it would be as easy to create an offence of unreasonably interfering with another person's reasonable expectations of privacy to sit alongside the proposed surveillance device warrant regime set out in chapter 11. All of these reasons suggest that the wider issue of criminalisation is one that should be considered as part of a broad review of privacy protection in New Zealand.
- 14.18 In one respect, however, we consider that a specific offence should be enacted to protect the confidentiality of information acquired by enforcement officers when exercising a search power. The proposed offence would make it unlawful for that officer to disclose any information acquired or gained through the execution of a warrant or the exercise of a warrantless power except in the performance of the officer's duty. An existing example of the type of provision we have in mind is section 312K of the Crimes Act 1961 which prohibits the disclosure of lawfully intercepted private communications.
- 14.19 The Police expressed the view that such an offence was unnecessary as existing remedies dealing with inappropriate disclosures are sufficient. They regard information derived from the exercise of a search power as no different from other information acquired by police officers in the discharge of their duties and for which there is also an obligation of confidence. A breach of that obligation would be dealt with as a disciplinary offence or a breach of the code of conduct.

- 14.20 We accept that existing codes of conduct provide a remedy in the case of a police or other enforcement officer knowingly disclosing information derived from the exercise of a search power. However, we consider that the privacy implications arising from exercising search, seizure and surveillance powers require additional protection by way of a specific criminal offence for the wrongful disclosure of information derived from executing those powers. We note that it is not uncommon for legislation to contain provisions relating to the unlawful disclosure of information derived from the exercise of official duties and we recommend the enactment of such an offence.⁵

RECOMMENDATIONS

- 14.4 The extent to which conduct that unreasonably interferes with privacy expectations ought to be criminalised should be considered as part of a wider review of privacy protection in New Zealand.
- 14.5 It should be an offence for an enforcement officer to disclose information acquired through exercising a search or surveillance power, otherwise than in performing his or her duty.

IMMUNITIES: THE CURRENT POSITION

- 14.21 A final, and separate, issue concerns the extent of the immunities that should be enjoyed by those who authorise and those who carry out searches, seizures, interception and surveillance.
- 14.22 Immunities can, and do, vary enormously in scope. At its narrowest, immunity may simply mirror the extent of the statutory authority under which an enforcement officer may be acting: as long as the officer has acted within his or her power, then he or she will be immune from criminal or civil liability. An example of this is section 26(3) of the Crimes Act 1961. It may be desirable to articulate such an immunity in statute to ensure that the position of enforcement officers is transparent, but strictly speaking it is redundant. That is because the courts will always assume that a statute that authorises people to do particular acts is intended to immunise them from criminal or civil liability for acts done within the limits of that statutory authority. We do not recommend the repeal of these types of immunity, but nor do we see great merit in extending the number of such immunity provisions. We do not deal with this type of immunity any further in this chapter.
- 14.23 In its widest form, immunity completely exempts a person from liability regardless of the nature and extent of unlawfulness in issue and regardless of the protected person's belief in the lawfulness of the action in issue. This form of immunity is unusual and has traditionally been frowned upon. In New Zealand complete civil and criminal immunity is only enjoyed by the Sovereign and the Governor-General, while High Court and District Court judges enjoy complete civil immunity. Complete immunity is usually only justified in those cases where the harassment that unmerited law suits would involve substantially outweighs the likelihood that powers will be arbitrarily exercised and/or that the effects of the arbitrary use of the power will be irreversible.

⁵ Serious Fraud Office Act 1990, s 36(4); New Zealand Security Intelligence Service Act 1969, s 12A(4); Inland Revenue Department Act 1974, s 13(5).

Beyond the limited areas in which such immunity is currently provided, we do not see any justification for extending it, except that, for reasons outlined below, we recommend that complete civil immunity be extended to justices of the peace (JPs) and other authorised issuing officers when exercising their powers to issue warrants and orders authorising the exercise of search powers.

- 14.24 Between their widest and narrowest forms, immunities can confer immunity from criminal and/or civil liability for acts done in good faith but which were done unlawfully, because, for example, the judicial authorisation for the act was provided in error or in excess of jurisdiction, or the act exceeded the limits of the warrant that purported to authorise it, or the act was done in an unreasonable manner. In respect of this intermediate form of immunity, the current statute book adopts a haphazard and inconsistent approach. That is unsatisfactory since the liability of those involved in undertaking searches and seizures raises important points of principle that need to be addressed in a consistent way.
- 14.25 In relation to those exercising a statutory power, the picture is confused. In the first place, a set of general statutory provisions in the Crimes Act 1961 applies to all enforcement officers when executing a judicial process. Executing a judicial process includes conducting a search and/or seizure under a judicially authorised warrant; it does not include exercising warrantless powers of search or seizure. Section 26(3) of the Crimes Act 1961 provides that everyone who is duly authorised to execute a lawful warrant issued by a court or JP (and any assistant lawfully assisting him or her) is not liable under criminal and civil law in executing the warrant. Section 26(3) only covers warrants that have been lawfully issued, and the immunity is lost if the person executing the warrant acts with malice or in bad faith, knowing that the search was outside the purpose for which the warrant was issued.
- 14.26 Under section 27 of the Crimes Act 1961, a person who executes a warrant that was erroneously issued by a court (or by a person with jurisdiction to issue the warrant) is immune from criminal and civil liability. It therefore protects a person who executes a warrant that ought not, on the facts of the particular case, to have been issued; but immunity is dependent on the issuer of the warrant having general jurisdiction to issue the type of warrant in question.
- 14.27 Sections 28 and 29 confer immunity from *criminal* liability only. Immunity applies to a person who executes a warrant that a court or JP had no jurisdiction to issue, so long as the person acted in good faith, believing that the court or JP did have jurisdiction to issue the warrant, and the person who issued the warrant did so acting under colour of authority to do so. It also applies to a person who acts pursuant to an invalid warrant, if the act done would have been lawful had the warrant been valid and if, further, the person acted in good faith and (without culpable ignorance or negligence) believed the warrant was properly issued.
- 14.28 In addition, to these general statutory provisions, law enforcement officers whose enforcement powers are contained in their parent legislation will generally look to that legislation to regulate their personal liability. This is particularly important where the power is one that can be exercised without warrant, since the general Crimes Act provisions discussed in paragraphs 14.25 and 14.26 above do not apply.

- 14.29 In our 1997 report,⁶ the Commission set out an extensive compilation of the immunity provisions contained in about 200 statutes and noted that there was considerable variation over who was given protection, what form of protection they were given, what acts that the officers did were protected, and what prerequisites had to be met in order for them to rely on the immunity.
- 14.30 There appears to be no particular rationale for these variations. This is particularly so in terms of what an officer is immune from. Some statutory regimes simply provide that “no proceedings” shall be brought against an officer who has committed an unlawful act in good faith and purported execution of his or her powers, leaving open the question of whether “proceedings” refers to civil proceedings only, or criminal proceedings only, or both. Others provide that no officer shall be personally liable for acts done in good faith; again what form of liability is intended is not made clear. In some statutory regimes, however, the immunity provisions are explicit that both criminal and civil liability are excluded (so long as the officer has acted in good faith), only adding to the confusion over the proper interpretation of those provisions that are silent on the point.
- 14.31 We turn then to the position of people who perform tasks that assist in search or seizure or who analyse or examine items that have been seized (for example, forensic scientists, accountants, or members of the public required to assist). Few statutory regimes address the legal position of these people. At common law, where items have been unlawfully seized, those who interfere with the chattels of others without consent or lawful authority commit a range of torts, so the question of third party liability is a real one. Some of the few statutory provisions that deal with third parties are sections 26 to 29 of the Crimes Act 1961. Under them people who lawfully assist enforcement officers in executing a judicial process enjoy the same level of protection from civil and/or criminal liability as the officer him or herself. However, the scope of the provisions is narrow because while they deal with the position of those who assist in searching for and seizing items, they do not address the position of those who examine the items seized.
- 14.32 Finally, the position of the Crown is a vexed one. At common law the position is tolerably clear. The Crown is not directly liable in tort. It can only be sued vicariously as employer of the primary wrongdoer. It is a core principle of vicarious liability that the person for whose acts the employer is liable must themselves be liable in tort. So where the primary wrongdoer enjoys immunity, so too does the employer. The common law position was affirmed in *Baigent’s* case.⁷ In addition, section 6(5) of the Crown Proceedings Act 1950 expressly provides that the Crown is not liable in tort for unlawful acts of those who are discharging or who are purporting to discharge responsibilities of a judicial nature or responsibilities in connection with the execution of judicial process.
- 14.33 The novelty of the well-known *Baigent’s* case was the holding that, notwithstanding that an individual police officer had personal immunity under tort principles, and hence the Crown also enjoyed vicarious immunity, the Crown could nonetheless be directly liable to pay compensation if the officer’s acts amounted to a breach of section 21 of the Bill of Rights Act. In a number of

6 New Zealand Law Commission *Crown Liability and Judicial Immunity: A Response to Baigent’s Case and Harvey v Derrick* (NZLC R37, Wellington, 1997).

7 *Simpson v Attorney-General (Baigent’s Case)* [1994] 3 NZLR 667 (CA).

subsequent cases, awards for breach of section 21 have been made against the Crown on this basis.

IMMUNITIES: RECOMMEND- ATIONS

Justices of the Peace

- 14.34 At present, no action can be brought against a JP unless he or she has exceeded or acted outside jurisdiction.⁸ That prohibition provides a broad measure of protection to a JP. However, the courts have in recent decades expanded the concept of excess of jurisdiction, so as to include unreasonableness (a type of error of law going to jurisdiction). This means there is always the danger that in the future section 193 of the Summary Proceedings Act 1957 may be interpreted as providing limited protection for unlawful acts. In such circumstances the indemnity provision would be triggered. Under that provision,⁹ a JP can be indemnified for any act done in excess of, or without, jurisdiction, so long as he or she acted in good faith and in the belief that he or she had jurisdiction. Before the indemnity can be paid, approval must be obtained from a High Court judge. Insofar as criminal liability is concerned JPs enjoy limited protection.
- 14.35 In our 1997 report,¹⁰ the Commission noted that it had originally proposed to recommend that JPs enjoy the same level of immunity as High Court judges, but that during consultation that proposal was opposed. As a result, it was recommended that there be no change to justices' immunity. Reasons given for opposing the Commission's original proposal were a lack of training and experience, making a blanket exemption inappropriate; and the limited jurisdiction JPs exercise. In our view, with the important extension to their powers that we recommend in this report, the consequent increased potential for civil actions, and the increased level of training that we regard as a concomitant of any extension of powers, it is appropriate to revisit our 1997 recommendation.
- 14.36 In our view, there is no good reason why JPs, who act judicially in issuing warrants, should not enjoy the same level of protection from civil actions as District Court judges. In terms of section 119 of the District Courts Act 1947, District Court judges now have the same immunities as a High Court judge. In our view the nature of the exercise involved in determining whether to grant an application for a search warrant is such that the possibility of error is inevitable. While it is unfortunate for any individual to have his or her property searched and/or seized in circumstances where no warrant for the search or seizure ought to have been issued, various avenues of redress (for example, an order for return of seized items, exclusion of evidence, declaration, or an *ex gratia* payment) are available to counter many of the negative effects associated with such a search or seizure.
- 14.37 Exposing a JP to liability for the negative effects of a search or seizure carried out pursuant to a warrant that was unreasonably issued by him or her would have potential negative effects (such as discouraging some people from applying to be JPs, or making some JPs overly risk-averse in their approach to warrant applications) that outweigh the benefits associated with allowing them to be sued. In addition, it must not be forgotten that there is a range of mechanisms (other than damages claims) that allow aggrieved individuals to challenge judicial

⁸ Summary Proceedings Act 1957, s 193.

⁹ Summary Proceedings Act 1957, s 197.

¹⁰ New Zealand Law Commission, above n 6, paras 167-170.

decisions with which they are unhappy. The mechanisms include exclusion of evidence, appeal and judicial review.

- 14.38 Consistent with the general approach to judicial immunity in New Zealand, we recommend that JPs who issue warrants should have the same immunity as a judge.
- 14.39 Though the discussion above is confined to JPs, the reasons that justify their immunity with respect to the issuing of warrants extend to other authorised issuing officers. In chapter 4 we recommended that the pool of issuing officers should include authorised registrars and deputy registrars, and other appointees who have the requisite knowledge, skills and experience to issue search warrants. We think the immunities protecting JPs should also apply to those issuing officers.

RECOMMENDATION

- 14.6 Justices of the Peace and other issuing officers should have the same immunities as judges in respect of the issuing of warrants and orders authorising the exercise of search powers.

Enforcement officers

- 14.40 In our view, sections 26 to 29 of the Crimes Act 1961 provide good, but not sufficient, protection to officers charged with executing a search warrant. On the positive side, section 27 provides adequate protection in that where the issuing court or JP makes an error, the executing officer is not liable for that error. The problem with section 27, however, is that it does not go far enough. In particular, the concept of error is not free from doubt in light of current judicial approaches to immunity provisions. In addition, section 27 only applies where the court or JP had general jurisdiction to issue the warrant and simply erred in granting the application in the particular case.
- 14.41 Because modern courts tend to see any error of law as depriving an inferior tribunal or administrative authority of its jurisdiction to have issued an impugned warrant or order in the first place, there is a risk that a finding of unreasonableness or illegality could lead to a consequential finding of lack of jurisdiction. This raises the question whether it is right that the executing officer should, in such circumstances, be liable to pay compensation for any harm caused by the judicial officer's error. Indeed, the unavailability of immunity would potentially result in enforcement officers having to determine on a case-by-case basis whether the judicial officer had made an error of law before they acted on the warrant. That should not be their responsibility and is clearly undesirable.
- 14.42 In our view, enforcement officers should not be liable at common law or under the Bill of Rights Act where they obtain and execute a warrant in good faith. The whole purpose of the warrant regime is to place an independent third party between the citizen and the state. While primarily conceived of as a protection for the citizen, we think that where an independent judicial officer sanctions the exercise of coercive power that should also be regarded as a form of protection for the enforcement officers who obtain and execute the warrant. There are two

qualifications. First, where the officers have knowingly provided false information to the judicial officer, no reasons of public policy can support immunity. Secondly, a warrant only ever sanctions the reasonable execution of the search it authorises.

- 14.43 No judicial officer is in attendance when a warrant is executed. Accordingly, a warrant cannot provide authority for its unreasonable execution. The types of unreasonableness can vary. For example, the unreasonable execution of a warrant can involve a range of misconduct including the inappropriate use of force to execute the search; searching people, places or things not referred to in the warrant; searching for items unrelated to the offences named in the warrant; searching at inappropriate times; seizing irrelevant material; and seizing material that includes material that is the subject of privilege. In such cases, it is more appropriate for the community to expect enforcement officers to be indemnified by their employer if a search warrant has been unreasonably executed, rather than providing a complete civil immunity.
- 14.44 Turning to warrantless search and seizure, the current state of uncertainty as to the nature of a searcher's immunity is unsatisfactory. In line with the position we have taken elsewhere in this report, a uniform and principled approach should be taken to questions of immunity for the exercise of warrantless search and seizure powers. In our view, where enforcement officers undertake unlawful warrantless searches and seizures the issues relating to immunity are more finely balanced. In those cases there will have been no prior consideration of the exercise of the power by an independent person; the decision to undertake the search will have been the officer's.
- 14.45 It might be argued that there is real danger that an overly generous approach to immunities might encourage enforcement officers to prefer to use warrantless search and seizure powers rather than undergo warrant processes. This danger should not be exaggerated. After all, most law enforcement search and seizure is directed at obtaining admissible evidence. If judges adopt a robust approach to the admissibility of evidence obtained pursuant to an unlawful warrantless seizure, the exclusion of evidence will be a powerful antidote to a preference for warrantless powers.
- 14.46 We recommend that, as a general proposition, where an enforcement officer reasonably believes that the prerequisites to the exercise of a warrantless power are satisfied in the circumstances as he or she believes them to be, the officer should be immune from criminal or civil liability where the power is reasonably exercised. Recognising the absence of a warrant, it is appropriate that the officer should have to discharge an evidential onus to put in issue how reasonable his or her actions were. Where the officer faces a civil suit he or she should bear the onus – on the balance of probabilities – of proving his or her belief that the relevant prerequisites were satisfied in the circumstances as he or she believed them to be.

RECOMMENDATIONS

> Continued next page

- 14.7 An enforcement officer should be immune from civil and criminal liability for acts done in good faith in obtaining a warrant or order, or in executing a warrant in a reasonable manner.

RECOMMENDATIONS

- 14.8 An enforcement officer should be immune from civil and criminal liability for acts done in good faith in exercising a warrantless power if the power is exercised in a reasonable manner and the officer believes on reasonable grounds that the prerequisites for the exercise of the power were satisfied. In any civil suit, the enforcement officer should bear the onus of establishing the basis for a claim of immunity.

People who assist enforcement officers

- 14.47 In our view, people who assist enforcement officers should be given immunities that recognise that they are removed from principal responsibility for the decision to search or seize. Where someone has been asked or required to assist in a search or seizure, they should be immune from criminal or civil liability for any acts done in good faith, whether under specific instruction of an enforcement officer or not.
- 14.48 Similarly, a person who is asked to undertake tests on unlawfully seized material should be immune from criminal or civil liability for acts that would be lawful if the material had been lawfully seized, so long as the acts in question are done in good faith. Importantly, in our view the immunity given to people who assist enforcement officers should *not* be dependent on the immunity of the enforcement officer. Rather, they should enjoy protection in their own right.
- 14.49 If, in executing a search or surveillance power, a person assists the executing officer, for example, by handing over documents or other items of evidence they reasonably believe to be covered by the warrant or falling within the scope of the search power, they too should be protected from liability for doing so.¹¹

RECOMMENDATION

- 14.9 A person who assists in executing a search or surveillance power, or who examines or analyses any item seized, should be immune from civil and criminal liability for all acts done in good faith in respect of his or her assistance, examination or analysis.

