Human Rights Commission
Te Kahui Tika Tangata

3 September 2010

Justice and Electoral Committee
Parliament Buildings
WELLINGTON

Attention: James Picker

Dear Sir

The following comments on the revised Search and Surveillance Bill (the Bill) are made by the Human Rights Commission (the Commission). The Commission appreciates the effort that has gone into revising the Bill and commends the Committee for its decision to release the revised version for further public consultation.

The comments below refer to the matters raised in our original submission and whether – or how - they have been addressed.

1. Structure of the Bill

1.1 The Commission (along with a number of other submitters) was concerned that the Bill would extend the powers in Part 4 to a variety of enforcement agencies other than the police and in doing so would confer on those agencies a wider range of powers than they currently have. We recommended the powers conferred on non-police agencies, in particular, should be scrutinised more closely to decide whether they were really necessary and proportionate to what the agencies were designed to regulate.

1.2 Although the Law Commission claimed that the Bill simply consolidated existing powers the Select Committee recognised there was a problem which it attributed principally to a misunderstanding about how the Act was intended to work in practice. The Committee also accepted that while Part 4 did not contain any new independent powers it did create some ancillary powers that may have resulted in the misconception that the powers available to some agencies had been extended.

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1.3 The Interim Report reflects this concern and contains several suggestions for addressing it, including amending the Bill to clarify how Part 3 and Part 4 apply to powers conferred under other Acts, limiting approval for the use of surveillance devices on private property by non-police agencies and training such agencies in the appropriate use of surveillance.

1.4 These changes, together with the suggestion that a reference to human rights be included in the purpose clause, appear to address the Commission's concerns about the extension of powers to non-police agencies.

2. Reference to human rights in the purpose statement and training for law enforcement personnel.

2.1 In its initial submission, the Commission recognised there was a need to consolidate and update the statutory provisions relating to search and seizure. It also appreciated the attempt to provide a coherent, consistent and certain approach to search and surveillance by balancing the complementary values of law enforcement and human rights.

2.2 In order to ensure that human rights principles and law enforcement are truly complementary the Commission suggested that the new legislation should include a specific reference to human rights. We are pleased that the Select Committee has adopted this recommendation and proposed a statutory reference to human rights values in the purpose statement as a way of creating greater certainty and clarity in the law.

2.3 The Commission also noted in its submission that to ensure human rights values were properly recognised and understood, it was essential that law enforcement personnel were properly trained in, and aware of, their human rights obligations when implementing the Act.

2.4 The report on the Bill prepared by the Crime Prevention and Criminal Justice Division of the Ministry of Justice appeared to consider that this was already the case as one module of the current training for the Police specifically focuses on section 21 of the New Zealand Bill of Rights (NZBoRA) i.e. unreasonable search and seizure. The report anticipated that this training would continue and be available to different agencies affected by the Bill.

2.5 While this is commendable and the Commission recognises that this is not something that can be easily legislated for, we consider that a more robust approach that was not simply limited to s.21 could be adopted. Our experience with Operation 8 - outlined in our original submission - revealed that it was not only the legality of the searches that was of concern to people but the way in which the searches were carried out and how they engaged other NZBoRA rights such as the right to be treated with humanity and dignity when detained and freedom of association.

3. Justification for restricting certain rights

3.1 While the Commission recognises that it is possible to justify restrictions on the rights and freedoms in the NZBoRA, we still consider that allowing someone to be apprehended because they are suspected of being about to commit a crime is too low a threshold.

3.2 The Ministry of Justice Interim Report suggests that there is little difference between the tests of suspicion and belief. However, because the legislation has the potential to be so intrusive, the Commission considers that the suspicion test is unacceptably low. Even if there is little difference in practical terms – as the commentary seems to suggest (at para 71) – the Commission considers that setting a standard of reasonable belief sends a stronger message about the importance of respecting human rights.

3.3 The Commission was also concerned that a further effect of the Bill will be that search warrants will no longer need to be issued by a Judge but by "... any other person" (provided they have sufficient knowledge, skill and experience). Although the Ministry dismissed our concerns on the grounds that the qualification of sufficient knowledge etc. would mean that only suitably qualified people would be authorised to be issuing officers, it also considered that the Attorney-General should have the power to remove the authorisation for a justifiable reason.

3.4 The Select Committee has adopted this recommendation and amended the relevant clause accordingly. Although it remains to be seen how this plays out in practice, widening the group of persons able to issue warrants is possibly less concerning.

