Chapter 7 – Warrantless powers

INTRODUCTION

7.1 In New Zealand and in many other jurisdictions, warrantless powers have long been available for police officers to enter and search premises for law enforcement purposes in certain exceptional circumstances, where the public interest in swift police action outweighs the personal and privacy interests at stake. New Zealand Police also have warrantless powers under the Search and Surveillance Act 2012 (the Act) to search people in specified circumstances.

7.2 In the 2014/15 reporting year, Police exercised warrantless search powers on 7,048 occasions; and 3,866 people were charged in criminal proceedings where the collection of evidential material relevant to those proceedings was significantly assisted by the exercise of a warrantless search power.[1]

7.3 This chapter outlines the powers Police may exercise without warrant to enter and search places, vehicles and things under the Act. We describe the current scope of those warrantless powers, identify some issues that have arisen from the operation of the Act's provisions in practice and suggest some possible amendments.

7.4 A number of issues arise in relation to the operation of warrantless search powers under the Act, which we consider below:

- whether the thresholds for exercising warrantless powers are realistic to apply in practice;
- whether the warrantless powers should be exercisable only where a search warrant cannot be readily obtained and, if so, whether the Act should state that explicitly;
- whether searches of mobile electronic devices should always require a warrant; and
- whether the Act should provide a new power to enter a property without a warrant when an electronic monitoring device has been tampered with.

[1] New Zealand Police *Annual Report 2014/15* at 149.

OVERVIEW OF THE WARRANTLESS POWERS REGIME

7.5 In its 2007 Report, *Search and Surveillance Powers*, the Law Commission identified various public interests that justify exercising warrantless powers, including: apprehending an offender who is a flight risk or who is unlawfully at large; preventing the imminent loss of or damage to evidential material; and averting an immediate risk to the life or safety of a person or serious damage to property.[2]

7.6 Prior to the enactment of the Act, warrantless powers for law enforcement purposes were found in various statutes and the common law. The Act codifies the existence and scope of those powers.

7.7 There is a range of warrantless powers available to Police under the Act. Broadly speaking, the purpose of the powers can be separated into five categories:

- warrantless powers of entry and search to preserve evidence;[3]
- warrantless powers of entry and search to make an arrest;[4]
- warrantless powers of entry to protect life and property;[5]
- warrantless powers to search for evidence of specific offences;[6] and
- warrantless powers to search places incidental to arrest or detention.[7]

7.8 For example, a police officer may enter and search a place without a warrant to find evidential material relating to serious offending if they have reasonable grounds to believe that the evidential material will otherwise be lost.[8] Police can also enter and search a place or vehicle without a warrant to arrest a person unlawfully at large.[9]

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2 Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [5.90].

3 For example, ss 8, 15, 16, 17, 25, 83, 84 and 88 of the Search and Surveillance Act 2012.

4 For example, ss 7, 8 and 9.

5 For example, ss 11, 14, 85 and 88.

6 For example, ss 18, 19, 20, 21, 22, 27, 28 and 29.

7 For example, s 11.

8 Section 15. Examples of cases that have considered the application of this section include *R v Lucas* [2015] NZHC 1944 and *Alamoti v R* [2016] NZCA 402.

9 Section 7. "Unlawfully at large" is defined in s 3 of the Act.

THRESHOLDS FOR EXERCISING WARRANTLESS POWERS

The thresholds in practice

7.9 During our preliminary consultation, we were told that warrantless powers can be difficult for police officers to apply in practice. We understand this stems from the wide variety of circumstances in which warrantless powers can be exercised and the need to remember the various threshold requirements applicable in each case. We are also aware of concern in some quarters that Police sometimes use warrantless powers too readily (for example, by misapplying the "reasonable grounds to believe" threshold where that is required before a particular search may be conducted).

7.10 These are operational issues and not ones that can be easily addressed by amending the legislation. An appropriate response is likely to involve further education and training for Police (for instance, on how to apply the various thresholds that need to be met before exercising the different warrantless powers). However, as we discuss below, it is possible that expressly recognising a preference for warrants over the use of warrantless powers in the Act would also help to reinforce the exceptional nature of warrantless powers.