The Crown

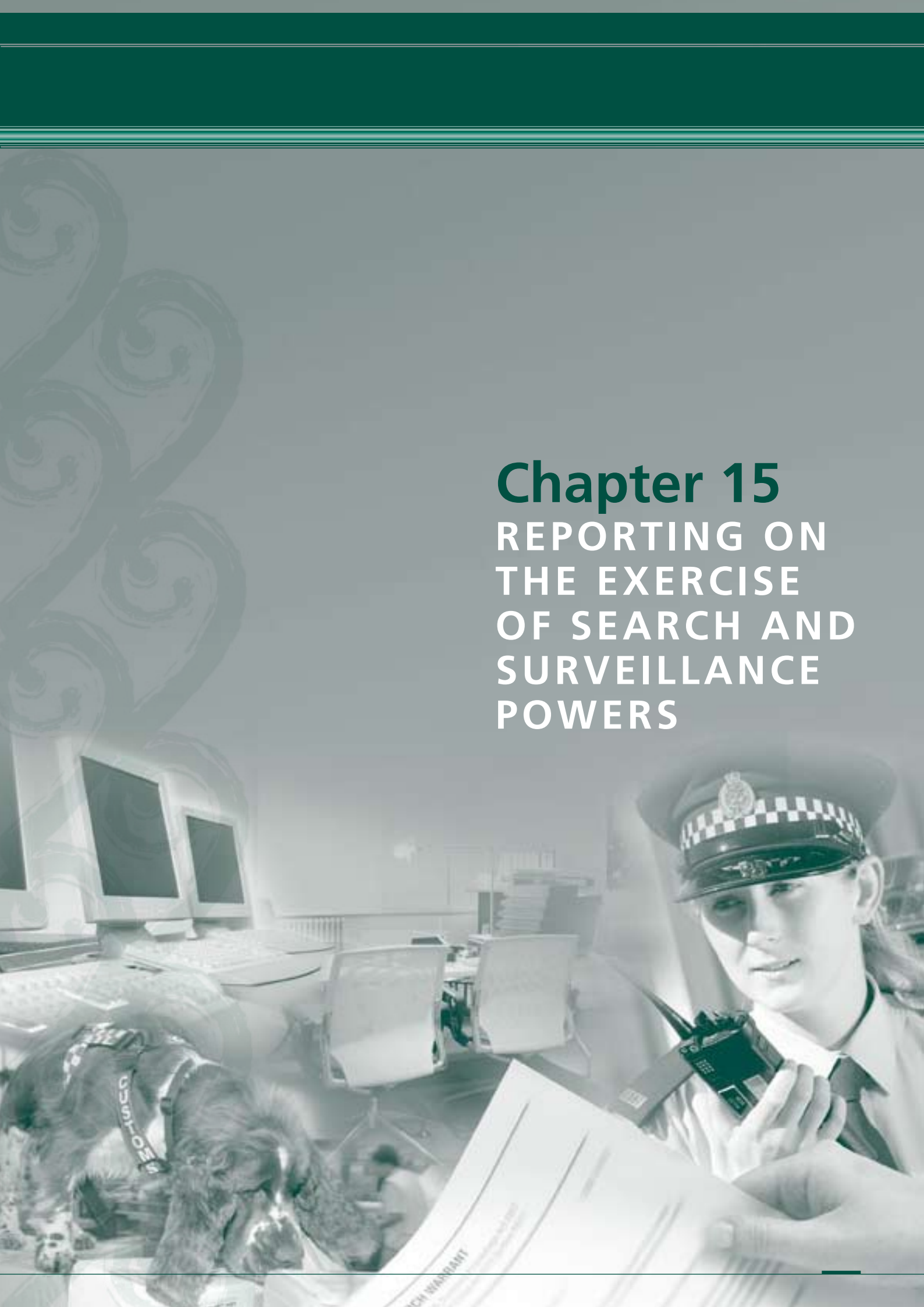
- 14.50 In our view, consistent with our overall approach in this report, there is no good reason why enforcement officers (and the Crown) who execute judicial process should have an immunity (subject to a bad faith exception) in respect of acts that would otherwise amount to common law torts, but the Crown is liable for those same acts under section 21 of the Bill of Rights Act. The whole purpose of the immunities is to strike a balance between competing public policies: on the one hand, a desire to encourage compliance with laws that limit the extent to which

¹¹ See paras 6.75-6.76 and 10.27. The protection would not extend to a breach of the suspect's property or privacy rights not encompassed by the terms of the warrant: see *R v Sanders* [1994] 3 NZLR 450, 471-72 (CA) Fisher J.

citizens should be subject to intrusion on their person, property, communications or privacy; but on the other hand, a desire to ensure that law enforcement officers are not dissuaded from using their powers as a result of a fear of facing criminal charges and/or leaving themselves or their employer exposed to a compensation claim. Reconciling those competing public policy choices should not depend on whether ultimate liability lies with the Crown or with the individual officer. We emphasise that our recommendation is not intended to undermine the concept of remedying breaches of the Bill of Rights Act. All remedies such as exclusion of evidence and declarations will be available; rather our recommendation is informed by a desire to achieve consistent, principle-based treatment of liability and immunities in the search and seizure field.

RECOMMENDATION

14.10 Where an enforcement officer has immunity in respect of his or her actions in applying for or executing a warrant or exercising a warrantless power, the Crown should also have that immunity.



Chapter 15

REPORTING ON THE EXERCISE OF SEARCH AND SURVEILLANCE POWERS

Chapter 15

Reporting on the exercise of search and surveillance powers

INTRODUCTION 15.1 This chapter discusses existing reporting requirements for the exercise of search and surveillance powers, and makes recommendations for rationalising those reporting requirements.

15.2 Reporting to the search subject is discussed in chapter 6 where notification provisions are recommended.¹ This chapter is concerned with other forms of reporting such as internal reporting within the enforcement agency, reporting back to the issuing officer who authorised use of the power, and public reporting on the use of search and surveillance powers.

15.3 The principal purpose of reporting the exercise of these powers is to enhance accountability. As the Queensland Criminal Justice Commission notes:²

When police officers know that they must account for their actions it is expected that they will turn their minds more carefully to the grounds upon which they act.

This statement applies equally to any law enforcement officer exercising a search or surveillance power.

15.4 As noted by the Victorian Parliament Law Reform Committee, a basic way of monitoring warrant powers is to require the agencies that have those powers to keep records of, and make reports on, their use:³

When personal and property rights are potentially restricted by legislative provisions in the public interest it is arguable that the public should know of the extent to which such provisions are exercised.

1 Chapter 6, recommendations 6.29-6.31.

2 Queensland Criminal Justice Commission *Report on a Review of Police Powers in Queensland – Volume II: Entry, Search and Seizure* (Brisbane, 1993) 459.

3 Victorian Parliament Law Reform Committee *The Powers of Entry, Search, Seizure, Questioning and Detention by Authorised Persons* (Discussion Paper, Melbourne 2001) 25, endorsed by that Committee in *Warrant Powers and Procedures* (Discussion Paper, Melbourne, 2004) 37.



- 15.5 Reporting requirements enable the supervision and monitoring of the exercise of enforcement powers. Reporting also enables information on the use of these powers to be collated so that their value, their appropriateness to the particular circumstances in which they are exercised, and the necessity for any changes in substance or procedure can be assessed.
- 15.6 Ideally, any reporting system should be simple and effective, and have demonstrable benefits. For reporting to be worthwhile, its purposes must be clearly articulated, understood and likely to achieve its stated policy objectives.

Policy objectives

- 15.7 Within the central objective of enhanced accountability lie a number of specific policy objectives:
- to provide internal or external oversight of the exercise of search and surveillance powers:
 - by individual officers, thereby providing a control accountability measure and a check on individual action;
 - by the enforcement agency, thereby providing an explanatory accountability measure and a check on how the agency exercises its powers, enhancing transparency and public confidence;
 - to provide a performance management measure as to how individual officers are carrying out their duties;
 - to provide a measure for feedback to key participants in the search and surveillance regime (including the enforcement officer, the enforcement agency, the issuing officer, and Parliament) that can influence future practice, and allow for review of aspects of the process;
 - to provide information on which law reform or reviews of the substance of enforcement powers and their processes can regularly draw.
- 15.8 Specifically, the various forms of reporting can meet the stated policy objectives as follows:
- internal reporting by the enforcement officer within an enforcement agency:
 - facilitates the internal oversight of the exercise of search and surveillance powers, thereby providing an opportunity for enforcement officers' individual performance to be monitored and an opportunity for the agency to verify whether applicable standards are being met;
 - facilitates the internal review of operational guidelines and procedures in order to verify, for example, whether current powers are meeting law enforcement objectives, whether legal changes to current powers are required, whether training needs are being met and whether internal authorisation procedures are effective;
 - external reporting by the enforcement officer to an independent person or agency:

- facilitates the external oversight of the exercise of search and surveillance powers, thereby providing an opportunity for independent monitoring of individual performance;
- provides an opportunity for feedback to the issuing officer, for the benefit of consideration of future applications;
- external reporting by the enforcement agency on an aggregate basis (i.e. to Parliament):
 - facilitates the external oversight of the exercise of search and surveillance powers by the agency as a whole;
 - provides information to Parliament on the exercise of powers provided for by legislation and an opportunity for review of those powers where necessary;
 - provides a measure of transparency in making key information publicly available.

CURRENT LAW AND PRACTICE

- 15.9 Three different types of statutory reporting mechanisms are currently used in New Zealand: reporting to the head of the enforcement agency; reporting to the issuing officer; and reporting to Parliament through agencies' annual reports. For the exercise of some powers, more than one of those reporting requirements applies. However, these mechanisms are not used generally; they arise only in relation to the exercise of certain specific powers.

Reporting to the head of the enforcement agency

- 15.10 Several statutory provisions require that the exercise of search powers, including the circumstances in which they were exercised, be reported to the Commissioner of Police, within three days of exercise of the power.⁴ One of these provisions (section 13EE of the Misuse of Drugs Amendment Act 1978), which applies to police and customs officers who undertake a rub-down or strip search following the issue of a detention warrant being issued under section 13EA of that Act, also requires the customs officer to report to the chief executive of the New Zealand Customs Service.

Reporting to the issuing officer

- 15.11 As noted in chapter 11, the Crimes Act 1961 requires a report to be made on the exercise of an interception warrant.⁵ Section 312P of that Act requires that, as soon as practicable after an interception warrant or an emergency permit has expired, a commissioned officer is to make a written report to the issuing judge on the manner in which the power has been exercised and the results obtained by the exercise of the power.⁶ On receiving the report under this section, the judge may request further information and may give such directions as he or she thinks desirable, whether relating to retrieval of the interception device or otherwise.⁷

4 Misuse of Drugs Act 1975, s 18(6); Misuse of Drugs Amendment Act 1978, s 13EE (in relation to a rub-down or strip search following the issue of a detention warrant); Arms Act 1983, s 60(4), s 61(3); Crimes Act 1961, s 78D(3) (in relation to a search for evidence of espionage without judicial warrant); Children, Young Persons and Their Families Act 1989, s 42(3); Maritime Security Act 2004, s 55(4).

5 Chapter 11, para 11.96.

6 Crimes Act 1961, s 312P(3) specifies certain information to be included in the report to the judge: where the interception device was placed; the number of interceptions made; whether relevant evidence was obtained; whether such evidence has been, or is intended to be used in any criminal proceedings and related matters.

7 Crimes Act 1961, s 312P(4).

- 15.12 Corresponding requirements and judicial powers to those under section 312P of the Crimes Act 1961 exist under section 28 of the Misuse of Drugs Amendment Act 1978.

Reporting to Parliament

- 15.13 The Commissioner of Police is required to include in the Police annual report:
- information about applications for and use of interception warrants and emergency permits, including the number of applications for these powers, the numbers of applications granted and refused, the average duration of warrants, and the number of resulting prosecutions;⁸
 - information about applications for detention warrants (including the number of rub-down searches and strip searches undertaken by members of the Police under section 13EA of the Misuse of Drugs Amendment Act 1978);⁹
 - information about tracking device warrants issued;¹⁰
 - information about the use of road blocks authorised under section 317B of the Crimes Act 1961;¹¹
 - information about applications for and use of call data warrants;¹²
 - information relating to taking bodily samples.¹³
- 15.14 The Serious Fraud Office includes information in its annual report about the exercise of its investigatory powers, although there is no statutory requirement mandating this reporting. Information reported includes the number of times the office required information or documents to be produced, people to answer questions, and the number of search warrants obtained, under the Serious Fraud Office Act 1990.¹⁴

OPTIONS FOR REFORM

- 15.15 Reporting requirements are currently piecemeal and are limited to the particular circumstances to which they apply. The key policy objective of enhanced accountability for exercising enforcement powers does not suggest that reporting should be confined only to certain powers such as warrantless powers or surveillance powers.
- 15.16 Various approaches to reporting have been taken overseas. The Victorian Parliament Law Reform Committee recommended comprehensive requirements for record-keeping by issuing agencies.¹⁵ In contrast, the Law Reform Commission of Canada took the view that requiring detailed reporting of the exercise of all search and seizure powers would not be desirable and that unreasonable record-keeping burdens should not be imposed upon the police.¹⁶

8 Crimes Act 1961, s 312Q; Misuse of Drugs Amendment Act 1978, s 29.

9 Misuse of Drugs Amendment Act 1978, s 13M. The Comptroller of Customs is also required to report under this provision.

10 Summary Proceedings Act 1957, s 200J. The Comptroller of Customs is also required to report under this provision.

11 Police Act 1958, s 65(4).

12 Telecommunications (Residual Provisions) Act 1987, s 10R. The Comptroller of Customs is also required to report under this provision.

13 Criminal Investigations (Bodily Samples) Act 1995, s 76.

14 Serious Fraud Office "Report of the Serious Fraud Office" [2006] AJHR E40 19.

15 Victorian Parliament Law Reform Committee *Warrant Powers and Procedures: Final Report* (No 170 of Session 2003-2005, Melbourne, 2005) recommendation 18.

16 Law Reform Commission of Canada *Police Powers – Search and Seizure in Criminal Law Enforcement* (WP 30, Ottawa, 1983) 246-247.

- 15.17 We have considered whether a generic statutory reporting framework should be introduced in New Zealand. A comprehensive regime would be required to fully meet the policy objectives outlined in paragraphs 15.7 and 15.8. However, we believe this would not be justifiable, given the administrative burden that would be imposed on enforcement officers and agencies and the significant additional resourcing that would be needed.
- 15.18 We have therefore sought to identify a simple and effective regime that focuses on areas where post-exercise reporting is a high priority, does not create an onerous compliance burden for enforcement officers and agencies and does not result in disproportionate compliance costs for the enforcement agency or the criminal justice sector. We note that the regime should be readily understandable by staff, in order for compliance to be achievable.
- 15.19 On this basis, we consider that the key elements of a reporting regime should include the following:
- it should be accepted good practice within each enforcement agency that processes should be in place to ensure that the execution of all warrants and the exercise of all warrantless powers are reviewed internally as a matter of course;
 - there should be a statutory requirement for enforcement officers to report internally within the enforcement agency following the exercise of warrantless powers;
 - enforcement agencies should accommodate any request from the issuing officer for a post-execution report on the exercise of a warrant power, to provide feedback to the issuing officer (rather than external oversight of the enforcement officer);
 - the enforcement agency should report on the use of warrantless and surveillance powers on an aggregate basis to Parliament in its annual report.
- 15.20 We accept that this proposed regime would only go part way towards meeting some of the identified policy objectives and that other policy objectives would not be advanced at all.¹⁷

Internal reporting within the enforcement agency

- 15.21 In chapter 4 we emphasized the necessity for every enforcement agency whose officers may apply for a search warrant to have adequate arrangements in place to supervise the application process, and to check and approve each warrant application before it goes to the issuing officer.¹⁸
- 15.22 Supervisory arrangements are also particularly important where warrantless powers are to be exercised, given the absence of independent scrutiny and authorisation.
- 15.23 In addition to supervision prior to exercising the enforcement power, we have considered whether it is desirable for search and surveillance powers to be reported within the agency after being exercised. A post-exercise reporting mechanism would allow a designated officer to check that the power had been exercised in accordance with the agency's procedures and guidelines and relevant legal

¹⁷ For example, our recommendations do not include any external post-execution reporting of search warrants (other than to the issuing officer for informational purposes, on request).

¹⁸ Chapter 4, para 4.38-4.39.

requirements, provide appropriate feedback to the enforcement officer and take any other necessary action with respect to the enforcement officer's performance. Internal post-exercise reporting could also be used for the following purposes:

- developing and modifying operational guidelines and procedures to ensure that legal requirements are adhered to and sound practices adopted for exercising search and surveillance powers, including identifying deficiencies in training;
- self-auditing whether applicable standards are being met by officers exercising enforcement powers;
- periodic review of the internal authorisation process;
- enhancing the quality of search practice throughout the enforcement agency by circulating information internally on the success (or otherwise) of the exercise of the power; individual cases where use of a power for a particular purpose has been successful or has failed to yield the expected results can be of illustrative benefit to other enforcement officers;
- providing a review of the use of warrantless powers (necessarily used without prior external supervision or checking) to ensure powers are exercised lawfully and within the enforcement agency's guidelines.

15.24 The question is whether there would be value in introducing a statutory requirement mandating a minimum level of internal post-exercise reporting within each enforcement agency. We encountered considerable opposition to this suggestion from enforcement agencies. Some noted that internal reporting already occurs as part of normal supervisory arrangements, but those arrangements are specific to each agency and take account of the context within which it operates. A standard statutory reporting requirement would thus simply create an additional compliance burden for minimal additional value.

15.25 We agree. We propose instead that it should be accepted good practice by each enforcement agency that the exercise of all enforcement powers should be reviewed internally as a matter of course. This would require adequate processes for internal reporting within each agency, even in the absence of an express statutory requirement.

15.26 Although we do not recommend a generic statutory internal reporting requirement, we consider that a statutory requirement for internal reporting on the exercise of warrantless enforcement powers, in particular, can be justified. As warrantless powers may be exercised without independent authorisation, a formal internal reporting requirement (even of brief details) is a necessary responsibility that should be placed on enforcement officers and is an important mechanism in facilitating internal accountability for the exercise of such powers and therefore maintaining public confidence. And because these are exceptional powers exercised infrequently, the administrative burden in complying with a statutory reporting requirement should not be onerous.

15.27 There are four types of warrantless powers that should be exempted from the proposed statutory reporting requirement on the basis that they do not require a 'reasonable grounds to believe' threshold to be met by the enforcement officer as a condition of exercise:¹⁹

19 We accept that consideration will need to be given to further exceptions from the reporting requirement, for example, the warrantless powers exercised by Customs to conduct searches at the border for evidence of border related offending; and warrantless powers exercised by the Department of Conservation on DOC land.

- initial frisk searches to ascertain whether there is anything on an arrested person that may be used to harm anyone or to facilitate the arrested person's escape;²⁰
 - searches of those in lawful custody under section 57A of the Police Act 1958;²¹
 - warrantless powers of entry with no accompanying power of search (for evidence-gathering purposes);²²
 - consent searches.²³
- 15.28 Otherwise, the reporting requirement for exercising warrantless powers should apply in every case, in preference to, for example, reporting based on random sampling or restricted reporting of cases only where the exercise of these powers fails to produce evidential material.
- 15.29 The report should record the exercise of the power, a short summary of the circumstances giving rise to the warrantless power (including a statement as to why the warrantless power was necessary in the circumstances), whether evidential material was seized and whether charges have been laid or are in contemplation, based on that material.
- 15.30 The report should be directed to a designated officer within the enforcement agency. Where police officers exercise law enforcement powers other than police powers (for example, as a fishery officer), the report should nevertheless be directed to a designated officer within the police. Internal reporting to the supervising officer within the enforcement agency should occur as soon as practicable after the power has been exercised.²⁴
- 15.31 A comprehensive reporting requirement extending to all warrantless enforcement powers (other than the exempted powers) should be introduced to replace existing requirements in particular statutes that the exercise of such powers be reported to the head of the enforcement agency.²⁵ Of course it would still be open for the head of the enforcement agency to require reports on the exercise of all or any particular enforcement powers, as may be necessary for the effective oversight of those powers.

RECOMMENDATIONS

> Continued next page

- 15.1 It should be accepted good practice within each enforcement agency that processes are in place to ensure that the execution of all warrants and the exercise of all warrantless powers are reviewed internally as a matter of course.

20 See chapter 8, recommendation 8.14.

21 See chapter 8, recommendations 8.18-8.19.

22 This would exempt the exercise of warrantless powers of entry to arrest from the reporting requirement.

23 As consent searches do not constitute the exercise of a power, we consider that recommendations 3.5-3.9 provide a sufficient framework.

24 Where the power can be exercised on multiple occasions or continuously, the reporting requirement should arise on final exercise of the power.

