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Electronic Technology and Police Investigations Some Issues

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Introduction

THE LAW COMMISSION has in hand a reference from its Minister relating to powers of entry, search and seizure. Because the project involves examining some hundreds of statutory provisions, it will be some time before it is completed.

It the meantime the Ministry of Justice, faced with certain deadlines in its legislative timetable, on 7 December 2001 requested advice from the Commission in the following terms:

> The Ministry requests that the Law Commission, pursuant to its powers under section 6(2)(d) of the Law Commission Act 1985, provides advice by the end of February 2002 on the following issues relating to Police search powers:
>
> 1. The power to obtain assistance orders for the search of computer systems. These would demand reasonable assistance in locating and downloading information from the person or company concerned. This power would apply to third parties, not to suspects themselves.
> 2. The power to use tracking devices, which enable the location of objects such as packages and vehicles to be monitored.
> 3. Legislative amendments to correct the anomaly identified by the Court of Appeal in *R v Aranui* (1999) 16 CRNZ 304, relating to the use of evidence of offending obtained under an interception warrant.

That advice was provided on 14 February 2002. This study paper reproduces that advice edited only for consistency with the stylistic standards employed in its publications by the Commission.

Commissioner Dugdale was the Commissioner having the carriage of this project and Michael Josling was the researcher.

Part I
Interception warrants

INTRODUCTION

1 PROVISION IN NEW ZEALAND law for a warrant to issue to a member of the police to intercept (a term that includes "hear, listen to, record, monitor or acquire") a private communication was first made by the Misuse of Drugs Amendment Act 1978. One purpose of that statute as expressed by its long title was "to facilitate the detection of certain drug dealing offences" and the power to issue an interception warrant was confined to cases where such an offence was suspected. Because such a warrant constitutes a substantial invasion of privacy, the new power was carefully hedged around with safeguards. One safeguard was a provision in section 26 that no evidence of an intercepted communication relating to other than such a drug dealing offence was admissible in evidence.

2 Civil libertarians who oppose increased police powers on thin-end-of-the-wedge or slippery-slope grounds can point to the history of interception warrants as demonstrating that their fears are not groundless. The Crimes Amendment Act (No 2) 1987 inserted Part XIA into the Crimes Act 1961. This Part was modelled on the corresponding provisions in the Misuse of Drugs Amendment Act 1978. The power conferred by Part XIA was to issue an interception warrant where plotting by members of an "organised criminal enterprise" was suspected. An organised criminal enterprise is "a continuing association of three or more persons having as its object or as one of its objects the acquisition of substantial income or assets by means of a continuing course of criminal conduct". There was a provision (section 312M) in terms not identical to, but having the same general purpose as, the Misuse of Drugs Amendment Act 1978 section 26.

3 The Misuse of Drugs Amendment Act 1978 was extended to dealing in cannabis on a substantial scale by the Misuse of Drugs Amendment Act (No 2) 1997. Part XIA of the Crimes Act 1961 was extended by the Crimes Amendment Act (No 2) 1997 to suspected serious violent offences and, in respect of such offences, was widened to include as a ground for the issue of a warrant the belief that such an offence might be *prevented*.

4 Included on its introduction in Part XIA of the Crimes Act was section 312N subsection (2) which (as amended following the 1997 insertion of the reference to a prescribed cannabis offence in the Misuse of Drugs legislation referred to above) provides an exception to the general prohibition of the use of information about other offences fortuitously obtained in the course of excising interception warrant powers. The subsection reads as follows:

(2) If, in any proceedings for a drug dealing offence [or a prescribed cannabis offence (as those terms are defined in section 10 of the Misuse of Drugs Amendment Act 1978)],—

(a) Evidence is sought to be adduced of a private communication intercepted in pursuance of an interception warrant or an emergency permit issued under this Part of this Act; and

(b) The Judge is satisfied, on the evidence then before the Judge,—

(i) That a warrant or permit could have been issued under Part 2 of the Misuse of Drugs Amendment Act 1978; and

(ii) That the evidence sought to be adduced would have been admissible if the warrant or permit had been issued under that Part of that Act,—

the evidence may be admitted notwithstanding subsection (1) of this section.

At the same time as the enactment of Part XIA, a provision corresponding to section 312N(2) was inserted into section 26 of the Misuse of Drugs Amendment Act 1978, subsection (2) of which (as amended following the 1997 insertion of the reference to serious violent offences in Part XIA) reads as follows:

(2) If, in any proceedings for [a specified offence or a serious violent offence (as those terms are defined in section 312A of the Crimes Act 1961)] or a conspiracy to commit such an offence,—

(a) Evidence is sought to be adduced of a private communication intercepted in pursuance of an interception warrant or an emergency permit issued under this Part of this Act; and

(b) The Judge is satisfied, on the evidence then before the Judge,—

(i) That a warrant or permit could have been issued under Part 11A of the Crimes Act 1961; and

(ii) That the evidence sought to be adduced would have been admissible if the warrant or permit had been issued under that Part of that Act,—

the evidence may be admitted notwithstanding subsection (1) of this section.

