

Search and Surveillance Powers Bill

17 November 2008

Attorney-General

Search and Surveillance Powers Bill 300-1: Consistency with the New Zealand Bill of Rights Act

Our Ref: ATT395/78

1. Further to brief advice provided in the course of the Cabinet process for this Bill, I have set out the basis for the conclusion given at that time that the Bill appears to be consistent with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act").

2. The Bill provides for comprehensive reform and consolidation of search, surveillance and other information-gathering powers. As such, it raises broad questions of the consistency of those powers and their attendant preconditions and other safeguards with the right against unreasonable search and seizure affirmed by s 21 of the Bill of Rights Act. The Bill also raises a number of more specific issues under the Bill of Rights Act:

2.1 The provisions for immunity and for restriction of interim judicial intervention engage the implicit right to an effective remedy;

2.2 Rights against arbitrary detention and to freedom of movement are engaged by powers to detain, to secure search scenes and to establish road blocks; and

2.3 Certain offence provisions, which place the burden of proving reasonable excuse on the accused, engage the right to presumption of innocence.

3. I have concluded that the search and related powers, which vary considerably according to context and to the extent of the information-gathering power, are not such as to give rise to unreasonable search or seizure under s 21. I have also concluded that the other issues that arise from the Bill do not give rise to any inconsistency with the Bill of Rights Act.

Consistency of search and related powers with right against unreasonable search or seizure

4. The Bill makes broad provision for information-gathering powers and procedures, along with conditions on their exercise:

4.1 Warrantless search of persons, places and things in a range of contexts (cll 7-11, 14-21, 24-28, 81, 83-86, 117-118);

4.2 Search under warrant issued by a judge or other independent issuing officer (cl 96-108);

4.3 The making of orders to produce certain information by way of interview under an "examination order" issued by a judge (cII 33-42) or in response to a specific "production or monitoring order" requiring specified information (cII 70-78);

4.4 Surveillance under warrant issued by a judge (cII 44-58); and

4.5 By way of general provision for control of other information-gathering that involves interference with privacy, the issue of a "residual warrant" by a judge (cII 59-69).

5. These provisions must be considered in light of the right against unreasonable search and seizure affirmed by s 21 of the Bill of Rights Act.

6. The reasonableness of the exercise of information-gathering powers involves a balance between the interest of the public and of the particular individual or entity concerned in being "left alone" and the public interest in the objective served by that information-gathering: see, for example, *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA), 407^[1]:

"Any search is a significant invasion of personal freedom. How significant it is will depend on the circumstances. There may be other values and interests, including law enforcement considerations, which weigh in the particular case."

7. It follows that the greater the degree of intrusiveness, the greater the justification that is required and, further, the greater the attendant safeguards to ensure that that justification is present. For example, a search of the private areas of a house will necessitate greater justification than a search of its grounds ^[2].

8. By way of law enforcement and related competing considerations, it is relevant that, for example, the circumstances are urgent or otherwise exigent, for example where safety is at risk or there is a risk^[3] of destruction or other loss of evidential material^[4].

9. Further, while the scope of the term "search" under s 21 remains open to some contention^[5], not all information-gathering engages the right. Notably, both the voluntary provision of information by persons entitled to provide it^[6] and gathering of information that is visible in a public place fall beyond the scope of s 21^[7].

Prior independent oversight and interpretation consistent with s 21

10. As noted, the Bill provides for information-gathering both under warrant issued by a judge or other independent officer and, in a range of specified circumstances, without warrant.

11. In respect of the former, the Bill requires a warrant for searches (cII 96-108), for examination, production or monitoring (cII 33-42, 44-58 and 70-78), for surveillance (cII 70-78) and other intrusive information-gathering (cII 59-69). That requirement is material in the context of s 21 for two reasons:

11.1 A warrant requirement allows for prior and independent verification that the exercise of a given information-gathering power is justified in the particular context. While there are

other, subsequent procedural safeguards that apply to the exercise of information-gathering powers, such as the reporting requirements under the Bill and the exclusion of improperly obtained evidence, the precondition of an independently issued warrant acts to prevent unjustified exercise of powers^[8]; and

11.2 In particular, when undertaking that prior verification, the judge or other independent officer must, by virtue of s 6 of the Bill of Rights Act, consider whether the exercise of that power is consistent with the right against unreasonable search and seizure.