25 See above, n 4.

RECOMMENDATIONS

15.2 The exercise of any warrantless power by an enforcement officer should be reported to a designated officer within the enforcement agency as soon as practicable, provided that the exercise of the following warrantless powers should be exempted from this requirement:

- initial frisk searches carried out in conjunction with arrests;
- searches of those in lawful custody in accordance with section 57A of the Police Act 1958;
- warrantless powers of entry with no accompanying power of search (for evidence-gathering purposes);
- consent searches.

15.3 Reports on warrantless powers should contain:

- a short summary of the circumstances giving rise to the warrantless power being exercised, including a statement of why the warrantless power was needed;
- whether evidential material was seized;
- whether charges based on that evidential material have been laid or are being contemplated.

15.4 Provided that recommendations 15.2 and 15.3 are implemented, specific requirements currently in force to report internally on the exercise of particular warrantless powers should be repealed.

Reporting to the issuing officer

15.32 A statutory requirement to report to the court when search warrants have been executed is a feature of several Commonwealth jurisdictions' legislation. There are two distinct approaches to this reporting.

15.33 Under the first approach, the enforcement officer is required to report back to the court, either in writing or by returning the warrant endorsed with the results of execution, within a certain time following execution or expiry of the warrant. A written report is required in New South Wales.²⁶ In the United Kingdom, the warrant is endorsed with a statement of whether the sought articles or people were found and whether articles other than those sought were seized, and then returned to the appropriate officer of the court from which it was issued.²⁷ Certain warrants not executed within the period also have to be returned to the court.

15.34 Under the second approach, the enforcement officer is required to bring seized items before the court. This approach has been adopted in Canada²⁸ and in

26 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 74. Information required includes a statement as to whether or not the warrant was executed; the result of the execution including a brief description of anything seized; a brief explanation of why the warrant was not executed; whether an occupier's notice in connection with execution of the warrant was served; if the occupier's notice was not served, a copy of that notice; in the case of a telephone warrant, a copy of the warrant; and such other particulars as may be prescribed by regulations.

27 Police and Criminal Evidence Act 1984 (UK), s 16.

28 Criminal Code RSC 1985 c C-46 (Can), s 489.1.

Victoria, Australia.²⁹ The requirement has recently been reviewed by the Victorian Parliament Law Reform Committee. That Committee recommended continuing with this approach, and expanding the requirement to include seized items not specified in the search warrant, as well as returning unexecuted warrants and a detailed report on the outcome of each warrant to the court.³⁰

- 15.35 Not all jurisdictions require reporting back to the court when enforcement powers are exercised. For example, the need for officials to whom a search warrant is issued to report back to the issuing officer or to return the warrant to the court after execution has not been accepted in Australia at Commonwealth level.³¹ Concerns raised included whether busy court staff could really provide effective scrutiny of the results of searches; the diversion of police from operational work; and the duplication of existing mechanisms to examine police files. Whether the return of the search warrant to the issuing officer or court would provide any additional protection or safeguards in relation to its execution was considered to be uncertain.³²
- 15.36 The Victorian Parliamentary review also noted concerns about imposing a comprehensive reporting requirement. A barrister questioned the effectiveness of submitting a report to the issuing court as a way of enhancing the accountability and oversight of the use of warrant powers:³³

It may or may not be practical, and it may or may not be effective for a justice of the peace or a magistrate who is issuing warrants to have a continual back flow of paperwork and to be reading it all and thinking about whether what has transpired was what was envisaged at the time the warrant was issued ... In terms of just search warrants ... I envisage that the number would be considerable, and I cannot imagine that those who are using them in those numbers would have the time to review [the report].

- 15.37 However, it concluded:³⁴

The Committee recognises that a requirement to report to court on the use of the powers conferred by a warrant is not a panacea for their potential misuse. However, it is an important part of the accountability framework: it constitutes another check on the use of the powers; and it establishes another record of actions taken under a warrant, one that is available for qualitative and quantitative analysis of the kind envisaged by the Committee in some of its recommendations in this report. The Committee therefore supports a reporting requirement, and notes that this

29 Magistrates' Court Act 1989 (Vic), s 78(1)(b)(ii).

30 Victorian Parliament Law Reform Committee, Final Report, above n 15, recommendations 70 and 71. Recommendation 71 requires the report to include whether the warrant was executed; the reasons for non-execution; the date, time and place of execution; the names of individuals who executed the warrant and individuals who were present at the premises; whether an occupier's notice was served; a list of seized property; confirmation countersigned by the occupier or other appropriate individual that receipts were issued for seized property; a description countersigned by the occupier or other appropriate individual of any damage that occurred during the search; confirmation countersigned by the occupier or other appropriate individual that they were informed of their rights to challenge the warrant; additional information as prescribed by specific legislation; and a section on directions to be given by magistrates pursuant to the Magistrates Court Act 1989 (Vic), s 78(6).

31 Victorian Parliament Law Reform Committee, Final Report, above n 15, 230.

32 Australian Government *Government Response to the Senate Standing Committee for the Scrutiny of Bills: Fourth Report: Entry and Search Provisions in Commonwealth Legislation* (Canberra, 2003) recommendation 9.

33 Victorian Parliament Law Reform Committee, Final Report, above n 15, 245.

34 Victorian Parliament Law Reform Committee, Final Report, above n 15, 246.

conclusion accords with Parliament's long held belief, expressed through legislation, in the principle that officials to whom a warrant is issued should answer to the issuing court for their actions under the warrant.

Recommended scope of the reporting requirement in New Zealand

- 15.38 As noted in paragraph 15.8, reporting back to the issuing officer has the potential to provide both independent oversight of the exercise of enforcement powers, and useful feedback to the issuing officer for the benefit of future applications.
- 15.39 In relation to independent oversight, although we recognise the potential for increased accountability, we have concluded that it is not practicable for issuing officers to be charged with reviewing how search warrants are executed, given the administrative burden that would be created. We are satisfied that adequate mechanisms already exist for challenging the execution of such warrants.³⁵ In chapter 11, we have recommended that reporting by enforcement agencies on how surveillance device warrants are executed should be the same as reporting requirements for the execution of search warrants, and that there should be no general requirement for ongoing supervision of surveillance device warrants.³⁶
- 15.40 However, feedback to the issuing officer can serve a valuable purpose in allowing him or her to assess whether a power exercised under his or her authority achieved the intended result. In essence it allows the issuing officer to be informed of the outcome or result of his or her decision. As submitted to the Victorian Parliamentary review, of particular structural concern is that those who authorise the issue of warrants should be made aware of the outcome of the process.³⁷
- 15.41 Nevertheless, we do not consider that it is necessary to impose a statutory requirement for reporting back to the issuing officer in this context, provided that he or she can request a post-execution report on a case-by-case basis. This will assist newly appointed issuing officers in particular, but should also accommodate any requests for such information from the issuing officer (not just new appointees). We therefore recommend that enforcement agencies accommodate any request from the issuing officer for a post-execution report to provide feedback on the outcome of the exercise of a warrant power (rather than independent oversight of the enforcement officer). Where a report is requested, it should contain the following information:
- whether the power was exercised;
 - whether the exercise of the power resulted in evidential material being seized (including plain view material);
 - whether any warrantless powers were exercised in conjunction with the exercise of the warranted power and resulted in evidential material being seized;³⁸
 - whether charges have been laid or are contemplated, based on that evidential material;

³⁵ For example, challenges under the Bill of Rights Act, s 21.

³⁶ Chapter 11, recommendation 11.15. Introducing the proposed surveillance device warrant regime would therefore involve repealing current report back requirements noted in paragraphs 15.11 and 15.12 above.

³⁷ Victorian Parliament Law Reform Committee, *Warrant Power and Procedures*, above n 3, preliminary submission of Brian Walters SC, 39.

³⁸ For example, the exercise of a warrantless power to search for drugs in conjunction with the exercise of a warrant power to search for stolen goods.

- where the warrant is a residual warrant, a brief description of how the power was exercised.³⁹
- 15.42 To meet the policy objective of providing feedback to the issuing officer, reports should be directed to the specific officer rather than to the court. This may require administrative procedures be put into place to ensure the report goes to the appropriate issuing officer.
- 15.43 In chapter 4 we concluded that collecting and retaining papers associated with the issue of search warrants should be the responsibility of the agency that exercises the power (rather than being treated as part of the court record). We also noted the current procedure under which court registries are a repository of copies of these papers.⁴⁰ We consider that reports to issuing officers on the exercise (or non-exercise) of warrant powers should be treated in the same way. Accordingly, the primary responsibility for retaining the reports should lie with the enforcement agency, while any copy sent to the issuing officer can simply be retained with the papers relating to the issue of the warrant.

RECOMMENDATIONS

- 15.5 Reporting to the issuing officer on the execution of a search or surveillance warrant should not be required for supervisory purposes. For information purposes, however, enforcement agencies should accommodate any request from the issuing officer for a post-execution report on the outcome of the exercise of any warrant power. Where an issuing officer requests such a report, it should contain the following information:
- whether the power was exercised;
 - whether the exercise of the power resulted in evidential material being seized (including plain view material);
 - whether any warrantless powers were exercised in conjunction with the exercise of the warrant power and resulted in evidential material being seized;
 - whether charges have been laid or are contemplated, based on that evidential material;
 - where the warrant is a residual warrant, a brief description of how the power was exercised.
- 15.6 The enforcement agency should be required to retain a copy of any post-execution report to the issuing officer in the same manner and for the same period that the enforcement agency is required to retain a copy of the warrant, the application and all documents that were tendered in support.

³⁹ See chapter 11, paras 11.121-11.143. As the residual warrant regime is designed to authorise the use of things or procedures not defined in legislation, the issuing officer will have an interest, for the benefit of future residual warrant applications, in knowing how any particular warrant was used in the circumstances.

⁴⁰ Chapter 4, paras 4.82-4.92.

Reporting to Parliament

- 15.44 Annual reporting to Parliament has been endorsed in some jurisdictions, but not in others. For example, the Victorian Parliament Law Reform Committee recommended that each agency maintain a detailed search warrants register, from which data should be published annually on the agency's website and in the agency's annual report.⁴¹ In contrast, the Australian Commonwealth government did not accept a recommendation that the exercise of powers of entry and search be reported annually to Parliament.⁴²
- 15.45 Aggregate reporting on the exercise of search and surveillance powers in agencies' annual reports serves two important purposes: it provides a layer of accountability by providing information to Parliament on the exercise of coercive powers specifically authorised by the legislature; and it requires information regarding the exercise of such powers to be collated in a publicly available document.
- 15.46 It would be desirable for the purposes of transparency and research (both independent research and the particular enforcement agency's own) for statistics on the numbers of enforcement powers exercised by enforcement agencies to be collated and made publicly available through their annual reports to Parliament. However, we accept that this would impose an administrative burden on enforcement agencies that cannot be justified for the benefits that such bare reporting would provide.
- 15.47 Nevertheless, we consider that the numbers of warrantless searches,⁴³ the numbers of surveillance device and residual warrants issued, and the extent of warrantless surveillance conducted should be reported in the annual reports of enforcement agencies.⁴⁴ Warrantless powers are not subject to the same external scrutiny that applies to powers that are exercised under warrant (unless challenged in court).
- 15.48 We also think that, while surveillance device warrants are subject to judicial authorisation, the fact that they are almost always exercised covertly, makes annual reporting of these powers desirable to bolster accountability and transparency.
- 15.49 We recommend that annual reporting of the exercise of warrantless powers and the execution of surveillance device warrants should be based on the same type of information that is currently required in relation to interception warrants,⁴⁵ with some modifications. Annual reporting of the exercise of warrantless powers should therefore include the following information:
- the number of warrantless search and surveillance powers exercised in the period;
 - the number of warrantless surveillance powers exercised that result in the use of:

41 Victorian Parliament Law Reform Committee, Final Report, above n 15, recommendations 18 and 20.

42 Australian Government, above n 32, recommendation 3.

43 Subject to the same exceptions proposed for internal reporting, namely initial frisk searches, searches of those in lawful custody, warrantless powers of entry with no accompanying power of search for evidence-gathering purposes, and consent searches.

44 The New Zealand Law Society Criminal Law Committee submitted that the commissioning of an independent study would be more effective than aggregate reporting.

45 Crimes Act 1961, s 312Q.

- an interception device;
 - a visual surveillance device;
 - a tracking device;
 - in respect of each type of surveillance device (interception, visual or tracking) the period for which the surveillance device was used by reference to the following categories: up to six hours, up to 12 hours, up to 24 hours, up to 48 hours;
 - the number of prosecutions in which evidential material obtained directly or indirectly from exercise of a warrantless power has been adduced, and the number of those prosecutions that resulted in a conviction;
 - the number of warrantless powers exercised that did not result in any charges being laid within 90 days of the exercise of the power.
- 15.50 Annual reporting of the execution of surveillance device warrants should include the following information:
- the number of applications for surveillance device warrants granted and refused in the period;
 - the number of warrants that authorised the use of:
 - an interception device;
 - a visual surveillance device;
 - a tracking device;
 - any other type of surveillance device;⁴⁶ or
 - more than one type of surveillance device;⁴⁷
 - the number of warrants that authorised entry onto private premises;
 - for each type of surveillance device (interception, visual, tracking or other type of device) the period for which the surveillance device was used by reference to the following categories: up to 24 hours, up to three days, up to seven days, up to 21 days, up to 60 days;⁴⁸
 - the number of prosecutions in which evidential material obtained directly or indirectly from using a surveillance device pursuant to a warrant has been adduced, and the number of those prosecutions that resulted in a conviction;
 - the number of warrants that did not result in any charges being laid within 90 days of the date on which the warrant expired.
- 15.51 These reporting requirements should not impose an undue administrative burden on enforcement agencies. We have recommended that agencies should report internally the exercise of warrantless powers. Statistics should therefore readily be extracted from these reports for the purpose of annual reporting.⁴⁹ In relation to surveillance device warrants, systems that capture statistics in relation

46 The use of other types of surveillance device may be authorised under the residual regime proposed in, recommendation 11.24.

47 For ease of reporting, the intention is that where a surveillance device warrant authorises the use of more than one type of surveillance device, the warrant should be reported under this category for multiple devices, rather than under a number of specific categories.

48 Note that a surveillance device warrant would have a maximum life of 60 days: recommendation 11.16. We consider that an indication of the period for which the surveillance device is used would be more useful than the current requirement for reporting the average duration of warrants (Crimes Act 1961, s 312Q(h)), given the variety of devices that would be covered by the proposed surveillance device regime.

49 We note the conclusion of the Victorian Parliament Law Reform Committee (Final Report, above n 15, 248) that resource requirements can be reduced through developing and using template forms and electronic management and collating relevant warrants data. Consolidating the reporting back requirements could produce a single form for reporting. This could produce improved records without increasing workloads.

to interception warrants and other powers for annual reporting under current requirements could be modified to ensure that details of all surveillance device warrants can be readily collated.

- 15.52 We have considered, but do not recommend, that supplementary reports containing information unavailable at the time of the initial report be required. While supplementary reporting would enhance the accuracy of an enforcement agency's annual report, the number of powers exercised with incomplete results should not have a material impact on the overall picture. Moreover, it is unlikely that the updated information would be able to be consistently captured by enforcement agencies and any supplementary reporting requirement would create an additional administrative burden.
- 15.53 Reporting to Parliament on the exercise of law enforcement powers in this context should expand the availability of information on the exercise of warrantless enforcement powers and the execution of surveillance device warrants. The reporting requirements should also extend broadly to all enforcement agencies, subject to any exceptions that should be made in the light of the nature and context of the enforcement powers of particular agencies.⁵⁰
- 15.54 Finally, requirements for annually reporting on particular matters outlined in paragraph 15.13 that will not fall within the annual reporting regime outlined above – namely detention warrants, use of road blocks, and the taking of bodily samples – should be retained.

RECOMMENDATIONS

> Continued next page

15.7 Aggregate reporting on the exercise of warrantless search powers and warranted or warrantless surveillance powers should be made by each enforcement agency in its annual report to Parliament. However, the exercise of the following warrantless powers should be exempted from this requirement:

- initial frisk searches;
- searches of those in lawful custody in accordance with section 57A of the Police Act 1958;
- warrantless powers of entry with no accompanying power of search (for evidence-gathering purposes);
- consent searches.

15.8 Annual reporting of the exercise of warrantless powers should include the following information:

- the number of warrantless search and surveillance powers exercised in the period;
- the number of warrantless surveillance powers exercised that result in the use of:
 - an interception device;
 - a visual surveillance device;
 - a tracking device;

⁵⁰ See chapter 16, paras 16.9 and 16.14.

RECOMMENDATIONS

- in respect of each type of surveillance device (interception, visual or tracking), the period for which the surveillance device was used by reference to the following categories: up to six hours, up to 12 hours, up to 24 hours, up to 48 hours;
- the number of prosecutions in which evidential material obtained directly or indirectly from the exercise of a warrantless power has been adduced, and the number of those prosecutions that resulted in a conviction;
- the number of warrantless powers exercised that did not result in any charges being laid within 90 days of the exercise of the power.

15.9 Annual reporting of the execution of surveillance device warrants should include the following information:

- the number of applications for surveillance device warrants granted and refused in the period;
- the number of warrants that authorised the use of:
 - an interception device;
 - a visual surveillance device;
 - a tracking device;
 - any other type of surveillance device; or
 - more than one type of surveillance device;
- the number of warrants that authorised entry onto private premises;
- for each type of surveillance device (interception, visual, tracking or other type of device), the period for which the surveillance device was used by reference to the following categories: up to 24 hours, up to three days, up to seven days, up to 21 days, up to 60 days;
- the number of prosecutions in which evidential material obtained directly or indirectly from using a surveillance device pursuant to a warrant has been adduced, and the number of those prosecutions that resulted in a conviction;
- the number of warrants that did not result in any charges being laid within 90 days of the date on which the warrant expired.

15.10 Requirements for the annual reporting of detention warrants, use of road blocks, and the taking of bodily samples should be retained.

Other external scrutiny

15.55 External scrutiny of law enforcement powers currently exists in individual cases. This occurs when cases before the courts challenge the exercise of such powers. Bodies such as the Police Complaints Authority and the Ombudsmen also consider complaints about the exercise of such powers by enforcement agencies. While we accept that these represent only ad hoc monitoring or scrutiny, the effectiveness of adverse findings by these external judicial or investigative bodies should not be underestimated in modifying agencies' behaviour.

15.56 Though Parliamentary Select Committees have the theoretical ability to review the performance of the Police and other enforcement agencies, there is, in practice, no effective external scrutiny of the exercise of search and surveillance powers in New Zealand. The Victorian Parliamentary review recommended that the Ombudsman and the Office of Police Integrity review search warrant records periodically and make appropriate recommendations.⁵¹ We do not, however, recommend any form of routine external monitoring of the exercise of search and surveillance powers by any existing or newly created agency. In our assessment, routine external monitoring would not add sufficient benefit over and above the ad hoc monitoring that currently occurs to justify the additional costs and resources that would be required to perform this function. However, where a particular review of enforcement powers is deemed necessary, the recommended reporting regime would assist to facilitate any such review (at least in relation to both warrantless search powers and warranted or warrantless surveillance powers).

51 Victorian Parliament Law Reform Committee, above, n 15, recommendation 25. Statutory provisions have been enacted in other Australian jurisdictions for ongoing external monitoring of the exercise of search and surveillance powers: see, for example, Police Powers and Responsibilities Act 2000 (Qld), ss 740-745 (public interest monitor).