5 In *R v Saunders-Francis* [1991] 1 NZLR 513 Richardson J for the Court of Appeal identified the intention of the legislature in enacting the provisions referred to in the previous paragraph in these terms:

> The legislation recognises that, although there are separate and parallel provisions for the issue of interception warrants and the use of material obtained under warrants, they are serving the same broad ends; they are subject to essentially the same stringent procedures and control; and they cannot sensibly be considered in isolation one from the other where evidence becomes available under one warrant which is relevant to offending to which the other statute is directed.
>
> In this regard it is significant that at the same time that Part XIA was introduced into the Crimes Act, a provision corresponding to s 312N(2) was enacted as s 26(2) of the Misuse of Drugs Amendment Act 1978. The legislature has demonstrated in the clearest terms that its intention is to allow evidence obtained under interception warrants disclosing serious crime of the kind outlined in s 312B(1) of the Crimes Act on the one hand, and drug-dealing offences under s 10 of the Misuse of Drugs Amendment Act on the other, to be admissible in proceedings when the interception warrant was obtained under the other Act. That crossover is carefully controlled and limited. The test that is applied to the use of such evidence in drug-dealing proceedings is whether a drug warrant could have been issued, and if so, whether that evidence would have been admissible under the misuse of Drugs Amendment Act.

This statement was adopted by the Court of Appeal in *R v Aranui* (1999) 16 CRNZ 304, 308.

6 *R v Aranui* demonstrates the limits to the statutory mechanism. The accused was arrested and charged with serious violent offences and eventually released on bail. While on bail, the accused was overheard making statements in relation to those offences, his conversation being intercepted pursuant to a Misuse of Drugs Act warrant authorising interception of conversations at a named address. The accused was not named either in the warrant or in the papers placed before the judge issuing the warrant. At the time of obtaining the warrant the police had no information as to the accused's connection with the address. The Court said:

> The crossover philosophy is to allow evidence obtained under one Act to be viewed as if it had been obtained under the second Act, but only if it could have been obtained under the latter. (Page 310.)

The Court held that a Crimes Act warrant could not have been obtained for two reasons.

7 One difficulty related to the words "successful conclusion" in section 312CB(1)(c) that lists the matters of which the issuing Judge must be satisfied as including the following:

> (c) Whichever of the following is applicable:
>
> (i) Other investigative procedures and techniques have been tried but have failed to facilitate the successful conclusion of the Police investigation of the case or, as the case may be, to provide assistance in preventing the commission of a serious violent offence; or
>
> (ii) Other investigative procedures and techniques are unlikely to facilitate the successful conclusion of the Police investigation of the case or, as the case may be, prevent the commission of a serious violent offence, or are likely to be too dangerous to adopt in the particular case; or
>
> (iii) The case is so urgent that it would be impractical to carry out the Police investigation using only investigative procedures and techniques other than the interception of private communications.

Here, the accused had been arrested and charged, and the Court said:

> In the context of the legislation, which is directed to enabling the police to obtain information, not otherwise available, by intercepting private communications, the phrase "successful conclusion of the police investigation" must be given a purposive meaning. The obvious intention is to allow such evidence to be obtained on a strictly controlled basis where ordinary methods have been unsuccessful in yielding sufficient evidence to warrant prosecution. It seems to us to be implicit in this provision that the police must be in a position where further evidence is required in order to establish a suspect's complicity in criminal activity. It is not directed to obtaining further evidence after the subject has been arrested and charged.
>
> If the police are not in possession of information which is likely to result in a successful conclusion of an investigation, a charge cannot be warranted. Conversely, if a charge is warranted, then the need for further evidence by this exceptional means to enable a conviction to be sought should have disappeared. If this desirable weapon in the armoury of the police is to be used as a means of gathering additional information once a suspect has on proper grounds been arrested and charged, then clear words are required. The indications are all to the contrary.
>
> In the present case there could have been no question of the police obtaining a warrant prior to the applicant's arrest. He was nominated by a co-offender as a participant, and within a short time interviewed and arrested. Once he had been arrested and charged, we are unable to see how a Judge could certify being satisfied that the admissible evidence then available to the police had not helped, or was

> unlikely to help, bring the investigation to a successful conclusion. The use of the word "facilitate" is significant. It does not equate, for example, "ensure". The New Shorter Oxford gives a meaning of "make easy or easier, promote, help forward". The dual contentions of the police that a successful conclusion had not [been] or was unlikely to be reached, and that there was sufficient evidence available to place the suspect on trial, are inconsistent. This special legislation is not designed to allow an existing prosecution to be strengthened. (Page 309.)

8 The second difficulty in the way of admissibility was that section 312D(1)(b)(ii) would, in the circumstances, have required the suspect to have been named and his address given in the warrant, or the premises specified. The police had, at the relevant time, no information justifying obtaining a Crimes Act warrant complying with these requirements because, before the chance interception of accused's statements, the police lacked the information to connect him to the premises or what was there occurring.

9 The precise matter on which we have been asked to advise has been identified by the Ministry of Justice in these terms:

> Legislative amendments to correct the anomaly identified by the Court of Appeal in *R v Aranui* (1999) 16 CRNZ 304, relating to the use of evidence of offending obtained under an interception warrant.

10 There were, as already noted, two matters decided in *Aranui*. The first point, although in *Aranui* it arose in a cross-over case, is not confined to cross-over situations. The issue (which is purely one of policy) is whether it should be lawful to obtain evidence by way of an interception warrant in order to clinch the case against a person already arrested and charged with a relevant offence. *R v Aranui* was a serious violent offence case to which Crimes Act section 312CB(1)(c) applies, but Crimes Act 1961 section 312B(e) (organised criminal enterprises) and Misuse of Drugs Amendment Act 1978 section 15(c) are sufficiently alike in their terms for it to be clear that, if *Aranui* was correctly decided, an interception warrant may not be granted to enable the obtaining of evidence to strengthen the case against a person already charged. It is not in the least unusual, particularly in serious cases, for police investigations to continue for this purpose well after a defendant is arrested and charged.