7.11 A related issue raised during our preliminary consultation is that it can be difficult—in exigent circumstances—for enforcement officers to satisfy themselves that all of the preconditions for exercising a warrantless power are met. For example, we understand the application of section 8 of the Act can be problematic in practice.

7.12 Section 8 permits a police officer to enter a place or vehicle without a warrant to search for and arrest a person the officer suspects has committed an offence. In order to exercise this power, the officer must have reasonable grounds to suspect the person has committed an offence, reasonable grounds to believe the person is there, and reasonable grounds to believe that, if entry is not effected immediately, the person will leave the location to avoid arrest (or that evidential material relating to the offence will be destroyed, concealed, altered or damaged).

7.13 We were told it can be extremely difficult to satisfy all the preconditions for the exercise of this power. For example, it may be difficult (if not impossible) for a police officer to forecast another person's intentions: an officer might believe a person is going to leave an address, but may not know whether the person is leaving for the purpose of avoiding arrest (as opposed to some other purpose).

7.14 We have not analysed this issue in depth for the purposes of this chapter. However, we invite comments from submitters on whether the preconditions for the exercise of warrantless powers achieve the intended purpose and are realistic to apply in exigent circumstances.

Q31 Do the preconditions for the exercise of warrantless powers achieve the intended purpose and are they realistic to apply in urgent circumstances?

Expressly limiting the use of warrantless powers to situations of urgency

7.15 In this section, we discuss the general question whether the Act should expressly limit the use of warrantless powers to situations where it is not practicable to obtain a warrant.

7.16 In 1993, the Court of Appeal held in *R v Laugalis*[10] that a search conducted pursuant to a warrantless statutory power (in that case, section 18(2) of the Misuse of Drugs Act 1975[11]) was unreasonable where there were no urgent circumstances and where a warrant could have been applied for. In that case, there was no reason for the police officer not to have applied for a warrant: the vehicle that was searched was being held in police custody. The Court said:[12]

> Although the power to search without warrant is not circumscribed by the [Misuse of Drugs Act], its reasonable exercise requires that it be resorted to only where that is reasonably necessary. … It is of particular importance where the drugs are believed to be in a motor vehicle. It would be absurd to require the police to obtain a warrant if in the meantime the vehicle could simply be driven away. But where there is no risk of that, no urgency, resort to the power is unnecessary and can in our opinion be unreasonable.

7.17 The Court acknowledged that its approach effectively wrote into section 18(2) "a restriction that the legislature has not thought appropriate to enact".[13] However, the Court reasoned that if its approach were not taken, section 21 of the New Zealand Bill of Rights Act 1990 (NZBORA)—which guarantees the right to be secure against unreasonable search or seizure—would "[lose] much of its force".[14]

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10 *R v Laugalis* (1993) 10 CRNZ 350 (CA).

11 Section 18(2) of the Misuse of Drugs Act 1975 provided that where a member of the Police had reasonable grounds for believing there was a specified controlled drug in or on any building, aircraft, ship, hovercraft, carriage, vehicle, premises or place, and that an offence against the Act had been or was suspected of having been committed, then there was a warrantless power to enter and search the place and any person found there.

12 *R v Laugalis*, above n 10, at 355–356.

13 At 356.

14 At 356.

7.18 The exact principle established by *Laugalis* was the subject of some debate. Some argued that the case introduced an additional prerequisite for the lawful exercise of the section 18(2) power: in other words, the use of that power would only be lawful if the circumstances were urgent and a warrant could not readily be obtained.[15] Others saw the case as standing for the more limited proposition that a search conducted pursuant to a warrantless power may be lawful yet unreasonable (under section 21 of NZBORA) where a warrant could have been readily obtained.

7.19 The courts preferred the latter view,[16] while also emphasising the need to have regard to the practicalities of policing in urgent situations. This includes consideration of whether a property can be kept under surveillance and evaluation of the resources available to officers at the time of assessing whether the situation faced made it reasonable to invoke a warrantless power.[17]

7.20 When the Law Commission prepared its 2007 Report, it considered whether the warrantless power provided in section 18(2) of the Misuse of Drugs Act should be amended to reflect the *Laugalis* decision. It recommended including a specific statutory provision that proscribes the use of the warrantless power unless the police officer exercising the power believes on reasonable grounds that it is not practicable to obtain a warrant.[18] This recommendation was carried through into what is now section 20 of the Search and Surveillance Act (which re-enacts, in modified form, section 18(2) of the Misuse of Drugs Act).

