Chapter 1 – Introduction

1.1 Search and surveillance powers are an essential tool in the armoury of the agencies that investigate and prosecute crime. Without those powers, much offending would go unprosecuted, many criminals would not be held accountable and our communities would be less safe.

1.2 However, it is just as important that those search and surveillance powers are designed to ensure they protect our human rights, particularly those rights relating to privacy, personal integrity, property and the rule of law. There is little to be gained by empowering agencies of the State to investigate crime if, in doing so, we erode the basic rights we value as a society and create fear or suspicion of the government among the very people it exists to protect.

1.3 The main purpose of the Search and Surveillance Act 2012 (the Act) is to facilitate the investigation and prosecution of offences in a manner that is consistent with human rights values.[1] This purpose does not set law enforcement and human rights values in opposition to each other; it suggests they are complementary. As the Law Commission said in 2007:[2]

> In our view, while there is a balance to be struck, there is also a good degree of complementarity between the two sets of values, particularly in a strong democratic state such as New Zealand. Search powers that encroach too far on human rights values are unlikely to gain legislative or community support. Similarly, investigative powers that are too tightly controlled and that prevent law enforcement officers from doing their job effectively will bring human rights norms into disrepute.

1.4 Balancing those complementary values remains at the heart of this review. However, as was apparent during the intense and extended public debate during the long passage of the Act, there is no clear agreement on how that balance should be struck. Opinions about the extent to which State intrusion into our lives is justified differ from person to person, depending in part on the nature of our personal experiences and beliefs.

1.5 For that reason, we wish to hear the views of as many individuals and organisations as possible. We hope that, through this consultation process, people will tell us where they think the right balance between law enforcement and human rights values lies.

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1 Search and Surveillance Act 2012, s 5.

2 Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [2.7].

THE CONTEXT FOR THIS REVIEW

1.6 Search and surveillance powers form an integral part of many law enforcement investigations. In the 2014/15 reporting year, New Zealand Police exercised warrantless search powers on 7,048 occasions and obtained 122 surveillance device warrants.[3] Over 4,000 people were charged with criminal offences in partial reliance on the evidence obtained through the exercise of those powers.[4]

1.7 These statistics show the important role search and surveillance powers play in detecting and prosecuting crime, as well as the impact that the exercise of those powers has on individuals. This illustrates why it is crucial that the law ensures those powers are exercised in an appropriate way without unduly compromising the effectiveness of law enforcement investigations.

1.8 The statistics referred to in paragraph 1.6 do not include the number of search warrants that were issued, which we expect would be significantly higher in number than surveillance device warrants. Unlike warrantless searches and surveillance device warrants,[5] the Act does not require annual reports to include statistics on the number of search warrants issued. In addition, the numbers we have referred to only cover Police. As we discuss below, other government agencies also exercise search and surveillance powers.[6]

1.9 In a number of cases since the Act came into force, the exercise of search and surveillance powers has given rise to challenges to the admissibility of the evidence obtained in subsequent criminal proceedings. These cases demonstrate how the Act has been operating in practice in the courts.[7]

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3 New Zealand Police *Annual Report 2014/15* at 148–148.

4 As above.

5 Search and Surveillance Act 2012, ss 170–172. Reporting is also required on examination orders and declaratory orders.

6 These agencies are also required to report on the use of warrantless powers and surveillance device warrants (Search and Surveillance Act, ss 171–172), but due to the large number of agencies we have not included those statistics here. As an example, in 2014/15 the New Zealand Customs Service obtained 16 surveillance device warrants and exercised warrantless entry or search powers governed by the Search and Surveillance Act on 34 occasions: New Zealand Customs Service *Annual Report 2014/15* at 93.

7 See *Rihia v R* [2016] NZCA 200 and *Birkinshaw v R* [2016] NZCA 220 for two recent examples of cases where evidence obtained through unlawful searches was nonetheless admitted; and *Ferens v R* [2015] NZCA 564 where the evidence was excluded. As we note in paragraph [1.47] below, there have been over 70 cases challenging the exercise of search and surveillance powers since the Act came into force.

What the Act does

Consolidating search and surveillance powers

1.10 The Act sought to bring the rules governing State intrusion on individuals' privacy for law enforcement and regulatory compliance purposes under one piece of legislation, as far as that could be done. It provides authority for the use of tools such as search warrants, surveillance device warrants, production orders and examination orders, and confers some warrantless powers on Police. It also controls how search powers are exercised.