12. It follows that while these powers of information-gathering are broad and, in the case of the general provision for examination, production and monitoring, in part novel in New Zealand law, their exercise remains subject not only to the preconditions under the relevant provisions of the Bill but also to oversight for consistency with s 21 of the Bill of Rights Act.

13. In this regard, it is also necessary to consider the capacity of the issuing officer to act as an independent check^[9]. The provisions dealing with surveillance, examination orders and residual orders provide only for authorisation by a judge. Search warrants and production orders can, however, be made by a judge or by an appointed issuing officer.

14. In respect of the latter, cl 108(1) provides for appointment, by the Attorney-General, of issuing officers on a fixed-term basis. Clause 108(2) in turn requires that a person may only be appointed if he or she "has sufficient knowledge, skill, and experience to act as an issuing officer". While cl 108(2) does not make express reference to necessary independence from the applicant, that requirement must be taken to be implicit: it would, for example, clearly be both beyond the scope of the power and potentially inconsistent with s 21 for an issuing officer to act where he or she was not sufficiently separated from the applicant.

15. Consequently, while certain of the powers subject to warrant give rise to other issues under the Bill of Rights Act, these powers do not raise any issue of inconsistency with s 21.

Warrantless search powers

16. The Bill also provides for warrantless search powers in a range of specific contexts and also for the limited exercise of certain surveillance powers without warrant in emergency situations.

17. As the exercise of a warrantless power lacks the inherent prior safeguard afforded by independent verification through the warrant process, two issues arise under s 21.

18. The first is whether the absence of a prior safeguard is itself justified in the context of the particular powers provided for under the Bill. It has been recognised that a search without warrant will be appropriate where the process of obtaining a warrant would have a disproportionate adverse effect. By way of relevant example, powers of warrantless search have been accepted where:

18.1 There is a serious threat to safety or property^[10];

18.2 There is a prospect of evidence being lost or destroyed, including through absconding or in the particular context of vehicle searches, the risk that a vehicle may move away^[11];

18.3 The search is undertaken as an incident to a lawful arrest or other detention where, for example, necessary to obtain evidence or ensure safety of the detainee^[12]; or

18.4 The search is undertaken in the context of a regulated activity, such as commercial activity carried out under conditional licence or border crossing, where limited routine inspections are incidental to the regulation of that activity^[13].

19. The provisions for warrantless search under the Bill correspond to these considerations:

CI	Context	Apparent justification
7	Entry to arrest person unlawfully at large	Strong public interest in arrest of person unlawfully at large / inherent likelihood to abscond
8	Entry to arrest or secure evidence where suspect believed likely to abscond or evidence at risk	Urgency/likelihood to abscond/likelihood of loss of evidence
9	Stopping vehicle to arrest person either unlawfully at large or suspected of imprisonable offence	Public interest in arrest of such persons / limited intrusiveness of vehicle stopping
10	Search of vehicle stopped under cl 9 where person arrested or seen fleeing	Public interest in investigation of apparent offence/limited intrusiveness of vehicle search
11	Search of person in Police custody	Safety
14	Entry to prevent offence involving injury or serious damage to property or respond to risk to life or safety	Urgency/safety
15	Entry to secure evidence in respect of offences punishable by 14 years imprisonment or more where evidence at risk	Strong public interest in investigation of serious offences / likelihood of loss of evidence
16/17	Search of person/vehicle in public place in respect of offences punishable by 14 years imprisonment or more	Safety / regulated activity
18	Search of person or vehicle and attendant entry to place or vehicle of armed person where that person in breach of the Arms Act, incapable of controlling the arms, at risk of killing or causing bodily injury or is or could be subject to a protection order	Safety / regulated activity