11 On this policy point, there is exalted authority for viewing with disfavour those who "strain at a gnat, and swallow a camel" (Matthew 23:24). It is more than a little odd to regard certain circumstances as so grave that the invasive investigation method of interception should be available up to the stage of arresting and charging a suspect, but to withhold availability of the method for the purposes of trying to ensure that a sufficiently strong case is made against a party charged. It would still be necessary to satisfy the "last resort" jurisdictional requirements and no doubt, in practice, this will be particularly difficult when an offender has been identified and charged, but even so the legislation should leave the possibility open.

12 This is essentially the view that had been arrived at by the Court of Appeal in *R v Aitken* [1988] 1 NZLR 252, 255 where the Court observed that:

> Section 15(c) refers to other investigatory procedures and techniques being unlikely to facilitate the successful conclusion of the Police investigation of the case. To give the statute a reasonable and workable interpretation, that must be held to extend to enabling the police to carry their investigation of a case as a whole, involving the activities of a drug ring, to a successful conclusion in the sense that

> the maximum available evidence in support of a Crown case against all involved in the ring has been obtained.

That approach was endorsed by the Court of Appeal in *R v Honan* [1991] 7 CRNZ 473, 478. Neither of these authorities were cited in *Aranui*. *R v Aranui* was overruled on this point by *R v Bouwer* [2002] 1 NZLR 105 where the Court of Appeal said:

> It seems to us that there is no necessary inconsistency between the belief of the police that they have enough evidence to justify charging someone with a crime and their considering that they still have not successfully concluded their investigation. They may well feel that they can establish a prima facie case, but also think that it is not especially strong and that there are aspects which can be strengthened if certain lines of investigation are further pursued. Although the High Court should be particularly cautious about granting a warrant authorising interception of conversations of an accused after there has been a charge, we are of the opinion that such a course is not precluded merely by the existence of the charge. (Page 112.)

This ruling would seem to take care of the first point in *Aranui*. If it were thought necessary to amend the two statutes, one simple way of the doing so would be to amend the Misuse of Drugs Amendment Act 1978 section 15 and the Crimes Act 1961 section 312B and section 312CB by inserting a provision to the effect that, for the purposes of those sections, the police investigation of a case is not concluded by reason only of the fact that a suspect has been charged. But we very much doubt whether there is need for amendment at all.

13 The second point on which *Aranui* turned is one that arises only in the cross-over context. The issue is not one of principle. The problem is a drafting one and arises because of a shortcut taken by the draftsman in using as a criterion of admissibility the words (in the case of Crimes Act 1961 section 312N(2)(b)(i)):

> That a warrant or permit could have been issued under Part II of the Misuse of Drugs Amendment Act 1978.

and in the Misuse of Drugs Amendment Act 1978 section 26(2)(b)(i):

> That a warrant or permit could have been issued under Part XIA of the Crimes Act 1961.

14 Both statutes define the offences that the judge must have reasonable grounds for believing to have been committed or to be contemplated (Misuse of Drugs Amendment Act 1978 sections 15, 15A and 15B; Crimes Act 1961 sections 312C and 312CB). In addition, both statutes prescribe the contents of warrants (Misuse of Drugs Amendment Act 1978 section 16, Crimes Act 1961 section 312D). We will call the requirement as to the contents of warrants the formal requirements. The trouble with the use of the shortcut described in the previous paragraph is exemplified by the decision in *Aranui*. In that case it was held that a warrant could not have been issued because the formal requirements could not have been satisfied. The provisions of the statutes as they stand are properly concerned to achieve a nice balance between the competing demands of privacy on the one hand and criminal investigation on the other. But the warrant is no more than a document, the purpose of which is to record for the benefit of all affected (including the constable) the metes and bounds of the constable's authority. The purpose of the requirement of a written warrant is to assist the policing of the requirement that the power be used only within the boundaries

that the issuing judge thought appropriate and this purpose is achieved by stipulating, for the purpose of avoiding any ambiguity, certain matters that the warrant must record. None of this has relevance when, on a cross-over application to the same or a different judge after the powers recorded by the warrant have been exercised, the question of the admission of evidence of other offences obtained fortuitously by means of the interception, is under consideration.

15 The inclusion in the requirements on which the judge must be satisfied on a cross-over application of the formal requirement is, we suggest, no more than a piece of drafting clumsiness which can be remedied without doing violence to the principles of the legislation by substituting words confining the requirement to one that the offence evidence, of which is fortuitously discovered in the course of a lawful interception, must be within the offence definition. So that the Crimes Act 1961 section 312N would read:

> Where a private communication intercepted in pursuance of an interception warrant or an emergency permit discloses evidence relating to any offence other than –
>
> (a) a specified offence, or a conspiracy to comment such an office; or
>
> (b) a serious violent offence, or a conspiracy to commit such an offence; or
>
> (c) a drug dealing offence or a prescribed cannabis offence (as those terms are defined in section 10 of the Misuse of Drugs Amendment Act 1978), –
>
> no evidence of that communication or of its substance, meaning, or purport, may be given in any Court.

