Hon Kris Faafoi
Minister of Justice

Proactive release – Documents relating to the Review of the Search and Surveillance Act 2012

Date of issue: 11 April 2022

The following documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

No.	Document	Comments
1.	**Next steps for the Search and Surveillance Act review** *Briefing* Ministry of Justice *17 May 2021*	Some information has been withheld in accordance with the following sections of the OIA: • s9(2)(a) to protect the privacy of natural persons. • s9(2)(f)(iv) to protect the confidentiality of advice tendered by Ministers of the Crown and officials. • s9(2)(g)(i) to maintain the effective conduct of public affairs through the free and frank expression of opinions.
2.	**Early Engagement for the Review of the Search and Surveillance Act 2012** *Briefing* Ministry of Justice *23 July 2021*	Some information has been withheld in accordance with the following sections of the OIA: • s9(2)(a) to protect the privacy of natural persons.
3.	**Options to progress the Search and Surveillance Act review** *Briefing* Ministry of Justice *29 October 2021*	Some information has been withheld in accordance with the following sections of the OIA: • s6(c) as the making available of that information would be likely to prejudice the maintenance of the law. • s9(2)(a) to protect the privacy of natural persons. • s9(2)(f)(iv) to protect the confidentiality of advice tendered by Ministers of the Crown and officials. • s9(2)(g)(i) to maintain the effective conduct of public affairs through the free and frank expression of opinions.
4.	**Review of the Search and Surveillance Act 2012** *Cabinet Paper* Ministry of Justice *19 November 2021*	• s9(2)(f)(iv) to protect the confidentiality of advice tendered by Ministers of the Crown and officials.

No.	Document	Comments
5.	**Cabinet Social Wellbeing Committee Decision [SWC-21-MIN-0525]** *Cabinet minute* Cabinet Office *Meeting date: 13 December 2021*	No redactions proposed.

Hon Kris Faafoi, Minister of Justice

Next steps for the Search and Surveillance Act review

Date	**17 May 2021**	File reference	Out of Scope

Action sought	**Timeframe**
Agree to start work on the Search and Surveillance Act review.	By 31 May 2021
Agree officials will report back in October with the outcomes of early engagement and initial policy work with options for the next stage of the review.	
Forward this briefing to Hon Andrew Little as the Lead Coordination Minister for the Government's response to the Royal Commission's Report into the terrorist attack on Christchurch masjidain on 15 March 2019 and Hon Poto Williams, Minister of Police.	

Contacts for telephone discussion (if required)

Name	Position	Telephone (work)	Telephone (a/h)	First contact
Brendan Gage	General Manager, Criminal Justice	s9(2)(a)	s9(2)(a)	☐
Alida Mercuri	Policy Manager, Criminal Law	04 466 2091	s9(2)(a)	☒
Joe Harbridge	Senior Policy Advisor, Criminal Law	s9(2)(a)		☐

Minister's office to complete

☐ Noted ☐ Approved ☐ Overtaken by events

☐ Referred to: _____

☐ Seen ☐ Withdrawn ☐ Not seen by Minister

Minister's office's comments

SENSITIVE

Purpose

1. This paper seeks your decisions on when and how to progress the review of the Search and Surveillance Act 2012 (**SSA**). It follows the aide memoire you received on 25 February 2021 on the SSA review process to date.

Executive summary

2. Search and surveillance activities are necessary for law enforcement to prevent and investigate crime and keep communities safe but can involve a high level of state intrusion into people's privacy.

3. Cabinet is expecting the SSA review to begin soon as part of the response to the *Royal Commission of Inquiry into the Terrorist Attack on the Christchurch masjidain* recommendation 18 to review all counter-terrorism related legislation.

4. We and the Law Commission jointly reviewed the SSA in 2017. The review found that it was generally working well and did not need a major overhaul but made 67 recommendations in a joint report to improve the clarity and workability of the SSA.

5. The joint report followed significant engagement with experts, government agencies and the public. However, due to the one-year statutory timeframe for the review, there was not broad engagement with our Treaty partners and several recommendations indicate areas where further policy work is required. In the ten years since the SSA was enacted, there has also been rapid advancement in communications technology alongside changes in how this technology is used as part of our daily lives

6. We propose that the next step for a review of the SSA is early engagement with Māori organisations and other communities who are likely to have a high interest in it[1]. This engagement will be crucial to building the social licence necessary to make changes in this area. If you agree, we will work with the Department of the Prime Minister and Cabinet (which has a lead role in coordinating Royal Commission engagement) on an engagement plan and provide your office with further detail on the proposed approach.

7. s9(2)(f)(iv)

8. We would report back to you in October on the outcome of our early engagement and initial policy work and provide options for the next steps. Depending on the outcome of early engagement, the next steps are likely to include Cabinet agreement to consult in 2022 on a package of legislative changes, s9(2)(f)(iv)

9. We are unsure of your expectations for the timing of legislative reform. If pace is a key consideration for you, we suggest we meet with you to discuss the options and implications further. s9(2)(f)(iv)

[1] These are likely to include, for example, our youth, minority ethnic, faith-based and rainbow communities, among others.

Background and context for reviewing the SSA

10. Search and surveillance activities involve government agencies searching people or property or carrying out surveillance to prevent or investigate crime or monitor compliance with the law. Search and surveillance powers are necessary to maintain the law but need to be used appropriately where state intrusion on reasonable expectations of privacy is justified.

The SSA has wide application to regulatory and law enforcement agencies' powers

11. The SSA controls when and how Police and other government agencies can search or surveil people or property. The SSA consolidated the search and surveillance powers from multiple Acts, bringing the rules governing the Government's intrusion on peoples' privacy under one piece of legislation, as far as that could be done.

12. The SSA applies to agencies that have powers of entry, search, inspection, examination or seizure conferred by over 70 different statutes. The people who exercise those powers are, along with police officers, referred to in the SSA as "enforcement officers"[2]. While the search powers available to non-Police enforcement officers are set out in separate pieces of legislation, some provisions of the SSA typically apply to how they are used.

Joint review of the SSA was completed in 2017

13. We completed a joint review of the SSA with the Law Commission on 27 June 2017, as required by section 357 of the SSA. Section 357 only allowed one year to complete the review, which required us to focus on the core elements of the regime.

14. The final report of the joint review, *NZLR R141 – Review of the Search and Surveillance Act 2012* (the joint report), made 67 recommendations to make the SSA clearer and ensure it keeps pace with changing technology and international trends. When the Government tabled the joint report in the House in January 2018, it said it would consider its recommendations and decide whether to accept some or all of them.

s9(2)(f)(iv)

s9(2)(f)(iv)

s9(2)(f)(iv)

[2] Enforcement officers include, for example, animal welfare inspectors, Inland Revenue officers, fisheries inspectors, product safety officers, food officers, forestry officers, gambling inspectors, immigration officers, inspectors of weights and measures, marine mammals officers, meat board auditors, park rangers, and wildlife rangers.

Recent decisions by the Government involve considering changes to the SSA

17. Recommendation 18 of the *Royal Commission of Inquiry into the Terrorist Attack on the Christchurch masjidain* is to review all counter-terrorism legislation. You recently agreed, in responding to Recommendation 18, to prioritise relevant work already underway – including the next steps on the SSA review. As part of the first report back, Cabinet noted [CAB-21-MIN-0049 refers] a review of the SSA would begin in 2021 as an upcoming milestone.

18. Progressing the SSA review is therefore part of the Government's wider response to the report of the Royal Commission. However, the SSA is much broader than just counter terrorism. It must be reviewed in this wider context to ensure it remains fit for purpose for regulatory and law enforcement agencies who rely on it to authorise their day to day activities.

Acceding to the Budapest Convention on Cybercrime requires amending the SSA

19. On 26 January 2021, Cabinet agreed to accede to the Budapest Convention [CBC-21-MIN-0001 refers]. To support cooperation on international investigations, the Budapest Convention requires parties to have powers to order the preservation of data, giving authorities time to seek its disclosure. Preservation orders mitigate the risk that evidence is modified or deleted before the disclosure process is completed.

20. Cabinet agreed [CBC-20-MIN-0129 refers] to make changes to the SSA to introduce a constrained data preservation regime through a Budapest Implementation Omnibus Bill so as not to delay accession to the Convention. s9(2)(g)(i)

Cabinet noted you would consider wider data preservation measures as part of the SSA review commencing in 2021 and report back to Cabinet on this work

There are several benefits to working on the SSA review now

21. We consider there are several benefits to starting the review now:

- We would be able to continue the Government's progress on the Royal Commission's Recommendation 18, alongside the Counter-Terrorism Legislation Bill 2021 and the process to accede to the Budapest Convention.
- We would be able to fulfil the Government's commitment to consider the joint report's recommendations and decide whether to accept some or all of them. We summarise the key recommended changes in **Appendix 1**.

s9(2)(f)(iv)

s9(2)(f)(iv)

s9(2)(f)(iv)

We recommend early engagement on the approach to the review

23. Search and surveillance is a complex policy area which will have a high public interest and will elicit a range of potentially competing views. Police and other enforcement agencies use the provisions in the SSA thousands of times per year and the number of complaints to the Independent Police Conduct Authority (IPCA) or the courts is very low. Statistics on the use of the Act are made public and are subject to parliamentary oversight.

24. However, some communities may have low levels of trust in enforcement authorities, and the Government in general, particularly if they feel they are being unfairly treated in the criminal justice system, as either offenders and/or as victims of crime. This review is an opportunity to build social licence and trust with these communities. This includes rebuilding trust with New Zealand's Muslim communities following the attack on the Christchurch masjidain of 15 March 2019.

25. We recommend early engagement with Māori organisations (as Treaty partners) and peak bodies connected to the communities with a high interest in the SSA, before Cabinet agrees the scope and timing of the review. This early engagement would occur from June to September 2021.

26. During early engagement, we would discuss things like:

    26.1. The context / environment in which law enforcement operates and how it is evolving.

    26.2. The high-level purpose and operation of the SSA.

    26.3. Some of the practical difficulties and challenges in administering the regime to apply across law enforcement and a wide range of regulatory regimes.

s9(2)(f)(iv)

s9(2)(f)(iv)

    26.6. How they recommend we engage with their communities.

    26.7. What they would seek from a review of the SSA.

    26.8. What they think about our proposed objectives of the review.

27. We propose the following objectives for the review, to discuss during early engagement:

- to build social licence and trust in the SSA regulatory system (in line with the Royal Commission report);
- to ensure the SSA remains fit for purpose (i.e. effective, efficient, responsive to operational circumstances, and consistent with New Zealand's Bill of Rights Act) in an increasingly digital world; and
- to consider and respond to the joint report's recommendations.

28. Alignment with engagement on other Royal Commission work streams is important to minimise the risk of engagement fatigue among affected communities. If the proposed approach is agreed, we can work with the Department of the Prime Minister and Cabinet on the engagement plan and provide your office with further detail on the proposed approach to engaging with Māori and stakeholders.

29. These conversations will give us clarity about the needs of these communities during the review and would influence our advice on the scope of legislative changes. We intend to report to you in October 2021 about what we have heard and make recommendations on the next steps for the review. This would include options for further engagement and progressing legislative change.

s9(2)(f)(iv)

Te Tiriti o Waitangi considerations

33. Search and surveillance activities have the potential to engage with all three articles of Te Tiriti o Waitangi. They are necessary for the Crown to exercise kāwanatanga, but when and how the Crown carries out those activities can impact on Māori exercising their rangatiratanga. There are also Article 3 implications for the Crown to ensure search and surveillance activities both respect tikanga and protect all New Zealanders' rights equally.

34. In several recent high-profile situations, Māori and the wider public have expressed concerns with search and surveillance activities targeting Māori. These include the proposed powers under the COVID-19 Public Health Response Bill and the Taumata Arowai (the Water Services Regulator Bill) to allow officers to enter a marae without a warrant. In addition, during the Budapest Convention consultation process, the Māori groups and individuals that we heard from highlighted that their lack of trust and confidence in search and surveillance powers and the people exercising them – while recognising that appropriate search and surveillance powers are a necessary part of the criminal justice system.

35. Engaging early with Māori organisations and then engaging with Māori more widely will be critical to building and maintaining confidence in the search and surveillance regime and ensuring the Crown meets its Tiriti o Waitangi obligations. It will be important to take the time to build knowledge and understanding on how the SSA regime works before engaging on specific proposals for change.

Risks on the review and the proposed approach

36. Engaging on the balance between powers and rights can be emotive for some, especially for communities that have low levels of trust in law enforcement officers and the Government in general. The proposed early engagement with Māori organisations and peak bodies representing communities with a high interest in the review is a way to help restore trust, as well as to hear from organisations representing the victims of crime.