Chapter 16

IMPLEMENTATION



Chapter 16

Implementation

- 16.1 In this chapter we outline the statutory framework that we propose for implementing the recommendations made in earlier chapters. In general terms we envisage a single statute in four parts: a first part bringing together police search powers; a second part establishing the surveillance device regime available to all enforcement officers; a third part providing for monitoring and production orders; and a fourth part prescribing the procedures governing the application for search warrants, the execution of search powers, post-execution procedures and reporting requirements relating to surveillance device warrants and warrantless search powers. The legislation would also provide for those amendments that are required to the relevant enactments dealing with non-police powers.

Police search powers

- 16.2 Police search powers (and associated powers such as those relating to the stopping of vehicles and road blocks) are scattered through a large number of statutes, and some, as we have noted, have been derived from the common law. Consolidating all police search powers in statute and in one place will simplify the law and make it more accessible. The core of this part of the legislation would include provisions to replace the warrant powers in section 198 of the Summary Proceedings Act 1957 and to enact the recommendations made in chapter 5 for warrantless search powers.
- 16.3 In summary, this would include the following:
- the search powers currently contained in sections 202B and 225 of the Crimes Act 1961;
 - the specific search powers currently contained in other enactments including sections 60 to 61 of the Arms Act 1983 and section 18 of Misuse of Drugs Act 1975;
 - the powers to stop and search vehicles currently contained in sections 314A to 314D; 317A to 317B of the Crimes Act 1961;
 - the power to search for evidential material relating to a serious offence;
 - the power to enter to execute an arrest warrant;
 - the power to enter for the purpose of arrest currently contained in section 317(1) of the Crimes Act 1961 (with modifications) and to arrest people unlawfully at large;
 - the power to enter in exigent circumstances currently contained in section 317(2) of the Crimes Act 1961;



- the power to search people in custody currently contained in section 57A of the Police Act 1958;
- the availability of search warrants for imprisonable offences;
- the availability of search warrants for a search for computer-stored data at a location specified by reference to access information (such as log-on credentials);
- amendments to specific provisions to implement recommendations in the report including:
 - section 224 of the Crimes Act 1961 (repeal);
 - section 198A of the Summary Proceedings Act 1957;
 - section 59 Police Act 1958;
 - section 312A of the Crimes Act 1961 (repeal);
 - section 25 of the Misuse of Drugs Amendment Act 1978 (repeal);

Surveillance powers of enforcement officers

- 16.4 A general code governing the use of surveillance devices by enforcement officers would form the second part of the search powers statute we propose. This would be partly new legislation, though it would also consolidate existing surveillance powers such as those relating to the interception of communications and the use of tracking devices.
- 16.5 This part of the proposed legislative framework is intended to give effect to the recommendations made in chapter 11 of the report. It will generally regulate the use of surveillance devices by law enforcement officers and should:
- outline the circumstances in which the use of surveillance devices are not the subject of regulation;
 - outline the circumstances when a warrant is required;
 - provide for the issue of surveillance device warrants by judges to authorise the use of surveillance devices by enforcement officers;
 - outline the powers of enforcement officers to use surveillance devices without warrant in situations of urgency;
 - contain any necessary ancillary powers (such as the power to enter, install, maintain and remove a device, and the use of force);
 - make provision for the residual warrant regime.

Monitoring and production powers

- 16.6 The third part of the proposed legislation would contain a monitoring and production order regime for law enforcement investigations. The purpose of this part would be to enact the recommendations made in chapter 10 including applying for and issuing monitoring orders and production orders and other matters relating to production and monitoring powers.

Generic provisions governing the exercise of search and surveillance powers

- 16.7 The fourth part of the proposed legislative framework would consolidate in one place all provisions governing the exercise of search and surveillance powers by all enforcement officers. It would contain provisions relating to:
- applying for and issuing search and surveillance device warrants incorporating the recommendations made in chapter 4;
 - the manner in which search powers are exercised including the obligations of enforcement officers, incorporating the recommendations made in chapter 6;
 - computer searches including the powers and procedures proposed in the recommendations made in chapter 7;
 - the procedures for dealing with specific issues that arise from the execution of search and surveillance powers incorporating the recommendations made in chapter 12 (some of which will be appropriate for regulations rather than statute);
 - post-execution procedures incorporating the recommendations made in chapter 13;
 - the protections and immunities that apply to enforcement officers exercising search and surveillance powers incorporating the recommendations made in chapter 14;
 - the reporting requirements with respect to the exercise of warrantless search powers and the exercise of surveillance powers incorporating the recommendations made in chapter 15.
- 16.8 This part would also include a number of related powers that may be exercised by enforcement officers in the execution of a search power including:
- the power to search vehicles and persons at the place that is being searched;
 - plain view seizures;
 - the power to require assistance to access data held on a computer under section 198B of the Summary Proceedings Act 1957;
 - general powers in exercising search powers including use of force provisions; assistance; copying; direction of people at the search scene;
 - the power to seize forensic material;
 - the power to search people, places and vehicles following arrest;
 - the power to search people who flee to avoid search;
 - the power to photograph search scenes;
 - the power to remove and test seized items;
 - the powers in respect of crime scenes.
- 16.9 There ought to be a statutory provision that automatically applies these generic procedures and requirements to all existing law enforcement powers unless they are specifically exempted. In the first instance, when the legislation is being drafted, any exemptions will have to be specified in the Bill. Thereafter, when a new law enforcement power is created, a decision will have to be made if exceptions to the generic statute should be made. If not, its requirements automatically extend to the new provisions.

- 16.10 As we noted in chapter 1, this legislation will not apply to regulatory powers as defined in that chapter – that is, those powers that can be exercised without the existence of a required threshold before they are exercised. However, it may well be possible that the fourth part of the proposed Bill containing the various procedural requirements could be applied to the exercise of regulatory powers. Therefore, we suggest that when the legislation is being drafted, it should be reviewed by regulatory agencies with a view to determining whether it should be extended to their regimes as well.

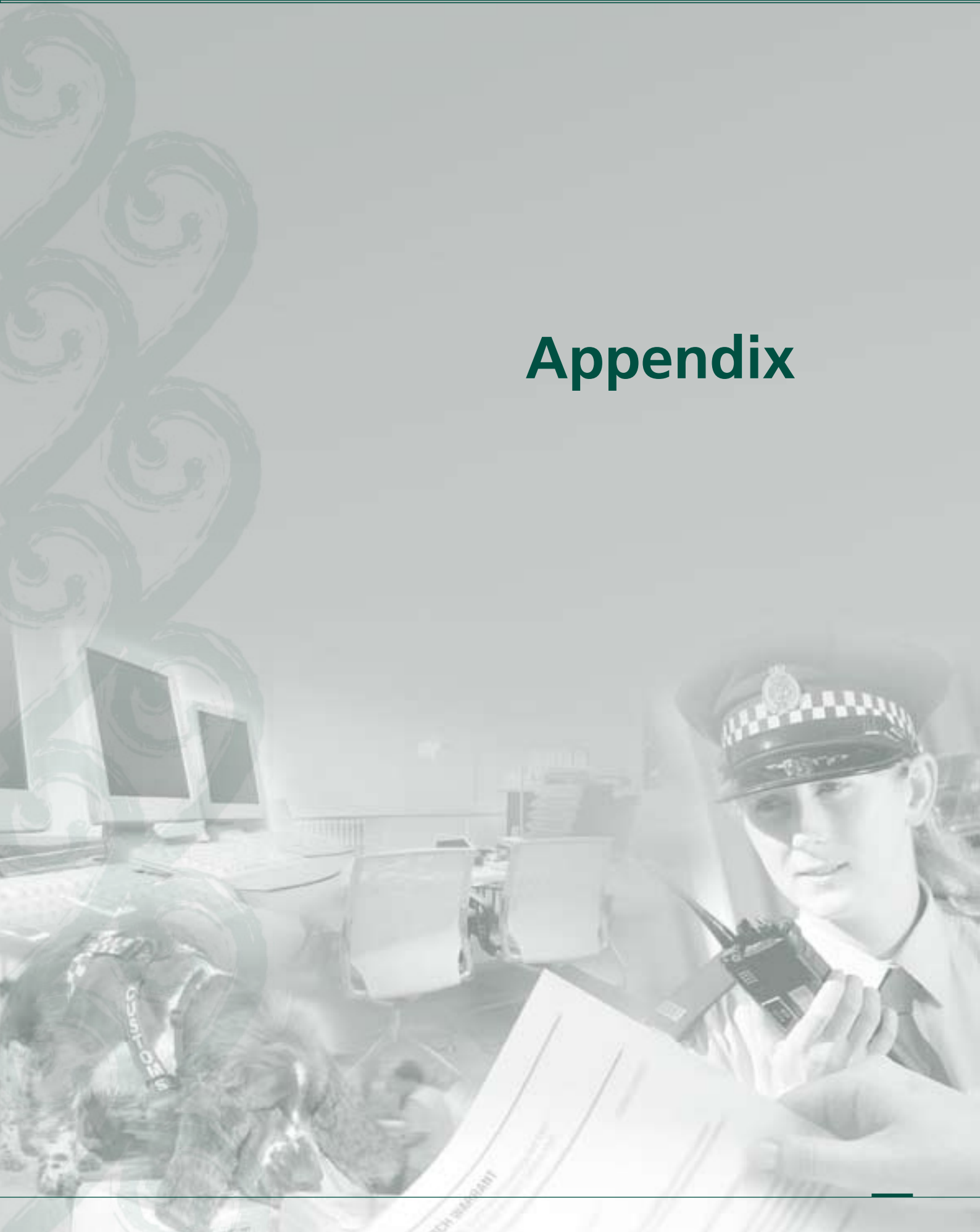
Amendments to statutes containing specific search regimes

- 16.11 The legislation we propose would also contain amendments to existing statutes containing search powers of non-police enforcement officers that require modification to align with the values and principles contained in the report. The substantive powers should remain in the primary legislation.
- 16.12 This would include the amendments specifically referred to in the recommendations to:
- section 12A of the Misuse of Drugs Amendment Act 1978;
 - sections 149D and 168 of the Customs and Excise Act 1996;
 - section 171 of the Customs and Excise Act 1996 (repeal);
 - section 38 of the Financial Transactions Reporting Act 1996;
 - section 119 of the Land Transport Act 1998;
 - section 453(2) of the Maritime Transport Act 1994;
 - section 58 of the Immigration Advisers Licensing Act 2007;
 - section 432(2)(d) of the Gambling Act 2003;
 - section 13(1) of the Aviation Crimes Act 1972;
 - section 55(1) and (2)(b) of the Maritime Security Act 2004;
 - section 13(1) of the Marine Mammals Protection Act 1978;
- 16.13 There may also be a need for amendment to existing provisions we have not identified to align them with particular recommendations – for example, the recommendation that the warrantless powers of non-police enforcement officers should not extend to a dwelling-house or a marae, where a warrant should be required.
- 16.14 The general provisions governing the exercise of search powers to be included in the fourth part of the proposed legislation are intended to apply to all enforcement agencies, though some individual exceptions may be necessary. Where such exceptions cannot be justified, amendments will also be required to specific statutes to repeal provisions that are inconsistent with or duplicate matters dealt with in the Bill.

Other matters

- 16.15 In chapter 10, we recommended that no amendment to the production notice provisions in the Serious Fraud Office Act 1990 should be made because of the integrated nature of the search powers in that Act. We proposed instead that a broader review of the nature and scope of the search powers under the Serious Fraud Office Act should be undertaken. It would be desirable for such a review to be undertaken against the background of the comprehensive regime proposed in this report.

Appendix



Appendix

Glossary of terms

Technical words and terms used in chapter 7 are explained as follows:


Clone: refer to **forensic copy**.

Computer: a programmable machine that responds to a specific set of instructions in a well-defined manner and that can execute a pre-recorded set of instructions.¹ The word computer has come into common parlance to refer to electronic machines operating as digital computers.² The Court of Appeal has noted that “digital computers rest on five functional elements: (i) input; (ii) storage of that input by a memory system; (iii) a control unit which receives memory and gives instructions for the necessary arithmetic; (iv) an arithmetic which carries out the control demands; (v) an output capacity”.³ In chapter 7, the term **computer** is used broadly to include all devices capable of storing data, including mobile phones, electronic organisers, smart cards, etc.

Computer forensics: the use of specialised techniques for recovering, authenticating and analysing electronic data when an investigation involves issues relating to the reconstruction of computer usage, examination of residual data, authentication of data by technical analysis or explanation of technical features of data and computer usage. Computer forensics requires specialised expertise that goes beyond normal data collection and preservation techniques available to end-users or system support personnel, and generally requires strict adherence to chain-of-custody protocols.⁴

Data: distinct pieces of information, usually formatted in a special way, existing as bits and bytes stored in a data storage device. The term data is often used to distinguish binary machine-readable information from textual human-readable information.⁵ In chapter 7, the term data is used more generally to refer to any information stored in a computer, whether stored in machine readable form or

- 1 Webopedia Computer Dictionary, < <http://www.webopedia.com> > (last accessed 5 March 2007).
- 2 Hon J Bruce Robertson (ed) *Adams on Criminal Law*, (loose-leaf, Brooker’s, Wellington, 1992) CA248.05.
- 3 *Pacific Software Technology Ltd v Perry Group Ltd* (2003) 7 NZBLC 103,950, 103,953.
- 4 The Sedona Conference *The Sedona Guidelines for Managing Information & Records in the Electronic Age*, (WGS, Sedona, Arizona, 2005) Appendix F, < <http://www.thesedonaconference.org> > (last accessed 19 February 2007).
- 5 Webopedia Computer Dictionary, above n 1. See also *Adams on Criminal Law*, above n 2, para CA248.04; Council of Europe *Convention on Cybercrime*, Article 1, < <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm> > (last accessed 12 August 2006).



human-readable form.⁶ Specific types of data that may not be accessible without special software include deleted data,⁷ distributed data,⁸ metadata (described below), residual data,⁹ embedded data¹⁰ and encrypted data.¹¹

Data storage device: the component of a computer in which data is stored (hard drive, CD-ROM, DVD-Rom, tape, etc), whether or not physically separate from the computer and whether or not removable from the computer.

Document: any file, whether text or graphics or otherwise, produced by a word processing, graphics or other application.¹²

Forensic copy: an exact copy of the entire data storage device including all active and residual data and unallocated space on the device.¹³ Forensic copies are also known as clones or imaged copies.

The process of making a forensic copy was described by Hammond J in *A-G v Powerbeat International Limited*:¹⁴

The process is that in order to preserve the data contained in an exhibit computer, a clone is made of the internal hard disk drive. The clone is preserved on a CD-Rom, and all analysis carried out during the technical investigation is performed

- 6 For example data is broadly defined the Crimes Act 1914 (Cth), s 3C(1), to include “information in any form; or any program (or part of a program).”
- 7 Deleted data may remain on storage media in whole or in part until overwritten or wiped. Even after data has been wiped, information relating to the deleted data may remain on the computer. Soft deletions are data marked as deleted but not yet physically removed or overwritten that can be restored with complete fidelity: *The Sedona Guidelines*, Appendix F, above n 4.
- 8 Distributed data resides on portable media and non-local devices such as remote offices, home computers, laptop computers, personal electronic assistants, wireless communication devices, internet repositories and the like: *The Sedona Guidelines*, Appendix F, above n 4.
- 9 Residual data includes data found on media free space; data found in file slack space; and data within files that has functionally been deleted, in that it is not visible using the application with which the file was created, without the use of undelete or special data recovery techniques: *The Sedona Guidelines*, above n 4, Appendix F.
- 10 Embedded data is data that is contained within a file but cannot be accessed by simply opening the container file. This occurs when multiple data items are stored in a single file. This is common with email, databases, accounts and personal organiser applications where many individual emails, records, transactions or addresses are stored in a single file. The format of these composite files is usually such that an individual item cannot be identified and extracted without using specific software: computer forensic evidence given in *H v Commissioners of Inland Revenue* [2002] EWHC 2164 (Admin.) para 35.
- 11 Encrypted data is data that has been protected so that only someone with the correct password or other access details can access the data: computer forensic evidence given in *H v Commissioners of Inland Revenue*, above n 10, para 36.
- 12 Webopedia Computer Dictionary, above n 1. See also legislative definitions of document noted in chapter 7, n 25.
- 13 *The Sedona Guidelines*, Appendix F, above n 4.
- 14 *A-G v Powerbeat International Limited* (1999) CRNZ, 555, para 100.

directly on the clone derived from the CD into a completely new hard disk drive, and transplanted into a host computer.¹⁵

The processes of forensic copying and subsequent search of the forensic copy are undertaken using specialist forensic software.¹⁶ On the creation of the forensic copy, this software mathematically creates a digital fingerprint (known as an MD5 hash) that uniquely describes the contents of the data and verifies that the data is an exact copy. During the search of the forensic copy, the forensic software constantly verifies the integrity of the copied data. If any attempt is made to alter the forensic copy during the search process, the forensic software records that the integrity of the data has been lost as the digital fingerprint is altered.

Metadata: Information about data.¹⁷ Metadata describes how and when a particular set of data was collected, by whom it was collected and how it is formatted.¹⁸ Some metadata, such as file dates and sizes, can be easily seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept.¹⁹ Examples of metadata include: a file's name, a file's location (for example, directory structure or pathname), file format or file type, file size, file dates (for example, creation date, date of last modification, date of last data access, and date of last metadata modification), and file permissions (for example, who can read the data, who can write to it, who can run it).²⁰

Network: A group of two or more computer systems linked together.²¹

Remote access: the ability to log onto a network from a distant location. Generally this implies a computer, a modem, and some remote access software to connect to the network.²² A remote search is one where data is accessed from premises other than the premises on which the data storage device for that data is located i.e. through connection to a network. Remote access does not require physical entry onto the premises where the data storage device is located.

15 According to police, due to the significant increase in the amount of data now stored on computers, forensic copies are now preserved in larger containers than CD-Roms, such as hard drives or tapes, or other suitable devices. Serious Fraud Office procedure is to burn a further copy to DVD as a master copy, prior to the search being conducted. For further descriptions of the process see:

- *A Firm of Solicitors v The District Court at Auckland and the Director of the Serious Fraud Office* [2004] 3 NZLR 748, para 82 (CA);
- Orin S. Kerr, "Searches and Seizures in a Digital World," (2005) 119 Harv Law Rev 531, 540-541;
- Brenner and Fredericksen, "Computer Searches and Seizures: Some Unresolved Issues" (2001) 8 Mich Telecomm Tech L Rev 39, n 81.

16 Forensic software used includes EnCase, Guidance Software Inc., Forensic Toolkit and Access Data Inc.

17 In *Williams v Sprint/United Management Company* 230 F.R.D. 640, 647, the court noted that metadata varies with different applications. As a general rule of thumb, the more interactive the application, the more important the metadata is to understanding the application's output. At one end of the spectrum is a word processing document where the metadata is usually not critical to understanding the substance of the document. At the other end of the spectrum is a database application where the database is a completely undifferentiated mass of tables of data. The metadata is the key to showing the relationships between the data; without such metadata, the tables of data would have little meaning.

18 Dictionary, OzNetLaw < <http://www.oznetlaw.net> > (last accessed 5 March 2007).

19 *The Sedona Guidelines* above n 4, Appendix E.

20 *The Sedona Guidelines*, above n 4, Appendix E, n1.

21 See the discussion of the phrase "2 or more interconnected computers" in *Adams on Criminal Law*, above n 2, para CA248.05. See also Council of Europe *Convention on Cybercrime*, above n 5, Article 1.

22 Webopedia Computer Dictionary, above n 1. See also the discussion concerning remote terminals in *Adams on Criminal Law*, above n 2, para CA248.07.