1.11 The Act is not only concerned with police investigations. Some provisions in the Act also apply to other 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 Act as "enforcement officers". While the search powers available to non-Police enforcement officers are set out in separate pieces of legislation, some provisions of the Act apply to their exercise.

1.12 The powers conferred on non-Police enforcement officers are often for the purpose of ensuring compliance with specific regulatory regimes. Enforcement officers include, for example, animal welfare inspectors, 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.

Controlling how information is gathered

1.13 The search and surveillance powers falling within the Act's ambit enable enforcement agencies to gather information to assist in the investigation or prosecution of offending. That information—referred to in the Act as "evidential material"[8]—can take many different forms. For example, it may be visual (such as video footage from a surveillance camera at the scene of a drug deal), oral (such as the recording of a phone call that may refer to the sale of illegal drugs), written (such as financial records that show illegal transactions), physical (such as drugs found inside a house) or digital (such as emails on a computer or remote server that reveal illegal activity).

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[8] Evidential material, in relation to an offence or suspected offence, means evidence of the offence, or any other item, tangible or intangible, of relevance to the investigation of the offence: Search and Surveillance Act 2012, s 3 (definition of "evidential material").

1.14 The Act regulates how this information is collected. In the examples given above, a surveillance device warrant could authorise the recording of the video footage and the interception of the phone call; production orders could require a bank to produce the financial records; and search warrants could enable the searching of the house, computer or remote server.

Providing checks and balances on the exercise of powers

1.15 In addition to consolidating search and surveillance powers, the Act seeks to ensure that State intrusion on privacy for law enforcement purposes is closely regulated, able to be audited and only occurs where it is justified. It provides thresholds for the exercise of search and surveillance powers; requires prior judicial approval of intrusive actions, except in carefully defined circumstances;[9] and includes other safeguards such as reporting requirements.

1.16 These safeguards help to ensure consistency with section 21 of the New Zealand Bill of Rights Act 1990 (NZBORA), which guarantees the right "to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise". This right will often have a role to play in auditing whether the tools provided in the Act have been legitimately or acceptably used. In most cases this auditing occurs when a defendant in criminal proceedings challenges the admissibility of evidence obtained under a search power.[10]

What the Act does not do

1.17 The Act does not govern the powers of intelligence agencies, such as the Government Communications Security Bureau (GCSB) and the New Zealand Security Intelligence Service (NZSIS). The powers of those agencies are set out in separate legislation and

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[9] By "judicial approval" we mean approval by an issuing officer. "Issuing officer" is defined in s 3 of the Search and Surveillance Act 2012 as a District Court or High Court judge; or a person such as a Justice of the Peace, Community Magistrate, Registrar, or Deputy Registrar, who is for the time being authorised to act as an issuing officer under s 108 of the Act.

[10] The admissibility of the evidence is then determined under section 30 of the Evidence Act 2006. We discuss the relationship between section 30 and the Search and Surveillance Act below at paragraphs [1.46]–[1.52] of this Issues Paper.

have also been the subject of a recent review.[11] A Bill responding to the recommendations of that review is currently before a Select Committee.[12]

The genesis of the Act

1.18 In 2001 the Law Commission was asked to "review the scope and adequacy of current powers to search persons and places and associated powers to seize in order to determine an appropriate balance between law enforcement [values] and the protection of individual rights".[13]

1.19 In its subsequent 2007 Report (which was the impetus for the Act), *Search and Surveillance Powers*, the Law Commission bluntly concluded that the existing law of search and surveillance in New Zealand was a "mess".[14] It was outdated, spread across numerous statutes, and there was significant variation in the tests for the exercise of powers as between Police and other enforcement agencies. The law also had not kept pace with technology.

1.20 The Commission observed that sometimes law enforcement agencies were constrained in terms of their enforcement role. At other times, their activity was completely unregulated, meaning that protections consistent with the rights affirmed in NZBORA were absent. Neither situation was satisfactory. Both drove the need to provide for a proper statutory framework, taking into account two sets of what the Commission termed "complementary" values: human rights and law enforcement values.[15]

1.21 Human rights values include the protection of privacy, personal integrity, property rights and maintenance of the rule of law. Law enforcement values reflect the public interest in detecting and prosecuting crime. The underlying principles of law enforcement include ensuring that powers are effective, simply expressed, certain in their exercise, and responsive (that is, able to meet different operational circumstances). Importantly, the protective rather than controlling role of law

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[11] Sir Michael Cullen and Dame Patsy Reddy *Intelligence and Security in a Free Society: Report of the First Independent Review of Intelligence and Security* (29 February 2016).