37. Categorising this review as part of the Government's response to the Royal Commission risks the review being coloured and driven by this context. s9(2)(g)(i)

Emphasising that the Royal Commission report is not the main focus of the review, and highlighting the broader objectives driving the review will mitigate this risk.

38. We envisage that early engagement would occur at the same time that the Counter-Terrorism Legislation Bill and the Budapest Accession Omnibus Bill (creating a data preservation order regime within the Search and Surveillance Act 2012) progress through the House. There is a risk that the separate parallel processes will cause confusion among people we engage with. This risk can be mitigated by clearly communicating the purpose of the early engagement to those involved.

39. The approach we are recommending enables us to engage early in the process and in good faith before key decisions are made. This will help to mitigate the risks overall. We will aim to provide further advice to you on the next steps in October based on the feedback received through early engagement.

Potential next steps after we provide our advice on October 2021

40. Subject to your agreement, we will work with the Department of the Prime Minister and Cabinet on an engagement plan and begin early engagement conversations with communities with a high interest in the review. We will also work closely with the team conducting the engagement on the incitement to hate discussion document given similar stakeholders will be interested in this work with the degree of overlap.

41. Alongside this work, we will work with Police and other interested agencies to progress the work around data preservation powers, and other priority issues.

42. Following early engagement, we will report back to you in October 2021 on the outcome of that engagement and initial policy work with options for the next steps of the review.

43. If timing of the review and legislative reform is a key consideration for you, we suggest we meet with you to discuss the options and implications further.

Recommendations

44. We recommend that you:

1.	**Note** Cabinet and agencies are expecting a review of the Search and Surveillance Act (**SSA**) to begin soon as part of the response to recommendation 18 of the report of the Royal Commission of Inquiry (**Royal Commission**) into the Terrorist Attack at Christchurch masjidain on 15 March 2019.	
2.	**Note** the Law Commission and Ministry of Justice jointly reviewed the SSA in 2016/17 and found it was generally working well and did not need a major overhaul, while making 67 recommendations aimed at improving the clarity and workability of the SSA in a joint report.	
3.	**Agree** to start work on the SSA review.	YES / NO
4.	**Agree** to the Ministry beginning early engagement discussions with Māori organisations and other relevant peak bodies (in consultation with your office) from June to September 2021.	YES / NO
5.	**Agree** officials will report back in October 2021 with the outcomes of early engagement and initial policy work with options for the next stage of the review.	YES / NO

6.	**Forward** this briefing to Hon Andrew Little as the Lead Coordination Minister for the Government's Response to the Royal Commission's report into the Terrorist Attack on the Christchurch Mosques and Hon Poto Williams, Minister of Police.	YES / NO

s9(2)(a)

Alida Mercuri

Policy Manager, Criminal Law

APPROVED SEEN NOT AGREED

Hon Kris Faafoi

Minister of Justice

Date / /

Attachments: Appendix 1: Key legislative changes the joint report recommended

Appendix 1: Key legislative changes the joint report recommended

The joint report recommended numerous legislative changes. Some recommendations address specific operational issues raised by law enforcement and regulatory agencies (together, "enforcement agencies"). Others propose more significant changes to the structure and scope of the SSA, based on developments in technology, case law and comparable overseas legislation.

Amendments to address operational issues

The recommendations made in response to specific operational issues include:

- enabling Police to enter properties or carry out surveillance to locate high risk offenders who have tampered with their electronic monitoring devices;
- allowing greater use of surveillance in emergency situations;
- clarifying that warrants can permit entry to neighbouring properties to execute a covert search or install a surveillance device; and
- providing for re-entry to a property that has been the subject of surveillance after the warrant has expired to retrieve surveillance devices.

The joint report also recommended redrafting the current provisions on "remote access" searches (searches of digital material not stored in a physical location, such as emails), as there is significant confusion about their effect. The proposed amendments would clarify that [enforcement officers] need specific approval in a warrant before searching Internet facilities (except in urgent situations), and that the issuing officer can authorise [enforcement officers] to carry out searches remotely (for example, from an enforcement agency's own premises).

Principles to be considered in exercising powers

A key recommendation is that the SSA should be amended to include a principles provision. This would require enforcement officers and issuing officers (who issue warrants) to take account of certain principles—such as the proportionality of proposed enforcement activity and the need to minimise privacy intrusions—when exercising powers under the SSA.

The principles largely reflect existing case law. The recommendation to incorporate them into the SSA aimed to increase transparency and to ensure the principles are considered before search or surveillance powers are exercised. Currently they are applied by the courts if the exercise of powers is challenged in proceedings, which can result in evidence being excluded.

The joint report proposes an overarching principle that any conduct that may constitute an intrusion into the reasonable expectation of privacy of any person should be carried out pursuant to a warrant, order, statutory power or "policy statement" (discussed below).

Policy statements on lawful activity

Policy statements would, under the joint report's proposals, guide the use of certain investigatory methods that are lawful but potentially intrusive (for example, the use of visual surveillance in public places). These would be like the ministerial policy statements required under the Intelligence and Security Act 2017, except they would be issued by the Commissioner of Police or the chief executives of other enforcement agencies. They would be published on agencies' websites (with some redactions where appropriate).

Enabling the use of new technology

The joint report recommended extending the existing surveillance device warrant regime in the SSA to address developments in technology. Under the proposals a warrant would be available (and required) to carry out surveillance using technology such as computer programs (rather than just “devices”) and “data surveillance” such as keystroke logging.

Regulating the use of covert operations

A new regime for covert operations (commonly referred to as undercover operations) is also proposed. Covert operations are regulated in some overseas jurisdictions, including the United Kingdom and Australia. The proposed regime would allow (but not require) enforcement officers to obtain warrants for covert operations and confer additional immunities on agents if a warrant is obtained. It would also require policy statements to be issued on the use of covert operations and provide for external audits of those operations. The policy statement would not include operationally sensitive information.

Requiring a warrant to search electronic devices

The joint report recommends that a warrant should be required to search electronic devices, such as mobile phones, except in urgent situations. Enforcement officers would be able to seize the device to avoid loss of evidential material while a warrant was being obtained. This recommendation reflects developments in New Zealand and international case law recognising that special privacy interests exist in respect of electronic devices.

Data preservation and accession to the Budapest Convention

The joint report also recommends that the Government consider acceding to the Budapest Convention to assist with trans-border access to data. As previously noted, Cabinet has already agreed to this and the relevant work is already underway. This process also noted that the SSA review would consider whether wider data preservation powers were required.

Hon Kris Faafoi, Minister of Justice

Early Engagement for the Review of the Search and Surveillance Act 2012

Date	23 July 2021	**File reference**	IPC-15-11

Action sought	**Timeframe**
Agree to officials beginning early engagement conversations on the Search and Surveillance Act 2012 with the groups outlined in this briefing.	30 July 2021
Forward a copy of this briefing to the Lead Coordination Minister for the Government's Response to the Royal Commission's Report into the Terrorist Attack on the Christchurch Mosques and the Minister of Police.	

Contacts for telephone discussion (if required)

Name	**Position**	**Telephone (work)**	**(a/h)**	**First contact**
Brendan Gage	General Manager	s9(2)(a)		☒
Alida Mercuri	Policy Manager	s9(2)(a)		☐
Dominic Kebbell	Principal Policy Advisor	04 474 0282		☐

Minister's office to complete

☐ Noted ☐ Approved ☐ Overtaken by events

☐ Referred to: _____

☐ Seen ☐ Withdrawn ☐ Not seen by Minister

Minister's office's comments

Purpose

1. This briefing provides information on our proposed early engagement approach and seeks your agreement to begin the early engagement conversations.

Background

2. In May 2021, you agreed:

   2.1. To start work on a review of the Search and Surveillance Act 2012 (the **Act**). This review will build on the report of the 2016/2017 joint review of the Act between the Ministry of Justice and the Law Commission (**Joint Review**).

   2.2. We would provide advice in October 2021 on a package of reforms based largely on the work in the Joint Review with the aim of introducing legislation in mid to late 2022.

3. We are now reviewing the Act as part of recommendation 18 of the *Royal Commission of Inquiry into the Terrorist Attack on the Christchurch masjidain* to review all legislation related to the counter-terrorism effort.

4. We also sought your approval to carry out an early engagement process prior to the start of the review. Before approving this, you requested information about the value we expect to get from early engagement and who we intend to talk with.

We see several potential benefits from early engagement

5. The Joint Review had to be completed within one year. This meant it focused on core issues with the Act and public engagement was limited.

6. We intend to review the Act quickly in response to the Royal Commission's findings and the Joint Review's recommendations. Early engagement will help us do this by helping us more quickly identify key issues and build key relationships.

7. The limited public engagement in the Joint Review meant we heard primarily from lawyers, judges, government agencies and businesses. A significant gap is the perspective of communities who have been subject to surveillance activities or are the victims of crime. Early engagement will help us fill that gap.

8. Early engagement also aligns with the findings of the Royal Commission, which highlighted the need for the government to improve how we engage with, and listen to, communities. It encouraged us to 'shift to value communities' input into decisions, promote transparency and engage in a robust debate'.[1]

9. Early engagement – with a small number of individuals and groups that represent a range of communities – will therefore enable us to:

   9.1. **Gauge public interest and the issues people are likely to care about**. This will help ensure our advice to you in October on a package of reforms is informed by a range of perspectives. It could also highlight opportunities for reform that may address issues that are important to specific communities.

[1] Section 1.2 of the report of the Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019 (Themes).

9.2. **Help us build key relationships**. Having early conversations with people now can help us facilitate more meaningful public engagement when the review is announced. Engagement prior to Government policy decisions builds rapport and generates greater social licence for legislative reform. It also helps us understand who is likely to participate in the review, how they would like to participate and how we might facilitate this participation.

9.3. **Provide an early indication of how the review will be perceived or issues or areas where you are likely to face public scrutiny**. We anticipate wide public interest in this review. Early engagement conversations are likely to give us insight into how the Joint Review recommendations might affect, and be perceived by, various communities. They can also help design future communications material so it is easy to understand and effective. It can also inform the Q&As and back pocket material we will prepare to support you when announcing the review or when the Bill is being scrutinised by a Select Committee.

10. There are some risks around early engagement, including:

- Managing stakeholder expectations on what the review can and cannot achieve.
- Inconsistent public messaging before the review is considered by Cabinet or formally announced.

11. We intend to mitigate these risks by targeting our engagement as set out below and making it clear that the government (i.e., Cabinet) has not yet received advice on the review and that the purpose of the early engagement conversations is to inform this advice. Overall, we consider the likelihood and potential impact of the above risks to be low.

12. If you agree, we will start setting up these conversations as soon as practicable.

Who we propose to engage with

13. Given the engagement fatigue some communities are experiencing, we intend to keep our engagements very targeted at this stage. We intend to include:

13.1. *Kāpuia*. This is the Ministerial reference group comprising various community members and leaders, to advise Minister Little on the government's implementation of the Royal Commission response. Kāpuia is an opportunity to test the sentiment around the inclusion of the review within the Government's response to the Royal Commission and any associated issues. The draft terms of reference for Kāpuia requires members to maintain and safeguard the confidentiality of information submitted to them.

13.2. *Justice Iwi Leaders Group*. We propose to talk to the Justice Iwi Leaders Group contact for the Ministry of Justice and offer to discuss with a small group our intention to review the Act. We expect to receive an early indication of the issues likely to be of importance to Māori and how we can facilitate the participation of Māori in the review.

13.3. *Police engagement networks*. Police have developed community engagement networks with Māori, Pacific and other ethnic communities to discuss issues related to crime and policing. They have offered to work with us to use these relationships to facilitate discussions on search and surveillance issues. This could potentially include trusted relationships the Police have developed with members of Ngāi Tūhoe Iwi following Operation 8.

14. We are aiming to have the conversations during August and September 2021.

15. We intend to take a low-key approach to the conversations. We will keep attendee numbers low and keep the conversations informal. Before our conversations, we will send people a high-level overview of the Act, including information on what the Act does, the types of agencies it covers, why it was passed, what protections there are in the Act, the changes since the Act was passed in 2012, and some of the key recommendations from the Joint Review.

16. We attach the information we intend to send people in the **Appendix**.

Next steps

17. If you agree, we will arrange early engagement conversations with the people listed above and send them the information in the **Appendix**.

18. We will have informal conversations with the listed people and work with government agencies on the issues in the Joint Review and other major issues they have with the Act.