7.21 Section 20 provides:

> A constable may enter and search a place or vehicle without a warrant if he or she has reasonable grounds—

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15 See for example the submission recorded in *R v Dobson* [2008] NZCA 359 at [12].

16 See *R v Smith* (1996) 13 CRNZ 481 (CA) at 485; *R v H* [1994] 2 NZLR 143 (CA) at 148; *R v Kingston* CA407/01, 18 March 2002 at [12]. *Laugalis* has sometimes been described as endorsing a "warrant preference approach": that is, it is "best practice" for powers of search and entry to be exercised pursuant to a warrant, even where a warrantless power is available: *Kalekale v R* [2016] NZCA 259 at [44]; *F v R* [2014] NZCA 313 at [46].

17 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [24]. See also *R v T* [2008] NZCA 99 at [16]; *R v Dobson*, above n 15, at [38]; and *Hughes v R* [2011] NZCA 661 at [25]. Cases decided both before and after the enactment of the Search and Surveillance Act 2012 have not limited the application of the *Laugalis* principle to warrantless searches of places and vehicles in respect of certain Misuse of Drugs Act offences (that is, s 18(2) of the Misuse of Drugs Act 1975 and s 20 of the Search and the Surveillance Act 2012). See *R v Williams* at [24]; *R v H*, above n 16, at 148; *Gillies v R* [2016] NZCA 289 (in relation to s 28 of the Search and Surveillance Act 2012); and *Kalekale v R*, above n 16 (in relation to s 15 of the Act).

18 Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [5.65].

(a) to believe that it is not practicable to obtain a warrant and that in or on the place or vehicle there is—

(i) a controlled drug …

(b) to suspect that in or on the place or vehicle an offence against the Misuse of Drugs Act 1975 has been committed, or is being committed, or is about to be committed, in respect of that controlled drug or precursor substance; and

(c) to believe that, if the entry and search is not carried out immediately, evidential material relating to the suspected offence will be destroyed, concealed, altered, or damaged.

7.22 Section 20 is currently the only section in the Act that explicitly states that a warrantless search may only be conducted if there are reasonable grounds to believe it is not practicable to obtain a search warrant.[19]

7.23 When the Search and Surveillance Bill was going through the House, there was no discussion as to whether such a requirement should also apply to the other warrantless search powers. The Law Commission's 2007 Report did, however, consider whether the requirement should extend to the warrantless powers conferred on Police when offending against the Arms Act 1983 is suspected.[20] The Commission did not think there would be any advantage in requiring Police to believe a warrant could not readily be obtained before exercising those powers: given the immediate threat to safety that firearms pose, it was most unlikely to be practicable for a warrant to be obtained.[21]

7.24 We note that since the enactment of the Search and Surveillance Act, the courts have appeared to accept the proposition that the lawful exercise of *any* warrantless statutory power can be unreasonable where a warrant could have been readily obtained.[22]

7.25 We are interested in hearing views as to whether the use of all warrantless search powers under the Act should be limited to situations where it is not practicable to obtain a warrant.

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19 We note that the wording of s 20(a) gives greater prominence to the *Laugalis* principle than it was given by the courts prior to the Act's enactment. As noted above, the courts accepted that a search conducted pursuant to a warrantless power could be lawful, but unreasonable, if there was no urgency and Police could have obtained a search warrant. But they did not interpret *Laugalis* as importing an additional requirement that needed to be satisfied *before* a warrantless search could be lawfully exercised: see in particular *R v Smith*, above n 16, at 485.

20 This is now contained in s 18 of the Search and Surveillance Act 2012.

21 Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [5.66]–[5.67]. The Commission came to the same conclusion in relation to the warrantless power to enter a place to arrest a person unlawfully at large: at [5.25].