[12] New Zealand Intelligence and Security Bill 2016 (158-1).

[13] Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at 19.

[14] At 14.

[15] At 20.

enforcement also requires consistency between the expression of those values and human rights values.[16]

1.22 That overarching balance was ultimately reflected in the detailed legislative purpose outlined in section 5 of the Act:[17]

> The purpose of this Act is to facilitate the monitoring of compliance with the law and the investigation and prosecution of offences in a manner that is consistent with human rights values by—
>
> (a) modernising the law of search, seizure, and surveillance to take into account advances in technologies and to regulate the use of those technologies; and
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> (b) providing rules that recognise the importance of the rights and entitlements affirmed in other enactments, including the New Zealand Bill of Rights Act 1990, the Privacy Act 1993, and the Evidence Act 2006; and
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> (c) ensuring investigative tools are effective and adequate for law enforcement needs.

1.23 The table below illustrates the lengthy process between the initiation of the Law Commission's original Search and Surveillance reference in 2001 and the enactment of the Search and Surveillance Act 2012. The public discussion that occurred over this 11-year period provides an important backdrop for our statutory review.[18] The table also shows that the process of drafting the current Act began as early as in 2007. There have been huge leaps forward in technology since then.

PROCESS FROM INITIATION OF ORIGINAL LAW COMMISSION REFERENCE TO ENACTMENT OF THE SEARCH AND SURVEILLANCE ACT 2012	
2002	The Law Commission published a Study Paper in March: *Electronic Technology and Police Investigations: Some Issues* (NZLC SP12). In April, the Commission also published a Preliminary Paper: *Entry, Search and Seizure* (NZLC PP50).[19]
2007	The Commission published its Report *Search and Surveillance Powers* (NZLC R97) and submitted the Report to the responsible Minister in June.

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16 Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at 36–54.

17 What became s 5 of the Act was inserted into the Bill during the select committee process at the combined suggestion of the Law Commission and the Ministry of Justice, "to demonstrate explicitly that the Bill recognises the importance of human rights values". See the Search and Surveillance Bill 2010 (45-1) (interim select committee report) at 28.

18 There was heated public discussion around the proposed legislation throughout its passage, sparking a number of protests. Concern centred in particular on the proposed new warrantless powers, an integrated surveillance regime, the new production and examination order regimes, and the new residual warrant regime. Apart from residual warrants, which were reframed as declaratory orders, all those proposed regimes became part of the Act.

19 Law Commission *Annual Report 2001-2002* (June 2002) at 11–12.

2008	The Search and Surveillance Powers Bill was introduced to Parliament as a Government Bill in September by the Labour Government.
2009	The Search and Surveillance Powers Bill was discharged in July. The Search and Surveillance Bill was introduced the same month by the National Government. The First Reading of the Bill occurred in August.
2010	The August interim report of the select committee released departmental and other supporting material and called for further written submissions. The final report of the select committee in November contained an extensive redraft of the Bill.
2012	The Bill was read for a second time in March. The Committee of the Whole House and the Bill's Third Reading took place the same month. The Bill received the Royal Assent in April. Most (but not all) of the Act's provisions came into force on 18 April.[20]

The structure of the Act

1.24 Part 2 of the Act empowers Police to apply for search warrants and examination orders, and confers an ability to conduct warrantless searches in some defined circumstances.[21]

1.25 Part 3 is directed to the powers of enforcement officers (whether Police or other officials) and confers the ability to apply for surveillance device warrants, declaratory orders and production orders.

1.26 Part 4 sets out general provisions in relation to the exercise of search, surveillance and inspection powers by any enforcement officer. So it applies both to powers conferred by Parts 2 and 3, and (at least in part) to the powers conferred on enforcement officers by other specified legislation.

1.27 The extent to which Part 4 applies to the exercise of a power by any non-Police enforcement officer is set out in the Schedule to the Act. The Schedule lists the powers in other legislation that all or part of Part 4 applies to, and the specific provisions of Part 4 that apply.