19. We will then report back to you in October with:

19.1. feedback we receive during early engagement

19.2. advice on how to progress a package of reforms based largely on the work from the Joint Review with the aim of introducing legislation in mid to late 2022

19.3. information about any issues we will not be able to address in that timeframe and any associated risks.

Recommendations

20. It is recommended that you:

1. **Agree** to officials beginning early engagement conversations on the Search and Surveillance Act 2012 with the groups outlined in this briefing. YES/NO

2. **Forward** a copy of this briefing to the Lead Coordination Minister for the Government's Response to the Royal Commission's Report into the Terrorist Attack on the Christchurch Mosques and the Minister of Police. YES/NO

3. **Note** we will report back to you in October 2021 with the outcomes of early engagement and initial policy work with options for the next stage of the review.

Alida Mercuri

Policy Manager, Criminal Law

APPROVED SEEN NOT AGREED

Hon Kris Faafoi
Minister of Justice

Date / /

Appendix: information we intend to send out to initiate early engagement conversations

The Search and Surveillance Act

What does the Search and surveillance Act do?

The Search and Surveillance Act 2012 (the **Act**) controls when and how Police and many other government agencies can conduct searches or use surveillance to investigate offences.

Examples of **searches** include:

- Using a search warrant to physically search something – like a person, a vehicle, a place or thing.
- Using a search warrant to digitally search a device like a cell phone or computer or to search for information on the Internet that cannot be accessed by the public – like the contents of an email account.
- Searching a person, place, vehicle, place or thing without a warrant in exceptional circumstances.

Examples of **surveillance** include:

- Intercepting and recording telephone conversations to hear the conversation.
- Installing a device in somebody's home or workplace to record conversations.
- Monitoring a private place and recording who comes or goes.

The Act also controls when the government agencies can **seize** property found during a search.

What is the Act's purpose?

The purpose of the Act is to:

- help government agencies monitor compliance with the law and investigate and prosecute offences; and
- make sure government agencies do this consistently with human rights values.

Which government agencies must comply with the Act?

The Act is focused on search and surveillance activities needed to detect and prevent or investigate and prosecute offences.

It does not cover search and surveillance activities by the intelligence agencies, which operate under different laws. It does however apply to the search and surveillance activities of the Police and a broad range of other government agencies in a wide variety of circumstances – including tax officers, fisheries officers, animal welfare inspectors, rangers and other similar regulatory officers.

Why was the Act passed?

Before the Act was passed in 2012 there were different rules for government agencies, even if they were doing the same or similar things. The Act was intended to create greater consistency and transparency about how enforcement agencies use search, seizure and surveillance powers. It also:

- Updated search, seizure, and surveillance rules to make sure they worked properly for technologies used at the time.
- Added rules reinforcing rights protected in other laws, including human rights.
- Improved the government's investigative tools to enable it to better investigate and enforce laws.

What protections are there for people in the Act?

One of the main purposes of the Act is to make sure government agencies use their powers under the Act consistently with human rights values. Two critical human rights values in this context are the right not to be subject to unreasonable search or seizure (affirmed in section 21 of the New Zealand Bill of Rights Act) and the right to privacy.

The Act seeks to ensure enforcement agencies act consistently with these human rights values through rules aimed to ensure the government can only use search, surveillance and seizure powers if there are clear reasons for doing so and providing oversight mechanisms for their use.

For example, the Act:

- Requires enforcement agencies to obtain a search warrant before doing most searches.
- Limits who can provide enforcement agencies with a search warrant (a Judge, Justice of the Peace, Community Magistrate, Registrar or Deputy Registrar authorised to issue a search warrant)
- Requires people granting a warrant to be satisfied the proposed search or surveillance is reasonable in the circumstances.
- Limits the situations when they can do searches or surveillance without a warrant.

The courts also interpret the Act's powers consistently with the right not to be subjected to unreasonable search or seizure. This can result in Police or enforcement officers not being able to use evidence they have gathered under the Act if their actions are considered unreasonable in the circumstances.

Has the Act been changed since it was passed?

The Act is largely unchanged since it was passed. Since then, there have been significant developments in society and technology, suggesting some changes to the Act may be needed.

The Ministry of Justice and the Law Commission reviewed the Act in 2016/17. This review found the Act was generally working well but recommended 67 changes to make the law clearer and ensure it can keep pace with changing technology and international trends. These recommendations have not yet been implemented.

What were the recommendations?

The **Appendix** contains a summary of the key recommendations of the 2016/17 joint review.

Appendix – Summary of key recommendations from the joint review

Add principles to the Act – Enforcement officers and issuing officers should be required to take these principles into account when exercising powers under the Act. The principles would reflect existing principles made by judges in cases. They include the requirements to consider whether the use of the powers is appropriate in the situation (proportionality), to minimise privacy intrusion and to consider cultural considerations. An overarching principle would be that any conduct that might be an intrusion into the reasonable expectation of privacy of any person should be carried out pursuant to a warrant, order, statutory power or policy statement (see below).
Agencies should publish policy statements – Chief executives of enforcement agencies should have to approve and publish policy statements on the use of certain investigatory techniques. Policy statements would cover some lawful activities not already covered by the Act that have the potential to intrude on reasonable expectations of privacy. Examples include visual surveillance in public places and the use of social media monitoring. Policy statements could also be used to clarify areas where there are statutory rules in place but additional guidance is desirable. An example is guidance on when production orders should be obtained. These are court orders requiring documents to be given to an enforcement officer.
Surveillance warrant regime should be broadened – It should cover surveillance using technology such as computer programs rather than just "devices". A warrant should also be required to carry out "data surveillance" (e.g. keystroke logging) and observation of private activity in private premises using extrasensory technology (e.g. thermal imaging and x-ray).
Covert operations should be regulated – All covert operations should be subject to a policy statement, external auditing, and a warrant regime paired with immunities for certain specified, non-violent offences (e.g. participation in an organised criminal group). Enforcement officers would need to obtain warrants only if they were likely to rely on the immunities but could also seek them in other situations (e.g. if there is doubt about the reasonableness of a proposed operation).
A warrant should be required to search electronic devices – Specific approval in a warrant should be required to search electronic devices except in urgent situations. If a device was found during the exercise of a search power and no specific approval to search it has been obtained, enforcement officers would be able to seize it to avoid loss of evidential material while they obtain a warrant.
Remote access (e.g. internet-based) search warrant provisions should be clarified – Specific approval in a warrant should be required to search Internet facilities except in urgent situations. Internet search warrants could authorise searches of data that is fragmented or held in an unknown overseas location (e.g. across multiple servers/locations) but not data held in a known overseas location (when international cooperation mechanisms must be followed). Searches of internet-based material could be done remotely (i.e. from an enforcement agency's own computer).
Accession to the Budapest Convention – The government should consider if New Zealand should accede to the Council of Europe Convention on Cybercrime ETS 185, which includes implementing a narrow preservation notice regime (see below). This recommendation is already being implemented as part of the government's response to recommendation 18 of the *Royal Commission of Inquiry into the Terrorist Attack on the Christchurch masjidain*. **Introduce a preservation notice regime –** A preservation notice regime should be introduced allowing the Assistant Commissioner of Police to issue a notice requiring a service provider to retain specified data for up to 20 days (with extension by a judge permitted). A notice could only be issued where the data is likely to be destroyed before a production order can be obtained.

Hon Kris Faafoi, Minister of Justice

Options to progress the Search and Surveillance Act review

Date	29 October 2021	**File reference**	IPC-15-11

Action sought	**Timeframe**
Agree to an engagement-centric approach in the review (option 1) that will involve, as a first phase, working with our Treaty partners and with ethnic, faith-based, youth, rainbow and other interested communities and other interested people and continuing our policy work with agencies.	4 November 2021
Direct officials to draft a Cabinet paper to give effect to the decisions in this briefing.	
Forward a copy of this briefing to Hon Andrew Little as the Lead Coordination Minister for the Government's Response to the Royal Commission's report into the Terrorist Attack on the Christchurch Mosques, Hon Poto Williams as Minister of Police and Hon Jan Tinetti as Minister of Internal Affairs.	

Contacts for telephone discussion (if required)

Name	**Position**	**Telephone (work)**	**(a/h)**	**First contact**
Brendan Gage	General Manager	s9(2)(a)		☒
Andrew Hill	Policy Manager	s9(2)(a)		☐
Joe Harbridge	Senior advisor	s9(2)(a)		☐

Minister's office to complete

☐ Noted ☐ Approved ☐ Overtaken by events

☐ Referred to: _____

☐ Seen ☐ Withdrawn ☐ Not seen by Minister

Minister's office's comments

Purpose

1. The purpose of this briefing is to:

   1.1. update you on what we heard in our early engagement conversations (paragraphs 8 to 17);

   1.2. update you on our policy work with agencies (paragraphs 18 to 23); and

   1.3. seek your decisions on the following matters (paragraphs 24 to 40):

      1.3.1. the form of participation people should have in the review of the Search and Surveillance Act 2012;

      1.3.2. the scope of the review; and

      1.3.3. the timing of the review.

Key messages

- Our early engagement conversations have given us consistent feedback that we need to engage widely and well on this review. This is in line with the expectations Cabinet has set in Cabinet Office circular CO (19) 5: Te Tiriti o Waitangi / Treaty of Waitangi Guidance and by endorsing Te Arawhiti's engagement framework and guidelines. It is also in line with the expectations Royal Commission of Inquiry (RCOI) Ministers set in endorsing the Department of Prime Minister and Cabinet's engagement checklist.

- Our initial Tiriti o Waitangi analysis suggests that the Māori interest in this review is high (see **Appendix 3**). This indicates we need to ensure we properly understand what those interests are at the start of this review to help inform our decision-making throughout it.

- Events like the Urewera raids, the Dawn Raids and perceptions that search and surveillance powers are used disproportionately against certain communities are likely to be a key part of the public discourse on the review.

- The Ministry of Justice and Law Commission Joint Report – *Review of the Search and Surveillance Act 2012* provides an excellent foundation for reviewing the Act but has some limitations. In particular, it did not have a counter-terrorism focus and we did not engage with our Treaty partners, the public or government agencies on our preferred option before we made our recommendations (i.e., there was no "options paper" stage).

- This briefing provides advice on four options:

   1) Take an engagement-centric approach (**option 1**) that will involve, as a first phase, working with our Treaty partners and with ethnic, faith-based, youth, rainbow and other interested communities and continue our policy work with agencies.

   2) Take a consultation approach in line with the 'consult' level of the IAP2 spectrum to help inform the preparation of an options paper (**option 2**). Publicly release the options paper in the third quarter of 2022, to allow for a bill to be Introduced in the first quarter of 2023.

3) Prepare an options paper for release without any prior engagement (**option 3**). This approach would align with the 'consult' level of engagement on the IAP2 spectrum and could be released in March 2022. Use the submissions to inform final policy decisions then prepare a bill for introduction in the fourth quarter of 2022.

4) Introduce a bill without further engagement (**option 4**). This approach would align with the 'inform' level on the IAP2 spectrum and would rely on the engagement done as part of the 2016/17 review and internal conversations with agencies. Prepare a Cabinet paper for the second quarter of 2022 to seek final policy decisions then prepare a bill for introduction in the third quarter of 2022.

- To meet Cabinet, ministerial and community expectations on how we should engage on a review of this nature, we recommend option 1. s9(2)(f)(iv)

Background

2. The Search and Surveillance Act 2012 (the **Act**) controls when and how Police and other government agencies[1] can carry out search and surveillance activities. The purpose of the Act is to facilitate the monitoring of compliance with the law and the investigation and prosecution of offences in a manner consistent with human rights values.

3. Examples of searches include searching a person, car, house or cell phone for evidence of an offence. Examples of surveillance include recording telephone conversations, installing recording devices in somebody's house or recording who comes and goes from a private place.

4. In May 2021 we briefed you on possible next steps for a review of the Act. There are two main drivers for reviewing the Act:

   4.1. Recommendation 18 of the *Ko tō tātou kāinga tēnei report: Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (the ***RCOI Report***) to review all legislation related to the counter-terrorism effort to ensure it is current and enables Public sector agencies to operate effectively.

   4.2. The review of the Act the Law Commission and the Ministry of Justice completed in 2017, resulting in Law Commission Report 141 – *Review of the Search and Surveillance Act 2012* (the **Joint Report**). The Joint Report made 67 recommendations to improve the Act. Many of the recommendations reflect two problems identified by the joint review:

      4.2.1. key aspects of search and surveillance law are contained in case law and are not evident on the face of the Act; and

      4.2.2. the Act has not kept pace with developments in technology.