19	Search of place or vehicle for certain controlled drugs and precursor substances where offending suspected and risk of loss of evidence	Regulated activity / likelihood of loss of evidence
20	Search of person found in places or vehicles searched under cl 19	Likelihood of loss of evidence
21	Search of person believed unlawfully to possess controlled drugs	Likelihood of loss of evidence
22	Internal examination of person arrested for certain drug offences provided that person prepared to permit examination	Empirical likelihood of internally concealed evidence / qualified consent (see cll 22(3)(b) and 23)
25/26	Search of person/vehicle in public place suspected of possession of offensive weapons/disabling substances	Safety
27	Search of vehicle for stolen property	Limited intrusiveness of vehicle search / loss of evidence
45	Use of surveillance device without warrant for up to 72 hours where not practicable to obtain a warrant	Safety / public interest in investigation of serious offences / loss of evidence
81	Search of person, place or vehicle in controlled delivery under s 12 Misuse of Drugs Amendment Act 1987	Loss of evidence
83	Search of place after arrest where delay would lead to loss of evidence (cl 83(2)(b))	Loss of evidence
84	Search of vehicle after arrest	Loss of evidence
85	Rub-down search of arrested person	Safety/evidence-gathering
89	Search of arrested person where risk to safety, risk of escaping or evidence	Safety/custody/evidence-gathering
117/118	Search incidental to arrest	Effecting lawful arrest/evidence-gathering

20. The second, and related, point is that in addition to the conditions and corresponding justifications provided in the Bill, those safeguards may where necessary be supplemented by way of interpretation consistent with the Bill of Rights Act, including s 21. There is a consistent body of New Zealand caselaw that has indicated that use of a warrantless power may not be lawful, notwithstanding that the conditions for its exercise are satisfied, where it would have been reasonably possible to obtain a warrant^[14]. It follows that even if the

evident justification for a given power were not available in some cases, that power will be interpreted so as not to give rise to an unreasonable search and so would not breach s 21.

21. It follows that no issue of inconsistency arises under s 21 in respect of these powers.

Other issues

Right to an effective remedy

22. Two provisions of the Bill raise issues in respect of the right to an effective remedy for breach of rights affirmed by the Bill of Rights Act.

23. First, cll 157-159 provide for immunities on the part of people who discharge functions under the Bill: issuing officers have the immunities of a District Court Judge (cl 157), people acting reasonably and in good faith under warrant are not civilly or criminally liable (cl 158) and people acting under warrantless powers are not civilly or criminally liable provided that they act reasonably and also reasonably believe that the preconditions of that power are met (cl 159). The standard for warrantless powers is thus higher than that applicable to people acting under warrant.

24. While these provisions do limit the scope for recourse in respect of an unreasonable search, they do not preclude recovery against the Crown (see cl 160) and also against individuals personally where the conditions in cll 158 or 159 are not met. It follows that no issue of inconsistency arises in respect of these provisions.

25. Second, cl 172 limits the circumstances in which a court may intervene on an interim basis in the exercise of an information-gathering power under the Bill. Under cl 172(3), interim relief may only issue where there is a prima facie case of unlawfulness, where the applicant would suffer substantial and irremediable harm and where the investigation or prosecution would not be unduly hindered^[15]. The power of the court to grant final relief is unaffected.

26. The provision balances, on the one hand, the right of recourse to the courts to ensure that the exercise of statutory powers is lawful and to obtain effective protection against unlawful exercise and, on the other, the competing public interest in ensuring that that recourse does not have a disproportionate adverse effect.

27. In many instances remedies after the fact, such as exclusion of evidence or civil liability, will suffice. Nonetheless, it is recognised that the exercise of potentially very far-reaching powers can have effectively irremediable consequences. The clause allows for intervention in such instances and, in doing so, strikes a necessary balance. It follows that no issue of inconsistency arises in respect of cl 172.

Privilege against self-incrimination

28. Clauses 113(b), 126(3) and 133 of the Bill make express provision for the privilege against self-incrimination affirmed by ss 25(a) and (d) of the Bill of Rights Act in relation to assistance with searches and compliance with production and examination orders. While cl

126(4)(b) provides that the privilege does not extend to a right to refuse assistance in accessing a computer system where that assistance is not itself incriminating, that is consistent with the principle that the privilege does not extend to independently existing evidence^[16]. Consequently, no issue of inconsistency arises.