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[20] Search and Surveillance Act 2012, s 2(1).

[21] Sections 6–44.

THE SCOPE OF THIS REVIEW

Issues that are within our scope

1.28 Our terms of reference (Appendix A) require us to consider the Act's operation since 1 October 2012. In particular, we were asked to consider significant case law and international developments relating to search and surveillance, as well as developments in technology and their broader implications. Our final report will provide recommendations on whether amendments to the Act are necessary or desirable.

1.29 This review was triggered by section 357 of the Act, which states:

> **357 Review of operation of Act**
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> (1) The Minister of Justice must, not later than 30 June 2016, refer to the Law Commission and the Ministry of Justice for consideration the following matters:
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> (a) the operation of the provisions of this Act since the date of the commencement of this section:
>
> (b) whether those provisions should be retained or repealed:
>
> (c) if they should be retained, whether any amendments to this Act are necessary or desirable.
>
> (2) The Law Commission and the Ministry must report jointly on those matters to the Minister of Justice within 1 year of the date on which the reference occurs.
>
> (3) The Minister of Justice must present a copy of the report provided under this section to the House of Representatives as soon as practicable after receiving it.

1.30 The departmental report provided to the Select Committee, which was produced during the passage of the Act, described the review process in section 357 as follows:[22]

> In addition to the safeguards of prior judicial approval, detailed reporting, and threshold requirements, the Bill provides for a comprehensive review of the Bill approximately five years after enactment. This recognises the significant changes in the area of search and surveillance that are effected by the Bill. … This provides an opportunity to review the Bill as a whole as well as the new powers contained within it to determine whether the Bill effectively protects the rights of individuals as well as meeting the operational needs of law enforcement and regulatory agencies.

1.31 In line with these comments, we consider that it is necessary to ensure, as far as practicable, that this review examines situations where the application of the current

[22] Ministry of Justice and Law Commission *Departmental Report for the Justice and Electoral Committee* (August 2010) at [48]–[49].

provisions is unclear or inconsistent, or where the balance between enforcement or regulatory objectives and individuals' rights needs some reassessment. However, this review is not designed to reopen the main policy decisions that underpin or are reflected in the legislation, unless there are readily apparent and significant problems that have arisen in the less than five years since the Act incrementally came into force.[23]

1.32 Although there is scope for improvement in some areas, particularly where changes in technology have had an impact, our overall impression so far is that the Act has provided greater clarity and consistency than the previous law. Where we have not identified any specific problems with provisions in the Act, we have not dealt with them in detail. This Paper instead focuses on those parts of the Act that appear to have given rise to operational difficulties or concerns about inadequate protection of rights. However, there may well be other issues with the Act we have not yet identified and we would welcome submissions on that.

1.33 Some parts of this Paper, particularly Chapters 2 and 3, do raise conceptual issues that have the potential to result in changes to the scope of the Act. We discuss these issues because enforcement agencies have highlighted real, practical problems that result from uncertainty in the current scheme of the Act. In particular, the lack of guidance as to when a search warrant must be obtained and the limited scope of the surveillance device warrant regime has led to uncertainty about the methods that enforcement agencies can lawfully use. This, in turn, has in some cases meant that enforcement agencies feel they are unable to use the most effective tools available to carry out their functions. Given these practical implications, we consider that addressing these issues falls squarely within our terms of reference and is in keeping with the purpose of this review.

Capabilities of intelligence agencies

1.34 As we have noted, the Act does not in general govern the powers of intelligence agencies. However, there is a small degree of cross-over due to the fact that GCSB is able to provide assistance to Police within the scope of police powers.[24]

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23 Section 2 of the Search and Surveillance Act 2012 provides different commencement dates for particular parts of the legislation, with a final commencement date of 1 April 2014 for anything that was not brought into force before then.

24 Government Communications Security Bureau Act 2013, s 8C.

1.35 In *Intelligence and Security in a Free Society*, the report of the First Independent Review of Intelligence and Security,[25] Sir Michael Cullen and Dame Patsy Reddy raised a particular question about whether the capabilities of GCSB and NZSIS should be able to be used for law enforcement purposes to a greater extent than under the current law.[26] As required by our terms of reference, this issue has been included in our review and is dealt with in Chapter 11. For reasons we discuss in that chapter, we consider no change to the current law is justified.