And the Misuse of Drugs Amendment Act 1978 section 26 would read:

> Where a private communication intercepted in pursuance of a interception warrant or an emergency permit discloses evidence relating to any offence other than –
>
> (a) a drug dealing offence; or
>
> (b) a prescribed cannabis offence; or
>
> (c) a specified offence as defined in the Crimes Act 1961 section 312A; or a conspiracy to commit such an offence; or
>
> (d) a serious violent offence as defined in the Crimes Act 1961 section 312A, or a conspiracy to comment such an offence, –
>
> no evidence of that communication or of its substance, meaning, or purport, may be given in any Court.

16 This change would also effect the alteration to the law attempted unsuccessfully by the enactment of a new section 312N(1) by section 19(1) of the Crimes Amendment Act (No 2) 1997 and of alternatives to section 26(1) and (2) by section 14 of the Misuse of Drugs Amendment Act (No 2) 1997. These measures began life as part of the Harassment and Criminal Associations Bill 1996. We set out the explanatory note to the relevant portion of clause 51 (the forerunner of the Crimes Amendment Act (No 2) 1997 provision) in full as follows:

> The intention of the amendment is that the reference to "a specified offence" be interpreted to encompass only the actual offences in respect of which a warrant may be issued under section 312C, without encompassing the other elements required for the purposes of the issue of a warrant. This means that where evidence relating to one of those offences is lawfully obtained pursuant to an interception warrant or permit, the evidence is admissible in a prosecution for the offence even though the offender is not part of an organised criminal enterprise or the offence is not part of an ongoing pattern of criminal activity by members of such an enterprise.

We emphasise the words "without encompassing the other elements required for the purposes of the issue of a warrant". The section was enacted as proposed. There seems to have been no contemporary misunderstanding of the intended effect of clause 51. The Ministry of Justice, assisting the select committee, told it "the effect of the amendment is that evidence of a kind that attracts interception powers obtained by a lawful interception is admissible in evidence whether or not the additional requirements for obtaining a warrant are satisfied". The explanatory note to the relevant portion of clause 80 (the forerunner of the Misuse of Drugs Amendment Act 1997 provision) is to the same general effect. These amendments failed to achieve their intended purpose because, in each case, that purpose seemed negated by the preservation of the subsequent subsections of each section.

17 Although we have suggested a solution intended to result in as little disturbance to the existing statues as possible, it may well be that Parliamentary Counsel will prefer to recommend grasping the nettle of replacing the fascicle of sections in each of the two statutes with a single code. This would do away with a great deal of repetition, but runs the risk that attempts may be made to relitigate issues already settled.

Part II
Assisting searches and interceptions

THE PROBLEM

18 A SEARCH WARRANT is a licence to the constable to whom it is addressed to perform acts that would otherwise be trespasses. It imposes no *legal* duty on the occupier of premises or on any other person to assist the constable in his search, though no doubt upright citizens will recognise a moral and social obligation so to do. The general rule is that while such other person may not hinder the constable (this would be an offence under the Summary Offences Act 1981 section 23) such a person is under no legal obligation (in the absence of an express statutory requirement) to lift a finger to help. The same rule applies to an interception warrant (discussed in the previous part). In the case of a third class of warrant, a call data warrant issued under the Telecommunications (Residual Powers) Act 1987 section 10B, there is an express statutory requirement to assist (section 10D) to which we will need to refer.

19 It seems clear enough that this rule is insufficiently sophisticated to cope fairly with some circumstances in which legitimate criminal investigation processes encounter contemporary technology. In particular:

- law enforcement access to computer-stored data may be difficult or time-consuming (and so unnecessarily expensive) or impossible unless the searcher is provided with various types of assistance such as passwords and information enabling decryption; and
- to the extent that the law permits access to the contents of telecommunications the co-operation of carriers and providers is needed.

It should be made clear that there is no question of interfering with the rules protecting a person suspected of an offence from self-incrimination. The concern is with the rights and obligations of third parties.

20 It is against this background that we have been asked to advise the Ministry of Justice in the context of police search powers on:

> The power to obtain assistance orders for the search of computer systems. These would demand reasonable assistance in locating and downloading information from the person or company concerned. This power would apply to third parties, not the suspects themselves.

21 The points arising are:

- whether the law should impose an obligation on third parties to assist (either in every case or if a court so orders);

- whether the party required to assist should be compensated for his services; and
- whether and to what extent carriers and providers should be required to employ systems that will preserve information that law enforcement officers are likely to require in a readily accessible form.

22 In practice in New Zealand such organisations as Telecom New Zealand Limited and Vodafone New Zealand Limited readily co-operate with the police. No doubt this is from a desire to be good corporate citizens, but there is also the factor expressed in the Explanatory Report to the Convention on Cybercrime adopted by the Committee of Ministers of the Council of Europe at its 109th Session (8 November 2001) in these terms:

> This power is not only of benefit to the investigating authorities. Without such co-operation, investigative authorities could remain on the searched premises and prevent access to the computer system for long periods of time while undertaking the search. This could be an economic burden on legitimate businesses or customers and subscribers that are denied access to data during this time. A means to order the co-operation of knowledgeable persons would help in making searches more effective and cost efficient, both for law enforcement and innocent individuals affected. Legally compelling a system administrator to assist may also relieve the administrator of any contractual or other obligations not to disclose the data. (Paragraph 201.)