Webmail: software run by an internet service provider or online service that provides access to send, receive, and review e-mail, accessible by username and password. Webmail provides easy access and storage of e-mail messages for users who are not connected to the internet from their usual location. Instead of the e-mail being downloaded to the computer from which the e-mail account is checked, the messages stay on the provider's server, allowing access to all e-mail messages regardless of what system or internet service provider provides internet access. (This can be contrasted with generic e-mail which must be downloaded from the server and a copy assembled in the recipient's hard drive in order to be accessed.) Hotmail, Gmail and Yahoo!mail are all examples of popular webmail providers.²³

23 Webopedia Computer Dictionary, above n 1.

Recommendations



Recommendations

CHAPTER 3 Common issues

RECOMMENDATIONS

- 3.1 There should be a standard statutory threshold for the exercise of general law enforcement powers of search. That threshold should be reasonable grounds to believe that an offence has been, is being, or is about to be committed, and that evidential material is in the place to be searched. That test should be departed from only where there is a compelling case to do so. Current provisions where the lower threshold can be justified and should be retained include sections 60 to 61 of the Arms Act 1983 and search powers relating to border control offences under the Customs and Excise Act 1996.
- 3.2 The term evidential material should be used to describe the items that may be the subject of a search power. “Evidential material” should be defined as evidence or any other item of significant relevance to the investigation of the specified offence.
- 3.3 Evidential material should expressly include intangible items.
- 3.4 A specific power to seize forensic material should be introduced. This should provide that, where there are reasonable grounds to believe that there is material somewhere on the place, person or vehicle that is the subject of the search (and, in the case of a search warrant, that material is described in the warrant as the object of the search), the enforcement officer should be able to seize any item that he or she believes on reasonable grounds may contain material that could, when examined scientifically, be significantly relevant to the investigation of the specified offence (whether by itself or together with other material). This power should apply to both warrant and warrantless searches.
- 3.5 Subject to recommendation 3.7, no search by consent should be undertaken unless:
 - the search is:
 - for the purpose of preventing crime;
 - for the purpose of protecting life or property or preventing injury;
 - for the purpose of investigating criminal activity;
 - for any other purpose for which a statutory power of search would exist if the appropriate threshold of suspicion or belief were met;



- the officer advises the person whose permission is sought the reason for the request and that he or she may refuse consent.
- 3.6 A consent search that does not comply with these requirements should be unlawful.
- 3.7 Nothing in recommendations 3.5 or 3.6 applies to members of the public or the range of activities conducted by government agencies specified in paragraph 3.91.
- 3.8 A search power exercised in reliance on consent given by a person without actual authority to give that consent should be unlawful.
- 3.9 A person under 14 should not have the authority to consent to an enforcement officer entering any private place, searching such place, or searching a vehicle (unless someone under 14 is driving a vehicle and nobody with actual authority is present in the vehicle).
- 3.10 The concept of implied licence to enter private land should not be defined in statute but, to avoid doubt, there should be provision that nothing in the legislation affects the common law concept of implied licence.
- 3.11 The law relating to “plain view” seizures should be codified to provide that a police officer may seize anything that:
- he or she has reasonable grounds to believe is evidential material;
 - comes into view while the officer is lawfully exercising a search power or is otherwise lawfully in the place or vehicle in which the thing is observed, even if the seizure of the item is not authorised by the terms of any search power that is being exercised.
- 3.12 Subject to recommendation 3.13, no person exercising an inspection or law enforcement power (other than a member of the police) should be permitted to seize any item seen in plain view and reasonably believed to be evidential material relating to *any* criminal offence unless he or she has statutory jurisdiction in respect of that offence.
- 3.13 A customs officer who is lawfully exercising a power of search should be able to seize any item that he or she finds in plain view and reasonably believes to be an objectionable publication (in terms of the Films, Videos, and Publications Classification Act 1993) whether or not it is a prohibited import or a prohibited export.

CHAPTER 4 Applying for and issuing search warrants

RECOMMENDATIONS

- 4.1 Search powers should be available only where they are necessary in the public interest for achieving the purposes of the legislation.
- 4.2 The Legislation Advisory Committee's *Guidelines on Process and Content of Legislation* should be revised so as to make explicit that:
 - search warrants should generally be available for offences punishable by imprisonment;
 - search warrants should not generally be available for infringement offences or for offences that are prescribed by regulation or other delegated legislation.
- 4.3 The Legislation Advisory Committee should consider including in its *Guidelines* a list of factors that should be taken into account in determining whether new search warrant powers for non-imprisonable offences ought to be created.
- 4.4 The categories of thing that may be the subject of a search warrant issued under section 198 of the Summary Proceedings Act 1957 should be replaced by a single category covering any item that is evidential material relating to a specified offence for which there are reasonable grounds for believing has been, is being, or is about to be committed. Other evidence-gathering powers should be similarly framed.
- 4.5 Where the fruits, objects or instruments of an offence are sought for non-evidentiary purposes, a process other than a generic search warrant should be used.
- 4.6 A search warrant should authorise the search of any specified place, vehicle or thing for the object of the search.
- 4.7 A search warrant authorising the search of a place should be sufficient authority for the enforcement officer to search any vehicle or other thing at that place if the object of the search may be in the vehicle or thing.
- 4.8 An application for a warrant should be made only by a member of the police or an enforcement officer authorised to make the application.
- 4.9 Each enforcement agency should have administrative instructions in place to ensure that all warrant applications are reviewed and approved by a supervisor before being made to the issuing officer.
- 4.10 There should be no statutory requirement for applications for a search warrant to be made by an enforcement officer of a certain rank or level.
- 4.11 Warrant applications should not be verified by oath or affirmation, but by a short statement confirming the truth and accuracy of their contents. Specific provision should be made for a criminal sanction for knowingly making a false application.
- 4.12 Warrant applications should usually be made in writing and require the applicant's personal appearance before the issuing officer.

- 4.13 A written application should be able to be transmitted electronically to the issuing officer.
- 4.14 An issuing officer should be able to dispense with the requirement for a personal appearance and may receive an oral application, where he or she is satisfied that:
- the delay that would be caused by requiring a personal appearance would compromise the effectiveness of the search;
 - the merits of the warrant application can be adequately determined on this basis.
- 4.15 Where an oral application for a warrant is made, the issuing officer should record the grounds for the application as soon as practicable.
- 4.16 Where it is not practicable for an enforcement officer to be in possession of the original search warrant at the time of execution, a facsimile or other electronic copy of the warrant transmitted by the issuing officer, or a copy that is made by an enforcement officer at the direction of the issuing officer and endorsed to that effect, may be executed.
- 4.17 Section 171 of the Customs and Excise Act 1996 should be repealed.
- 4.18 Warrant applications should be in a form prescribed by regulations and should cover the information set out in paragraph 4.72.
- 4.19 An applicant should be required to disclose in the warrant application, after having made reasonable inquiries, details of any warrant application made by his or her enforcement agency to search the same place or thing in respect of the same or a similar matter in the previous three months, and the results of any such application.
- 4.20 The original of any warrant application (or in the case of an oral application the record made by the issuing officer) should be retained by the court registrar in secure custody.
- 4.21 The applicant should be required to retain the original warrant and a copy of the application and all documents that were tendered in support:
- where a warrant is issued and executed, until the completion of proceedings where the validity of the warrant may be relevant;
 - in any other case, until the documents relating to the search are required to be transferred or destroyed in terms of the Public Records Act 2005.
- 4.22 Only judges and people who are trained and appointed for the purpose should be authorised to issue warrants.
- 4.23 People appointed to consider warrant applications should include authorised justices of the peace, authorised registrars and deputy registrars and other appointees who have the requisite knowledge, skills and experience.
- 4.24 All issuing officers other than judges should be appointed for fixed terms that may be renewed.

- 4.25 Arrangements should be made to ensure the availability of issuing officers on a 24-hours-a-day basis.
- 4.26 Commissioned police officers should not have the statutory authority to issue a written order authorising the exercise of search powers.
- 4.27 A search warrant should be able to be issued where there are reasonable grounds to believe that the evidential material that is the object of the search will be at the place to be searched when the warrant is executed.
- 4.28 The issuing officer should retain the residual discretion not to grant a search warrant where the grounds justifying its issue have been made out.
- 4.29 A search warrant should contain sufficient specificity and detail to enable the enforcement officer and the owner or occupier of the place or thing searched to understand the nature and scope of the search.
- 4.30 The form of the search warrant should be standard and contain the particulars set out in paragraph 4.136.
- 4.31 Search warrants should be valid for 14 days from the date of issue unless the issuing officer specifies a shorter period in the warrant. Where the issuing officer is satisfied that, owing to the special circumstances of the case, a period longer than 14 days is necessary for the execution of the warrant, he or she should be able to issue a warrant that is valid for up to 30 days.
- 4.32 Search warrants should be subject to any conditions specified in the warrant that the issuing officer considers reasonable to impose.
- 4.33 A search warrant should be executed only once, except where the issuing officer is satisfied that more than one execution is reasonably required for the purposes for which the warrant is being issued. The issuing officer should specify in the warrant that more than one execution is permitted.
- 4.34 A search warrant is executed when the enforcement officers executing the warrant:
 - have seized and removed all the items specified in the warrant; or
 - leave the place and do not return within four hours.
- 4.35 No separate provision should be made for renewing a search warrant. Where an extension or renewal is needed, an application for a fresh warrant should be made.
- 4.36 A search warrant should be declared to be invalid and not capable of being saved by section 204 of the Summary Proceedings Act 1957 if:
 - having regard only to the information provided in the warrant application, the threshold for issuing the warrant is not met; or
 - the warrant contains a defect, irregularity, omission or want of form that is likely to mislead anyone as to its scope or purpose.

RECOMMENDATIONS

- 5.1 For the purpose of executing a warrant to arrest, a police officer should retain the authority to enter a place to search for and arrest the person against whom the warrant is issued where the officer has reasonable grounds to believe that the person is in the place. The authority to enter should also be specified in the warrant itself.
- 5.2 Section 317(1)(a) of the Crimes Act 1961 should be repealed and replaced with a provision that authorises a police officer to enter a place to search for and arrest a person pursuant to a power to arrest without warrant for an offence punishable by imprisonment, if the police officer has reasonable grounds to believe that:
- the person is in the place; and
 - if entry is not effected immediately, either:
 - the person will flee from the place in order to evade arrest; or
 - evidential material relating to the offence for which the person is to be arrested will be destroyed, concealed or impaired.
- 5.3 Section 317(1)(b) of the Crimes Act 1961 should be amended to authorise a police officer to enter a place to arrest a person who is believed on reasonable grounds to have committed an offence punishable by imprisonment in that place.
- 5.4 A police officer should be able to enter a place without warrant in order to search for and apprehend a person whom the officer has reasonable grounds to believe is in the place and the person is unlawfully at large.
- 5.5 A person should be regarded as unlawfully at large if he or she:
- is unlawfully at large in terms of the Corrections Act 2004 or the Parole Act 2002;
 - is a special or restricted patient who has escaped from an institution or is absent without leave under the Mental Health (Compulsory Assessment and Treatment) Act 1992;
 - has escaped from lawful custody under sections 119 or 120 of the Crimes Act 1961.
- 5.6 The existence of the power to search incidental to arrest, and the scope of such a power, should be codified to permit a police officer who has arrested a person to enter and search a place if the officer has reasonable grounds to believe that:
- evidential material relating to the offence for which the person was arrested is in the place; and
 - the delay caused by obtaining a search warrant will result in that evidential material being destroyed, concealed or impaired.

- 5.7 Section 317(2) Crimes Act 1961 should be repealed and replaced with a provision that permits a police officer to:
- enter a place without warrant if he or she has reasonable grounds to suspect that in that place:
 - an offence is occurring or about to occur, which would be likely to cause injury to any person, or serious damage to or loss of any property; or
 - there is a risk to the life or safety of any person that requires an emergency response;
 - take any action that the police officer has reasonable grounds to believe is necessary to prevent the offending from occurring or continuing, or to avert the emergency.
- 5.8 The common law defence of necessity should be expressly preserved for people other than police officers.
- 5.9 Sections 60 to 61 of the Arms Act 1983 should be retained with the existing threshold of reasonable grounds to suspect, rather than reasonable grounds to believe. The requirement for a commissioned officer of police to authorise a search under section 61 in writing should be removed.
- 5.10 Section 18(2) of the Misuse of Drugs Act 1975 should be retained.
- 5.11 A police officer should not exercise the warrantless powers of search under section 18 of the Misuse of Drugs Act 1961 unless the officer exercising the power believes on reasonable grounds that it is not practicable to obtain a warrant.
- 5.12 Section 12A of the Misuse of Drugs Amendment Act 1978 relating to the controlled delivery of unlawfully imported drugs should be amended to authorise customs officers and police officers to search a place or vehicle as well as any person involved in the delivery. The description of a controlled delivery contained in section 12 should be refined to meet changes in unlawful drug importing patterns.
- 5.13 A police officer should be able to enter and search any place if he or she has reasonable grounds to believe that:
- evidential material relating to an offence punishable by 14 years' imprisonment or more will be found; and
 - the delay caused by obtaining a search warrant will result in the evidential material being concealed, destroyed or impaired.
- 5.14 Section 119(3)(c) of the Land Transport Act 1998 should be amended so that the threshold is reasonable grounds to believe, not reasonable grounds to suspect. Subsection (3) should also be amended so that the power to enter and seize a vehicle in terms of paragraphs (a) to (c) can be exercised only when it is impracticable to obtain a warrant.
- 5.15 Legislation providing non-police enforcement officers with a power to search a place without warrant for law enforcement purposes should be enacted only where there is a specific overriding public interest that justifies the departure from the warrant requirement.

- 5.16 The public interests that may justify providing a warrantless search power, which are described in paragraphs 5.90 and 5.92, should be incorporated into the Legislation Advisory Committee's *Guidelines*.
- 5.17 Warrantless search powers exercised by non-police enforcement officers should not extend to dwelling-houses or marae; a warrant should be required.
- 5.18 Legislation that provides for warrantless search powers that do not meet the criteria in recommendations 5.15 to 5.17 should be reviewed to determine whether the enactment should be repealed or amended so that the power is appropriately modified or exercised pursuant to a warrant. This includes:
 - section 453(2) of the Maritime Transport Act 1994;
 - section 58 of the Immigration Advisers Licensing Act 2007.

CHAPTER 6 Executing search powers

RECOMMENDATIONS

- 6.1 Search warrants should be directed to and executed by any enforcement officer with the statutory authority to exercise the relevant power.
- 6.2 An enforcement officer at any level should be able to exercise warrantless powers of entry, search and seizure.
- 6.3 Enforcement agencies should have administrative procedures in place to ensure that an officer is identified as the responsible officer whenever a search power is exercised. That officer should ensure that all legal and procedural requirements during and after the search are fulfilled. In the absence of such an appointment the most senior officer present should be deemed to be the responsible officer.
- 6.4 Before entering the place to be searched, the enforcement officer should announce to the occupier his or her intention to enter and search the place pursuant to a search power, and identify himself or herself.
- 6.5 Compliance with recommendation 6.4 should not be required, where the officer exercising the search power has reasonable grounds to believe that:
 - the place to be searched is unoccupied; or
 - compliance would endanger the safety of any person; or
 - compliance would prejudice the successful exercise of the search power; or
 - compliance would prejudice ongoing or subsequent investigations.
- 6.6 Statutory provision should be made to permit force to be used when exercising a search power where it is necessary for the purposes of:
 - entering any place authorised to be searched;
 - breaking open or accessing any area within the place searched, or any item found in the place searched;
 - seizing any item.

- 6.7 The extent to which force may be used should be governed by the single standard of reasonable force.
- 6.8 Search powers should be exercised at any time of the day or night that is reasonable subject, in the case of a warrant, to any restriction on the time of execution imposed by the issuing officer.
- 6.9 An enforcement officer should conduct a search in a manner that is not more intrusive than is consistent with the purpose for which it is being conducted.
- 6.10 Provided the recommendations we make in this chapter and chapters 4 and 13 are adopted, a separate regime for covert searches is unnecessary.
- 6.11 An enforcement officer should be able to use such assistance, including, but not limited to human assistants, devices, equipment and dogs, as is reasonable for the purpose of exercising any search power.
- 6.12 Every person, other than an enforcement officer exercising an independent power of search, called on to assist with the execution of the search should be subject to the responsible officer's direction or supervision.
- 6.13 Except in relation to searching a person, an assistant should have the search powers that an enforcement officer is lawfully entitled to exercise, but an assistant may only exercise those powers under the supervision of the responsible officer.
- 6.14 An enforcement officer should be able to use equipment found in the place being searched where there are reasonable grounds for believing that the use of such equipment will provide access to evidential material, or where the use of the equipment is reasonable for the purposes of the search.
- 6.15 A duty to assist an enforcement officer in the execution of a search power should be imposed by legislation only when there is a compelling policy reason to do so and should be confined to those matters that are essential for the discharge of the search power.
- 6.16 In the course of exercising a search power, an enforcement officer should be entitled to take photographs or record images and sounds in the place searched and of anything found there where such photographs or recordings are relevant to the purposes of the search or to verify that the search power was properly exercised.
- 6.17 An enforcement officer should be entitled to copy any document, or part of a document, where there are reasonable grounds for believing that it may be seized under the search power.
- 6.18 Where it is not reasonably practicable to determine whether an item may be seized pursuant to a search power at the place where the search occurs, an enforcement officer should be permitted to remove it for the purpose of examination or processing to determine whether it may be seized.
- 6.19 Items removed for examination should be:
- examined or processed as soon as reasonably practicable;

- returned to the person from whom they were taken once the enforcement officer determines they are not to be seized and retained;
 - subject to the provisions as to access applying to seized items that are retained.
- 6.20 Where an enforcement officer is lawfully at a place and a search warrant to search that place is being or is about to be applied for, the officer should be authorised to:
- establish a crime scene at the place to be searched for the lesser of a period of six hours or until a search warrant is obtained and available at the scene;
 - give reasonable directions to a person at the crime scene to ensure that evidential material is not destroyed, concealed, or impaired.
- 6.21 The power of a police officer under section 342A of the Local Government Act 1974 to temporarily close a road should be retained, but shifted to the proposed legislation dealing with police search powers.
- 6.22 If it is necessary to enable a search power to be exercised effectively or to ensure that evidential material is not destroyed, concealed or impaired, an enforcement officer should be authorised to:
- give reasonable directions to a person at the place searched;
 - guard the scene, or arrange for it to be guarded and prevent persons from entering.
- 6.23 It should be an offence for anyone to fail to comply with the reasonable directions that an enforcement officer gives at a crime or search scene.
- 6.24 An enforcement officer who, in terms of recommendations 6.20 or 6.22, establishes a crime scene or gives directions while undertaking a search, should identify himself or herself to those affected and advise them of the authority for the action taken.
- 6.25 Where there is a statutory power to search premises, it should carry with it the power to detain a person who is at the place being searched, or who arrives there while the search is being undertaken, for such period as is reasonable, not exceeding the duration of the search, to enable the officer to determine whether the person is connected with the object of the search.
- 6.26 An enforcement officer who lawfully detains someone at a search scene should be able to use reasonable force to do so.
- 6.27 An enforcement officer who is exercising a search power should, upon entry, produce evidence of his or her identity as an enforcement officer and advise the person who appears to be the occupier of the authority for the search.
- 6.28 When a search warrant is being executed and the occupier of the place is present, the enforcement officer should, upon entry, give him or her a copy of the warrant.
- 6.29 Unless recommendations 6.32 or 6.33 apply, if anything (including any copy

or clone of information) is seized, the enforcement officer should give the occupier (i.e. the person who appears to be the occupier) an inventory of the things removed, unless it is not reasonably practicable to do so. In that case the inventory should be provided as soon as practicable and, unless an extension is approved by a judge, no later than seven days after seizure.