Issues that are out of scope

Technical issues

1.36 Given our terms of reference and the one-year deadline for our final report, we have not been able to address all of the issues that have come to our attention. We have taken the view that the main benefit of our joint review process is that it allows for broad public consultation. Therefore, we decided that our review should focus on the issues that would benefit the most from widespread public discussion. As our terms of reference reflect, these tend to relate to broader concerns around developments in technology, New Zealand case law and international practice in the nine years since the drafting of the Act began.

1.37 Other concerns, such as discrete drafting problems or matters that could be described as "technical", will be worked through separately by the Ministry of Justice and implemented at the same time as any reforms made as a consequence of this joint review. While we recognise that these types of issues can cause significant problems for enforcement agencies, in our view they would benefit less from broad public consultation.

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[25] Cullen and Reddy *Intelligence and Security in a Free Society*, above n 11.

[26] The New Zealand Intelligence and Security Bill 2016 (158-1) introduced on 15 August 2016 implements the Government's response to Cullen and Reddy *Intelligence and Security in a Free Society*, above n 11. The Bill will replace the four Acts that currently apply to NZSIS, GCSB, and their oversight bodies with a single Act. That proposed legislation does not address the issue reserved for this review.

Bodily samples

1.38 In addition to technical matters, this review will not deal with the issue of whether the general search warrant regime is an appropriate mechanism for seizing a bodily sample. This question was raised but not determined in *T v R*.[27]

1.39 This is because the Law Commission commenced a separate reference on the use of DNA in criminal investigations on 27 July 2016. This will involve a comprehensive review of the Criminal Investigations (Bodily Samples) Act 1995. It will also consider the relationship between that Act and the Search and Surveillance Act 2012. An issues paper will be published in relation to this reference in mid-2017.

CONSULTATION

1.40 We conducted preliminary consultation in order to identify key problems with the current operation of the Act. This consultation was necessarily limited given the one-year time frame for the review. However, we attended over 30 meetings with enforcement officers, prosecutors, trial lawyers and other persons whose work engages the Act. We also held a combined meeting of officials and consulted with the judiciary, issuing officers, Internet specialists, privacy and human rights specialists, and the Commission's Māori Liaison Committee.

1.41 These preliminary discussions helped us to decide which issues to focus on in this Issues Paper. The submissions we receive in response to this Paper, as well as further meetings with interested parties as the review progresses, will help us to form our views on where amendments to the Act are needed and what form they should take. This will influence the recommendations that we make in our final report.

1.42 We have also established an Expert Advisory Group to assist us as we progress toward a final report. The members of this Group have been appointed for their individual expertise in the following fields – technology, digital security, privacy, human rights and criminal law.

[27] *T v R* [2016] NZCA 148.

RECURRING THEMES

1.43 As we identified potential problems with the Act during our preliminary consultation, certain recurring themes emerged. These themes provide the backdrop to much of our discussion in this Issues Paper.

The relationship between law enforcement and human rights values

1.44 The Commission in its 2007 Report stated that law enforcement values and human rights values are "complementary".[28] Despite that, the relationship between them is under pressure in terms of how the Act is implemented.

1.45 Much of that pressure comes from changes to technology and the way in which people use it, whether for lawful or unlawful purposes. The ubiquity of the smart phone, the rise of cloud computing, the automatic encryption of devices, the inevitable acquisition by enforcement officers of data that is not related to suspected offending – all these aspects place real stress on the balance between investigatory or regulatory needs and protection from State intrusion.

The relationship between the Act and section 30 of the Evidence Act 2006

1.46 The Act contains a great deal of procedural detail about how search powers are carried out, but generally other legislative regimes determine what happens if there is a failure to adhere to those processes.[29] For example, successful challenges to the issue or execution of warrants or orders, or the exercise of search powers, may result in the evidence obtained from those flawed processes being ruled inadmissible in criminal proceedings.[30] Whether that will happen mostly depends on the exercise of a judicial discretion to exclude evidence under section 30 of the Evidence Act 2006, which is the regime for determining the admissibility of "improperly obtained" evidence.

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28 Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at 20.

29 One of the exceptions to this general statement about remedies is that where a claim to privilege is successfully upheld, the Act states that the communication or information to which the privilege applies is not admissible in any proceedings arising from, or related to, the execution of the search warrant or exercise of the other search or surveillance power or the carrying out of the examination or production order: Search and Surveillance Act 2012, s 148.