We understand that in fact the Telecommunications (Residual Powers) Act 1987 section 10D requiring a network operator to assist in the operation of a call data warrant was enacted at the request of operators who wished to be helpful but needed protection from any suggestion of contractual breaches.

COMPARATIVE MATERIAL

23 Part 14 of the Australian Telecommunications Act 1997 imposes on the telecommunications industry obligations to provide necessary assistance for law enforcement purposes. Section 313(3) is in the following terms:

> (3) A carrier or carriage service provider must, in connection with:
> (a) the operation by the carrier or provider of telecommunications networks or facilities; or
> (b) the supply by the carrier or provider of carriage services;
> give officers and authorities of the Commonwealth and of the States and Territories such help as is reasonably necessary for the following purposes:
> (c) enforcing the criminal law and laws imposing pecuniary penalties;
> (d) protecting the public revenue;
> (e) safeguarding national security.

Section 313(4) imposes identical obligations on a carriage service intermediary. The effect of section 314(3A) is that the basic cost of providing such assistance is born by the provider. Part 15 imposes an obligation to provide at the expense of the provider an interception capability.

24 Still in Australia, the Cybercrime Act 2001 inserted in the Crimes Act 1914 a new section 3LA as follows:

> **3LA Person with knowledge of a computer or a computer system to assist access etc.**
> (1) The executing officer may apply to a magistrate for an order requiring a specified person to provide any information or assistance that is reasonable and necessary to allow the officer to do one or more of the following:

(a) access data held in, or accessible from, a computer that is on warrant premises;
(b) copy the data to a data storage device;
(c) convert the data into documentary form.

(2) The magistrate may grant the order if the magistrate is satisfied that:
(a) there are reasonable grounds for suspecting that evidential material is held in, or is accessible from, the computer; and
(b) the specified person is:
(i) reasonably suspected of having committed the offence stated in the relevant warrant; or
(ii) the owner or lessee of the computer; or
(iii) an employee of the owner or lessee of the computer; and
(c) the specified person has relevant knowledge of:
(i) the computer or a computer network of which the computer forms a part; or
(ii) measures applied to protect data held in, or accessible from, the computer.

(3) A person commits an offence if the person fails to comply with the order.
Penalty: 6 months imprisonment.

The same statute inserts in the Crimes Act 1914 section 201A as follows:

201A Person with knowledge of a computer or a computer system to assist access etc.
(1) An executing officer may apply to a magistrate for an order requiring a specified person to provide any information or assistance that is reasonable and necessary to allow the officer to do one or more of the following:
(a) access data held in, or accessible from, a computer that is on warrant premises;
(b) copy the data to a data storage device;
(c) convert the data into a documentary form.

(2) The magistrate may grant the order if the magistrate is satisfied that:
(a) there are reasonable grounds for suspecting that evidential material is held in, or is accessible from, the computer; and
(b) the specified person is:
(i) reasonably suspected of having committed the offence stated in the relevant warrant; or
(ii) the owner or lessee of the computer; or
(iii) an employee of the owner or lessee of the computer; and
(c) the specified person has relevant knowledge of:
(i) the computer or a computer network of which the computer forms a part; or
(ii) measures applied to protect data held in, or accessible from, the computer.

(3) A person commits an offence if the person fails to comply with the order.
Penalty: 6 months imprisonment.

It will be noted that in each of these new sections the effect of the definition of "specified person" in subsection (2)(b) that the provision does impinge on the right to avoid self-incrimination.

25 In the United Kingdom the Police and Criminal Evidence Act 1984 section 20 provides as follows:

20 Extension of powers of seizure to computerised information

(1) Every power of seizure which is conferred by an enactment to which this section applies on a constable who has entered premises in the exercise of a power conferred by an enactment shall be construed as including a power to require any information contained in a computer and accessible from

the premises to be produced in a form in which it can be taken away and in which it is visible and legible.

(2) This section applies –
(a) to any enactment contained in an Act passed before this Act;
(b) to sections 8 and 18 above;
(c) to paragraph 134 of Schedule 1 to this Act; and
(d) to any enactment contained in a Act passed after this Act.

Under the UK Regulation of Investigatory Powers Act 2000:

- Section 12 entitles a Minister to require providers of public postal services or public telecommunications services to maintain an interception capability and section 14 contemplates the granting of a contribution to compliance costs;
- Chapter II of Part I imposes a duty on a postal or telecommunications operator to provide on notice certain classes of information, mainly "traffic data" which means broadly data identifying persons, apparatus or the locations of apparatus, and section 24 contemplates the granting of a contribution to compliance costs.
- Part III is a code requiring third parties to provide keys to electronic data inaccessible without the key and section 52 contemplates the granting of a contribution to compliance costs.

26 Articles 18–20 of the Council of Europe Convention on Cybercrime, referred to in paragraph 22, require member states to adopt measures to empower ordering the production of computer data by any person within whose control it is. Such power must extend to the real-time collection of traffic data and interception of contact data. Paragraph 4 of Article 19 reads:

> Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to order any person who has knowledge about the functioning of the computer system or measures applied to protect the computer data therein to provide, as is reasonable, the necessary information, to enable the undertaking of the measures referred to in paragraphs 1 and 2.

The Convention leaves to member states the question of the incidence of costs.