5. The first phase of the review was the early engagement and initial policy analysis phase. It involved:

   5.1. holding conversations with targeted groups you approved for early engagement (see paragraphs 8-10 below); and

[1] This includes a wide range of agencies involved in both traditional law enforcement and overseeing regulatory regimes. It excludes the intelligence agencies, which have their own legislative framework.

5.2. identifying issues that agencies have with the Joint Report's recommendations and other significant operational or technical issues with the Act we could address in the review.

6. Your preferences in May 2021 were to proceed with the review at pace s9(2)(g)(ii)

7. You directed us to report back to you in October 2021 with options for the next stage of the review.

Early engagement conversations

8. Our early engagements included:

   8.1. An online hui with Kāpuia on 9 September 2021. Kāpuia is the ministerial advisory group comprising various community members and leaders to advise Hon Andrew Little on the government's implementation of the RCOI Report.

   8.2. An informal conversation with Te Huia Bill Hamilton on 21 September 2021. Mr Hamilton is the Lead Advisor of the Pou Tikanga of the National Iwi Chairs Forum.

9. We were not able to engage with some of the other target groups you authorised us to engage with. Engagement fatigue and other immediate priorities for the Police's Māori and Ethnic focus forums – including issues related to the August 2021 Covid-19 lockdown – meant those groups could not have direct discussions with us. Police also informed us that Ngāi Tūhoe had said they were inundated with challenging kaupapa but had expressed a clear interest to engage with us on this review at a later stage.

10. The Police were, however, able to provide feedback to us from their Māori and Ethnic focus forums through informal conversations with a small number of members.

Key themes

11. We asked people what they thought the level of communities' interest was in the search and surveillance regime, how we should engage with the public on the review, and whether there were specific objectives, areas or issues the review should focus on.

12. The key themes coming out of the early engagement discussions were:

   12.1. It is critical that we engage widely and well on this review – with Māori, ethnic and faith-based communities, younger members of the community as well as the general public.

   12.2. We will need to work out how best to partner with Māori on this review and, in particular, how to respect rangatiratanga throughout it.

   12.3. How powers are used is as important as – and possibly more important than – what the powers are. There was a lot of concern about search and surveillance powers being used disproportionately by Police and other enforcement officers on Māori and other communities.

12.4. The Urewera raids will be central parts of any discussions with Māori. There is still a lot of hurt, anger and distrust of the Crown flowing out of these events, particularly for Ngāi Tūhoe.

12.5. We will need to include people who can provide technical advice to communities about the proposals, given the complex nature of issues dealt with in the Act.

13. We provide more detail about our early engagement conversations in **Appendix 1**.

14. Although we were not able to receive feedback from the Police's Pacific focus forum, the Ministry for Pacific Peoples emphasised the Dawn Raids are likely to be a feature of engagements with Pacific Peoples. Dialogue associated with the Government's formal apology for the Dawn Raids has highlighted the sense of distrust they fostered in authorities and the way they still shape the perceptions of government today.

15. Our early engagement conversations indicate that communities are going to be focused on operational issues like the disproportionate use of search and surveillance powers. The disproportionate use of search powers against Māori and Pacific Island New Zealanders has received media attention in recent years, with the Police Commissioner publicly acknowledging that the statistics showing the disproportionate use of warrantless powers were "appalling"[2].

16. Our review is primarily focused on what search and surveillance powers should *be* rather than how they are *used*. But taking a compartmentalised approach to these issues (for example, by saying that is an issue for the Police or other agencies rather than us) is unlikely to create the sort of trust and goodwill we are seeking to cultivate in this review.

17. If you agree to the recommendations in this paper for further engagement with communities, we should therefore consider how to provide an opportunity for Police and other enforcement agencies[3] to discuss the measures they are taking to address the concerns communities have. This would go some way to demonstrate we intend to consider the issues more holistically – something many Māori and other New Zealanders have been urging the Crown to do for some time.

Policy work with agencies

18. We have been working through a number of significant issues agencies have raised with us in relation to the recommendations in the Joint Report.

19. There appear to be key differences between agencies' views on fundamental aspects of the Joint Report's recommendations. For example, we support the principle that any search and surveillance activities that encroach on reasonable expectations of privacy should be regulated. The Law Commission also supported this view and it was a cornerstone principle on which many of the Joint Report recommendations were based. s9(2)(f)(iv)

[2] 2020 Stuff investigation entitled "Unwarranted", which found that Māori and Pacific Peoples were many times more likely to be searched pursuant to warrantless powers than the rest of the population. In 40 Police stations in the country, Māori are five times more likely to be subject to an warrantless search than Pākehā.

[3] This includes a wide range of agencies involved in both traditional law enforcement and overseeing regulatory regimes.

20. s9(2)(f)(iv)

21. We still stand by most of the recommendations in the Joint Report and think it forms an excellent foundation for reviewing the Act. However, working through it with agencies has highlighted some of its limitations:

    21.1. The review began around 4 years after the Act came into force. This was required by the Act itself. This meant there were a limited number of number of cases involving the Act we could analyse. This limited the experience that enforcement agencies, businesses and the public had of the Act when we did the review. There have also been rapid changes to the digital environment in the past few years.

    21.2. The review did not have a counter-terrorism focus. The Joint Report does include a small number of recommendations that would support our counter-terrorism approach[4] but the reviewers were primarily focused on the day to day use of the Act.

    21.3. The Act required the Ministry of Justice and the Law Commission to complete the 2016/17 review within one year. This meant that:

        21.3.1. we did not engage with our Treaty partners before we made our recommendations; and

        21.3.2. we were unable to consult with the public or government agencies on our preferred option before we made our recommendations (i.e., there was no "options paper" stage).

22. We therefore consider that we should use the Joint Report recommendations as a foundation for the review but recommend engaging with our Treaty partners and with other interested communities before committing to implement them. Interested communities include ethnic, faith-based, youth, rainbow and other communities who may be disproportionately impacted by search and surveillance activities – as the subject of those activities or as the victims of offending.

23. Taking an engagement-centric approach would give us the best opportunities to identify improvements to the Act from both a counter-terrorism and a regulatory stewardship perspective. It would however, extend the time needed for the review compared to alternative options (see below analysis of options).

The decisions we are seeking

24. In this paper we are seeking decisions on:

    24.1. what form of participation people should have in the review;

    24.2. the scope of the review; and

[4] Examples include the proposed refinement to the scope of surveillance powers, including those available for monitoring compliance with supervision orders and covert operation warrants. Other relevant issues may be raised by agencies or the public as the review progresses.

24.3. the timing of the review.

Our objectives

25. The objectives underlying our advice in this paper are to:

    25.1. Ensure the Act is working effectively, including:

        25.1.1. from a counter-terrorism perspective;

        25.1.2. in respect of new and emerging technologies; and

        25.1.3. by considering the Joint Report recommendations.

    25.2. Facilitate high-quality engagement that meets Cabinet's expectations on how we should engage with our Treaty partners, ethnic, faith-based communities and the general public on work responding to the RCOI Report

Engagement expectations

26. A key objective for us in this advice is meeting Cabinet, ministerial and community expectations about how we should engage with New Zealanders on a review of this nature. Cabinet has given a clear indication of its expectations for engagement on policy proposals affecting Māori by endorsing Te Arawhiti's engagement framework and engagement guidelines and Cabinet Office circular CO (19) 5: Te Tiriti o Waitangi / Treaty of Waitangi Guidance. RCOI Ministers also recently expressed an intention to make DPMC's community engagement checklist mandatory if agencies are conducting community engagement to inform responses to RCOI Report recommendations.[5]

27. The RCOI Report urged agencies involved in the counter-terrorism effort to change how we engage with communities, including by shifting our mindset "to value communities' input into decisions, transparency and engaging in robust debate" and ensuring our counter-terrorism effort is valued by the people it seeks to protect. Recommendation 38 of the RCOI Report, accepted in-principle by the government, was to:

    27.1. require all Public sector community engagement to be in accordance with New Zealand's Open Government Partnership Commitments (these largely relate to the IAP2 Public Participation Spectrum in this context);

    27.2. be clear on the degree of influence that community engagement has on associated decision-making by indicating where the engagement sits on the IAP2 Public Participation Spectrum; and

    27.3. undertake more "involve" and "collaborate" levels of engagement.

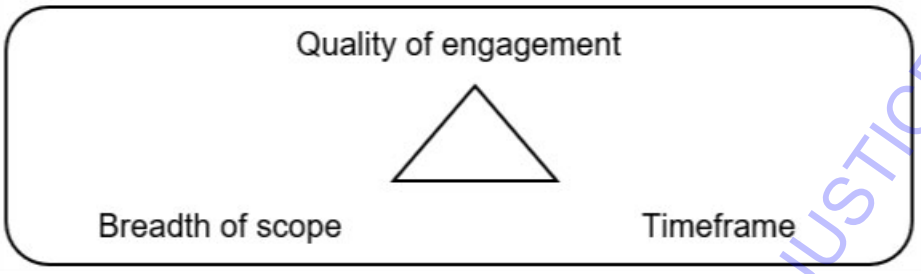
28. Kāpuia's 30 July 2021 letter to the Lead Coordination Minister for the Government's Response to the RCOI Report shows the increasing expectations ethnic and faith-based communities have for government engagement on issues affecting them.

[5] Minutes of the 3 August 2021 Responsible Ministers Meeting on Government Response to the Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques.

29. We provide more detail on Te Arawhiti's engagement framework, the IAP2 Public Participation Spectrum and DPMC's community engagement checklist in **Appendix 2**. We summarise our initial Tiriti o Waitangi analysis, taking into account the considerations in CO (19) 5: Te Tiriti o Waitangi / Treaty of Waitangi Guidance, in **Appendix 3**.

Relationship between the decisions

30. The decisions we refer to in paragraph 24 are interrelated.



31. We consider that prioritising any two of these would involve significant compromises for the other. Our preferred approach is to prioritise engagement and scope. However, we cannot prioritise those without affecting the timeline. s9(2)(f)(iv)

Options

32. We have considered the following options:

    32.1. **Option 1: Engagement-centric approach** (recommended option):

        32.1.1. **Phase 1**: Work with our Treaty partners and with ethnic, faith-based, youth, rainbow and other interested communities in the **first and second quarter of 2022** in accordance with the 'involve' level of engagement on the IAP2 spectrum. Seek to accommodate the preferences of our Treaty partner and participating communities on the form and timing of the engagements as much as possible. Potentially form working groups and/or a technical advisory group to advise participating communities. Ensure we are properly informed about the Māori interests in relation to search and surveillance and the issues ethnic, faith-based, youth, rainbow and other affected communities face. Seek ideas from participating communities on how to engage with their communities and the wider public in phase 2. At the same time, continue our policy work with agencies.

        32.1.2. **Phase 2**: Facilitate the wider public's participation in the review. Subject to discussions in phase 1 on how to engage with the wider public, this could include the public release of proposed reform options for public feedback, in accordance with the 'consult' level of engagement on the IAP2 spectrum. s9(2)(f)(iv)

32.1.3. s9(2)(f)(iv)

This option would promote quality of engagement and breadth of scope but would extend the time needed for the review compared to other options.

32.2. **Option 2: Targeted consultation to inform options paper** (not recommended): Do targeted consultation in accordance with the 'consult' level of the IAP2 spectrum in the first and second quarters of 2022 with our Treaty partners and a section of ethnic, faith-based, youth, rainbow and other interested communities to help inform the preparation of an options paper. Publicly release the options paper in the **third quarter of 2022**. This option would enable a bill to be prepared for introduction in the **first quarter of 2023**.

This option would involve compromises to the quality of our engagement and potentially to the review's scope.

32.3. **Option 3: Release options paper without further engagement** (not recommended): Do no prior engagement before publicly releasing an options paper around March 2022 in accordance with the 'consult' level of the IAP2 spectrum. Use the public's submissions to inform final policy decisions then prepare an amendment bill for introduction in the **fourth quarter of 2022**.

This option would promote the timeliness of a bill's introduction but would materially compromise the quality of our engagement and would likely involve a restriction on the review's scope.

32.4. **Option 4: Introduce a bill without further engagement** (not recommended): Do no further public engagement. Rely on the engagement done as part of the 2016/17 review and internal conversations with agencies. Prepare a Cabinet paper for the second quarter of 2022 to seek final policy decisions. Prepare a bill for introduction in the **third quarter of 2022** and provide information to the public about the proposed reforms in accordance with the 'inform' level on the IAP2 spectrum.

This option would result in the introduction of a bill in the fastest possible timeframe but would significantly compromise the review's quality of engagement and scope.

