New Zealand Law Society
Te Kāhui Ture o Aotearoa

Level 4, 17–21 Whitmore Street, Wellington
PO Box 5041, Wellington 6140 · DX SP20202, Wellington
04 472 7837 · inquiries@lawsociety.org.nz

lawsociety.org.nz

29 June 2022

Search and Surveillance Act review
Ministry of Justice
Wellington

By email: ssareview@justice.govt.nz

Re: Review of the Search and Surveillance Act 2012

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to contribute to the Ministry of Justice's (the **Ministry**'s) review of the Search and Surveillance Act 2012 (the **Act**).

1.2 We have addressed each of the questions posed in the order they have been provided on the Ministry's website, aside from questions 9, 11, 12 and 13 which are less relevant to the Law Society.

1.3 This submission has been prepared with the assistance of the Law Society's Criminal Law, Public and Administrative Law, and Law Reform Committees.[1]

2 General comments

2.1 At the outset, the Law Society makes two general points:

(a) The Law Society contributed to the Ministry and Law Commission's review of the Act in 2017. This found that the Act was working relatively well overall, but made 67 recommendations for improvements.[2] The Law Society considers that the comprehensive report published following the review is sound, and should continue to provide the framework for any eventual reform of the Act.

(b) Some of the questions posed in the current review raise a number of issues that arguably are not capable of being appropriately addressed simply by amending the Act, particularly in relation to the disproportionate treatment of particular groups, including Māori, by enforcement agencies. In the Law Society's view, addressing such issues requires changes at all steps of the criminal justice system.

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1 More information regarding these committees is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

2 *Review of the Search and Surveillance Act 2012*, New Zealand Law Commission and Ministry of Justice, Report 141, June 2017.

3 Question one: How do we ensure search and surveillance law enforcement activities are consistent with human rights?

Question two: How do we ensure rights, including those in Te Tiriti o Waitangi, are protected?

3.1 Given the overlap between these two questions, we have addressed them together.

3.2 Ensuring search and surveillance powers are exercised in a rights-consistent way is an important and complex issue, which requires a suite of policy measures to address:

(a) As further discussed in relation to Question Four, the Act should include a set of overarching principles that guide how search and surveillance powers are exercised. These should expressly recognise the obligation to exercise powers under the Act in a way that has regard to te ao Māori, the Crown's obligations under Te Tiriti o Waitangi and any other relevant cultural, spiritual, or religious considerations.

(b) The search and surveillance powers included in the Act should be clearly defined and carefully prescribed to ensure that any potential for overreach is limited. As the Law Commission noted in its 2017 report, while the Act was designed to clarify, rationalise, and codify search and surveillance powers, some key aspects of how these powers can be used in practise are set out in case law.[3] To the extent possible, the Act should set out the factors that should be taken into consideration before approving or exercising a search power. Having clear, well-defined tests will also aid in the training of enforcement officers and the development of sound policies, which will help achieve compliance.

(c) The Act should be amended to remove the permissive approach to obtaining search warrants (recognised in the Law Commission's 2017 report) and clarifying and strengthening the warrant preference rule. As the Law Society noted in our submissions on the 2017 review, the current permissive approach creates uncertainty for enforcement officers. It also does not contain sufficient safeguards to ensure proactive protection of privacy interests and compliance with section 21 of the New Zealand Bill of Rights Act 1990. As noted in *The New Zealand Bill of Rights Act: A Commentary*, "one of the objectives of section 21 is to *prevent* unreasonable interferences with privacy; to ensure that this happens the legal system must have frameworks regulating the types of activities to which section 21 applies".[4] That is best achieved through a system of mandatory prior authorisation for most cases. There will invariably be situations where warrantless searches or surveillance are necessary (for example, in situations where there is an immediate risk of to life or safety of an individual, or a risk that evidence will be destroyed, and it is not feasible to obtain a warrant in advance). The Act should continue to provide for these situations, but as submitted above the scope of such powers should be clearly defined and carefully prescribed.

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3 At 20.

4 A Butler & P Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, Lexis Nexis, Wellington, 2015) at [18.10.5(2)].

(d) The current ability to seek a declaratory order should be replaced with a residual warrant regime. This was recommended as part of the 2017 review. In the Law Society's submission, this option is closest to the intention of the Act as it was originally conceived and is sufficiently flexible to respond to new investigative techniques and technologies. It also provides both the greatest level of certainty for enforcement officers and the greatest protection for privacy interests.

(e) The requirement for judicial oversight and approval prior to the use of more intrusive forms of surveillance should be retained.

(f) The requirement for additional enforcement agencies to obtain approval via Order-in-Council before being authorised to use more intrusive forms of surveillance should be retained. This ensures that these investigative techniques are only available to agencies with sufficient training, experience, and policies in place to mitigate the risk of misuse.

(g) The Act should provide for monitoring and reporting on the use of search and surveillance powers by enforcement agencies.

(h) There should be meaningful and accessible mechanisms to receive complaints and hold enforcement agencies to account where search and surveillance powers are improperly used. There are already some means of redress available for individuals who are subject to illegal or unreasonable searches (such as seeking damages for a breach of the New Zealand Bill of Rights Act 1990); however, many of these are too expensive or unwieldy for individuals to pursue. While the IPCA provides a mechanism for investigating complaints arising from searches carried out by Police, there is no independent equivalent for other enforcement agencies. Establishing a single complaints body for alleged misuse of search and surveillance powers would ensure consistency, regardless of which enforcement agency has executed the search or surveillance power.