27 In the United States of America, Title III of the Omnibus Crime Control and Safe Streets Act 1968 established a judicial process by which law enforcement officials could obtain authorisation to conduct electronic surveillance. An amendment of 1970 (Public Law 91–358) inserted in paragraph 4 of the relevant section (18 USC section 2518) the following:

> An order authorizing the interception of a wire, oral, or electronic communication under this chapter shall, upon request of the applicant, direct that a provider of wire or electronic communication service, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider, landlord, custodian, or person is according the person whose communications are to be intercepted. Any provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing such facilities or assistance.

The US Communications Assistance for Law Enforcement Act 1994 imposes on telecommunications carriers the obligation to modify the design of their equipment, facilities and services to ensure that lawfully authorised surveillance can actually be performed, and imposed an affirmative duty on manufacturers of telecommunications equipment and support service providers to make available all features or modifications necessary to meet the assistance capability requirements of the Communications Assistance for Law Enforcement Act. The entire scheme proceeds on the premise that the cost will be compensated by the United States Government.

AN OBLIGATION TO ASSIST

28 We now return to consider, with the assistance of all this comparative material, the three issues identified in paragraph 21. By way of preface to our discussion we note that although the fact has tended to be lost sight of with the retreat from occupational licensing that was part of the economic shift of the 1990s, the rule that the right to engage in certain callings carries with it public obligations is one that has long formed part of the law. A common carrier was, in the absence of lawful grounds for refusal, obliged to accept goods from all comers, and this remained the law of New Zealand until abolished by the Carriage of Goods Act 1979 section 28. Barristers accept an ethical obligation enforceable by statutory disciplinary mechanisms to accept any brief within their field of expertise for which they are available. To assist in the investigation of traffic in stolen goods secondhand dealers must keep certain detailed records (Secondhand Dealers Act 1963 sections 12 and 12A) and retain certain classes of goods for a month before onselling (section 14). Until it was repealed by the Sale of Liquor Act 1989 the Sale of Liquor Act 1962 section 182(2) (like its predecessors) required urban hotel or tavern premises to provide "a place of convenience for the use of the public", in other words a public lavatory. Traditionally, copyright statutes require publishers to deliver copies of books to particular depositories. The current New Zealand provision is the National Library Act 1965 section 30A. We have already referred to the Telecommunications (Residual Powers) Act 1987 section 10D which provides:

> 10D. Network operator required to assist in execution of warrant – A network operator that owns or operates a network that is subject to a call data warrant must provide such assistance as is necessary to enable any person who is authorised by the warrant to connect a telephone analyser –
>
> (a) To locate the part of the network to which the analyser is to be connected (including, where necessary, any relevant line, apparatus, or equipment); and
>
> (b) To connect the analyser in accordance with the warrant.

No doubt the law contains other examples. The reasons for these various measures are diverse, but they all support the proposition that the law has never shrunk from imposing, in the community interest, obligations on particular occupational groups.

29 On the general point of an obligation to assist, we recommend that section 198 of the Summary Proceedings Act 1957 be amended to provide for an order imposing:

- An obligation on any person (not being a person suspected of having committed the relevant offence) to provide information and assistance in

terms comparable with parts of the Australian Crimes Act section 3LA inserted in the Crimes Act 1914 by the Cybercrime Act 2001 and set out in paragraph 24. Such an order would authorise the judicial officer issuing the warrant either at the time of issuing the warrant or subsequently to order a specified person to provide any information or assistance that is reasonable and necessary to allow the constable to do one or more of the following: namely access data held in, or accessible from, a computer that is on premises defined in the warrant, copy the data to a data storage device or convert the data into documentary form. New Zealand precedents for statutory provision comparable in effect are to found in the Telecommunications (Residual Powers) Act 1987 section 10D (set out in paragraph 28), the Serious Fraud Office Act 1990 sections 5(2)(b), 9(2)(d) and 12(1)(f) (note the definition of "document" in section 2) and the Submarine Cables and Pipelines Protection Act 1996 (section 20(2)(b)) and in the decision of the Cabinet Policy Committee on 12 December 2001 to legislate to "impose a 'duty to assist' on all telecommunications service providers to provide reasonable assistance to Police, GCSB and SIS in executing an interception warrant, within their technical capacity and on a cost recovery basis".

- An obligation on any person (not being a person suspected of having committed the relevant offence) to furnish the key to electronic data that a constable is entitled to search. A suitable definition of "key" is to be found in the Regulation of Investigatory Powers Act 2000 (UK) in section 56(1):

  > . . . "key", in relation to any electronic data, means any key, code, password, algorithm or other data the use of which (with or without other keys)–
  > (a) allows access to the electronic data, or
  > (b) facilitates the putting of the data into an intelligible form . . .

THE COST OF FURNISHING ASSISTANCE

30 On the second point, that is how the cost of furnishing the assistance is to be borne, it will be seen from the material set out above that in the United States of America those giving the help have an entitlement (perhaps on constitutional grounds) to be fully indemnified, that in Australia, telecommunications carriers and intermediaries must bear the cost themselves and that in the United Kingdom, what has been provided is a middle way, a discretionary contribution to the costs of the party providing the assistance. In New Zealand, the issue has been a live one. Press reports suggest that the communications providers Saturn and Clear did not, but Telecom for some four years and Vodafone for a lesser period have charged for assistance and that the cost to police is between $500 000 and $750 000 per year ("Big bill in police searches" *New Zealand Herald*, 1 August 2000; "Police want phone search fee dropped" *Dominion*, 1 August 2000). Telecom charged the police $40 000 to sift through telephone records in the inquiry into the murder of Terri King ("Telecom charges police $40 000 for murder search" *New Zealand Herald*, 29 July 2000). Telephone record searches were said to be a big part of the cost of the investigation into the disappearance of Gavin Dash ("Police cop big bills for phone probes" *Evening Post*, 29 July 2000). A High Court judge (Priestley J) has been reported as criticising Telecom for charging $2 400 for telephone intercepts involving drug smugglers Lorraine and Aaron Cohen. Other inquiries were not taken further because of police lack of cash. ("Judge ticks off Telecom for charging

for phone tap" *Dominion*, 17 November 2001). Police confirm to us that these figures are substantially correct.