Analysis of options

33. Option 1 is our preferred option. It would:

33.1. Enable us to meet Cabinet and RCOI Ministers' expectations on how we should engage with our Treaty partners and with ethnic, faith-based, youth, rainbow and other interested communities on work relating to the RCOI Report. It would provide us with an opportunity to aim towards engagement on the 'involve' and "collaborate" parts of the IAP2 engagement spectrum on certain aspects of the review, consistent with recommendation 38 of the RCOI Report.

33.2. Enable us to keep our options open about the potential scope of the review until we have engaged with our Treaty partners and with ethnic, faith-based, youth, rainbow and other interested communities on potential reforms.

33.3. Enable the public and agencies to comment on the Joint Report's proposed reforms and on whether there are other ways we can improve the Act from a counter-terrorism perspective.

33.4. Provide flexibility by building in "check in" points. This would enable you and your Cabinet colleagues to decide how best to proceed at each point. We expect this to be valuable given the reforms will likely be perceived as controversial.

34. Option 1 could extend the timeframe for s9(2)(f)(iv) This is discussed in the risk section.

35. Option 2 would enable us to do some awareness-raising and building support for reform. However, the timeframe would be very tight. We would likely need to be prepared to remove issues that looked particularly controversial from the scope of the review to meet timeframes. That would risk passing up opportunities to improve the Act in important ways.

36. One of the main disadvantages of option 2 would be a lack of flexibility. Our proposed timing would likely be insufficient for understanding communities' concerns and finding ways of responding to them. In terms of recommendation 38 of the RCOI Report, we would be in the 'consult' part of the IAP2 engagement spectrum but there would be an increased risk that our consultation did not meet Cabinet's, our Treaty partners' or the public's expectations for a review of this nature. While we do not prefer this option, we consider it significantly better than options 3 and 4.

37. The main benefit of option 3 or 4 would be to enable the introduction of a bill in 2022. However, there would be significant disadvantages:

37.1. Neither option would be likely to meet Cabinet's expectations for engaging with our Treaty partners or ethnic and faith-based communities as part of work responding to the RCOI Report.

37.2. Based on our early engagement conversations, these options would not meet the community's expectations for engagement on this review. Our Treaty partners will expect to engage with the Crown rather than merely be given the opportunity to participate in a select committee consultation process in Parliament.

37.3. Both options 3 and 4 would make it difficult to build support for the review and any reforms coming from it among our Treaty partners and ethnic, faith-based, youth, rainbow and other interested communities. We consider this would create significant headwinds for the project.

38. In terms of recommendation 38 of the RCOI Report, option 3 would put us in the "consult" part of the engagement spectrum, although the preparation of the options paper itself would not be informed by recent engagement on the issues. Option 4 would put us on the least intensive form of engagement – merely informing the public that we were Introducing a bill based on the 2016/17 review and conversations with agencies.

39. Under the shortened timeframes in option 3, we would likely need to consider reducing the scope of the review to enable us to engage effectively on fewer issues. This would minimise the impact on communities, particularly in the context of current levels of engagement fatigue. In the context of the RCOI Report, it would make sense to prioritise reforms that would strengthen our counter-terrorism approach. However, we would not advise this approach:

    39.1. Considering legislative change with only a counter-terrorism lens could have significant unintended consequences and risks prejudicing the internal integrity within the Act.

    39.2. Although the Act is a part of our approach to counter-terrorism, it is not a central part. On a day to day basis, the Act is used almost entirely for non-counter-terrorism purposes. Focusing exclusively or primarily on the counter-terrorism aspects of the Act would therefore involve missing an important opportunity to improve the Act for non-counter-terrorism purposes – which is its primary focus.

    39.3. We would need to explain why we were leaving many of the issues identified in the Joint Report to be addressed in a subsequent review. Given that many of the Joint Report recommendations seek to provide new limitations and transparency mechanisms on enforcement agencies, leaving these issues out of the scope of this review would likely exacerbate the likely concerns of our Treaty partners and ethnic and faith-based communities about what our objectives are in this review and lower trust even further in an already low-trust environment.

40. In summary, we do not consider the potential gains we could get from improving our counter-terrorism effort through reforms to the Act would outweigh the approach's detrimental impacts on the Māori-Crown relationship, our relationship with other key communities and leaving the non-counter-terrorism problems identified in the Joint Report unresolved.

Potential risks when reviewing the Act

41. The use of search and surveillance powers can be extremely contentious. Some people are likely to strongly oppose any proposed reforms. This might cause delays to the project or reduce the social licence of the government to reform the law. Option 1 would seek to mitigate this by putting emphasis on engagement with interested communities at the start of the review and making substantive and procedural decisions informed by those engagements. Although we consider this would go some way both to improving substantive outcomes of the review and enable a wide array of views to influence the review's direction, there is likely to be strongly felt opposition to the reforms regardless of the approach we take on the review.

42. The review is likely to put a spotlight on whether enforcement agencies are treating all New Zealanders equally when using search and surveillance powers. This is likely to highlight, in turn, what enforcement agencies are doing to combat institutional prejudice in their organisations. Any public perception that agencies are not doing enough could increase opposition to any extensions of search and surveillance powers. We intend to mitigate this risk by identifying and highlighting the measures enforcement agencies are taking to reduce or eliminate institutional prejudice in their organisations.

43. The Waitangi Tribunal has commenced a kaupapa inquiry into the justice system, which is currently in its beginning stages. Any concerns about the review from a Treaty perspective could be raised in that inquiry – as well as any discrepancy between how the Crown says it wants to approach justice system issues affecting Māori and how we do so in this review. We intend to mitigate this risk by engaging with Māori to ensure we properly understand Māori interests in the review and by seeking to keep in contact with officials involved in the kaupapa inquiry.

44. Search and surveillance is a complex legal area. There is a risk that legislative reform could have unintended consequences. For example, the definition of surveillance technology could be either too narrow to allow newer but less intrusive forms of surveillance from being authorised, or too broad and enable the use of technology that goes beyond what Parliament envisioned. We intend to mitigate this risk by engaging widely, particularly with enforcement agencies and interested groups (including legal experts).

45. There is also a risk that the Act fails to keep up with the needs of enforcement agencies. s6(c)

46. s9(2)(f)(iv)

Some of the issues associated with this trend may be addressed through accession to the Council of Europe Convention on Cybercrime (the Budapest Convention) and its potential to open up bilateral agreements with the United States under their Clarifying Lawful Overseas Use of Data Act or CLOUD Act.

47. We also intend to address these concerns by working as swiftly as we can on this review. We consider that engaging well at the start of the review and taking on board the feedback we receive will provide the best opportunity of maintaining momentum without having to put it on hold or re-engage in the future to remedy a perceived lack of engagement at the outset. We note that the original Search and Surveillance Bill had an extended select committee process with multiple rounds of submissions, in part due to public concerns at the time with the proposed powers in the bill.

48. Lastly, the impact of Covid-19, particularly on communities' ability to engage, is an ongoing risk. This is likely to decrease over time as the vaccination programme progresses.

Next steps

49. If you agree to our recommendations, we propose the following next steps:

    49.1. we prepare a Cabinet paper seeking authority to begin a review of the Act for you to take to Cabinet at the next available opportunity;

    49.2. we prepare a public announcement for you to make if Cabinet agrees to the review;

49.3. we begin planning engagements with our Treaty partners and with ethnic, faith-based, youth, rainbow and other interested communities, s9(2)(f)(iv) and

49.4. we will continue to work with agencies to develop policy work.

Recommendations

50. We recommend that you:

Note that the feedback we have received during the early engagement conversations has highlighted an expectation that we will engage widely on this review.

Agree to one of the following options:

1) take an engagement-centric approach in the review (**option 1**) that will involve, as a first phase, working with our Treaty partners and with ethnic, faith-based, youth, rainbow and other interested communities and continue our policy work with agencies. **(recommended)** YES / NO

2) a consultation approach in line with the 'consult' level of the IAP2 spectrum to help inform the preparation of an options paper **(option 2)**. Publicly release the options paper in the third quarter of 2022, to allow for a bill to be Introduced in the first quarter of 2023. **(not recommended)** YES / NO

3) to prepare an options paper for release without any prior engagement **(option 3)**. This approach would align with the 'consult' level of engagement on the IAP2 spectrum and could be released in March 2022. Use the submissions to inform final policy decisions then prepare a bill for introduction in the fourth quarter of 2022. **(not recommended)** YES / NO

4) to Introduce a bill without further engagement **(option 4)**. This approach would align with the 'inform' level on the IAP2 spectrum and would rely on the engagement done as part of the 2016/17 review and internal conversations with agencies. Prepare a Cabinet paper for the second quarter of 2022 to seek final policy decisions then prepare a bill for introduction in the third quarter of 2022. **(not recommended)** YES / NO

OR

Agree to discuss this briefing with officials. YES / NO

Direct officials to draft a Cabinet paper to give effect to the decisions in this briefing. YES / NO

Forward a copy of this briefing to Hon Andrew Little as the Lead Coordination Minister for the Government's Response to the Royal Commission's report into the Terrorist Attack on the Christchurch Mosques, Hon Poto Williams as Minister of Police and Hon Jan Tinetti as Minister of Internal Affairs. YES / NO

s9(2)(a)

Andrew Hill
Policy Manager, Criminal Law

APPROVED SEEN NOT AGREED

_____

Hon Kris Faafoi
Minister of Justice

Date / /

Attachments:

Appendix 1: More detailed feedback from the early engagement conversations
Appendix 2: Engagement frameworks
Appendix 3: Initial Tiriti o Waitangi analysis

Appendix 1: More detailed feedback from the early engagement conversations

The importance of engaging widely

1. All the groups we engaged with stressed the importance of engaging widely and well on this review. Views included:

    1.1. Wide engagement is important given that search and surveillance has wide reaching consequences for Māori.

    1.2. Proposed changes need to have the confidence of the people to build faith and confidence between Police, the government and the community. We need to take time to build trust with communities and community organisations before engaging on challenging topics.

    1.3. We should consult with younger members of the community. We also need to consider how to include hapū and whānau Māori in the conversation.

    1.4. We need to take some lessons from the consultation on incitement to hate. (Kāpuia wrote to the Lead Coordination Minister for the Government's Response to the Royal Commission's Report into the Terrorist Attack on the Christchurch Mosques dated 30 July 2021. The letter specified various shortcomings Kāpuia had identified with the incitement to hate engagements, including short timeframes, lack of engagement with umbrella groups, the times consultation meetings were held, the locations for the meetings and the consultation material provided.)

    1.5. There should be more community *involvement* in the context of IAP2's scale of public participation (see **Appendix 2**).

    1.6. We need to consider language barriers in all our consultations, whether in a written or oral form.

    1.7. Having diversity on the team undertaking the consultation (that reflected too, where possible, the diversity of the communities we were engaging with) would be likely to improve the quality of the consultations.

How powers are used is as important as what they are

2. It was clear in our conversations that how search and surveillance powers are used is as important – and perhaps more important – than what the powers are. Most of the people we talked to expressed concern about the Police using search and surveillance powers disproportionately against Māori and other communities.

Te Urewera raids will be central parts of the conversation

3. The Urewera raids came up in several conversations. We were asked whether the Crown had learned anything since the Urewera raids. We were told:

    3.1. search and surveillance is a top priority for Māori to "ensure things like the Urewera raids don't happen again"

    3.2. the outcomes of events like the Urewera raids are "disastrous for the fabric of New Zealand"

3.3. the strong feelings from the Urewera raids have not gone away and there is still strong distrust of the Crown and its people.