4 Question three: What safeguards are appropriate for search and surveillance activities?

4.1 As set out in our response to questions one and two, the Law Society considers the following legislative safeguards are critical to ensuring that search and surveillance powers are exercised in a rights-consistent way:

(a) Ensuring that powers are clearly drafted and carefully prescribed, so that they are no more intrusive than necessary to achieve their objectives.

(b) The requirement that the most intrusive search and surveillance powers must always have prior independent authorisation through a warrant or order issued by a judicial officer.

(c) Limiting the availability of the most intrusive search and surveillance powers to authorised enforcement agencies.

(d) The availability of mechanisms for addressing misuse of search and surveillance powers and monitoring how such powers are being used.

5 Question four: What principles, if any, should guide search and surveillance powers?

5.1 The Law Society agrees with the principles recommended by the Law Commission in its 2017 report.[5]

5.2 In addition to these, the Law Society would support including in an additional principle that search and surveillance powers are required to be exercised in compliance with s 21 of the New Zealand Bill of Rights Act 1990.

6 Question five: Do you think Policy Statements addressing how agencies must conduct certain search and surveillance activities would be helpful?

6.1 The Law Society considers that any enforcement agencies that are able to exercise search or surveillance powers under the Act should put in place policy statements to guide how these are to be conducted. Ideally, these should be publicly available (subject to there being appropriate grounds for withholding such information under the Official Information Act 1982). It is noted that some organisations, including Police, already have such policy statements. However, the Law Society stresses that policy statements should act as a supplement to, and not as a substitute for, well-defined statutory powers.

7 Question six: How can we ensure the powers in the Act aren't used disproportionately against different groups of people?

7.1 In the Law Society's view, the principles recommended by the Law Commission in its 2017 report would provide a sound framework that, if supported by clearly defined and carefully prescribed search and surveillance powers, will reduce the risk that powers provided by the Act will be used disproportionately.

7.2 The Law Society also considers that requiring enforcement agencies to monitor and report on how search and surveillance powers are used will act as an important safeguard to particular groups of people being targeted.

7.3 The creation of an independent complaints body would also allow for the investigation of instances where individuals have been inappropriately targeted.

7.4 However, as noted in our initial comments, the discrimination that exists in the criminal justice system is not able to be addressed solely by way of amendment to the Act. It is noted that there is already a legislative prohibition on the discriminatory use of public powers under s 19 of the New Zealand Bill of Rights Act 1990. Courts are regularly called upon to scrutinise allegations of such behaviour. Adding in safeguards and principles to guide the execution of search and surveillance powers will help, but any regime that is grounded in concepts of belief and suspicion held by decisionmakers will be inherently vulnerable to unconscious bias. Ultimately, these are systemic issues that will require a systemic response.

[5] Recommendation 5, page 16.

8 Question seven: As technology has developed, legislation and regulation has been slow to respond to the new ways in which people communicate and interact. How do we best make rules about surveillance considering ever-changing technology?

8.1 In the Law Society's submission, new surveillance methods should be addressed in the Act by way of amendment. It is accepted that technological advances can outpace the legislative process at times, and it is therefore understandable that enforcement agencies may wish to future-proof the legislation as much as possible. However, it is important that Parliament considers whether and how new technological developments in surveillance should be permitted. New technologies come with new and different privacy concerns. The Law Society considers that Parliament should turn its mind on each occasion to whether use of each new electronic surveillance technique is socially acceptable in New Zealand and whether the potential privacy impact of its use is justifiable. It is also preferable that the Act remains a code that governs search and surveillance powers, rather than regulation being split between multiple instruments.

8.2 As noted above, the inclusion of a residual warrant scheme would allow for the flexibility for new investigative techniques to be used, while still providing judicial oversight and a level of protection for privacy interests.

8.3 The Law Society also agrees with the Law Commission's recommendation from the 2017 review that the Act should be amended to remove the references to 'devices' (for example, in interception devices, tracking devices, and visual surveillance devices), given surveillance can occur through a variety of means which are not always reliant on physical devices.[6]

9 Question eight: What safeguards (if any) are appropriate for covert operations?

9.1 The Law Society considers that in-person surveillance involving undercover activity should be incorporated into the Act. Such investigations give rise to significant potential for the undermining of fundamental rights and protections. It also has the potential to undermine respect for the rule of law because undercover activity often requires breaches of law to be perpetrated by Police officers.

9.2 The Supreme Court's decision in *R v Wichman*, which involved consideration of the controversial "Mr Big" technique, highlights the potential issues that can arise in the course of covert operations.[7] The Court was divided, with the majority upholding the use of the technique. However, the Court nonetheless recognised the desirability of a formal authorisation and supervision framework.[8]

9.3 The Law Society agrees with recommendations 55 and 56 from the Law Commission's 2017 report as a framework for how covert operations should be defined and regulated.

10 Question ten: Are there any other aspects of search and surveillance that your organisation and the communities you are involved with are concerned about?

10.1 The Law Society has received feedback from the profession in favour of clarifying the process to be followed where privilege is claimed in relation to information obtained via search or

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6 Recommendation 14, page 18.

7 *R v Wichman* [2015] NZSC 198.

8 At [127].

surveillance powers, and clarifying the interplay between part 4, subpart 5 of the Act and part 2, subpart 8 of the Evidence Act 2003.

11 Next steps

11.1 We would be happy to discuss this feedback further, if that would be helpful. Please feel free to contact me via the Law Society's Law Reform & Advocacy Advisor, Dan Moore (dan.moore@lawsociety.org.nz).

Nāku noa, nā

Caroline Silk
Vice-President