

# **Protection of Journalists' Sources Bill**

Member's Bill

## **Explanatory note**

### **General policy statement**

Protection of sources is well recognised in international law as a key principle underpinning press freedom. Journalists rely on source protection to gather and reveal information in the public interest from confidential sources. Such sources may require anonymity to protect them from physical, economic or professional reprisals in response to their revelations.

New Zealand law currently contains a gap as to how this important protection is guaranteed in the case of searches by Police, as demonstrated by the issues that arose in relation to the 2014 Police search of journalist Nicky Hager's home and property. Although the Search and Surveillance Act 2012 identifies the existence of journalistic privilege with reference to the protections laid out in the Evidence Act 2006, it contains no clear description as to the processes to be followed when this issue of privilege arises.

This Bill seeks to address this issue by:

- Amending the definition of journalist in the Evidence Act 2006 so that it explicitly includes investigative journalists based on the United Nations Educational, Scientific and Cultural Organization (UNESCO) position that investigative journalism crucially contributes to freedom of expression and media development, which are at the heart of UNESCO's mandate. It also addresses questions that have arisen from a court decision by Justice Winkelmann by clarifying that books written by investigative journalists are covered by journalistic privilege, not just media articles.
- Amending the Search and Surveillance Act 2012, to ensure that journalists' sources are clearly protected in relation to production orders and Police searches, and inserting clear requirements on Police in these circumstances to ensure that the protections are understood and upheld.

### Clause by clause analysis

*Clause 1* is the title clause.

*Clause 2* is the commencement clause. It provides for the Bill to come into force on the day after the date on which it receives the Royal assent.

#### *Part 1 — Amendment to the Evidence Act 2006*

*Clause 3* states that Part 1 amends the Evidence Act 2006.

*Clause 4* amends the definition of journalist in section 68(5) of the Evidence Act 2006 to include investigative journalists who may not publish work on a regular basis.

#### *Part 2 — Amendments to the Search and Surveillance Act 2012*

*Clause 5* states that Part 2 amends the Search and Surveillance Act 2012.

*Clause 6* amends section 3 of the Search and Surveillance Act 2012 to provide that journalist has the same meaning as in section 68(5) of the Evidence Act 2006.

*Clause 7* amends section 71 of the Search and Surveillance Act 2012 to provide that an application for a production order must also include whether the enforcement officer knows or has reasonable grounds to believe that the person against whom the order is made is a journalist or the documents for which production is sought include information relating to a journalist.

*Clause 8* inserts new section 79A into the Search and Surveillance Act 2012 to provide that an application for a search warrant must also include sufficient detail to inform an issuing officer if the enforcement officer knows or has reasonable grounds to believe that the person against whom the order is made is a journalist or the documents for which production is sought include information relating to a journalist.

*Clause 9* amends section 98 of the Search and Surveillance Act 2012 to provide that an application for a search warrant must also include sufficient detail to inform an issuing officer if the enforcement officer knows or has reasonable grounds to believe that the person against whom the order is made is a journalist or the documents for which production is sought include information relating to a journalist.

*Clause 10* amends section 102 by providing that an issuing officer must not issue a warrant to seize any electronic devices held by a journalist of a kind to which privilege normally applies unless those electronic devices have already been sought by a production order.

*Clause 11* inserts new section 102A in order to restrict the type of issuing officer that may issue a production order or search warrant where the rights of a journalist are involved.

*Clause 12* inserts new section 110A to provide for a general duty to protect journalists' rights when exercising powers.

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**The Parliament of New Zealand enacts as follows:****1 Title**

This Act is the Protection of Journalists' Sources Act **2021**.

**2 Commencement**

This Act comes into force on the day after the date on which it receives the Royal assent. 5

**Part 1****Amendment to the Evidence Act 2006****3 Amendments to Evidence Act 2006**

This Part amends the Evidence Act 2006. 10

**4 Section 68 amended (Protection of journalists' sources)**

In section 68(5), replace the definition of **journalist** with:

**journalist** means—

- (a) a person who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium; and 15
- (b) includes an investigative journalist who publishes work, including books, of in-depth inquiry and original research into matters of public interest that may not otherwise be disclosed.