- 6.30 The back of the inventory form should provide people from whom items are seized with information about:
- access to and the disposition of seized items;
 - their right of access to documentation relating to the application for a search warrant or exercise of a search power that would be discoverable under the Official Information Act 1982 or the Criminal Disclosure Act (when enacted);
 - the procedures to be followed where they wish to initiate a claim that privileged or confidential material has been seized.
- 6.31 Unless recommendations 6.32 or 6.33 apply, when the occupier of the place searched is not present at the time of the search, the responsible officer should leave in a prominent position notice of the search containing details of:
- the date and time of the search;
 - the name or unique identifier of the executing officer;
 - a copy of the warrant or, in the case of a warrantless search, the authority for the search;
 - the inventory of the things removed;
 - the contact address to which inquiries should be made.
- 6.32 Where an enforcement officer has reason to believe that the person present when a search power is exercised is not the occupier, the officer should leave the notice required as if the occupier were not present at the time of the search. A child under the age of 14 years should not be treated as an occupier for this purpose.
- 6.33 Where it is apparent that the inventory should be given to someone other than the occupier of the place searched, the enforcement officer need not notify the occupier, but should rather make reasonable efforts to identify the owner of the property seized and to provide the inventory to him or her unless recommendation 6.34 applies.
- 6.34 The requirement to provide the notice of search (including the inventory) need not be complied with if an application is made by an enforcement officer either at the time the warrant is applied for or within seven days of the exercise of the search power and a judge postpones the requirement upon being satisfied that there are reasonable grounds for believing that compliance would unduly prejudice ongoing or subsequent investigations, or endanger the safety of any person. Such postponement should be for a specified period of up to 12 months.
- 6.35 If at the end of the postponement period the responsible officer believes that providing notice of the search to the occupier would continue to unduly

prejudice ongoing or subsequent investigations or endanger the safety of any person, the officer should be able to make a further application to the judge. The judge should then make a final order:

- declining the application; or
- if he or she is satisfied that the grounds for the application are made out, either extending the postponement until a future specified date when notification must then be given, or dispensing with notification altogether.

6.36 Except in relation to copies or clones of information taken or made, where things have been seized, there should be no power to extend a postponement order or to dispense with the giving of the notice of search and inventory of things seized to the occupier.

CHAPTER 7 Computer searches

RECOMMENDATIONS

- 7.1 Searches of computers should generally be regulated by the search and seizure regime that applies to tangible items (subject to any necessary modification), in preference to the creation of a different regime carrying more restrictive requirements.
- 7.2 Search powers should be generic and permit searches for tangible items or intangible material, with no specific application required to authorise a computer search.
- 7.3 Law enforcement agencies should have express powers to access and copy intangible material from computers and data storage devices when exercising their search and seizure powers.
- 7.4 Specialist search methods for searching computers, such as previewing and forensic copying, should be available to law enforcement agencies under the proposed power to remove an item for examination outlined in chapter 6, recommendation 6.18.
- 7.5 Where an agency is authorised to remove a computer for examination, there should be express authority to forensically copy the computer hard drive or other data storage device, either before or after its removal for examination, and to examine the forensic copy.
- 7.6 The plain view doctrine should apply to the seizure of intangible material, without any additional restrictions.
- 7.7 A general power to execute computer searches remotely is *not* recommended (Scenario A).
- 7.8 Remote access to network computer data – that is, data which is accessible from a computer found on the search premises – should be permitted where the access is within the terms of the search power and is otherwise lawful,

regardless of whether the data is remotely accessed from the search premises or elsewhere (Scenario B).

- 7.9 Search warrant regimes should permit search warrants to be issued for places such as internet data storage facilities where there is no specific physical location that can practicably be searched prior to remote access but where a particular search area can be adequately specified by reference to access information (Scenario C).
- 7.10 An alignment of the interception warrant regime with the search warrant regime to permit remote access to stored communications is *not* recommended (Scenario D).
- 7.11 Warrantless search powers involving remote access should be limited to Scenario B searches.
- 7.12 Remote cross-border searches (under either Scenario B or Scenario C) should be permitted where:
 - the search is limited to open-source (publicly available) data; or
 - the search is conducted in accordance with mutual assistance arrangements in place between New Zealand and the relevant jurisdiction; or
 - the search is specifically authorised under a search warrant.
- 7.13 Consideration should be given to whether New Zealand should accede to the Convention on Cybercrime.
- 7.14 The power under section 198B of the Summary Proceedings Act 1957 to require assistance from specified persons in order to gain access to data:
 - should be retained;
 - should be extended to apply to access to data held in or accessible from all types of data storage devices found at the place to be searched;
 - should expressly include the furnishing of access codes, passwords and encryption keys as a form of required assistance;
 - should be extended so that it applies to third party service providers that hold access information;
 - should be extended to relevant agencies, besides police, that are empowered to search computers;
 - should be extended to warrantless searches.
- 7.15 The maximum monetary penalty for failing to assist should be increased.
- 7.16 In addition to having the power to use reasonable force, enforcement officers should have the power to use such *measures* as are reasonable to gain lawful access to any data storage device located at or accessible from the place or thing to be searched.
- 7.17 Where an agency is authorised to forensically copy a computer hard drive, server or other data storage device, the agency should have the power to use such measures as are reasonable to create the forensic copy.

- 7.18 Where a computer search involves remote access under Scenario B, information about the search should be given to the person in overall charge of the computer network that is accessed remotely, except if that person is entitled to receive information about the search on any other basis and subject to any authorised postponement or dispensation of notice.
- 7.19 Once the enforcement agency has carried out an examination of forensically copied data, unless there is a basis for ongoing retention, all forensic copies should be destroyed.
- 7.20 Where a basis for retaining forensically copied data is established, the police or other relevant agency should be empowered to retain the forensic copy in its entirety and should not be required to separate and destroy irrelevant material.
- 7.21 Chapter 13 recommendations 13.11 to 13.13, relating to applications for the return of seized items, should apply to forensic copies that are retained by an enforcement agency.
- 7.22 Chapter 13 recommendations 13.1 to 13.4, relating to access to seized items, should apply to forensic copies that are retained by an enforcement agency.
- 7.23 Enforcement agencies should be authorised to conduct subsequent searches of forensic copies that are retained, provided that such searches remain within the parameters of the initial search power.

CHAPTER 8 Search of persons

RECOMMENDATIONS

- 8.1 The power to search people should include the power to search any item they are wearing or carrying, and any such item in their physical possession or immediate control.
- 8.2 Where the police are searching a place or vehicle pursuant to a search power, they should also have the power to search anyone who is found at or arrives at the place, or who is in or alights from the vehicle, if an officer has reasonable grounds to believe that evidential material that is the object of the search is on that person.
- 8.3 Sections 18(1) and (2) of the Misuse of Drugs Act 1975 should be retained in their present form and should not require a police officer to have a reasonable belief that the person being searched incidental to a search of a place or vehicle is in possession of controlled drugs.
- 8.4 Section 342(2)(d) of the Gambling Act 2003 should be amended to require a reasonable belief threshold before searching someone.
- 8.5 Where the police are searching a place or vehicle pursuant to a search power, they should also have the power to search anyone who is found at or arrives

at the place, or who is in or alights from the vehicle, if an officer has reasonable grounds to suspect that person is in possession of a dangerous item that poses a threat to safety, and immediate action is needed to address the threat.

- 8.6 Unless the possession of the dangerous item constitutes an offence, the item should be returned to the person from whom it was taken once the search has been completed, or when the police officer is satisfied there is no longer any threat to safety.
- 8.7 The powers to search a person under section 18(3) of the Misuse of Drugs Act 1975, section 12A of the Misuse of Drugs Amendment Act 1978 and sections 60 to 61 of the Arms Act 1983 should be retained.
- 8.8 The power to search a person under section 202B of the Crimes Act 1961 should be retained, but amended so that the threshold for search is reasonable suspicion rather than reasonable belief.
- 8.9 The power to search a person under section 108 of the Biosecurity Act 1993 and sections 149 to 149BA of the Customs and Excise Act 1996 should be retained.
- 8.10 The search powers in section 13(1) of the Aviation Crimes Act 1972 and section 55(1)(b) of the Maritime Security Act 2004 should be amended to require the member of police conducting the search to have reasonable grounds to suspect both that a relevant offence has been, is being, or is about to be committed and that a search of the person will disclose evidential material relating to that offence.
- 8.11 The power to search a person for stolen goods in transit under section 224 of the Crimes Act 1961 should be repealed.
- 8.12 The police should be able to search without warrant a person in a public place if there are reasonable grounds to believe that he or she is in possession of evidential material relating to an offence punishable by 14 years' imprisonment or more.
- 8.13 Where a police officer has formed an intention to undertake a lawful search of a person in a place (including a public place) or in a vehicle, and that person leaves the place or vehicle before being searched, the officer should be able to search him or her upon subsequent apprehension and to enter any private property for that purpose, provided that:
 - the police officer is freshly pursuing the person from the location of the intended search;
 - the officer believes on reasonable grounds that the person still has the relevant evidential material on him or her.
- 8.14 Police officers effecting an arrest should be entitled to undertake a frisk search to ensure the arrested person is not carrying anything that may be used to facilitate his or her escape or to harm anyone.
- 8.15 No threshold of belief or suspicion should be required before a frisk search may be undertaken following arrest.

- 8.16 The scope of a frisk search should be prescribed, having regard to its protective purpose.
- 8.17 Police officers effecting an arrest should be entitled to search the arrested person if they have reasonable grounds to believe that there is anything on the person:
- that may be used to cause harm to anyone;
 - that may be used to facilitate the arrested person's escape;
 - that is evidential material relating to the offence for which the person is being arrested.
- 8.18 The power in section 57A of the Police Act 1958 to search an arrested person who is to be locked up in police custody should be retained.
- 8.19 For the purposes of that section, a person should be regarded as being locked up if he or she is to be detained in secure custody in a police facility whether or not a decision has been made as to the grant of police bail.
- 8.20 The Commissioner of Police should be able to authorise any suitably trained members of the police to search people who are held in police custody pursuant to section 57A of the Police Act 1958.
- 8.21 A police officer's authority to search a person following arrest for items that may cause harm or facilitate escape should also apply to a person who has been detained pursuant to a statutory power of detention.
- 8.22 A specific power to authorise the police to search an arrested person for identifying marks is not necessary, such authority being provided by the power to search an arrested person proposed in recommendation 8.17.
- 8.23 The principles that govern the powers of police officers to conduct personal searches are equally applicable to non-police enforcement officers. The Legislation Advisory Committee should consider a revision of its *Guidelines* to incorporate these principles.
- 8.24 The right in sections 149D and 168 of the Customs and Excise Act 1996 and section 38 of the Financial Transactions Reporting Act 1996 of a person who is to be searched under those enactments to request to be taken before a reviewing officer before being searched should be repealed.
- 8.25 In narrowly defined circumstances, non-police enforcement officers should have the power to search a person to prevent loss of life or serious harm to others. The power of search in section 12(2)(a) of the Maritime Crimes Act 1999 and a similar power proposed in the Aviation Security Legislation Bill 2007 are justified on this basis.
- 8.26 Non-police enforcement officers who have any statutory arrest power and who are searching a place or vehicle pursuant to a search power should be able to search anyone who is found at or arrives at the place, or who is in or alights from the vehicle, if the officer has reasonable grounds to believe that evidential material that is the object of the search is on that person.

- 8.27 Recommendations 8.5 and 8.6, which relate to the power of police officers to search people for dangerous items incidental to the search of places or vehicles, should apply equally to non-police enforcement officers who have any statutory arrest power.
- 8.28 Non-police enforcement officers who have any statutory arrest power should have the same power as a police officer to search anyone apprehended after leaving the location of an intended search in the circumstances described in recommendation 8.13.
- 8.29 Non-police enforcement officers who have any statutory arrest power should be able to conduct a frisk search or a more extensive search of an arrested person as proposed in recommendations 8.14 to 8.17.
- 8.30 Non-police officers who have a statutory power of detention should have the power to search a detained person as proposed for police officers in recommendation 8.21.
- 8.31 The use of devices or aids to facilitate a search should be permitted if their use is reasonable in the circumstances.
- 8.32 A strip search should only be conducted by an enforcement officer in accordance with the enforcement agency's guidelines governing the conduct of such a search.
- 8.33 An internal body search for law enforcement purposes should only be conducted in accordance with specific legislative authority and should require judicial authorisation on a case-by-case basis.
- 8.34 Further policy consideration should be given to whether the current maximum period for detention following the issue of a detention warrant under section 13E of the Misuse of Drugs Amendment Act 1978 is adequate.
- 8.35 Where an enforcement officer is exercising a personal search power, other than a search of a person in custody under section 57A of the Police Act 1958, that officer should first identify himself or herself by name or unique identifier and advise the person to be searched of the authority and reason for the search, unless it is impracticable to do so in the circumstances.
- 8.36 Where items are seized as a result of the exercise of a search power (and also where the person consents to the search), an inventory of the property taken should be promptly prepared and the person searched given a copy. Where property is removed from an arrested person after a search under section 57A of the Police Act 1958, the person searched should be shown the inventory and verify its accuracy.
- 8.37 No person other than an enforcement officer should conduct a personal search unless specifically authorised by legislation, or the person to be searched consents to the search being conducted by someone other than an enforcement officer.

- 8.38 Any power to search a person should expressly include the authority to detain the person to allow the search to be carried out. The detention should last only as long as is necessary to achieve that purpose.
- 8.39 Further work should be undertaken with a view to developing a clear policy on collecting, using and storing DNA samples obtained other than by way of blood or buccal sample under the current statutory procedures.

CHAPTER 9 Search of vehicles

RECOMMENDATIONS

- 9.1 Unless the context of the statute requires otherwise, a uniform definition of vehicle should be adopted for search powers in respect of vehicles.
- 9.2 The recommendations relating to applications for and the execution of search warrants in respect of places should apply with the necessary modifications to vehicles.
- 9.3 Powers to enter premises without warrant in emergency situations to protect people and property (see chapter 5 recommendation 5.7) should apply in the same terms to vehicles.
- 9.4 A police officer should be able to search a vehicle without warrant if he or she has reasonable grounds to believe that the vehicle contains evidential material relating to an offence punishable by 14 years' imprisonment or more.
- 9.5 The warrantless powers to search vehicles in section 18 of the Misuse of Drugs Act 1975, sections 60-61 of the Arms Act 1983 and section 202B of the Crimes Act 1961 should be retained, but the threshold for a search under section 202B of the Crimes Act 1961 should be changed to reasonable grounds to suspect.
- 9.6 The power to search vehicles without warrant for stolen or dishonestly obtained property in section 225 of the Crimes Act 1961 should be retained, but confined to stolen property.
- 9.7 The power of a police officer to search a vehicle without warrant incidental to arrest and the scope of such a power should be codified.
- 9.8 The power should be exercised when a police officer has reasonable grounds to believe that the vehicle contains evidential material relating to the offence for which the person was arrested.
- 9.9 Where a police officer has formed an intention to search a vehicle pursuant to a search power, and the vehicle leaves the search location before the search can be commenced or completed, the officer should be able to search that vehicle wherever it is subsequently located, provided that:
- the police officer is freshly pursuing the vehicle when it is located;
 - the officer believes on reasonable grounds that the relevant evidential material is still in the vehicle.

- 9.10 Non-police enforcement officers who have any statutory power of arrest should have the power to search vehicles on the same basis as police officers under recommendation 9.8.
- 9.11 Non-police enforcement officers who have any statutory power of arrest should have the same power as a police officer to search a vehicle found after leaving the location of an intended search in the circumstances described in recommendation 9.9.
- 9.12 The search power in section 13(1) of the Marine Mammals Protection Act 1978 should be amended to require the officer exercising the power to have reasonable grounds to believe that a breach of the Act or Regulations has been or is being committed and that relevant evidential material will be found in the vehicle, vessel, aircraft or hovercraft to be searched.
- 9.13 Police powers to stop a vehicle for the purpose of exercising a power to search the vehicle should be governed by a single statutory regime incorporating the requirements, powers, and obligations contained in sections 314A to 314D of the Crimes Act 1961. The requirement in section 314B(4)(a) for the officer to identify himself or herself should be met by the officer providing his or her name or unique identifier.
- 9.14 The definition of vehicle in section 314A(3) should be expanded to include all types of vehicles. The requirement in s 314B(2) that the police officer demonstrate his or her official status in advance of the stop should be retained, but recast to take account of the greater variety of vehicles involved.
- 9.15 Where an enforcement officer other than a police officer has a statutory power to stop a vehicle, the officer should, after the vehicle has stopped:
- identify himself or herself to the driver by name or unique identifier;
 - tell the driver the authority for the stop;
 - if not in uniform and if requested, produce evidence of his or her authority as an enforcement officer.
- 9.16 A non-police enforcement officer should have the authority to require persons in the vehicle to supply their particulars and to require the vehicle to remain stopped for as long as reasonably necessary for the exercise of the search power. Offences similar to those in section 314D of the Crimes Act 1961, but with an appropriate knowledge requirement, should be provided for.
- 9.17 The Crimes Act powers to stop and search vehicles for the purpose of arrest should be retained in their present form, except that:
- the reasonable grounds to suspect threshold in section 317A(1)(a) should be replaced with reasonable grounds to believe;
 - the expression “unlawfully at large” should be redefined in the same terms as proposed in chapter 5 (warrantless search of places);
 - the power to search for evidence in section 317AA(1)(b)(ii) should apply only where the person to be arrested has been apprehended, or is seen fleeing from the vehicle before he or she can be apprehended.

- 9.18 The current authority to establish road blocks provided by section 317B of the Crimes Act 1961 should be retained, with the addition of a definition of unlawfully at large.
- 9.19 Where a vehicle is found or stopped by an enforcement officer, the officer should have the power to move the vehicle to another place if:
- there is a lawful authority to search the vehicle, but it is impracticable to do so at that place; or
 - the officer reasonably believes that the vehicle needs to be moved for safekeeping or road safety purposes.
- 9.20 A warrant to search a vehicle should authorise entry onto any private place where the vehicle is reasonably believed to be located to conduct the search.
- 9.21 A warrantless power to search a vehicle should not in itself authorise entry onto any private place on which the vehicle is believed to be located.

CHAPTER 10 Production and monitoring powers

RECOMMENDATIONS

- 10.1 A production order regime should be available to enforcement agencies for investigating offences and enforcement officers should be able to apply for a production order or a search warrant.
- 10.2 The criteria relating to the issue of production orders should be the same as those applying to the issue of search warrants.
- 10.3 The immunities and protections proposed with respect to search warrants should apply to production orders.
- 10.4 It should be an offence to fail to comply with a production order without reasonable excuse and within a reasonable time.
- 10.5 Non-compliance with a production order should be justified if the production of the items specified would be likely to incriminate the person to whom the order is directed in terms of section 60 of the Evidence Act 2006.
- 10.6 A production order regime should be retained for the purposes of proceeds of crime investigations.
- 10.7 The exercise of production powers should be authorised by an independent issuing officer and enforcement agencies should not be able to issue production notices for general law enforcement purposes.
- 10.8 The issue of production notices may be justified in some specific operational circumstances. On this basis the production notice powers of customs officers under section 160 of the Customs and Excise Act 1996 is justified and should be retained.