31 There are a number of options as to how any statute imposing a duty to assist should deal with the cost of furnishing assistance:

- The statute could be silent on the question of cost, as are the Serious Fraud Office Act 1990 sections referred to in paragraph 29, the Submarine Cables and Pipelines Protection Act 1996 section referred to in the same paragraph and the Telecommunications Act 1987 section 10D set out in paragraph 28. This would not preclude ex gratia payments by the police.
- The statute could spell out that the cost of providing the assistance is to be borne by the provider. The arguments in favour of this are the notions of community obligation touched on in paragraph 28 and the fact touched on in paragraph 22 that it is probably in the interests of a third party to provide the assistance rather than having the constable take away the computer or getting underfoot while he tries to access the information unaided. The contrary argument is that such an obligation could cast an unfair burden (in particular on small operators) and that free of any cost obligation police may overuse the obtaining of such orders.
- The statute could spell out that the provision of assistance was to be on the basis of recovery of the cost from the police or other enforcement agency. There is a precedent for this in the decision regarding interception warrants already referred to in paragraph 29.

32 Our recommendation is against adopting any of these three options in favour of a fourth, which would entitle the third party providing the assistance to seek from the District Court, if the provision of the information has imposed extraordinary financial hardship, an order for recompense. The fact that such an application would involve the applicant in legal costs would have the consequence that an application would not be made where the claim was trifling, and the formulation suggested would limit its application in practice to the relief of the hardship to the small operator of long and difficult searches. In practice, we would expect such applications to be resolved by agreement. The provision should expressly provide that the obligation to assist is not suspended pending the determination of any issue of recompense.

A DUTY TO MODIFY

33 The final point is whether, as under the UK Regulation of Investigatory Powers Act 2000, Part 15 of the Australian Telecommunications Act 1997 and the US Communications Assistance for Law Enforcement Act 1994, service providers should be subjected to an affirmative duty to modify their systems if need be to enable them to comply effectively with the obligation to assist that we suggest, and if yes how the cost should be borne. Circumstances of which we have been informed, in which this issue is currently important in New Zealand are:

- The reported technical impossibility of interceptions on the Vodafone network, said to require $1.1 million to correct, an estimate disputed by one expert ("Police close to new deal on bugging cellphones" *New Zealand Herald*, 22 February 2001). Reports suggest that police paid for a comparable

modification by Telecom ("Police want $1 million to tap cellphone criminals" *Dominion*, 22 February 2001).

- The fact that it is impossible to trace the users of mobile phones with pre-paid calling capacity, and that this is well known to professional criminals ("Pre-paid cellphone a crook's best mate" *New Zealand Herald*, 20 March 2000).

34 In relation to the first of these situations, the Cabinet Policy Committee on 12 December 2001 agreed on a policy for the imposition of interception capability requirements and the incidence of the cost and there is no point in the Law Commission discussing this matter further. In relation to mobile phones with pre-paid calling capability, we have discussed the matter with the police. In their view (and we agree), the inconvenience of the current situation is insufficiently great to justify the elaborate mechanisms that would be necessary (identification of buyers of mobile phones, keeping of registers, prohibition of buying by dummy agents and so on) to try to put an end to it.

Part III
Tracking devices

35 ELECTRONIC TRACKING DEVICES enabling the location of a vehicle or package to be monitored are a useful law enforcement tool. The only statutory provision in New Zealand making provision for the use of tracking devices is the Misuse of Drugs Amendment Act 1978 section 13 which applies only to the investigation of drug offences. The problem in other cases is that because the physical affixing of the device and probably its ultimate removal would constitute trespass (to land, or even if the affixing is in a public or other place which the officer is licensed to enter, to the chattel to which the device is affixed) there is a risk that evidence so obtained may be ruled inadmissible as unlawfully obtained. Our terms of reference require us to advise on:

> The power to use tracking devices, which enable the location of objects such as packages and vehicles to be monitored.

They do not extend to tracking the movement of human beings.

36 Except for the trespass involved in the affixing or removal of the device there is no obvious reason why surveillance that is permissible by the use of manpower should be regarded as impermissible when carried out more efficiently with the aid of an electronic device. Statutory provision for the issue of warrants authorising electronic tracking is common in comparable jurisdictions with our own. Examples are:

- in the United Kingdom, the Police Act 1997 section 93 and the Regulation of Investigatory Powers Act 2000 Part II;
- in Canada section 492.1 of the Criminal Code;
- in Queensland, the Crime Commission Act 1997 section 82 and the Police Powers and Responsibilities Act 1997 section 68;
- in the Northern Territory, the Surveillance Devices Act 2000;
- in Victoria, the Surveillance Devices Act 1999;
- in Western Australia, the Surveillance Devices Act 1998 section 7.