Detention incidental to search / freedom of movement

29. The Bill provides for detention incidental to search (cII 21, 23 & 116) and also makes specific provision for the securing of places and vehicles subject to search (cII 115 & 119) and for road blocks for search purposes (cII 29-32).

30. Each of these powers is necessarily limited to such exercise as is reasonably necessary for the related search. As such, no issue of inconsistency arises.

Reverse onus provisions

31. Clauses 166 and 168-170 provide for summary offences of failure, without reasonable excuse, with production orders, directions to remain pending a search, detention pending search, directions to stop a vehicle or request to provide assistance in respect of a computer search. As summary offences subject to s 67(8) of the Summary Proceedings Act, these provisions place an onus on the accused to prove the excuse.

32. As such, these provisions are inconsistent with the right to the presumption of innocence affirmed by s 25(c) of the Bill of Rights Act. It is therefore necessary to consider whether that inconsistency is justifiable. In the context of non-compliance with a statutory requirement where the nature of the excuse may only be known to the person concerned, these provisions appear justified.

33. This advice has been reviewed, in accordance with Crown Law protocol, by Fergus Sinclair, Crown Counsel.

Yours sincerely

Ben Keith
Crown Counsel

Footnotes

1 See, similarly, *Sugrue v Attorney-General* [2006] 3 NZLR 464 (PC), [23] (s 21 BORA concerned with prevention of invasion of personal freedom and privacy); *R v Ngan* [2008] 2 NZLR 48 [104] (SC) per McGrath J.

2 See, for example, *Fraser* [2005] 2 NZLR 109.

3 See, for example, Williams [2007] 3 NZLR 207, [123]

4 See, for example, Ngan, above n 1, [112] per McGrath J.

5 See, for example, A Butler & P Butler The New Zealand Bill of Rights Act: A Commentary (2005) 550 ("disappointing" unwillingness of New Zealand courts to define "search" and "seizure").

6 Provision of information where the provider is advised that a warrant is held or that a warrantless power to compel provision is available is not voluntary: see R v Sanders [1994] 3 NZLR 450.

7 For example, in R v Dodgson (1995) 2 HRNZ 300 (CA), the inspection of a vehicle grille was held not to be a search, but rather an "external observation".

8 See, for example, Hunter v Southam [1984] 2 SCR 145.

9 See, similarly, R v Baylis (1988) 65 CR (3d) 62 (Saskatchewan CA).

10 See, for example, R v Feeney [1997] 2 SCR 13; R v Godoy [1999] 1 SCR 311

11 See, for example, R v Rao (1984) 12 CCC (3d) 97.

12 See, for example, Cloutier v Langlois [1990] 1 SCR 158.

13 See, for example, British Columbia Securities Commission v Branch [1995] 2 SCR 3; Simmons v R [1988] 2 SCR 495.

14 See, notably, R v Laugalis (1993) 10 CRNZ 350 (CA) and, more recently and among many others, R v D [2008] NZCA 359, [30]ff (accepting that the "exigencies of policing" tending against seeking a warrant were in the circumstances a sufficient basis for invoking the warrantless power). The New Zealand courts have tended against imposition of a standard of necessity.

15 The word "not" is missing from cl 172(3)(d).

16 See, for example, Saunders v UK (1996) 23 EHRR 313, 338.

In addition to the general disclaimer for all documents on this website, please note the following: This advice was prepared to assist the Attorney-General to determine whether a report should be made to Parliament under s 7 of the New Zealand Bill of Rights Act 1990 in relation to the Search and Surveillance Powers Bill. It should not be used or acted upon for any other purpose. The advice does no more than assess whether the Bill complies with the minimum guarantees contained in the New Zealand Bill of Rights Act. The release of this advice should not be taken to indicate that the Attorney-General agrees with all aspects of it, nor does its release constitute a general waiver of legal professional privilege in respect

of this or any other matter. Whilst care has been taken to ensure that this document is an accurate reproduction of the advice provided to the Attorney-General, neither the Ministry of Justice nor the Crown Law Office accepts any liability for any errors or omissions.