30 Sometimes a search warrant may be challenged by judicial review proceedings, particularly where no criminal proceedings are laid. However, this occurs in limited circumstances as there is usually no cross-examination in such proceedings and so the court has restricted fact-finding abilities, as noted in *Hager v Attorney-General* [2015] NZHC 3268, [2016] 2 NZLR 523 at [50]. In *Southern Storm Fishing (2007) Ltd v Chief Executive, Ministry of Fisheries* [2015] NZCA 38, [2015] NZAR 816 the Court of Appeal confirmed this should only be permitted where a fundamental defect has occurred in the process of issue or execution.

1.47 Challenges to the admissibility of evidence obtained through the exercise of search or surveillance powers are relatively frequent. A brief case law search suggests there have been over 70 such cases since the Search and Surveillance Act came into force, and the actual number is likely to be higher.[31]

1.48 The route to section 30 of the Evidence Act can be either direct or indirect. An example of the direct route is where a flaw in the application process for a search warrant means that the warrant was not lawfully issued. That might be because the grounds or conditions for issue (thresholds) have not been properly established in the application or because the warrant itself is so defective that anyone either executing or affected by it would likely be misled as to its purpose or scope. In either case the admissibility of the evidence gathered under the warrant can be challenged under section 30 of the Evidence Act.

1.49 An example of the indirect route is where a warrant is lawfully issued, but a judge nonetheless finds that it was executed unreasonably – thus breaching the right under section 21 of NZBORA to be "secure against unreasonable search or seizure". NZBORA contains no remedies, but a finding of unreasonableness will open up the exercise of the section 30 discretion to exclude the evidence obtained.

1.50 Exclusion of evidence is not a guaranteed result. Section 30 requires the court to consider whether the exclusion of improperly obtained evidence is proportionate to the impropriety of the way it was obtained. That balancing process is informed by giving appropriate weight to the impropriety but also by taking proper account of "the need for an effective and credible system of justice".[32] A number of non-exhaustive factors are listed in section 30 for the judge to consider.[33]

1.51 Throughout this Issues Paper we discuss whether section 30 of the Evidence Act is an appropriate mechanism for ensuring compliance with the Search and Surveillance Act. In particular, we discuss the fact that section 30 only provides a remedy for breaches of rights, rather than preventing breaches from occurring. In addition, it only applies where the legitimacy of a search is challenged in subsequent legal proceedings. This

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31 A search on the *Westlaw NZ* online database for cases referring to section 30 of the Evidence Act and the Search and Surveillance Act returned 74 results. There are likely to be some District Court cases not included in these results.

32 Evidence Act 2006, s 30(2)(b).

33 Section 30(3).

raises the question of whether a greater level of rights protection is required at the point where a search is carried out.

1.52 However, this review is not concerned with the operation of section 30 itself. That will be considered by the Law Commission in a separate review of the Evidence Act that is due to commence shortly.[34]

The application of the Act in regulatory contexts

1.53 The Law Commission's 2007 Report only considered search and seizure in the context of law enforcement. It did not address search or inspection powers in regulatory contexts – that is, search or inspection powers that "are enacted to secure regulatory compliance, and intended to be exercised in an environment where regulated activity is undertaken, and do not depend on the existence of a threshold before they are exercised".[35]

1.54 However, after the Law Commission's Report was published a decision was made to extend the operation of aspects of Part 4 of the Act to apply to powers exercised for regulatory compliance purposes as well.[36] Hence the Act is addressed to "enforcement officers", which includes not only police officers but also other officials (such as customs, internal affairs or fisheries officers) who have specified powers of entry, search, inspection, examination or seizure.[37]

1.55 In other words, the Act built on an existing legal structure for law enforcement, by overlaying general procedures for the exercise of those powers in both enforcement and regulatory (compliance) contexts.

1.56 On occasion this has created a less than comfortable operational fit. For example, parts of the Act are premised on the ability to obtain a search warrant, whereas some regulatory agencies have extensive warrantless powers of search or inspection and can

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34 This will be the second periodic review of the Evidence Act 2006, required by section 202 of that Act. The Law Commission expects to receive the reference by early 2017.

35 Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at 20.