- 10.9 The production notice powers of the director under the Serious Fraud Office Act 1990 should not presently be repealed, but their continued justification should be considered as part of a broader review of the nature and scope of the powers under that Act.
- 10.10 Production notices should not be available for proceeds of crime investigations.
- 10.11 Monitoring orders for proceeds of crime investigations should be confined to transactions through an account held with a financial institution, but should be available where the proceeds relate to any offence punishable by five years imprisonment or more.
- 10.12 Enforcement officers should be able to apply for a monitoring order in respect of offences for which a search warrant may be issued.
- 10.13 A monitoring order regime should not be restricted to information held by financial institutions or telecommunications service providers; monitoring orders should be available for any type of information.
- 10.14 Where the transaction information held by an institution or provider includes the content of the transaction, the monitoring order should be able to include that information.
- 10.15 Monitoring orders should be authorised by an independent issuing officer who should be satisfied that there are reasonable grounds for believing that the information to which the order relates will provide evidential material relating to a specified offence.
- 10.16 A monitoring order should have a maximum life of 30 days.
- 10.17 A separate call data warrant regime is no longer required and the relevant provisions of the Telecommunications (Residual Provisions) Act 1987 should be repealed.

CHAPTER 11 **Interception and surveillance**

RECOMMENDATIONS

- 11.1 Certain specific forms of non-trespassory surveillance by enforcement officers should be statutorily regulated.
- 11.2 Surveillance activities should be regulated without creating additional criminal or civil liability; whether any additional liability is needed is beyond the scope of our report and requires separate consideration.
- 11.3 A new generic surveillance device warrant regime should be created, replacing the current interception and tracking device regimes.
- 11.4 A judge issuing a surveillance device warrant should be able to authorise the use of a multi-function surveillance device as well as multiple surveillance devices within the terms of a single warrant.

11.5 The proposed surveillance device regime should:

- require that enforcement officers obtain a warrant for the use of interception and tracking devices, as currently defined in legislation;
- require that enforcement officers obtain a warrant in order to observe any activity in a private building by means of a visual surveillance device, where in the circumstances any of the parties to the activity ought to have a reasonable expectation that they are being observed only by themselves;
- require that enforcement officers obtain a warrant to observe any activity in the curtilage of a private building for more than three hours in a 24-hour period or more than eight hours in aggregate, where any part of that observation involves the use of a visual surveillance device and in the circumstances any of the parties to the activity ought to have a reasonable expectation that they are being observed only by themselves;
- as an exception to these requirements, permit an enforcement officer to record with a visual surveillance device any activity that he or she sees in a private building or its curtilage, where he or she is lawfully within the building or curtilage or has the consent of one of the parties to the activity to observe it.

11.6 Certain specified uses of surveillance devices that either do not amount to intrusions on reasonable expectations of privacy or that are reasonable intrusions on such expectations should be excluded from the warrant requirement.

11.7 For surveillance activities that do amount to an intrusion on reasonable expectations of privacy, a warrant should be required (except in the emergency situations discussed at paragraphs 11.104 to 11.113).

11.8 Whenever a statutory search warrant power for law enforcement purposes exists, it should be extended to include a surveillance device warrant power to obtain evidential material in respect of any offence covered by the search warrant power.

11.9 The surveillance device warrant regime should be available to any enforcement agency that has a search warrant power for law enforcement purposes.

11.10 The legislation establishing the regime should incorporate a mandatory review after five years.

11.11 The prerequisites to issuing a surveillance device warrant should, in principle, be the same as for the search warrant power to which it relates.

11.12 There should be no requirement that a surveillance device warrant should only be issued if evidential material cannot be obtained by the execution of a search warrant.

11.13 A surveillance warrant should specify the people, places or objects that are to be the subject of the surveillance and the evidential material relating to a particular offence that is to be obtained by using the device. Where specificity is not practicable, the warrant should describe the circumstances in which the

surveillance is to be undertaken with sufficient particularity to identify the parameters of, and objectives to be achieved by, the use of the device.

11.14 A surveillance device warrant should be able to be issued in anticipation of the existence of the evidential material that is sought to be obtained.

11.15 Reporting requirements in relation to the execution of surveillance device warrants should be the same as those that apply in respect of search warrants. There should be no general requirement for ongoing judicial supervision of surveillance device warrants.

11.16 A surveillance device warrant should have a maximum life of 60 days. This does not preclude subsequent applications upon the expiry of an earlier warrant.

11.17 A surveillance device warrant should be issuable by any judge, except for national security warrants.

11.18 A surveillance device warrant should authorise entry onto premises and into vehicles, if necessary using reasonable force, for the purposes of installing, maintaining or removing the device. It should also authorise the use of electricity to power the device.

11.19 In a situation of urgency, an enforcement officer should be able to use a surveillance device without warrant or other authorisation in the following circumstances:

- where there are reasonable grounds to believe drug offending as specified in section 18(2) of the Misuse of Drugs Act 1975 (as we propose to amend it) and it is not practicable to obtain a warrant;
- where there is reasonable suspicion justifying a search under sections 60 to 61 of the Arms Act 1983;
- in the course of a controlled delivery of drugs under section 12A of the Misuse of Drugs Amendment Act 1978;
- where there are reasonable grounds to believe that an offence punishable by 14 years' imprisonment or more is occurring or about to occur and the delay caused by obtaining an interception warrant will prevent the evidence from being obtained;
- where there are reasonable grounds to suspect that:
 - an offence is occurring or about to occur, which would be likely to cause injury to any person, or serious damage to or loss of any property; or
 - there is an emergency that may endanger the life or safety of any person.

11.20 The emergency use of a surveillance device without warrant should not extend beyond 48 hours.

11.21 Notification of surveillance should be given within seven days of the conclusion of the surveillance unless postponement or dispensation is granted by a judge.

11.22 Where an enforcement officer applies to a judge for postponement or dispensation from the notification requirement at the time of the application or following the exercise of a surveillance power, the application should be

granted unless the judge is satisfied that notification would not prejudice ongoing or subsequent law enforcement investigations and would not endanger the safety of any person.

11.23 When notification of the exercise of a surveillance power is to be given, a judge should be able to give directions to the enforcement officer as to the person or people to be notified.

11.24 A residual regime should be enacted to authorise the use of devices that interfere with reasonable expectations of privacy, but which are not otherwise subject to regulation. In particular:

- the warrant should be issuable only by a judge;
- the issuing judge should prescribe in detail the scope of the action that may be taken pursuant to the warrant;
- as with other powers proposed in this report, the residual regime should contain a warrant preference, ie surveillance ought to be conducted pursuant to a warrant in the normal course of events:
 - it should only be granted on the judge being satisfied of the grounds that support the issuance of a surveillance device warrant;
 - it should be available to obtain evidential material relating to any offence in respect of which a search warrant could be obtained;
 - it should have a maximum life of 60 days;
 - notice of execution should be required.

11.25 A residual warrant is not invalid by reason only that it may authorise law enforcement activities that are governed by or authorised by another provision of the search and seizure code or by other legislation.

11.26 Certain activities that do not unreasonably interfere with expectations of privacy should be specified in statute as not requiring authorisation under the residual warrant regime.

CHAPTER 12 Privileged and confidential material

RECOMMENDATIONS

12.1 The legal privileges (lawyer-client privilege and litigation privilege) available when law enforcement search and surveillance powers are exercised should be codified. Codification should be consistent with that contained in the Evidence Act 2006 and should include the privilege for settlement negotiations or mediation.

12.2 The legal privileges should not be available for a communication or information if made or received, or compiled or prepared, for a dishonest purpose or to enable anyone to plan what the person claiming the privilege knew, or ought reasonably to have known, to be an offence.

- 12.3 Statutory procedures to regulate the application of legal privilege when law enforcement search and surveillance powers are exercised should be enacted.
- 12.4 A search warrant should not be approved by an issuing officer for any material held by a lawyer that is known to be privileged.
- 12.5 The standard form of search warrant should contain a notice on the availability of each legal privilege (lawyer-client privilege, litigation privilege, and privilege for settlement negotiations or mediation) and outline how a privilege claim may be made. For warrantless searches, this note should be included in the inventory provided to the search subject following the exercise of the search power.
- 12.6 Where the scope of a search warrant includes confidential client material held by a lawyer:
- the search warrant should not be executed in the absence of the lawyer, or his or her representative. Where the enforcement officer is unable to contact the lawyer or his or her representative or the lawyer fails to attend the search having been asked to do so, the enforcement officer should request the appointment of a Law Society representative to act for the lawyer's clients in respect of the search;
 - the enforcement officer should give the lawyer an opportunity to claim legal privilege on behalf of any client before the search begins. Where the lawyer is unable to contact the client within a reasonable time period, the lawyer should have the authority to make an interim privilege claim until the client's instructions are obtained.
- 12.7 The legal privileges should be available for searches other than those executed against lawyers under warrant, but the enforcement officer should not have to provide an opportunity to claim privilege, except where he or she has reasonable grounds to believe that any search material may be privileged, or unless that is an express condition of the search. In either such case, the officer should provide an opportunity for the person who may have the benefit of the privilege to claim it.
- 12.8 Where the enforcement officer is unable to identify or contact the potential privilege claimant or his or her lawyer within a reasonable timeframe, the officer should be entitled to ask the court to determine the status of the material.
- 12.9 An enforcement officer should be authorised to secure any material within the scope of the search power, either on the search premises or by seizing that material, in any circumstances where the privilege procedures delay the search of that material.
- 12.10 Where any material within the scope of the search power is intangible, such as computer data, and the privilege procedures delay its search, the enforcement officer should be authorised to secure that material by making forensic copies.
- 12.11 The lawyer or potential privilege claimant should be entitled to request copies of or supervised access to any secured material.

- 12.12 Material that has been secured may not be searched, unless its status has been determined not to be privileged.
- 12.13 A generic requirement that law enforcement searches of confidential client material held by lawyers be independently supervised is not recommended. Independent supervision should be considered on a case-by-case basis and should only be a warrant condition where considered necessary by the issuing officer.
- 12.14 A privilege claim should be particularised by the person making the claim, either by identifying the particular material or by providing the enforcement officer with an itemised list of the material that is claimed to be privileged. Where the circumstances preclude adequate particularisation, the claimant may apply to the court for relief or directions.
- 12.15 Material claimed to be privileged may not be searched unless that material has been determined not to be privileged. Material claimed to be privileged should be removed from the scope of the search and sealed. The sealed material should be delivered to the court, together with an application for the claim to be determined.
- 12.16 Where the enforcement agency considers that the privilege claim is unlikely to have any substantive basis, it should be able to accelerate the process by applying to the court for determination of the privilege claim as soon as is reasonably practicable.
- 12.17 Where a search warrant authorises the search of confidential client material held by a lawyer in intangible form (such as computer data), the enforcement officer should provide the lawyer with an opportunity to claim privilege on behalf of any client in any intangible material sought under the search warrant, prior to that material being searched.
- 12.18 Subject to any privilege claim in respect of any particular metadata, an enforcement officer should be authorised to search metadata that pertains to privileged material where that metadata falls within the scope of the search power, and to seize or retain such metadata where it constitutes evidential material.
- 12.19 The court should have the discretion to give directions that are necessary to limit the use made of any privileged material that is obtained as a result of the exercise of an enforcement power.
- 12.20 Law enforcement interception of communications should be conducted by a centralised monitoring unit within the relevant enforcement agency.
- 12.21 It should be a mandatory condition in every surveillance device warrant to intercept communications that where the monitoring officer has reasonable grounds to believe any intercepted communication may be privileged, it must be extracted from the information that is accessible to enforcement officers and secured until any potential claim of privilege is resolved.
- 12.22 Section 198A of the Summary Proceedings Act 1957 should be repealed, provided that the substance of section 198A(3) is retained and made applicable to the generic procedures proposed.

- 12.23 The codified privileges for communications with ministers of religion, medical practitioners, and registered clinical psychologists contained in the Evidence Act 2006 should be available when enforcement powers are exercised.
- 12.24 The procedures recommended for protecting legal privilege in recommendations 12.2 to 12.12 and 12.14 to 12.21 should be adapted to protect religious and medical privilege, including:
- in warrant searches of confidential professional material held by ministers of religion, medical practitioners, or clinical psychologists, by the enforcement officer providing an opportunity for the minister, medical practitioner or psychologist to claim the relevant privilege on behalf of the entitled person, before the search begins;
 - in other searches, by the enforcement officer providing the search subject with an opportunity to claim the relevant privilege where there are reasonable grounds to believe that any search material may be privileged, or where this is an express condition of the warrant.
- 12.25 The qualified protection for confidential information should continue to be dealt with solely as a matter of admissibility in accordance with section 69 of the Evidence Act 2006 and should not be available when enforcement powers are exercised.
- 12.26 Public interest immunity should continue to be dealt with solely as a matter of admissibility in accordance with section 70 of the Evidence Act 2006 and should not be available when enforcement powers are exercised.
- 12.27 The qualified protection for material identifying journalistic sources in section 68 of the Evidence Act 2006 should be available when enforcement powers are exercised.
- 12.28 Recommendations 12.5, 12.7 to 12.12, 12.14 to 12.16 and 12.19 to 12.21 should be extended to protect material identifying journalistic sources, provided that the enforcement agency may apply to the court for disclosure of the information on the grounds specified in section 68(2) of the Evidence Act 2006.
- 12.29 The privilege procedures recommended for the exercise of enforcement powers should be adapted for the proposed production order regime, including the following key elements:
- the production order should contain a notice on the availability of each privilege and outline how a privilege claim may be made;
 - where the production order includes confidential legal, religious or medical information held by the relevant professional, the enforcement agency should provide the recipient of the notice with a reasonable opportunity to claim privilege in any material to which the production order relates, on behalf of the entitled person;
 - a privilege claim should be particularised by the person making the claim, by providing the enforcement agency with an itemised list of the material specified in the production order that is claimed to be privileged;

- where a privilege claim is made, the recipient of the production notice must produce the material claimed to be privileged to the court for purpose of determining the privilege claim;
- where the enforcement agency considers that the privilege claim is unlikely to have any substantive basis, the enforcement agency should be able to accelerate the process by applying to the court for determination of the privilege claim as soon as reasonably practicable;
- where a privilege claim is upheld by the court, the material determined to be privileged should be returned to the recipient of the production order;
- where a privilege claim is not upheld by the court, the court should order that the material in question be delivered to the enforcement agency.

CHAPTER 13 Post-execution procedures

RECOMMENDATIONS

- 13.1 The person from whom an item is seized pursuant to a search power, and anyone else claiming to be entitled to it, should be able to apply to the enforcement agency that is holding the item for reasonable access to it at any time before an information has been laid.
- 13.2 The enforcement agency should be able to impose conditions on access or refuse access if it would be likely to prejudice the maintenance of the law.
- 13.3 The applicant may apply to the court for an order permitting access where the applicant does not accept the conditions imposed, or where the enforcement agency refuses the request for access.
- 13.4 Access to seized items once an information has been laid should be determined under the rules relating to criminal disclosure.
- 13.5 An enforcement officer should be able to retain any seized item that is required for investigative or evidentiary purposes unless a court has ordered its delivery to a person entitled to possession.
- 13.6 When a copy or photograph of a seized item will suffice for investigative or evidentiary purposes, the enforcement agency may, at its discretion, return the item to the person entitled to possess it.
- 13.7 When a seized item is no longer required for investigative or evidentiary purposes, the enforcement agency should return it to whoever appears to be entitled to possession.
- 13.8 If no prosecution has been commenced within six months from the date an item is seized, the enforcement officer should, upon request, either return it to the person entitled to possess it or apply to a judge on an ex parte basis for an order authorising its continued retention.

- 13.9 Recommendation 13.8 should only apply to original items seized and not to clones of computer hard drives, photographs, or video or audio recordings made or held by the enforcement agency. Such items should be able to be held by the enforcement agency without the need to apply to the court for an order for their retention.
- 13.10 Where an application to retain a seized item is made, and the judge is satisfied that retaining the property is reasonably required for investigative or evidential purposes, the enforcement officer should be authorised to retain it, subject to such conditions as the judge thinks fit.
- 13.11 Any person claiming to be entitled to possession of a seized item should be able to apply to the court at any time for an order for its return. The court should make such an order only where it is satisfied that it would be contrary to the interests of justice for the enforcement agency to retain it, having regard to:
- the gravity of the alleged offence;
 - any loss or damage to the applicant that is caused or likely to be caused by retaining the item;
 - the likely evidential value of the seized item having regard to any other evidential material held by the enforcement agency;
 - whether the evidential value of the item can be adequately preserved by means other than keeping it.
- 13.12 When a seized item is not to be produced in evidence but there are competing claims as to its ownership, or for any other reason an enforcement officer is uncertain as to whom the item should be returned, the enforcement officer should be able to apply to the court for directions.
- 13.13 When the court is considering an application for the disposition of a seized item, it should be able to make one of the following orders:
- that the item be destroyed or forfeited (where there is statutory authority to do so);
 - that the item be delivered to the person appearing to the court to be entitled to it;
 - that the item be treated as unclaimed and disposed of as the court directs.
- 13.14 Forfeiture of a seized item should only be ordered by the court where there is a specific statutory power to do so.
- 13.15 If a seized item produced in evidence is not forfeited, the enforcement officer should return to the person entitled to its possession, or it should be the subject of an application to the court by either the enforcement officer or a person claiming to be entitled to possession.
- 13.16 Where an unlawful item has been seized and there is no legislation governing its disposal, or no court order has been made as to its disposal, an enforcement agency should have the authority to destroy it if notice has been given to the person from whom it was seized and that person has not objected to its destruction or, if notice cannot be given, after reasonable enquiries have been made to locate that person.

- 13.17 The disposal of seized items that are either perishable or of little intrinsic value should be vested in the chief executive of the relevant enforcement agency.
- 13.18 There should be a procedure available, similar to section 59 of the Police Act 1958, to provide for the disposal of unclaimed seized property. Section 59 of the Police Act 1958 should be specifically confined to lost or unclaimed property.
- 13.19 Procedures for redeeming forfeited goods or relief from forfeiture should be made in the context of specific enactments rather than by way of a general statutory provision.
- 13.20 Whenever there is a statutory provision for the court to make an order forfeiting or disposing of seized property, or where forfeiture results from a conviction, provision should also be made suspending the operation of the order or forfeiture until the time for appeal has expired, and if an appeal is filed, until it is determined.
- 13.21 For the avoidance of doubt, statutory provision should be made authorising an enforcement agency to retain a copy or photograph of any seized item for its official records (so that, for example, investigations of applications for the prerogative of mercy can be properly undertaken), even where the original has been returned or disposed of pursuant to a court order.
- 13.22 Access to warrant applications and to reports on the exercise of warrantless search powers should be governed by the Official Information Act 1982 and the law relating to prosecution disclosure in criminal cases.

CHAPTER 14 Remedies and immunities

RECOMMENDATIONS

- 14.1 Remedies for unlawful acts arising from search, seizure, and surveillance should continue to be developed by the courts and not incorporated into statute.
- 14.2 Remedies for unlawful search, seizure and surveillance should not differ depending merely on the type of search, seizure or surveillance in issue.
- 14.3 Section 312M of the Crimes Act 1961 and section 25 of the Misuse of Drugs Amendment Act 1978 should be repealed.
- 14.4 The extent to which conduct that unreasonably interferes with privacy expectations ought to be criminalised should be considered as part of a wider review of privacy protection in New Zealand.
- 14.5 It should be an offence for an enforcement officer to disclose information acquired through exercising a search or surveillance power, otherwise than in performing his or her duty.