37 Our recommendation is that legislation be enacted along the lines of the Canadian provision which is in the following terms:

> **492.1** (1) A justice who is satisfied by information on oath in writing that there are reasonable grounds to suspect that an offence under this or any other Act of Parliament has been or will be committed and that information that is relevant to the commission of the offence, including the whereabouts of any person, can be obtained through the use of a tracking device, may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant

(a) to install, maintain and remove a tracking device in or on any thing, including a thing carried, used or worn by any person; and
(b) to monitor, or to have monitored, a tracking device installed in or on any thing.

(2) A warrant issued under subsection (1) is valid for the period, not exceeding sixty days, mentioned in it.

(3) A justice may issue further warrants under this section.

(4) For the purposes of this section, "tracking device" means any device that, when installed in or on any thing, may be used to help ascertain, by electronic or other means, the location of any thing or person.

(5) On *ex parte* application in writing supported by affidavit, the justice who issued a warrant under subsection (1) or a further warrant under subsection (3) or any other justice having jurisdiction to issue such warrants may authorize that the tracking device be covertly removed after the expiry of the warrant
(a) under any terms or conditions that the justice considers advisable in the public interest; and
(b) during any specified period of not more than sixty days.

Part IV
Bill of Rights issues

38 WE HAVE BEEN ASKED, in relation to each of the three changes proposed above, to comment in relation to the Minister of Justice's obligations to Cabinet under the *Cabinet Office Manual* and the Attorney-General's obligations to the House of Representatives under the New Zealand Bill of Rights Act 1990 section 7 on whether the proposals have implications under that statute. The relevant provision is section 21:

> Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

Discussion is made more difficult by the Court of Appeal's current policy of refraining from defining "search" and concentrating on the issue of reasonableness.

39 In relation to interception warrants, what is proposed is no more than a refinement of an existing power. The existence of that power (assuming it to be a search power) has not been treated as unreasonable in any of the cases both in the High Court or the Court of Appeal in which the existing power has been considered. In *Bouwer* (page 112) the Court of Appeal observed:

> Parliament has decided that it is in the interests of justice that, under conditions prescribed by it and under the supervision of the High Court, eavesdropping techniques are to be made available to the police for the detection of serious crime. If and to the extent that such surveillance within the limits of the warrant constitutes a search and/or a seizure, what is done is rendered lawful. The Court will exclude the resulting material if it considers that what has been done is nevertheless unreasonable. In this manner the values underlying s 21 can be accommodated in accordance with s 5.

We think, therefore, that the Minister and the Attorney-General can certify properly that there are no Bill of Rights implications.

40 The proposal in Part II is to impose on the party subjected to the search a new obligation to assist the searcher. This would be a breach of section 21 if the view were taken that such an obligation transformed an otherwise reasonable search into an unreasonable one. The existence of comparable obligations in other democracies establishes reasonably conclusively either that the search is not thereby rendered unreasonable or that if there is a limitation of the rights described in section 21 it can be demonstrably justified in a free and democratic society.

41 In relation to Part III, it is not clear whether use of a tracking device is a "search". The US Supreme Court says not, and that nothing in the Fourth Amendment prohibits the police from augmenting their sensory facilities with such enhancement as is afforded by science and technology (*US v Knotts* 460

US 276 (1983)). Note that this case considers only the monitoring and not the act of installation. The Supreme Court of Canada has come to a contrary view (*R v Wise* [1992] 1 SCR 527). The Canadian provision that we recommend for adoption was enacted subsequently to *R v Wise* and its constitutionality seems to be accepted. Even if the use of a tracking device is a search, the existence of comparable measures in other democracies establishes reasonably conclusively either that such a search would not be unreasonable or that if there is a limitation of the rights described in section 21 such limitation can be demonstrably justified in a free and democratic society.

Part V
Addenda

EXCLUSION OF EVIDENCE IN INTERCEPTION CASES

42 ALTHOUGH IT IS NOT PART OF OUR TERMS OF REFERENCE, we draw attention to the problems created by the absolute terms of the Crimes Act 1961 sections 312M(1) and 312(N)(1) and the Misuse of Drugs Amendment Act 1978 section 25(1) (which preclude evidence of communications intercepted by means of a listening device otherwise than in pursuance of an interception warrant). It is understandable that these provisions should have been inserted to allay fears of misuse when interception warrants were first given statutory authorisation. William Young J has recently drawn attention to the inappropriateness of these provisions in a case where interception has occurred innocently and unofficially. (*Moreton v Police* (unreported) Greymouth Registry AP No 1/01 Judgment 20 September 2001). A better approach than a blanket exclusion is that contained in the Evidence Code proposed by the Law Commission (NZLC R55 (1999)). Under clause 29 of that proposed code the court has power to admit evidence improperly obtained in certain circumstances. We understand that it is proposed to introduce legislation adopting the substance of this proposal, but the effect of the *generalia specialibus non derogant* rule is that this will leave the provisions referred to in the opening sentence of this paragraph unaffected. They should, as part of the statute adopting the Evidence Code, be expressed to be subject to the Evidence Code provision.

OTHER LAW ENFORCEMENT AGENCIES

43 Our letter of request is, by its terms, confined to police search powers, but we would note that there seems no logical reason why comparable powers should not be available in appropriate cases to other state enforcement agencies.

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