22 See *Gillies v R*, above n 17; and *Kalekale v R*, above n 16.

7.26 We note that limiting the use of all warrantless search powers in this way is arguably unnecessary. The underlying rationale for having warrantless powers is to allow enforcement officers to respond to urgent situations. This is already reflected in the statutory preconditions for the exercise of most of the warrantless powers. For example, section 8 of the Act permits the warrantless entry and search of a place or vehicle to arrest a person suspected of having committed an offence. The constable needs to have reasonable grounds to believe that, if entry is not effected immediately, the person will flee to avoid arrest or evidential material will be lost, altered or damaged.[23] Where that requirement is satisfied, it is difficult to imagine a situation where it would nonetheless be practicable for the constable to obtain a warrant.

7.27 On the other hand, expressly limiting the use of warrantless powers to situations where it is not practicable to obtain a warrant may reinforce the importance of using warrantless powers in exceptional circumstances only. Because warrantless powers are exercised without pre-authorisation by an issuing officer, it may be particularly important to underscore their exceptional nature to enforcement officers.

7.28 A related point is that requiring enforcement officers to be satisfied that it is not practicable to obtain a warrant would promote proactive protection of privacy interests. Without such a requirement, the reasonableness of using a warrantless power is only determined by a court *after* the power has been exercised (when considering a potential breach of section 21 of NZBORA), and only if the conduct is challenged.

Q32 Should the Act expressly limit the use of warrantless powers to situations where it is not practicable to obtain a warrant?

WARRANTLESS SEARCHES OF ELECTRONIC DEVICES

7.29 A police officer conducting a warrantless search will sometimes encounter an electronic device in the place or vehicle searched or carried by the person searched. Currently, the law allows the person conducting the search to use reasonable measures to access a computer system or data storage device if intangible material that is the subject of the search may be on that device.[24] Often electronic devices such as smart phones and tablets are searched under warrantless powers because they are particularly mobile and there is a greater risk of evidence contained on them being lost, altered or

[23] Search and Surveillance Act 2012, s 8(2)(c).

[24] Sections 110(h) and 125(1)(l).

destroyed. However, in theory, warrantless powers would also apply to searches of less mobile electronic devices, such as personal computers, if the thresholds for the exercise of the power are met.

7.30 Prior to the advent of smart phones, the information that could be discovered during a warrantless search of an electronic device was generally fairly limited. However, as we discussed in Chapter 6, searches of electronic devices may now reveal significantly more information. The question for this review is whether the level of privacy invasion likely to be involved in a search of an electronic device is such that a warrant should always be obtained beforehand.

7.31 There have been a number of recent cases both overseas and in New Zealand that have considered this issue.

Riley v California

7.32 In 2009, in the United States case of *Riley v California*, Mr Riley was stopped by Police for suspected traffic offences.[25] In accordance with police department policy, his car was impounded and subjected to a warrantless search. Two handguns were found, which were linked to a prior shooting. Upon arresting Mr Riley for that offence, Police confiscated and searched his smart phone without a warrant. Data from the phone was used in evidence in the trial at which Mr Riley was convicted.

7.33 Mr Riley argued that the warrantless search of his phone was an unacceptable intrusion on his privacy. The State of California argued that the search was required for safety reasons and to prevent the destruction of evidence. The question for the United States Supreme Court's consideration was whether Police could, without a warrant, search data on a cell phone seized from an individual who has been arrested.

7.34 It held that, except in extreme circumstances (for example, to prevent the imminent destruction of evidence, to pursue a fleeing suspect or to assist a person who was threatened with imminent injury), a search of a cell phone must always be done with a warrant:[26]

> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life," … The fact that technology now allows an individual to carry such information in his hand does not make the information any

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25 *Riley v California* 573 US 1 (2014).

26 At 28.

> less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident [sic] to an arrest is accordingly simple – get a warrant.

R v Fearon

7.35 In a 2014 case in Canada, Mr Fearon was arrested following an armed robbery of a jewellery seller at a Toronto market.[27] Following arrest, a pat-down search revealed his cell phone, which was searched both then and later at the police station. Incriminating text messages and photographs were found on the phone. The issue that came before the Supreme Court of Canada for consideration was the scope of the circumstances in which a warrantless search of a cell phone of an arrested person may be conducted.