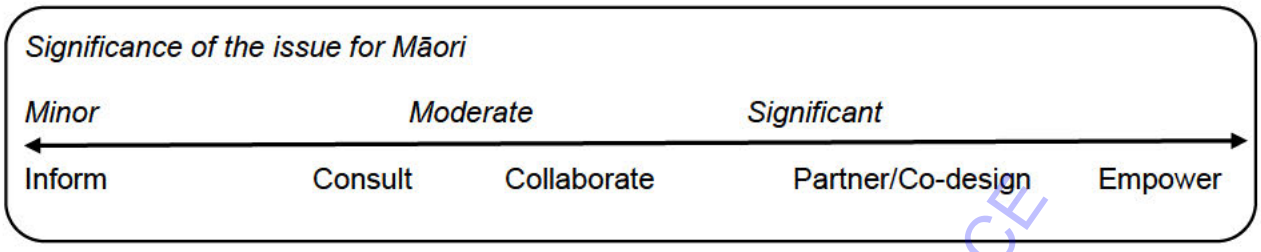
Suggested approaches

4. We received advice on how to engage well. This included:

4.1. s9(2)(f)(iv)

Appendix 2: Engagement frameworks

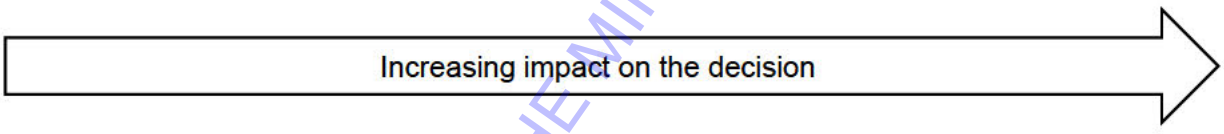
Te Arawhiti's engagement framework, engagement guidelines and Cabinet Office circular CO (19) 5: Te Tiriti o Waitangi / Treaty of Waitangi Guidance



1. We consider the issues in the review will range from minor and moderate on the engagement framework (e.g., there is not likely to be a stronger Māori interest in whether companies should be able to recover their costs in responding to production orders) to significant (whether there should be a principle requiring enforcement officers to take into account te ao Māori considerations when exercising their powers, whether marae should be protected on the basis that they constitute private premises or based on considerations of tapu and noa, and whether the Act's powers are used proportionately to investigate New Zealanders consistently with Article 3 of te Tiriti o Waitangi).

2. This indicates our engagements should range from consult to collaborate or partner/co-design, depending on the relevant issue.

IAP2 Public Participation Spectrum



Inform	Consult	Involve	Collaborate	Empower
Objective: To provide the public with balanced and objective information to assist them in understanding the problem, alternatives, opportunities and/or solutions.	Objective: To obtain public feedback on analysis, alternatives and/or decisions.	Objective: To work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.	Objective: To partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution.	Objective: To place final decision making in the hands of the public.

RCOI Report

3. Recommendation 38, accepted in-principle by the Government, recommended the Government:

    3.1. require agencies to be clear about the degree of influence that community engagement has on associated decision-making by indicating to communities where the engagement sits on the IAP2 Public Participation Spectrum

    3.2. encourage agencies to undertake more "involve" and "collaborate" levels of engagement in accordance with the International Association for Public Participation IAP2 Public Participation Spectrum.

DPMC's mandatory community engagement checklist

4. DPMC's community engagement checklist for agencies conducting community engagement while responding to recommendations in the RCOI Report suggests agencies need to ensure they do several things when engaging, including:

    4.1. seeking to ensure the engagements enable the participation of diverse groups

    4.2. reflecting the voice of tangata whenua in our engagement plan

    4.3. testing our engagement plan with key representatives of target groups to determine whether we have successfully understood their needs

    4.4. seeking agreement from Ministers on which level of public participation is appropriate for the engagement from an IAP2 perspective

    4.5. ensuring the results of engagements are used in policy development and decision making

    4.6. sharing the result of engagements with participants and how their input affected the decision.

Appendix 3: Initial Tiriti o Waitangi analysis

1. We have undertaken preliminary analysis about Te Tiriti o Waitangi and its relevance to the review of the Search and Surveillance Act 2012 (the **Act**), informed by Cabinet Office Circular CO (19) 5 and the Te Arawhiti framework for engagement and guidelines.

2. In brief, our analysis is:

    2.1. The Crown must ensure it is properly informed of Māori interests when exercising its kāwanatanga powers in respect of search and surveillance activities.

    2.2. We need to understand the interplay between kāwanatanga and rangatiratanga in relation to search and surveillance issues, including with respect to specific whenua (land), to kainga (homes/settlements) and to any affected taonga.

    2.3. The Crown must consider the effect of the Act and any reforms to it on Māori. For example, we should consider whether the safeguards and accountability mechanisms in the Act or operating elsewhere will prevent the powers from impacting disproportionately on Māori.

3. We consider that engaging with Māori is a necessary step in meeting these responsibilities, for the reasons addressed below.

The Māori interest here appears high

4. There are many indications that the Māori interest in search and surveillance activities is high:

    4.1. Limited data is available on the exercise of search and surveillance powers by ethnicity. However, nine months of Police data from March 2019 shows significantly disproportionate warrantless searches of Māori (16 percent of population, 40 percent of warrantless searches) and Pākehā (70 percent of population; 41 percent of warrantless searches).[6]

    4.2. With respect to the criminal justice system more broadly, available data has long shown significantly disproportionate impacts on Māori. As at 2019, Māori comprised around 16 percent of the general population but made up:[7]

        4.2.1. 38 percent of people proceeded against by Police

        4.2.2. 42 percent of adults convicted

        4.2.3. 57 percent of adults sentenced to prison.

[6] The data was provided by Police Commissioner Andrew Coster to Stuff in 2020 on the basis that it provided a broad outline (not complete reliability). See https://interactives.stuff.co.nz/2020/12/unwarranted-police-searches-racial-bias-justice/

[7] Te Uepū Hāpai I te Ora — Safe and Effective Justice Advisory Group *He Waka Roimata; Transforming Our Criminal Justice System* (June 2019, at 23).

4.3. Māori are also disproportionately affected as victims of crime. The most recent New Zealand Crime and Victims Survey[8] found over one third of Māori adults (38%) were victimised within a 12-month period. This is significantly higher than the New Zealand average of 30%.

4.4. A consistent message from Māori when engaging with Te Uepū Hāpai I to Ora – Safe and Effective Justice Advisory Group was that racism is embedded in every part of the criminal justice system. Te Hunga Rōia Māori o Aotearoa (also known as The Māori Law Society) has submitted in the context of our proposed accession to the Budapest Convention on Cyber Crime 2001 that Māori have a keen interest in search and surveillance legislation, because Māori are disproportionately represented within the criminal justice system and have particular relationships with the whenua.

4.5. High profile search and surveillance activities like Operation 8 (Police's investigation into alleged paramilitary training camps operating in Te Urewera) have heightened existing concerns of Māori about how search and surveillance powers are used. In their submission to the Joint Reviewers, Te Hunga Rōia Māori pointed to the historical context of the exercise of search and surveillance with respect to Māori people and communities. This includes intelligence gathering in the lead up to the invasion of Parihaka in 1881, the monitoring of the independence movement advocated for by Rua Kēnana prior to the invasion of Maungapōhatu in 1916, surveillance of Māori activism on rights issues including Ngā Matakite (from which the Māori Land March emerged) in 1975, the Ngāti Whātua occupation of Bastion Point in 1977 and anti-racism groups in the 1980s.

Engagement with Māori is necessary to ensure we understand the Māori interest

5. The Crown must exercise its kāwanatanga responsibilities reasonably and in the utmost good faith. This includes taking reasonable steps to ensure we are informed of the effect of search and surveillance law and operation on Māori, and of any broader Māori/Treaty interest.

6. The above considerations with respect to the Māori interest here indicate the need to engage with Māori to ensure we are properly informed of the Māori interests in the review. This engagement will also inform the steps we must take in the review in light of these interests.

[8] https://www.justice.govt.nz/assets/Documents/Publications/Maori-victimisation-report-v2.01-20210329-fin.pdf

Office of the Minister of Justice

Chair, Cabinet Social Wellbeing Committee

Review of the Search and Surveillance Act 2012

Proposal

1 This paper seeks Cabinet's approval to begin a review of the Search and Surveillance Act 2012 (the **Act**) and to take an engagement-centric approach to the review.

Relation to government priorities

2 The review would form part of the government's response to the Royal Commission of Inquiry into the terrorist attack on the Christchurch masjidain on 15 March 2019 (the **Royal Commission**). The importance of responding appropriately to the Royal Commission was noted in the Speech from the Throne.

Executive Summary

3 I seek Cabinet's approval to begin a review of the Act. There are two main drivers for the review:

3.1 Recommendation 18 of the Royal Commission's report to review all legislation related to the counter-terrorism effort to ensure it is current and enables public sector agencies to operate effectively.

3.2 The statutory review of the Act completed by the Law Commission and the Ministry of Justice in 2017, which made 67 recommendations to improve the Act. The government has not yet considered whether to accept these recommendations.

4 The Act controls when and how Police and many other government agencies can carry out search, inspection and surveillance activities to prevent or investigate offences or monitor compliance with the law. There are over 80 statutes that rely on the powers and procedures under the Act for enforcement.

5 I propose the objectives of the review be to:

5.1 build public confidence in the Act and the activities it regulates; and

5.2 ensure the Act is working appropriately and effectively, including:

5.2.1 from a counter-terrorism perspective; and

5.2.2 in respect of new and emerging technologies.

6 The first phase of the review would involve working with iwi, hapū, whānau and Māori communities and with ethnic, faith-based, youth, rainbow and other interested communities in the first half of 2022. The intention for this engagement would be to facilitate participation at the "involve" level of engagement on the International Association for Public Participation Spectrum. This approach is informed by the Royal Commission's recommendations for public engagement.

7 I intend to report back to Cabinet next year with the outcomes from the first phase of engagement and ongoing policy work with agencies. s9(2)(f)(iv)

Background: the Search and Surveillance Act

8 The Act controls when and how Police and many other government agencies can carry out search, inspection and surveillance activities to prevent or investigate offences or monitor compliance with the law. The Act recognises both law enforcement and human rights values by providing:

8.1 powers that enable government agencies to effectively monitor and enforce the law; and

8.2 safeguards against unjustified intrusions on individuals' reasonable expectations of privacy.

9 Examples of searches include searching a person, car, house or the contents of a computer or cell phone. Examples of surveillance include recording telephone conversations, installing recording devices in somebody's house or recording who visits a private place.

10 There are over 80 statutes that rely on powers under the Act for enforcement. Officials who exercise these powers (**enforcement officers**) include Police officers, animal welfare inspectors, fisheries inspectors, forestry officers, immigration officers, Inland Revenue officers, product safety officers and wildlife rangers. See **Appendix 1** for a list of affected legislation.

I seek Cabinet's authority to begin a review of the Act

11 There are two main drivers for reviewing the Act:

11.1 Recommendation 18 of *Ko tō tātou kāinga tēnei: report of the Royal Commission of Inquiry into the Terrorist Attack on the Christchurch masjidain* (**Royal Commission Report**) to review all legislation related to the counter-terrorism effort to ensure it is current and enables public sector agencies to operate effectively. While the Act is much broader than just counter terrorism, it includes powers relevant to that effort. Cabinet was informed in March 2021 that a review of the Act would begin in 2021 as part of the government's response to Recommendation 18 [CAB-21-MIN-0049].

11.2 The review of the Act completed by the Law Commission and the Ministry of Justice in 2017: *NZLC R141 – Review of the Search and Surveillance Act 2012* (**Joint Report**). This review was required by the Act. The reviewers found the Act was generally working well but made 67 recommendations to clarify parts of the Act and ensure it keeps pace with changing technology and international trends. The government tabled the Joint Report in Parliament in January 2018 and said it would consider the recommendations and decide whether to accept some or all of them. This has not yet been done.

12 Alongside the Joint Report's 67 recommendations, the review would consider other issues raised by government agencies and the community. My proposed objectives in reviewing the Act would be to:

12.1 build public confidence in the Act and the activities it regulates; and

12.2 ensure the Act is working appropriately and effectively, including:

12.2.1 from a counter-terrorism perspective; and

12.2.2 in respect of new and emerging technologies.

The review would take an engagement-centric approach

13 The review would take a phased approach to enable wide engagement:

13.1 The first phase would involve working with iwi, hapū, whānau and Māori communities and with ethnic, faith-based, youth, rainbow and other interested communities in the first half of 2022. This engagement would be in accordance with the "involve" level of engagement on the International Association for Public Participation Spectrum (**IAP2 Public Participation Spectrum**). The intention would be to ensure we are properly informed about the Māori interests in relation to search and surveillance and the issues other interested communities face, e.g. through facilitated discussions. Alongside this engagement, my officials would progress policy work with government agencies.

13.2 s9(2)(f)(iv)

14 This approach reflects strong feedback provided to my officials during early engagement conversations with a small number of stakeholders and with representative agencies. Key themes from these discussions included the importance of engaging widely and well on the review, concern about Police and other enforcement officers using search and surveillance powers disproportionately on Māori, Pacific peoples and other communities, and the effect events like the Urewera raids and the Dawn Raids have had on the way affected communities view government agencies. See **Appendix 2** for more detailed information about officials' early engagement conversations.

15 Broad engagement did not occur during the Law Commission and the Ministry of Justice's joint review because the Act imposed a one-year timeframe for the review. In particular, the reviewers were unable to engage with our Treaty partners or to consult with the public or enforcement agencies on their final recommendations (i.e. there was no options paper phase).