4. Consent by minors

4.1 In its original submission the Commission recommended that the age of consent to search a vehicle be raised from 14 to 18 (the age at which the United Nations Convention on the Rights of the Child (UNCROC) deems a person to be an adult).

4.2 We suggested raising the age because we considered that given the evolving concept of capacity that applies to children and is reflected in UNCROC, children and young people should not be presumed to acquire responsibility at a particular age. Some children may be mature enough to understand the consequences of their actions at 14 while others may not.

4.3 The Select Committee has decided not to raise the age of consent as it considers it would be anomalous if a person could be charged in relation to an offence involving a vehicle at 14 but unable to agree to the search of a vehicle. We find this argument unattractive. Rather than retaining the lower age of 14 because it equates with the age of criminal responsibility, the Commission considers it would be more appropriate to raise both to 18.

5. Residual warrants

5.1 Residual warrants are designed to ensure that evidence is not rendered inadmissible because the way in which it was obtained does not fit within a recognised category. From our initial reading of the Bill it appeared that an enforcement agency would be able to obtain a warrant if an agency considered that the device, technique or procedures they were proposing to use constituted an invasion of a person's "reasonable expectation of privacy".

5.2 While the Commission recognised what the Bill was trying to achieve by introducing the concept of the residual warrant, it also considered that the wording was overly vague and could make it difficult to question the legality of a search. In other words, it could create a category of surveillance techniques that were not subject to regulation.

5.3 We are pleased to see, therefore, that the Select Committee has conceded that the residual warrant provisions in the Bill "may be unclear and too wide ranging" and has recommended that the relevant clauses are amended and the residual warrant regime replaced with a declaratory order regime that is more narrowly circumscribed and requires greater accountability.

6. Examination Orders

6.1 The Bill introduces a limited examination power that would enable enforcement agencies to require a specified person to answer questions about the content and context of documents. The power would apply in both business and non-business contexts.

6.2 The Commission was critical of the wording in the Bill which could have potentially required any information to be provided as long as it satisfied the criteria in cls.32 and 34. That is, there were reasonable grounds for suspecting an offence that could attract a term of imprisonment had been committed and the person concerned had evidential information relevant to the investigation of the offence. We also considered, despite the Attorney-General's advice to the contrary, that the examination orders had the potential to infringe the right not to incriminate oneself.

6.3 The Commission considered that the definition of information for the purpose of examination orders was unreasonably broad, and recommended that it be redefined to limit the power to the assessment of complex documents for the purposes of fraud.

6.4 While recognising that examination orders provide the police with a valuable tool the Ministry and Law Commission considered that they were a novel order necessitating significant safeguards but also that, given the concerns raised by submitters, they should be further limited.

6.5 The Committee has therefore suggested limiting examination orders in the business context to offences carrying a maximum penalty of 5 or more years and in the non-business context, 7 or more years of imprisonment or where the offence is committed by an "organised criminal group" (as defined in the Crimes Act). It has also recommended changes to who can approve an application for such an order and the introduction of a reporting regime similar to that required for surveillance devices and residual warrants.

6.6 The requirement that offences carry greater periods of imprisonment effectively limits the conditions under which information can be sought for the purposes of an examination order, addressing the Commission's concerns.

7. Confidential journalistic sources

7.1 The Commission was one of two agencies that expressed concern about the protection of journalistic sources. We considered that the wide reach of the Bill meant that it could have a disproportionate impact on journalists. The only protection (which reflected the qualified protection in s.68 of the Evidence Act) was found in cl.130.

7.2 The Commission suggested that because of the Bill's potential to infringe freedom of expression and the importance of a free press in a democracy, consideration should be given to including a specific presumption against information held by journalists being subject to the legislation unless the criteria in cl.130(2) were satisfied.

7.3 The Ministry of Justice considered that the present protection was adequate and no change was warranted. However, submissions about the inadequate protection of legal sources led the Committee to suggest several changes to bring cl.100 into line with s.67 of the Evidence Act. As a result, the standard in cl.130(2) was raised and it now requires an issuing officer to be "satisfied that there is a prima facie case" that something was made, received, completed or prepared for a dishonest purpose or in the planning or committal of an offence.

7.4 While this is not the level of protection for journalist sources we originally suggested it does raise the threshold in cl.130(2).

The Commission thanks the Committee for providing an opportunity to comment on the proposed changes. The changes suggested reflect a thoughtful consideration of the issues raised by submitters and, while we have some outstanding issues which we have identified, most of the matters we raised in our original submission have been addressed at least to some extent.

Yours sincerely

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Chief Commissioner
Te Amokapua