36 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): *Legislation Advisory Committee Guidelines on Process and Content of Legislation* (Wellington, 2014) at 75.

37 The Search and Surveillance Act 2012 only applies to persons other than constables if their powers are authorised by an enactment that appears in the Schedule to the Act or any other enactment expressly applying to provisions of Part 4 of the Act: see the definition of "enforcement officer" in s 3.

only obtain warrants in limited circumstances.[38] A number of the questions we identify in this Issues Paper have been raised by non-Police enforcement agencies. Their particular operational context and the manner in which their powers are conferred in other legislation give rise to different issues than those experienced by Police.

THIS ISSUES PAPER

1.57 This Issues Paper explores the key areas where we consider the Act may benefit from amendment. It identifies some possible options for reform—if reform is considered desirable—and raises specific questions that we would like feedback on. It does not contain any recommendations; its purpose is to elicit comments that will assist us in reaching a final view.

1.58 We seek submissions on whether we have correctly identified problems with the operation of the Act and, if so, what changes should be made to address them. Submissions are open until 16 December 2016.

1.59 We use a number of specific terms in this Paper that are either used in legislation or relate to technological processes. We have footnoted statutory and technical terms the first time they are used. We have also collected the most frequently used terms in a glossary for ease of reference (Appendix C).

1.60 We also note that we are aware of some court cases relevant to the issues we discuss in this Paper that are subject to suppression orders. Where these suppression orders prevent us from referring to the content of the proceedings, we have either not referred to them at all or have simply noted (where it seems important to do so) that the issue is being considered by the courts.

1.61 We begin this Issues Paper with a discussion of some conceptual issues, as this influences our analysis throughout. Chapter 2 examines the scope of the Act, in terms of the type of conduct that it regulates. This chapter discusses the permissive nature of the Act, in that it enables enforcement officers to obtain warrants in certain situations but it does not usually explain when officers *must* obtain a warrant. It describes the uncertainty this causes and the implications that has both for the ability of enforcement officers to do their jobs effectively and for the protection of rights.

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[38] For example, the Act only specifically provides for remote access searches in the context of search warrants (see paragraphs [6.106]–[6.108] of this Issues Paper).

1.62 Chapters 3, 4 and 5 look at particular issues that arise in the context of surveillance. Chapter 3 builds on the discussion in Chapter 2, by examining the availability of surveillance device warrants under the Act and whether a wider range of activities should be covered by the surveillance regime. We then explore specific issues with interception and tracking device warrants in Chapter 4. Chapter 5 has more of an operational focus. It discusses some of the practical difficulties that enforcement officers have encountered in the execution of surveillance device warrants.

1.63 The impact of recent developments in technology is a significant theme for this review. This is squarely at the heart of Chapter 6, which outlines an array of problems that stem from the way the Act deals with searches of digital material. The Act focuses heavily on how physical searches should be conducted. These rules are then applied by analogy to digital searches. This chapter looks at whether this approach should remain. It also considers how the Act should deal with access to remotely stored data.

1.64 In Chapter 7 we consider the powers to enter and search places, vehicles and things without a warrant and signal issues about their use and breadth. Among other issues, this chapter discusses the extent to which warrantless powers should be applicable to searches of electronic devices.

1.65 Our discussion of privilege in Chapter 8 ties into the important theme of whether the "complementary" nature of human rights and law enforcement values is appropriately reflected in the Act. We ask whether the Act should do more to protect privileged material from being seen during a search. We also discuss the privilege against self-incrimination and whether there is any scope for it to apply to production orders.

1.66 Then, in Chapters 9 and 10, we discuss two regimes that were considered new and controversial when the Act first came into force: production orders and examination orders. In relation to production orders, we ask whether the Act should be clearer about when a production order is required. We also seek views on whether a mechanism should be introduced for temporarily preserving data while a production order is obtained. To our knowledge, the examination order regime in the Act has never been used. We consider whether or not it should be retained.

1.67 The final chapter in our Issues Paper addresses the single issue that was referred to us as a result of the report of the First Independent Review of Intelligence and Security.[39]

[39] Cullen and Reddy *Intelligence and Security in a Free Society*, above n 11.

We examine the possible ways in which the capabilities of intelligence agencies could be used to a greater extent for law enforcement purposes. However, we indicate our initial view that no change to the current position is desirable.