7.36 The majority of the Court (four judges out of seven) recognised the important privacy interests implicated by searches of digital devices, but found that not every search of a cell phone is inevitably a significant intrusion on privacy. It held that cell phones may be searched without warrant following a lawful arrest under a common law power, but the potential for a significant invasion of privacy requires some modification to the standard rules. Four specific conditions must be met:

- the arrest must be lawful;
- the search must be truly incidental to the arrest – that is, it must be done promptly upon arrest and must effectively serve law enforcement purposes (protecting Police, the accused or the public; preserving evidence; or discovering evidence if the investigation will be stymied or significantly hampered without the ability to promptly conduct the search);
- the nature and extent of the search must be tailored to its purpose – in practice this means that generally only recently sent or drafted emails, texts, photos and the call log will be available; and
- Police must take detailed notes of what they have examined on the device and how they examined it.

7.37 The three dissenting judges placed a greater emphasis on preventing invasions of privacy and treated cell phones as unique sources of evidence. They thought that a warrant must be obtained before the content of a seized cell phone may be searched,

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[27] *R v Fearon* 2014 SCC 77, [2014] 3 SCR 621.

except in exigent circumstances. They thought that the modifications proposed by the majority would generate problems of impracticality, police uncertainty and increased after-the-fact litigation. It would also require enforcement officers to determine whether law enforcement objectives outweighed the intrusion into privacy, despite their inherent conflict of interest in answering that question. And where their assessment is wrong, the subsequent exclusion of evidence would not be an adequate remedy for the initial privacy violation.

Dotcom v Attorney-General

7.38 In this 2014 case, the New Zealand Supreme Court assessed the privacy interests in electronic devices in the context of considering the validity of a mutual assistance search warrant, which authorised searches of (amongst other things):[28]

> all digital devices, including electronic devices capable of storing and/or processing data in digital form, including, but not limited to … mobile telephones …

7.39 The Court found that computers (including smart phones) raise special privacy concerns because of the nature and extent of the information they hold and that the potential for invasions of privacy is high.[29] It held that:[30]

> … for a search of any computer to be reasonable, a mutual assistance warrant must give specific authorisation for the computer to be searched in order to identify and seize the data that it is believed is evidence of commission of an offence.

S v R

7.40 In this very recent decision, the appellant challenged his conviction for importing drugs on the basis that the evidence obtained from his iPhones by New Zealand Customs Service officers as he entered the country was obtained by an unlawful and unreasonable search and was therefore inadmissible.[31] In searching the contents of the iPhones, Customs officers relied on the broad powers in section 151 of the Customs

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28 *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 at [87]. This case concerned the validity of search warrants that were executed by Police in 2012 at premises associated with Mr Kim Dotcom and Mr Bram van der Kolk. The United States has sought the extradition of these individuals to face trial on charges of racketeering, copyright infringement and money laundering. The warrants were held to be invalid in the High Court, but the Court of Appeal subsequently overturned that decision and concluded the warrants were valid. The Court of Appeal's decision was upheld by a majority of the Supreme Court.

29 At [191].

30 At [192].

31 *S v R* [2016] NZCA 448.

and Excise Act 1996 to examine or analyse goods that are subject to the control of Customs.

7.41 The appellant argued, relying on the remarks in *Dotcom v Attorney-General* about the special privacy concerns associated with computers, that:[32]

> Customs should not be entitled to treat every occasion when a person returns from overseas as a fortuitous opportunity to engage in highly invasive data collection when this would not be permitted in any other circumstances. The conduct of warrantless searches is not subject to judicial oversight or other statutory control with significant potential for serious abuse of such a power.

7.42 The Court of Appeal held that the search power in section 151 unambiguously permits iPhones to be searched as goods and was satisfied that there was no scope to read down the explicit language of that section to have regard to the privacy interests of the owner of the iPhones.[33] It said that if Parliament had intended a warrant to be required for searches of electronic devices, it would have said so.[34]

7.43 We note that the Government has recently announced proposals to amend the Customs and Excise Act.[35] Currently, there is no threshold that must be satisfied before a Customs officer can exercise the power to examine goods under section 151. However, as part of the proposals Cabinet agreed in principle that Customs officers should not be able to examine or search data stored on, or accessible from, electronic devices without appropriate statutory thresholds being met. Cabinet noted that compliance with NZBORA would likely be satisfied by a two-threshold test requiring reasonable suspicion of criminal offending and reasonable belief that the device contains evidential material.[36]

Analysis

7.44 We have identified a number of options for how the Act should deal with searches of electronic devices:

- retaining the status quo;
- requiring a warrant to be obtained for all searches of electronic devices; or

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32 *S v R*, above n 31, st [19].

