

18. Creating powers of search, surveillance and seizure

Powers of entry, search, surveillance and seizure (referred to in this chapter by the generic term “search powers”) must be authorised by an enactment, the common law (provided that the Government’s actions do not breach s 21 NZBORA¹³¹), or be carried out by consent.

Search powers balance important sets of values. On one hand is respect for liberty, dignity, bodily integrity, privacy, and the right to peaceful enjoyment by people of their property. These values are affirmed by the right to freedom from unreasonable search and seizure in s 21 NZBORA. On the other hand are law enforcement and regulatory objectives. Law enforcement objectives are ensuring public safety, and protecting the public through the prevention, detection and prosecution of crime. Regulatory objectives involve conducting inspections, monitoring and enforcing compliance in particular industries or regulated fields, particularly where serious harm can occur from non-compliance (such as physical harm to people, harm to the environment, or damage to New Zealand’s economy).

A well-designed set of search powers will strike a balance between respecting individual rights and providing an agency with the vital tools it needs to give effect to a policy or Act. Poorly designed search powers may be unjustifiably intrusive or might be insufficient. They may be difficult to use, be inconsistently exercised, and be subject to challenge in the courts. In these cases it may be necessary to urgently amend the legislation to rectify defective search powers.

The Search and Surveillance Act 2012¹³² reformed the law of search and seizure. It consolidates the existing police powers that were previously contained in multiple enactments. It also provides a detailed set of procedural rules and safeguards that will apply to the exercise of police powers in Part 2 and the majority of the powers held by non-police regulatory agencies (which remain in agency specific legislation, but are listed in the Schedule to the Act).

The Search and Surveillance Act strikes a balance between the competing rights discussed above. Therefore the procedural rules contained in Part 4 should generally be the first port of call for those intending to create new search powers. The Act is discussed in more detail below. Legal advisers and the Ministry of Justice (who play an important “gate keeping” role in respect of search powers) should be consulted to ensure that any proposed departures from the Act are justified.

Guidelines

18.1. Should new search powers be granted?

New search powers should only be granted when the policy objective cannot be achieved by other means.

If the information or evidence concerned can be obtained by means other than by granting new search powers either by recourse to the common law, consent, or existing powers, those alternatives should be used.

¹³¹ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

¹³² <http://legislation.co.nz/act/public/2012/0024/latest/whole.html>

If new search powers are required, the approach that results in the least limitation on privacy rights should be adopted.

Search powers should not be granted for the convenience of the agency or ease of prosecution. Each search power must have a separate justification for why it is necessary. A general justification that search powers are required will not be sufficient. The more invasive a particular search power, the greater the justification required to create that search power. Searches of a person's body are more invasive than searches of a business premises, and will generally require a greater justification.

In the regulatory context, search powers may have a legitimate monitoring or deterrent effect, but in the law enforcement context it is inappropriate for search powers to be used for coercive or deterrent reasons.

In the law enforcement context, search powers should generally not be available for infringement offences, breaches of regulations, or offences that are not considered serious enough to warrant a sentence of imprisonment. They should generally not be available for offences that are prescribed by delegated legislation.

Statutory law enforcement search powers must be triggered by suspicion that a specific matter or class of matters has taken place. Generally worded law enforcement search powers (which allow "fishing expeditions") will likely be interpreted narrowly by the courts, and should not be authorised by legislation.

In some cases, the effective exercise of search powers might necessitate the inclusion of a power to require information to be produced (such as codes to access computers) or questions to be answered. However, these powers are likely to be being used in situations where prosecutions are likely to follow, and the privilege at general law (and in the Evidence Act¹³³) against self-incrimination should be respected. If grounds exist to override that privilege, then the override should be explicitly stated. If not, then the privilege should be affirmed.

These powers should also respect other privileges such as legal professional privilege.

18.2. Is a warrant required to exercise new search powers?

All searches should be carried out pursuant to a warrant unless there are good reasons not to.

The starting point is that all law enforcement searches should be carried out pursuant to a warrant issued by an independent judicial officer.

Warrantless search powers can be exercised without independent judicial oversight; therefore a compelling reason must exist to create them. Generally, a real risk must exist that some serious harm or damage will occur or evidence will be lost if officers are required to obtain a search warrant.

¹³³ <http://www.legislation.govt.nz/act/public/2006/0069/latest/DLM393463.html>

However, consideration must still be given to whether or not any risk can be satisfactorily addressed by obtaining a warrant, but not giving notice to the person or the occupants of a property that is the subject of the search. In the law enforcement context, compelling reasons must exist for granting warrantless search powers in respect of non-imprisonable offences.

It may be appropriate to allow warrantless inspections to take place without notice where it is the only effective way to ensure certain regulatory standards are being adhered to (such as the inspection of restaurants). Regardless of the context, all searches must be carried out by properly authorised and trained officers.

Warrantless search powers should rarely extend to dwelling-houses or marae; and only in circumstances where there is a compelling justification for such a high level of intrusion. Such powers should be rarely granted in the regulatory context.

18.3. How should the search powers be framed?

New search powers should only be exercisable when there are “reasonable grounds to suspect” the relevant factual situation has occurred, and “reasonable grounds to believe” that evidence will be found, or a particular thing may be achieved during the course of that search.

In the law enforcement context, legislation should set out the thresholds that must be satisfied before a search power is exercised. The default thresholds below are based on the search powers of the police in s 6 of the Act and should apply to any new search powers:

- there are “reasonable grounds to suspect” the relevant factual situation has occurred (such as a criminal offence); **and**
- there are “reasonable grounds to believe” that evidence will be found, or a particular thing might be achieved, during the course of the search (a common example is finding evidence relating to a criminal offence).

Compelling reasons must exist for relying on different thresholds in a law enforcement context (such as a suspicion that the person is carrying a dangerous item, or may otherwise pose a serious and imminent threat to themselves or other people).

In the regulatory context, suspicion of a breach is not always necessary for search or inspection powers to be exercised. However the power must still be justified (for instance, a search or inspection power is required to monitor compliance with legislation). Even so, those powers must only be capable of being exercised for the purpose of monitoring compliance or detecting breaches of the legislation.

18.4. What procedure should apply to the exercise of the search power?

New search powers should apply the rules and procedures set out in Part 4 of the Search and Surveillance Act 2012.

Legislation that creates new search powers should contain a specific statutory provision that applies Part 4 of the Act.

Part 4 sets out a comprehensive set of rules concerning the conduct of searches by consent; the application for, issuing and execution of search warrants; the conduct of warrantless searches; how to treat legally privileged and confidential material; and the application of other legal privileges. Part 4 also addresses what happens to seized material following the end of proceedings or an investigation, and what immunities apply to those people who issue and execute orders and search warrants under the Act.

Where Part 4 applies, enforcement officers will also have access to the powers and procedures in Part 3 of the Act (including surveillance powers, production orders, declaratory orders, and surveillance device warrants).

Legal advice should be sought to help determine whether or not the rules and procedures in the Act should apply in their entirety or in part. Good reasons are required for not applying or for modifying the procedures in Part 4. Good reasons might include the need for a more specialised or technically complex set of rules and procedures (see, for example, the Animal Welfare Act 1999¹³⁴).

¹³⁴ <http://www.legislation.govt.nz/act/public/1999/0142/latest/DLM49664.html>