The approach is informed by the Royal Commission's recommendations for public engagement

16 The approach I am proposing in this paper is informed by recommendation 38 of the Royal Commission Report, accepted in principle by Cabinet, which was for the government to:

16.1 require agencies to indicate where the engagement sits on the IAP2 Public Participation Spectrum; and

16.2 encourage agencies to undertake more "involve" and "collaborate" levels of engagement on the spectrum.

17 More detail on the IAP2 Public Participation Spectrum is in **Appendix 3**.

The approach reflects that the Māori interest here appears high

18 My officials have undertaken preliminary analysis about Te Tiriti o Waitangi and its relevance to the review of the Act. In brief, the analysis is:

18.1 The Crown must ensure it is properly informed of Māori interests when exercising its kāwanatanga powers in respect of search and surveillance activities.

18.2 We need to understand the interplay between kāwanatanga and rangatiratanga in relation to search and surveillance issues, including with respect to specific whenua (land), to kāinga (homes/settlements) and to any affected taonga.

18.3 The Crown must consider the effect of the Act and any reforms to it on Māori. For example, the review should consider whether the safeguards and accountability mechanisms in the Act or operating elsewhere will prevent the powers from impacting disproportionately on Māori.

19 More detail of my officials' analysis of the Māori interest here and the importance of engaging with Māori is in **Appendix 4**.

How the review links with other work responding to the Royal Commission's Recommendation 18

20 I am responsible for leading the government's response to Recommendation 18 of the Royal Commission Report. As noted above, Recommendation 18 is to review all legislation related to the counter-terrorism effort to ensure it is current and enables public sector agencies to operate effectively. The Royal Commission recommended several areas for prioritised consideration: the implementation of the Council of Europe Convention on Cybercrime (the **Budapest Convention**); the creation of precursor terrorism offences; and the review of aspects of the Intelligence and Security Act 2017.

The review relates to work implementing the Budapest Convention

21 Cabinet agreed to accede to the Budapest Convention on 26 January 2021 and has already authorised the necessary legislative changes [CBC-20-MIN-0129; CAB-21-MIN-0001]. These include data preservation orders that can be obtained at the request of another country. The purpose of these orders is to prevent data being deleted in New Zealand before it can be obtained for an overseas investigation. When agreeing to that scheme, Cabinet noted that:

21.1 a wider data preservation scheme with a practical domestic application would be considered as part of the upcoming review of the Act; and

21.2 the upcoming review of the Act would consider matters relevant to cybercrime and the challenges of enforcing the law in a digital age [CBC-20-MIN-0129; CAB-21-MIN-0001].

The review builds on the Counter-Terrorism Legislation Act

22 The Counter-Terrorism Legislation Act 2021 amended the Terrorism Suppression Act 2002, the Terrorism Suppression (Control Orders) Act 2019 and the Search and Surveillance Act. It created several new terrorism-related offences including planning or preparation for a terrorist act. This fulfilled the Royal Commission's specific recommendation to prioritise the creation of precursor terrorism offences.

23 The Search and Surveillance Act amendments were designed to ensure that appropriate search and surveillance powers are available for the new planning or preparation offence. s9(2)(f)(iv)

The review will occur concurrently with the Intelligence and Security Act review

24 An independent statutory review of the Intelligence and Security Act 2017 will commence shortly. s9(2)(f)(iv)

There are potential risks when reviewing the Act

25 The use of search and surveillance powers can be contentious. Several risks for the review arise from this:

25.1 Some people are likely to strongly oppose any proposed reforms. This might cause delays to the project or reduce the government's social licence to reform the law.

25.2 The Royal Commission Report concluded that "there was an inappropriate concentration of counter-terrorism resources on the threat of Islamist extremist terrorism". As this review forms part of the Government's response to the Royal Commission, it has the potential to stigmatise and distress ethnic and faith-based communities. These communities could become the focus of strong public views about proposed reforms, with implications for social cohesion. In the case of the Islamic community in particular there is the risk of retraumatisation.

25.3 The review would likely put a spotlight on whether enforcement agencies are treating all New Zealanders equally when using search and surveillance powers. This would likely highlight, in turn, what enforcement agencies are doing to combat institutional bias in their organisations. Legal powers are rarely constructed in a way that is discriminatory — it is when they are put in practice and the application of discretion by decision makers where discriminatory outcomes can result. Any public perception that agencies are not doing enough to combat institutional bias could increase opposition to any changes to search and surveillance powers.

26 The review would seek to mitigate these risks by:

26.1 putting emphasis into safe and sensitive engagement that is tailored to particularly affected communities at the start of the review, such as the Islamic community and Māori;

26.2 developing a communications plan that articulates the benefit of the review to all New Zealanders;

26.3 working with agencies to align engagements and avoid consultation fatigue;

26.4 making substantive and procedural decisions informed by those engagements;

26.5 involving Police and other operational agencies in the engagement process so we can capture both legislative and operational issues that result from lived experiences and design appropriate solutions; and

26.6 highlighting the measures enforcement agencies are taking to address institutional bias in their organisations.

27 These steps would go some way to reducing the risks, however there would likely still be some strongly-felt opposition to the reforms and concerns about how search and surveillance powers are used. This opposition would be stronger if the government were to proceed without wide engagement.

28 The Waitangi Tribunal has commenced a kaupapa inquiry into the Justice System, which is currently in its beginning stages. Any concerns about the review from a Treaty perspective could be raised in that inquiry — as well as any discrepancy between how the Crown says it wants to approach justice system issues affecting Māori and how it does so in this review. The approach to the review is intended to mitigate this risk by engaging with Māori to ensure we properly understand the Māori interests in Crown search and surveillance activities and designing the review's process and proposed reforms with those interests in mind.

29 Other risks arise from the legal and technological complexity of search and surveillance activities. Without careful consideration, legislative reform could have unintended consequences and may fail to keep up with the needs of enforcement agencies. My proposed approach to the review is intended to mitigate these risks by engaging widely, including with enforcement agencies and legal experts. s9(2)(f)(iv)

Financial Implications

30 There are no financial implications from this paper. The Ministry of Justice will meet the costs of the review from existing baselines.

Legislative Implications

31 There are no legislative implications arising directly from this paper. Any legislative proposals arising from the review will be addressed in a future Cabinet paper.

Regulatory Impact Analysis

32 The proposals in this paper do not require Regulatory Impact Analysis. The approach taken in this paper will allow future Regulatory Impact Analysis to be informed by wide and thorough engagement.

Population Implications

33 There are no population implications arising directly from the proposals in this paper.

34 While limited data is available on the exercise of search and surveillance powers by population group, there are indications that Māori are disproportionately impacted — both as the subject of search and surveillance activities and as the victims of offending. Other interested communities may also be disproportionately impacted in these ways, including Pacific peoples, other ethnic communities, and faith-based, youth and rainbow communities.

35 The Royal Commission Report concluded that "there was an inappropriate concentration of counter-terrorism resources on the threat of Islamist extremist terrorism". As this review forms part of the Government's response to the Royal Commission, it has the potential to stigmatise and distress ethnic and faith-based communities.

36 Policy proposals will need to consider the effect of the Act and any reforms to it on Māori and other population groups, including whether the safeguards and accountability mechanisms in the Act or operating elsewhere will prevent the powers from disproportionately impacting some groups.

Human Rights

37 There are no human rights implications arising directly from the proposals in this paper.

38 The protection of human rights is a key focus of the Act and will be a central consideration in the review. One focus will be to ensure that search and surveillance powers (including any new powers proposed in the review) have appropriate safeguards against unjustified state intrusion on reasonable expectations of privacy, in accordance with section 21 of the New Zealand Bill of Rights Act 1990 (the right to be free from unreasonable search and seizure).

39 We also anticipate that the Government will be challenged on whether the Crown's use of search and surveillance powers is consistent with Article 3 of Te Tiriti o Waitangi (guaranteeing equal treatment of all New Zealanders), section 19 of the New Zealand Bill of Rights Act (the right to be free from discrimination, for example on ethnic or religious grounds) and the United Nations Declaration on the Rights of Indigenous Peoples.

40 The approach to the review proposed in this paper is intended to ensure that any proposed reforms are fully informed by the human rights implications arising from search and surveillance activities and the impact of those activities on people and communities.

Consultation

41 The following agencies have been consulted on this paper: the Crown Law Office, the Department of Conservation, the Department of Corrections, the Department of Internal Affairs, the Department of the Prime Minister and Cabinet (National Security Group), the Environmental Protection Authority, the Financial Markets Authority, the Government Communications Security Bureau, the Inland Revenue Department, the Ministry of Business, Innovation and Employment, the Ministry for the Environment, the Ministry for Ethnic Communities, the Ministry of Foreign Affairs and Trade, the Ministry for Pacific Peoples, the Ministry for Primary Industries, the Ministry of Social Development, the Ministry of Transport, the New Zealand Customs Service, the New Zealand Police, the New Zealand Security Intelligence Service, Te Arawhiti, Te Puni Kōkiri and Worksafe New Zealand.

Communications

42 If Cabinet agrees to the proposals in this paper, I intend to release a press statement announcing the upcoming review. I will liaise with the Prime Minister and the Lead Coordination Minister for the Government's Response to the Royal Commission Report on an appropriate time to make this announcement.

Report back

43 I intend to report back to Cabinet next year with the outcomes from the first phase of engagement and ongoing policy work with agencies. s9(2)(f)(iv)

Proactive Release

44 This paper, and the briefings that informed it, will be proactively released on the Ministry of Justice's website, subject to any redactions as justified in accordance with the Official Information Act 1982. The release of these documents will be coordinated with the announcement of the review.

Recommendations

The Minister of Justice recommends the Committee:

1 **note** that a review of the Search and Surveillance Act 2012 (the **Act**) completed by the Law Commission and the Ministry of Justice in 2017 (the **Joint Report**) made 67 recommendations to improve the Act;

2 **note** that the government:

2.1 tabled the Joint Report in Parliament in January 2018 and said that it would consider the recommendations and decide whether to accept some or all of them; and

2.2 has not yet considered the Joint Report's recommendations;

3 **note** that Cabinet was informed in March 2021 that a review of the Act would begin in 2021 as part of the Government's response to the Royal Commission of Inquiry into the terrorist attack on the Christchurch masjidain [CAB-21-MIN-0049];

4 **note** that Cabinet, in the context of considering New Zealand's implementation of the Council of Europe Convention on Cybercrime (the Budapest Convention), noted that:

4.1 a domestic scheme of data preservation orders would be considered as part of the upcoming review of the Act; and

4.2 the upcoming review of the Act would consider matters relevant to cybercrime and the challenges of enforcing the law in a digital age [CBC-20-MIN-0129; CAB-21-MIN-0001];

5 **agree** to begin a review of the Act;

6 **agree** that the review will take an engagement-centric approach to enable wide engagement, including with iwi, hapū, whānau and Māori communities and with ethnic, faith-based, youth, rainbow and other interested communities;

7 **note** that the Minister of Justice's intention is for the first phase of engagement to be in accordance with the "involve" level of engagement on the International Association for Public Participation Spectrum;

8 **note** that the Minister of Justice will liaise with the Prime Minister and the Lead Coordination Minister for the Government's Response to the Royal Commission's Report into the Terrorist Attack on the Christchurch Mosques on the timing to release a press statement announcing the review;

9 **note** that the Minister of Justice intends to report back to Cabinet next year with the outcomes from the first phase of engagement and ongoing policy work with agencies.