33 At [32] and [44].

34 At [45].

35 Cabinet Minute "Customs and Excise Act Review: Powers, Obligations and Regulated Goods" (2016) CAB-16MIN-0015.01.

36 As above.

- a middle option – permitting the device to be held while a warrant is obtained.

7.45 In addition to these options (discussed below), it should be noted that two of the options for reform identified in Chapter 6 (which seek to address the risk of seeing too much irrelevant material during an electronic search) could also be relevant to searches of all electronic devices. Those two options were a requirement to document search procedures[37] and a statutory duty to take steps to avoid seeing privileged or irrelevant material.[38]

Status quo

7.46 Currently, the risk of unreasonable searches of electronic devices is primarily managed through section 30 of the Evidence Act 2006 and section 21 of NZBORA.[39] Where the prosecution seeks to adduce evidence from a warrantless search of an electronic device in criminal proceedings, the defendant may challenge the admissibility of the evidence under section 30 on the basis that it was improperly obtained. The grounds for that challenge would be that the search was unreasonable under section 21 because a warrant was not obtained in circumstances where it could have been. This potential for exclusion of evidence provides motivation for the person carrying out a search to obtain a warrant, if it is reasonably practicable in the circumstances.

7.47 The advantage of retaining the status quo is that it retains the flexibility for enforcement officers to search electronic devices under warrantless powers when the appropriate thresholds, if any, for exercising those powers are met. It would be consistent with the majority finding in *R v Fearon* that searches of electronic devices are not inevitably a significant invasion of privacy. For example, if the enforcement officer has grounds to believe that a suspect had an accomplice whose name was known to the officer, it may be reasonable to search the contact list or very recent texts on a smart phone without a warrant on the basis that the information would likely be deleted if it was not obtained immediately.

7.48 The main disadvantage of this option is that section 30 can only offer a remedy after the search has occurred, and only if criminal proceedings eventuate. While the risk of

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37 See paragraphs [6.42]–[6.44].

38 See paragraphs [6.52]–[6.56].

39 See for example *Hoete v R* [2013] NZCA 432, (2013) 26 CRNZ 429; *McLean v R* [2015] NZCA 101; and *R v Lucas* [2015] NZHC 1944.

having evidence subsequently ruled inadmissible provides some motivation for enforcement officers to ensure searches are reasonable, that may provide a fairly weak protection of privacy interests. Also, it could be argued (as it was by the minority in *R v Fearon*) that enforcement officers have a conflict of interest when assessing whether a search of an electronic device without a warrant is unreasonable.

7.49 It should also be noted that, even if a court finds that evidence was improperly obtained under the Evidence Act, the evidence may still be admissible if the court determines that exclusion of the evidence is disproportionate to the impropriety.[40]

Warrants for all searches of electronic devices

7.50 The Act could specify that all searches of electronic devices must be authorised by a warrant. That would mean that in all cases where an officer wishes to search an electronic device, a search warrant would first have to be obtained.

7.51 The advantage of this option is the independent assessment of the exercise of the power by an issuing officer. That assessment would provide some assurance that the search is being conducted within the legal limitations.

7.52 However, the disadvantage is that it can take a number of hours to obtain a search warrant. In the meantime, the evidence on the electronic device could be deleted, amended or otherwise destroyed. Also, the device itself may no longer be able to be located by the time the warrant is obtained.

7.53 A modified version of this option would permit an exception to the requirement in exigent circumstances (for example, where there is a risk of the imminent destruction of evidence). This was the position adopted by the Court in *Riley v California*. However, it could be argued that an ability to dispense with the requirement for a warrant in exigent circumstances provides little extra protection beyond what the current thresholds for warrantless searches provide. As we described in the previous section of this chapter, the thresholds for warrantless searches are generally designed to apply only in exigent circumstances because that is the underlying rationale for searches without a warrant.