**Part 2**

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**Amendments to the Search and Surveillance Act 2012****5 Amendments to Search and Surveillance Act 2012**

This Part amends the Search and Surveillance Act 2012.

**6 Section 3 amended (Interpretation)**

In section 3(1), insert in the appropriate alphabetical order: 25

**journalist** has the same meaning as in section 68(5) of the Evidence Act 2006

**7 Section 71 amended (Enforcement officer may apply for production order)**

After section 71(2), insert:

- (3) An application under this section must also include, if applicable, sufficient detail to inform an issuing officer if the enforcement officer knows or has reasonable grounds to believe that— 30
  - (a) the person against whom the order is made is a journalist; or

- (b) the documents for which production is sought include information relating to a journalist.

**8 New section 79A inserted (Production order where rights of journalist involved)**

After section 79, insert:

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**79A Production order where rights of journalist involved**

- (1) This section applies to a production order if the enforcement officer who applied for the order knows or has reasonable grounds to believe that—
- (a) the person against whom the order is made is a journalist; or
- (b) the documents for which production is sought include information relating to a journalist. 10
- (2) A production order to which this section applies must, in addition to the matters specified in section 75(2), include an explanation of the rights conferred on a journalist under section 68 of the Evidence Act 2006, and how those rights may be claimed (where applicable). 15
- (3) Where a production order is made in respect of documents that include information relating to a journalist, the enforcement officer who applied for the order must—
- (a) provide a copy of the order to the journalist to whom the information sought under the order relates as soon as reasonably practicable after the order is provided to the person against whom it is made; and 20
- (b) provide the journalist with a reasonable opportunity to seek legal advice and claim the rights conferred on a journalist under section 68 of the Evidence Act 2006.
- (4) A journalist must be given reasonable time to respond to a production order before a search warrant is sought. 25
- (5) The protections under section 68 of the Evidence Act 2006 apply with any necessary modifications to a production order under this section.

**9 Section 98 amended (Application for search warrant)**

After section 98(1), insert:

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- (1A) An application under this section must also include, if applicable, sufficient detail to inform an issuing officer if the applicant knows or has reasonable grounds to believe that—
- (a) the person who holds the item or items or evidential material sought under the search warrant is a journalist; or 35
- (b) the item or items or evidential material sought under the search warrant includes information relating to a journalist.

- (c) The protections under section 68 of the Evidence Act 2006 apply with any necessary modifications to a search warrant under this section.
- (1B) An application relating to items or evidential material held by a journalist or relating to a journalist may only be made after those items and evidential material have been sought with a production order. 5
- 10 Section 102 amended (Restrictions on issue of search warrant)**  
After section 102(1), insert:
- (2) An issuing officer must not issue a warrant to seize any electronic devices held by a journalist of a kind to which privilege in section 68(2) normally applies unless those electronic devices have already been sought by a production order. 10
- 11 New section 102A inserted (Restriction on type of issuing officer where rights of journalist involved)**  
After section 102, insert:
- 102A Restriction on type of issuing officer where rights of journalist involved**
- (1) An application for a search warrant to seize any thing that the applicant knows or has reasonable grounds to believe is held by a journalist, or includes information relating to a journalist, must be made to an issuing officer who is a Judge. 15
- (2) Where an issuing officer who is not a Judge has reasonable grounds to believe that an applicant for a search warrant seeks to seize any thing that is held by a journalist, or includes information relating to a journalist, the issuing officer must transfer the application to an issuing officer who is a Judge. 20
- 12 New section 110A inserted (General duty to protect journalists' rights when exercising search powers)**  
After section 110, insert: 25
- 110A General duty to protect journalists' rights when exercising powers**  
Every person exercising a power under this Act must exercise that power in a manner that protects—
- (a) the rights conferred on a journalist under section 68 of the Evidence Act 2006; and 30
- (b) any privilege held by, or available to, any journalist.