Authorised for lodgement

Hon Kris Faafoi

Minister of Justice

Appendix 1: Statutes that rely on powers under the Search and Surveillance Act for enforcement

Agricultural Compounds and Veterinary Medicines Act 1997

Animal Products Act 1999

Animal Welfare Act 1999

Antarctic Marine Living Resources Act 1981

Antarctica (Environmental Protection) Act 1994

Anti-Money Laundering and Countering Financing of Terrorism Act 2009

Anti-Personnel Mines Prohibition Act 1998

Aviation Crimes Act 1972

Biosecurity Act 1993

Boxing and Wrestling Act 1981

Building Act 2004

Chemical Weapons (Prohibition) Act 1996

Civil Aviation Act 1990

Commerce Act 1986

Commodity Levies Act 1990

Conservation Act 1987

Coroners Act 2006

Credit Contracts and Consumer Finance Act 2003

Criminal Proceeds (Recovery) Act 2009

Crown Minerals Act 1991

Customs and Excise Act 2018

Dairy Industry Restructuring Act 2001

Dog Control Act 1996

Driftnet Prohibition Act 1991

Electricity Act 1992

Electricity Industry Act 2010

Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

Extradition Act 1999

Fair Trading Act 1986

Films, Videos, and Publications Classification Act 1993

Financial Markets Authority Act 2011

Financial Transactions Reporting Act 1996

Fire and Emergency New Zealand Act 2017

Fisheries Act 1996

Food Act 2014

Forests Act 1949

Gambling Act 2003

Gas Act 1992

Hazardous Substances and New Organisms Act 1996

Health and Safety at Work Act 2015

Health Practitioners Competence Assurance Act 2003

Human Assisted Reproductive Technology Act 2004

Human Tissue Act 2008

Immigration Act 2009

Immigration Advisers Licensing Act 2007

Insurance (Prudential Supervision) Act 2010

International Crimes and International Criminal Court Act 2000

International Energy Agreement Act 1976

International War Crimes Tribunals Act 1995

Land Transport Act 1998

Land Transport Management Act 2003

Local Government Act 2002

Major Events Management Act 2007

Marine Mammals Protection Act 1978

Marine Reserves Act 1971

Maritime Crimes Act 1999

Maritime Security Act 2004

Maritime Transport Act 1994

Meat Board Act 2004

Motor Vehicle Sales Act 2003

Mutual Assistance in Criminal Matters Act 1992

National Animal Identification and Tracing Act 2012

National Parks Act 1980

Non-bank Deposit Takers Act 2013

Oranga Tamariki Act 1989

Outer Space and High-altitude Activities Act 2017

Overseas Investment Act 2005

Ozone Layer Protection Act 1996

Pork Industry Board Act 1997

Prostitution Reform Act 2003

Psychoactive Substances Act 2013

Radiocommunications Act 1989

Reserve Bank of New Zealand Act 1989

Reserves Act 1977

Resource Management Act 1991

Road User Charges Act 2012

Sale and Supply of Alcohol Act 2012

Smokefree Environments and Regulated Products Act 1990

Tax Administration Act 1994

Trade in Endangered Species Act 1989

Unsolicited Electronic Messages Act 2007

Waste Minimisation Act 2008

Weights and Measures Act 1987

Wild Animal Control Act 1977

Wildlife Act 1953

Wine Act 2003

Appendix 2: Key themes of officials' early engagement conversations

Early engagement conversations

1 My officials' early engagement included:

1.1 speaking with Kāpuia (the ministerial advisory group comprising various community members and leaders to advise the Lead Coordination Minister for the Government's Response to the Royal Commission's Report into the Terrorist Attack on the Christchurch Mosques);

1.2 engaging informally with a technical advisor of the Iwi Chairs Forum; and

1.3 receiving feedback from Police following informal conversations they had with some members of their Māori and Ethnic focus forums.

2 Ngāi Tūhoe expressed an interest in engaging at a later stage.

Key themes

The importance of engaging widely

3 All the groups officials engaged with stressed the importance of engaging widely and well on this review. Views included:

3.1 Wide engagement is important given that search and surveillance has wide reaching consequences for Māori.

3.2 Proposed changes need to have the confidence of the people to build faith and confidence between Police, the government and the community. The government needs to take time to build trust with communities and community organisations before engaging on challenging topics.

3.3 The review should consult with younger members of the community. The government also needs to consider how to include hapū and whānau Māori in the conversation.

3.4 The government needs to take some lessons from the consultation on incitement to hate. Kāpuia wrote to the Lead Coordination Minister for the Government's Response to the Royal Commission Report on 30 July 2021. The letter specified various shortcomings Kāpuia had identified with the incitement to hate engagements, including short timeframes, lack of engagement with umbrella groups, the times consultation meetings were held, the locations for the meetings and the consultation material provided.

3.5 There should be more community *involvement* in the context of the IAP2 Public Participation Spectrum (see **Appendix 3**).

3.6 The government needs to consider language barriers in all its consultations, whether in a written or oral form.

3.7 Having diversity on the team undertaking the consultation (that reflected too, where possible, the diversity of the communities we were engaging with) would be likely to improve the quality of the consultations.

How powers are used is as important as what they are

4 It was clear in the conversations that how search and surveillance powers are used is as important — and perhaps more important — than what the powers are. Most of the people Ministry of Justice officials talked to expressed concern about the use of search and surveillance powers disproportionately against Māori and other communities.

The Urewera raids will be central parts of the conversation

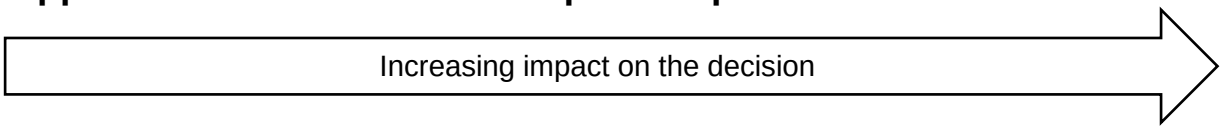
5 The Urewera raids came up in several conversations. Officials were asked whether the Crown had learned anything since the Urewera raids and were told:

5.1 Search and surveillance is a top priority for Māori to "ensure things like the Urewera raids don't happen again".

5.2 The outcomes of events like the Urewera raids are "disastrous for the fabric of New Zealand".

5.3 The strong feelings from the Urewera raids have not gone away and there is still strong distrust of the Crown and its people.

Appendix 3: IAP2 Public Participation Spectrum



Inform	Consult	Involve	Collaborate	Empower
Objective: To provide the public with balanced and objective information to assist them in understanding the problem, alternatives, opportunities and/or solutions.	Objective: To obtain public feedback on analysis, alternatives and/or decisions.	Objective: To work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.	Objective: To partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution.	Objective: To place final decision making in the hands of the public.

Appendix 4: Initial Tiriti o Waitangi analysis

1 My officials have undertaken preliminary analysis about Te Tiriti o Waitangi and its relevance to the review of the Act, informed by Cabinet Office Circular CO (19) 5 and the Te Arawhiti framework for engagement and guidelines.

2 As noted at paragraph 18 of this paper, in brief the analysis is:

2.1 The Crown must ensure it is properly informed of Māori interests when exercising its kāwanatanga powers in respect of search and surveillance activities.

2.2 We need to understand the interplay between kāwanatanga and rangatiratanga in relation to search and surveillance issues, including with respect to specific whenua (land), to kāinga (homes/settlements) and to any affected taonga.

2.3 The Crown must consider the effect of the Act and any reforms to it on Māori. For example, the review should consider whether the safeguards and accountability mechanisms in the Act or operating elsewhere will prevent the powers from impacting disproportionately on Māori.

3 I consider that engaging widely with Māori is a necessary step in meeting these responsibilities, for the reasons addressed below.

The Māori interest here appears high

4 There are many indications that the Māori interest in search and surveillance activities is high. These include:

4.1 There is limited data available on the exercise of search and surveillance powers by ethnicity. However, nine months of Police data from March 2019 analysed by Stuff.co.nz reporters showed significantly disproportionate warrantless searches of Māori (16 percent of population, 40 percent of warrantless searches) and Pākehā (70 percent of population; 41 percent of warrantless searches).[1]

4.2 With respect to the criminal justice system more broadly, available data has long shown significantly disproportionate impacts on Māori. As at 2019, Māori comprised around 16 percent of the general population but made up:[2]

4.2.1 38 percent of people proceeded against by Police;

4.2.2 42 percent of adults convicted; and

4.2.3 57 percent of adults sentenced to prison.

[1] The data was provided by Police Commissioner Andrew Coster to Stuff in 2020 on the basis that it provided a broad outline (not complete reliability). See https://interactives.stuff.co.nz/2020/12/unwarranted-police-searches-racial-bias-justice/

[2] Te Uepū Hāpai i te Ora — Safe and Effective Justice Advisory Group *He Waka Roimata; Transforming Our Criminal Justice System* (June 2019, at 23).

4.3 Māori are also disproportionately affected as victims of crime. The most recent New Zealand Crime and Victims Survey found over one third of Māori adults (38 percent) were victimised within a 12-month period.[3] This is significantly higher than the New Zealand average of 30 percent.

4.4 A consistent message from Māori when engaging with Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group was that racism is embedded in every part of the criminal justice system. Te Hunga Rōia Māori o Aotearoa (also known as The Māori Law Society) has submitted in the context of our proposed accession to the Budapest Convention on Cybercrime that Māori have a keen interest in search and surveillance legislation, because Māori are disproportionately represented within the criminal justice system and have particular relationships with the whenua.

4.5 High profile search and surveillance activities like Operation 8 (Police's investigation into alleged paramilitary training camps operating in Te Urewera) have heightened existing concerns of Māori about how search and surveillance powers are used. In their submission to the 2016/17 Joint Review of the Act, Te Hunga Rōia Māori pointed to the historical context of the exercise of search and surveillance with respect to Māori people and communities. This includes intelligence gathering in the lead up to the invasion of Parihaka in 1881, the monitoring of the independence movement advocated for by Rua Kēnana prior to the invasion of Maungapōhatu in 1916, and surveillance of Māori activism on rights issues, including Ngā Matakite (from which the Māori Land March emerged) in 1975, the Ngāti Whātua occupation of Bastion Point in 1977 and anti-racism groups in the 1980s.

4.6 Submissions from Māori during consultation on accession to the Budapest Convention have raised concerns about the impact of electronic search and surveillance activities on Māori data sovereignty.

Engagement with Māori is necessary to ensure the Crown understands the Māori interest

5 The Crown must exercise its kāwanatanga responsibilities reasonably and in the utmost good faith. This includes taking reasonable steps to ensure it is informed of the effect of search and surveillance law and operation on Māori, and of any broader Māori/Treaty interest.

6 The above considerations with respect to the Māori interest here indicate the need to engage widely with Māori to ensure we are properly informed of the Māori interests in the review. This engagement will also inform the steps the government must take in the review in light of these interests.

[3] https://www.justice.govt.nz/assets/Documents/Publications/Maori-victimisation-report-v2.01-20210329-fin.pdf

SWC-21-MIN-0210

Cabinet Social Wellbeing Committee

Minute of Decision

Review of the Search and Surveillance Act 2012

Portfolio **Justice**

On 8 December 2021, the Cabinet Social Wellbeing Committee:

Background

1 **noted** that a review of the Search and Surveillance Act 2012 (the Act) completed by the Law Commission and the Ministry of Justice in 2017 (the Joint Report) made 67 recommendations to improve the Act;

2 **noted** that the government:

2.1 tabled the Joint Report in Parliament in January 2018 and said that it would consider the recommendations and decide whether to accept some or all of them;

2.2 has not yet considered the Joint Report's recommendations;

3 **noted** that in March 2021, Cabinet was informed that a review of the Act would begin in 2021 as part of the government's response to the Royal Commission of Inquiry into the terrorist attack on the Christchurch masjidain [CAB-21-SUB-0049];

4 **noted** that in December 2020, in the context of considering New Zealand's implementation of the Council of Europe Convention on Cybercrime (the Budapest Convention), the Cabinet Business Committee noted that the upcoming review of the Act would consider:

4.1 a domestic scheme of data preservation orders;

4.2 matters relevant to cybercrime and the challenges of enforcing the law in a digital age;

[CBC-20-MIN-0129];

Review of the Act

5 **agreed** that a review of the Act commence;

6 **agreed** that the review will take an engagement-centric approach to enable wide engagement, including with iwi, hapū, whānau and Māori communities and with ethnic, faith-based, youth, rainbow and other interested communities;

7 **noted** that the Minister of Justice intends the first phase of engagement to be in accordance with the "involve" level of engagement on the International Association for Public Participation Spectrum;

8 **noted** that the Minister of Justice will liaise with the Prime Minister and the Lead Coordination Minister for the Government's Response to the Royal Commission's Report into the Terrorist Attack on the Christchurch Mosques on the timing to release a media statement announcing the review;

9 **noted** that the Minister of Justice intends to report back to Cabinet in 2022 with the outcomes from the first phase of engagement and ongoing policy work with agencies.

Rachel Clarke
Committee Secretary

Present:
Rt Hon Jacinda Ardern
Hon Grant Robertson
Hon Kelvin Davis
Hon Dr Megan Woods
Hon Chris Hipkins
Hon Carmel Sepuloni (Chair)
Hon Andrew Little
Hon Poto Williams
Hon Kris Faafoi
Hon Peeni Henare
Hon Willie Jackson
Hon Jan Tinetti
Hon Dr Ayesha Verrall
Hon Aupito William Sio
Hon Meka Whaitiri
Hon Priyanca Radhakrishnan

Officials present from:
Office of the Prime Minister
Office of the Chair
Officials Committee for SWC