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[40] Evidence Act 2006, s 30(2)(b).

The middle option – hold the device while a warrant is obtained

7.54 Under this option, the Act could be amended to both:

- require a warrant to be obtained before conducting a search of an electronic device (as described above); and
- provide a power to seize (but not search) the device in order to preserve the evidence while a search warrant is obtained.

7.55 We note that an ability to preserve evidence pending an application for a warrant would not be a new concept under the Act. Section 117 permits enforcement officers to secure a place, vehicle or other thing pending determination of a search warrant application.

7.56 This option retains the advantage of the previous option (independent oversight by an issuing officer), but overcomes the disadvantage. The enforcement officer could be required to disconnect the device from the Internet so that the data on it cannot be remotely updated, amended or deleted (for example, by switching it to "flight mode"), place the device in a sealed bag and retain it in secure storage at the police station. The Act would need to provide a time limit within which the device is either retained for search under a warrant or returned to its owner.

7.57 The disadvantage (depending on the circumstances) of this option is that the owner does not have possession of the device pending the warrant being obtained. That would need to be weighed up against the advantages of obtaining a warrant.

Q33 Should warrants always be required for searches of electronic devices? If so, should there be an exception for urgent circumstances and/or a power to seize the device while a warrant is obtained?

POLICE POWERS OF ENTRY – TAMPERING WITH ELECTRONIC MONITORING DEVICES

7.58 Currently, Police do not have an express power to enter a property without a warrant when an alert is received suggesting an occupant subject to electronic monitoring may have tampered with his or her electronic monitoring device.

What is electronic monitoring and when is it used?

7.59 Electronic monitoring is a where a tracking device is attached to a person's ankle to monitor their compliance with the conditions of a sentence or order imposed by a court.[41] The tracking device must be worn 24 hours a day, seven days a week for the duration of the sentence or order. A monitoring unit is also installed at the person's address and, in some cases, their place of employment.

7.60 There are two types of electronic monitoring – Radio Frequency (RF) and Global Positioning System (GPS). RF is mainly used for community detention to monitor the offender at their detention address.[42] GPS is used to monitor the location of a person whether at home or away from their address – for example, under sentences of home detention,[43] extended supervision orders[44] or bail orders.[45] It can also be used to monitor compliance with a special condition following an offender's release from prison or an intensive supervision order made in respect of a young person.[46]

7.61 The monitoring system will receive an electronic alert if something unusual happens to the tracker, for example if a person tampers with it. However, alerts can occur for a number of reasons besides removal or deliberate interference: for example, if the tracker is accidentally knocked or submerged in water. When an alert occurs, the matter can often be resolved by a Corrections field officer or probation officer contacting the person and ascertaining what happened. In other cases, a police officer may be called. We understand that, more often than not, a person subject to electronic monitoring will come to their door if an officer is sent to their address to respond to a tamper alert. Access to the premises by Police is only required in those cases where the person does not come to the door, to check whether they have absconded.

7.62 The Department of Corrections told us that approximately 4,000 people are subject to electronic monitoring at any one time and tamper alerts frequently occur. It estimates there may be three cases per day in which access to the house by Police is required because the matter is not able to be resolved in other ways. Corrections emphasised

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41 Department of Corrections "Electronic monitoring" <www.corrections.govt.nz>.

42 Sentencing Act 2002, s 69E(1)(e).

43 Section 80C(2)(d).

44 Parole Act 2002, ss 15 and 107K.

45 Bail Act 2000, s 30B.

46 Parole Act 2002, s 15 and Children, Young Persons, and Their Families Act 1989, s 296J(6).

that those cases tend to be higher risk cases, because low-risk cases are usually able to be resolved by other interventions.

Problem

7.63 If Corrections receives an alert that a device has been tampered with and the device is inside the property of the person subject to electronic monitoring, there is no statutory authority for a police officer to enter the property without a warrant to check whether the person is inside.