- 14.6 Justices of the Peace and other issuing officers should have the same immunities as judges in respect of the issuing of warrants and orders authorising the exercise of search powers.
- 14.7 An enforcement officer should be immune from civil and criminal liability for acts done in good faith in obtaining a warrant or order, or in executing a warrant in a reasonable manner.
- 14.8 An enforcement officer should be immune from civil and criminal liability for acts done in good faith in exercising a warrantless power if the power is exercised in a reasonable manner and the officer believes on reasonable grounds that the prerequisites for the exercise of the power were satisfied. In any civil suit, the enforcement officer should bear the onus of establishing the basis for a claim of immunity.
- 14.9 A person who assists in executing a search or surveillance power, or who examines or analyses any item seized, should be immune from civil and criminal liability for all acts done in good faith in respect of his or her assistance, examination or analysis.
- 14.10 Where an enforcement officer has immunity in respect of his or her actions in applying for or executing a warrant or exercising a warrantless power, the Crown should also have that immunity.

CHAPTER 15 Reporting on the exercise of search and surveillance powers

RECOMMENDATIONS

- 15.1 It should be accepted good practice within each enforcement agency that processes are in place to ensure that the execution of all warrants and the exercise of all warrantless powers are reviewed internally as a matter of course.
- 15.2 The exercise of any warrantless power by an enforcement officer should be reported to a designated officer within the enforcement agency as soon as practicable, provided that the exercise of the following warrantless powers should be exempted from this requirement:
- initial frisk searches carried out in conjunction with arrests;
 - searches of those in lawful custody in accordance with section 57A of the Police Act 1958;
 - warrantless powers of entry with no accompanying power of search (for evidence-gathering purposes);
 - consent searches.
- 15.3 Reports on warrantless powers should contain:
- a short summary of the circumstances giving rise to the warrantless power being exercised, including a statement of why the warrantless power was needed;
 - whether evidential material was seized;

- whether charges based on that evidential material have been laid or are contemplated.
- 15.4 Provided that recommendations 15.2 and 15.3 are implemented, specific requirements currently in force to report internally on the exercise of particular warrantless powers should be repealed.
- 15.5 Reporting to the issuing officer on the execution of a search or surveillance warrant should not be required for supervisory purposes. For information purposes, however, enforcement agencies should accommodate any request from the issuing officer for a post-execution report on the outcome of the exercise of any warrant power. Where an issuing officer requests such a report, it should contain the following information:
- whether the power was exercised;
 - whether the exercise of the power resulted in evidential material being seized (including plain view material);
 - whether any warrantless powers were exercised in conjunction with the exercise of the warrant power and resulted in evidential material being seized;
 - whether charges have been laid or are contemplated, based on that evidential material;
 - where the warrant is a residual warrant, a brief description of how the power was exercised.
- 15.6 The enforcement agency should be required to retain a copy of any post-execution report to the issuing officer in the same manner and for the same period that the enforcement agency is required to retain a copy of the warrant, the application and all documents that were tendered in support.
- 15.7 Aggregate reporting on the exercise of warrantless search powers and warranted or warrantless surveillance powers should be made by each enforcement agency in its annual report to Parliament. However, the exercise of the following warrantless powers should be exempted from this requirement:
- initial frisk searches;
 - searches of those in lawful custody in accordance with section 57A of the Police Act 1958;
 - warrantless powers of entry with no accompanying power of search (for evidence-gathering purposes);
 - consent searches.
- 15.8 Annual reporting of the exercise of warrantless powers should include the following information:
- the number of warrantless search and surveillance powers exercised in the period;
 - the number of warrantless surveillance powers exercised that result in the use of:
 - an interception device;
 - a visual surveillance device;
 - a tracking device.

- in respect of each type of surveillance device (interception, visual or tracking), the period for which the surveillance device was used by reference to the following categories: up to six hours, up to 12 hours, up to 24 hours, up to 48 hours;
- the number of prosecutions in which evidential material obtained directly or indirectly from the exercise of a warrantless power has been adduced, and the number of those prosecutions that resulted in a conviction;
- the number of warrantless powers exercised that did not result in any charges being laid within 90 days of the exercise of the power.

15.9 Annual reporting of the execution of surveillance device warrants should include the following information:

- the number of applications for surveillance device warrants granted and refused in the period;
- the number of warrants that authorised the use of:
 - an interception device;
 - a visual surveillance device;
 - a tracking device;
 - any other type of surveillance device; or
 - more than one type of surveillance device;
- the number of warrants that authorised entry onto private premises;
- for each type of surveillance device (interception, visual, tracking or other type of device), the period for which the surveillance device was used by reference to the following categories: up to 24 hours, up to three days, up to seven days, up to 21 days, up to 60 days;
- the number of prosecutions in which evidential material obtained directly or indirectly from using a surveillance device pursuant to a warrant has been adduced, and the number of those prosecutions that resulted in a conviction;
- the number of warrants that did not result in any charges being laid within 90 days of the date on which the warrant expired.

15.10 Requirements for the annual reporting of detention warrants, use of road blocks, and the taking of bodily samples should be retained.

Index



Index

Legislation referred to

NEW ZEALAND

Agricultural Compounds and Veterinary Medicines Act 1997 56, 91, 93, 185, 188, 406

Alcoholism and Drug Addiction Act 1966 256

Animal Products Act 1999 59, 93, 152, 162, 400, 403, 410

Animal Welfare Act 1999 56, 86, 88, 90, 91, 93, 94, 95, 97, 121, 123, 160, 162, 168, 185, 188, 272, 282, 283

Antarctica (Environmental Protection) Act 1994 108

Antarctic Marine Living Resources Act 1981 56

Armed Forces Discipline Act 1971 33

Arms Act 1983 56, 58, 59, 85, 86, 117, 131, 146, 147, 149, 157, 165, 183, 243, 244, 245, 264, 266, 270, 272, 274, 275, 281, 290, 339, 340, 400, 410, 411, 434, 450, 462, 468, 476, 479, 484

Aviation Crimes Act 1972 74, 243, 245, 246, 260, 453, 476

Bail Act 2000 132, 255

Biosecurity Act 1993 56, 59, 71, 90, 93, 95, 97, 108, 112, 125, 156, 162, 185, 186, 188, 244, 245, 246, 270, 396, 476

Boxing and Wrestling Act 1981 90, 91, 161

Care of Children Act 2004 104, 272

Children, Young Persons, and Their Families Act 1989 96, 104, 151, 160, 256, 262, 291

Civil Defence Emergency Management Act 2002 93, 151, 156

Climate Change Response Act 2002 162, 188, 400

Commerce Act 1986 33, 56, 60, 95, 112, 156, 160, 162, 165, 168, 170, 173, 175, 185, 188, 201, 290, 297

Commodity Levies Act 1990 162, 175, 188

Conservation Act 1987 151, 283, 403, 407, 412

Copyright Act 1994 415


Corporations (Investigation and Management) Act 1989 175

Corrections Act 2004 33, 56, 74, 116, 135, 136, 151, 253, 284, 467

Courts Security Act 1999 33, 74

Crimes (Intimate Covert Filming) Amendment Act 2006 316

Crimes Act 1961 12, 24, 25, 37, 58, 79, 85, 91, 93, 95, 97, 99, 101, 110, 117, 125, 131, 133, 134, 135, 136, 141, 142, 143, 145, 150, 160, 175, 200, 201, 215, 219, 220, 227, 243, 244, 245, 246, 247, 248, 264, 266, 272, 273, 274, 275, 276, 281, 282, 283, 284, 285, 286, 287, 314, 315, 316, 324, 325, 326, 328, 331, 335, 336, 337, 338, 340, 341, 381, 399, 410, 415, 420, 421, 422, 423, 424, 425, 427, 434, 435, 443, 444, 467, 468, 476, 479, 480, 481, 491, 496, 499, 500



Crimes Amendment Act (No 2) 1997 275, 308
 Crimes Amendment Act 1995 307
 Crimes Amendment Act 2003 119, 215, 221
 Crimes Amendment Bill (No 6) 1999 215
 Criminal Investigations (Bodily Samples) Act 1995 33, 37, 56, 240, 267, 435
 Criminal Proceeds (Recovery) Bill 2007 298, 303
 Crown Proceedings Act 1950 425
 Customs and Excise Act 1996 33, 56, 58, 59, 70, 71, 90, 94, 95, 96, 104, 105, 112, 121, 125, 156, 159, 160, 162, 165, 168, 170, 171, 172, 178, 182, 183, 188, 190, 199, 215, 234, 241, 243, 244, 245, 246, 259, 260, 263, 280, 283, 290, 302, 303, 356, 358, 396, 407, 410, 415, 453, 462, 465, 476, 477, 481
 Customs and Excise Amendment Act 2004 172
 Customs Laws Consolidation Act 1882 259
 District Courts Act 1947 111, 114, 426
 Dog Control Act 1996 151
 Driftnet Prohibition Act 1991 151
 Electronic Transactions Act 2002 201
 Evidence Act 2006 26, 27, 297, 298, 352, 353, 354, 355, 356, 357, 362, 368, 371, 381, 383, 384, 386, 387, 388, 389, 390, 403, 418, 420, 421, 481, 485, 488
 Evidence Amendment Act (No. 2) 1980 383
 Extradition Act 1999 56, 95, 156, 160, 161
 Fair Trading Act 1986 33, 56, 60, 95, 156, 162, 168, 173, 175, 188
 Films, Videos, and Publications Classification Act 1993 56, 87, 88, 90, 91, 93, 95, 156, 160, 161, 165, 168, 185, 186, 188, 201, 247, 281, 400, 406, 407, 410, 411, 412, 463
 Financial Transactions Reporting Act 1996 56, 60, 90, 95, 122, 153, 156, 160, 161, 168, 170, 173, 175, 259, 260, 308, 400, 406, 407, 453, 477
 Fisheries Act 1996 30, 33, 56, 88, 151, 153, 154, 160, 175, 177, 260, 272, 280, 283, 290, 329, 396, 407, 410, 412, 413
 Food Act 1981 161, 410
 Forests Act 1949 412
 Gambling Act 2003 56, 90, 91, 94, 95, 97, 112, 121, 123, 156, 161, 165, 185, 242, 264, 266, 400, 406, 407, 410, 453, 475
 Hazardous Substances and New Organisms Act 1996 112, 157, 162, 174, 188, 400
 Human Assisted Reproductive Technology Act 2004 400
 Immigration Act 1987 153
 Immigration Advisers Licensing Act 2007 153, 154, 453, 469
 Insolvency Act 2006 56, 168
 International Crimes and International Criminal Court Act 2000 112, 160, 161
 International Energy Agreement Act 1976 400
 International War Crimes Tribunals Act 1995 60, 112, 156, 160, 161
 Justices of the Peace Act 1866 97, 98, 115, 156
 Justices of the Peace Act 1927 113

- Justices of the Peace Act 1957 116
- Justices of the Peace Amendment Act 2007 115, 116
- Land Transport (Driver Licensing) Rule 1999 76
- Land Transport Act 1998 86, 150, 151, 256, 271, 272, 274, 282, 290, 453, 468
- Local Government Act 1974 179, 181, 184, 471
- Local Government Act 2002 116, 188, 410
- Marine Mammals Protection Act 1978 56, 90, 95, 168, 271, 280, 281, 453, 480
- Maritime Security Act 2004 74, 244, 245, 246, 434, 453, 476
- Maritime Transport Act 1994 108, 116, 152, 154, 188, 453, 469
- Medicines Act 1981 410
- Mental Health (Compulsory Assessment and Treatment) Act 1992 135, 136, 256, 284, 467
- Misuse of Drugs Act 1975 56, 77, 80, 84, 85, 95, 96, 121, 131, 146, 147, 148, 149, 150, 159, 161, 165, 190, 213, 238, 240, 241, 242, 243, 244, 245, 263, 264, 266, 270, 272, 274, 275, 281, 339, 340, 410, 434, 450, 468, 475, 476, 479, 484, 498
- Misuse of Drugs Amendment Act 1978 12, 56, 85, 99, 105, 110, 125, 148, 149, 152, 153, 160, 240, 243, 244, 245, 263, 264, 266, 275, 315, 326, 336, 338, 339, 340, 415, 420, 421, 422, 434, 435, 451, 453, 468, 476, 478, 484, 491
- Misuse of Drugs Amendment Act 2005 147
- Motor Vehicle Sales Act 2003 56, 59, 60, 90, 91, 93, 95, 156, 173, 185, 188, 400, 406, 407, 410
- Mutual Assistance in Criminal Matters Act 1992 60, 90, 112, 161, 226, 299
- National Parks Act 1980 153, 283, 410
- New Zealand Bill of Rights Act 1990 19, 20, 27, 32, 38, 39, 40, 41, 43, 44, 45, 46, 48, 49, 50, 51, 53, 73, 75, 123, 126, 128, 140, 158, 162, 163, 164, 172, 183, 205, 208, 212, 215, 219, 240, 241, 266, 307, 312, 314, 318, 319, 320, 321, 345, 346, 347, 355, 390, 400, 418, 419, 420, 425, 427, 429, 430, 441, 498
- New Zealand Security Intelligence Service Act 1969 33, 423
- Official Information Act 1982 27, 109, 110, 175, 187, 415, 416, 472, 491
- Ozone Layer Protection Act 1996 112, 157, 188
- Parole Act 2002 135, 136, 284, 467
- Police Act 1958 97, 99, 118, 132, 169, 170, 250, 254, 255, 256, 257, 265, 266, 396, 399, 400, 401, 407, 412, 413, 435, 438, 439, 445, 451, 477, 478, 491, 492, 493
- Police Amendment Act 1979 250
- Police Offences Act 1927 247
- Privacy Act 1993 212, 317
- Private Investigators and Security Guards Act 1974 97, 316
- Proceeds of Crime Act 1991 90, 93, 94, 95, 112, 122, 156, 160, 161, 170, 175, 281, 291, 292, 298, 299, 303, 304, 306, 356, 358, 396, 409, 413
- Prostitution Reform Act 2003 112, 122, 123, 161, 188, 400
- Public Records Act 2005 111, 465
- Radiocommunications Act 1989 90, 91, 95, 112, 168, 173, 175
- Reserve Bank of New Zealand Act 1989 60
- Reserves Act 1977 403, 410
- Resource Management Act 1991 56, 90, 92, 93, 95, 112, 116, 121, 156, 165, 168, 170, 190, 400, 406, 407
- Sale of Liquor Act 1989 56, 90, 94, 95, 112, 121, 162, 165, 170, 185, 188, 410

Secondhand Dealers and Pawnbrokers Act 2004 290

Securities Act 1978 175, 290

Sentencing Act 2002 421

Sentencing and Parole Reform Bill 2001 40

Serious Fraud Office Act 1990 60, 90, 95, 97, 108, 112, 156, 160, 162, 168, 175, 188, 201, 205, 296, 297, 299, 300, 302, 303, 356, 358, 379, 423, 435, 453, 482

Summary Offences Act 1981 76, 133, 316

Summary Proceedings Act 1957 5, 10, 11, 50, 53, 56, 59, 60, 61, 62, 64, 65, 66, 67, 68, 80, 81, 90, 92, 93, 94, 95, 96, 97, 100, 101, 102, 104, 112, 113, 118, 121, 122, 123, 125, 126, 127, 128, 132, 156, 157, 160, 161, 163, 165, 166, 167, 168, 170, 173, 175, 186, 188, 190, 196, 197, 200, 204, 215, 216, 229, 230, 231, 255, 270, 272, 273, 291, 314, 317, 326, 327, 328, 338, 339, 340, 358, 360, 362, 369, 383, 391, 399, 400, 401, 403, 404, 405, 406, 407, 408, 409, 411, 413, 415, 426, 435, 450, 451, 452, 464, 466, 474, 487, 499

Tax Administration Act 1994 33, 290, 358

Telecommunications (Interception Capability) Act 2004 173

Telecommunications (Residual Provisions) Act 1987 125, 304, 309, 310, 415, 435, 482

Terrorism Suppression Act 2002 159

Trade in Endangered Species Act 1989 56, 90, 93, 112, 151, 153, 160, 161, 283, 290, 403, 410, 412

Transport Act 1962 161

Trespass Act 1980 410

Wild Animal Control Act 1977 161, 272, 283

Wildlife Act 1953 56, 90, 151, 161, 272, 283, 410

Wine Act 2003 112, 152, 162, 169, 174, 188, 400, 403, 410

COMMONWEALTH

United Kingdom

Criminal Justice Act 1988 292

Criminal Justice Act 2003 169

Criminal Justice and Police Act 2001 177, 207, 365

Criminal Procedure and Investigations Act 1996 415

Drug Trafficking Act 1994 292

Interception of Communications Act 1985 323

Police (Property) Act 1897 402

Police Act 1997 323, 381

Police and Criminal Evidence Act 1984 60, 61, 62, 68, 70, 71, 75, 83, 84, 96, 131, 139, 140, 162, 163, 169, 170, 251, 257, 292, 295, 365, 381, 388, 397, 401, 402, 403, 404, 439

Police Reform Act 2002 170, 256

Proceeds of Crime Act 2002 292, 293, 295, 303, 305

Regulation of Investigatory Powers Act 2000 229, 305, 309, 323, 381

Serious Organised Crime and Police Act 2005 300

Terrorism Act 2006 300

Australia

Confiscation Act 1997 (Vic) 293, 303, 305

Confiscation of Proceeds of Crime Act 1989 (NSW) 293, 305

Crime and Misconduct Act 2001 (Qld) 328

Crimes Act 1900 (ACT) 119, 162, 402

Crimes Act 1914 (Cth) 60, 63, 96, 103, 104, 119, 131, 162, 164, 171, 172, 177, 178, 199, 207, 229, 232, 233, 239, 293, 300, 402, 457

Crimes Act 1958 (Vic) 60, 96, 119, 402

Criminal Assets Confiscation Act 2005 (SA) 293, 305

Criminal Assets Recovery Act 1990 (NSW) 293, 305

Criminal Code Act Compilation Act 1913 (WA) 162

Criminal Property Confiscation Act 2000 (WA) 305

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) 60, 96, 125, 162, 179, 180, 190, 293, 296, 297, 402, 412, 439

Listening and Surveillance Devices Act 1972 (SA) 322, 328, 332, 339

Magistrates' Court Act 1989 (Vic) 402, 440

Police Powers and Responsibilities Act 2000 (Qld) 67, 96, 119, 131, 162, 179, 180, 293, 296, 297, 305, 402, 403, 447

Proceeds of Crime Act 2002 (Cth) 293, 303, 305

Search Warrants Act 1985 (NSW) 162

Search Warrants Act 1997 (Tas) 119, 162, 402

Surveillance Devices Act 1998 (WA) 322, 338, 339

Surveillance Devices Act 1999 (Vic) 322, 328, 332, 334, 339

Surveillance Devices Act 2000 (NT) 322, 328

Surveillance Devices Act 2004 (Cth) 322, 326, 334, 338, 339

Terrorism (Community Protection) Act 2003 (Vic) 166

Terrorism (Police Powers) Act 2002 (NSW) 166, 190

Canada

Criminal Code RSC 1985 c C-46 10, 71, 72, 83, 84, 96, 103, 104, 131, 143, 162, 171, 294, 296, 297, 305, 324, 332, 339, 341, 343, 347, 365, 397, 401, 402, 415, 439