7.64 Under the Act, a police officer can only enter and search a place without a warrant to locate a person if he or she:

- has reasonable grounds to suspect the person is unlawfully at large and to believe the person is at the property;[47] or
- has reasonable grounds to suspect the person has committed an offence, and to believe the person is at the property and may flee to avoid arrest if entry is not effected immediately.[48]

7.65 In circumstances where the police officer only has information that the electronic monitoring device has been tampered with and that the device is in the property, it will often be the case that neither of these two powers apply. The powers require the officer to have reasonable grounds to believe the person is at the property. Police are more likely to suspect that a person who has tampered with his or her electronic monitoring device has *left* the address.

7.66 We understand the absence of a warrantless power in these circumstances may hinder the ability of Police to effectively respond to tamper alerts. Because Police do not have an express power to enter the property, they cannot be sure if the person has absconded.[49] Without this information, Police may be reluctant to launch a full-scale search for the individual in the community.

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47 Search and Surveillance Act 2012, s 7.

48 Section 8. The suspected offence must be punishable by imprisonment and one for which the individual can be arrested without warrant. Section 8(2)(c)(ii) also allows an officer to enter a place or vehicle without a warrant if they believe evidential material will be lost if entry is not effected immediately.

49 In theory, Police could obtain a search warrant under s 6 of the Act in order to lawfully enter the property on the basis that there are reasonable grounds to suspect an offence has been committed (for example, a suspected breach of the sentence condition or order that requires the person to be subject to electronic monitoring); and reasonable grounds to believe that

7.67 This issue recently arose in relation to a child sex offender who removed his electronic tracking device while subject to an extended supervision order. Police were notified that his device had been tampered with and was still inside the property, but they had no way of knowing whether he was still there or had fled. Because there did not appear to be any applicable warrantless power under the Act that would allow entry into the property in those circumstances, Police were unable to immediately enter and check whether he was present.[50]

Option for reform: a new warrantless power

7.68 One possible solution is for a new section to be inserted into the Act,[51] conferring an explicit power on Police to enter a property without a warrant upon receiving information from Corrections that an electronic monitoring device has been tampered with and was last located inside the property. This new section would not require a constable to have reasonable grounds to believe that the person is present before entering the property. The threshold for the exercise of the power could be that there are reasonable grounds to suspect the electronic monitoring device has been tampered with and reasonable grounds to believe that it is in the property.

7.69 There is a strong public interest in apprehending offenders who are a flight risk. This is the policy justification for the warrantless power that permits Police to enter a property to apprehend an offender who may flee to avoid arrest.[52] If there is reason to suspect that a person has tampered with his or her electronic monitoring device and may have absconded from his or her monitored address, there is a similar public

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evidential material in respect of the offence (such as a broken/abandoned electronic monitoring device) will be found on the property. However, the process of applying for and obtaining a warrant under s 6 may take too much time.

50 This incident was noted during a recent government inquiry into State sector agencies' management of another offender (who was convicted of rape and murder committed while being electronically monitored after his release from an eight-year term of imprisonment for child sex offending). The inquiry did not analyse whether Police could have lawfully used a warrantless power under the Act, but instead noted that the issue could be explored more fully in our review of the Act: see Mel Smith *Government Inquiry into Tony Douglas Robertson's Management Before and After his Release from Prison in 2013* (29 January 2016) at 6 and 64–65.

51 We suggest the new section is inserted into the Search and Surveillance Act (rather than under the legislation that governs the imposition of electronic monitoring, such as the Parole Act 2002 or Sentencing Act 2002) because this aligns with the original legislative intention to codify the existence and scope of Police warrantless powers that were previously scattered across different statutes.

52 Search and Surveillance Act 2012, s 8. See Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [5.90].

interest in giving police officers the ability to respond in a timely and effective manner.

7.70 However, there is a risk that such a power could be used in a manner that unduly infringes on the privacy of persons subject to electronic monitoring (for example, if Police were to enter all properties, as a matter of course, where an alert is received). To avoid this, the Act could require a police officer to take reasonable steps to ascertain whether the person is at the address before entering the property. This could include, for example, knocking on the door and/or calling the person's phone so that they have an opportunity to present themselves voluntarily.

Q34 Should the Act allow Police to enter a property to search for a person subject to electronic monitoring without a warrant, if there are reasonable grounds to suspect the electronic monitoring device has been tampered with?