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Amnesty International Aotearoa New Zealand:

Supplementary Submission on the Search and
Surveillance Bill 2009 to the Justice and
Electoral Committee.

1 October 2009

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Amnesty International, recognising that human rights are indivisible and interdependent, also works to promote all the human rights enshrined in the Universal Declaration of Human Rights and other international standards, through human rights education programs and campaigning for ratification of human rights treaties.

Amnesty International's New Zealand section has approximately 8,100 members and regular donors, and active members in some 30 local community groups, specialist groups and various action networks. At any one time its members are working on cases and issues in approximately 90 countries. The work of Amnesty International's New Zealand members is supported by paid staff and volunteers based in Auckland, and the movement's International Secretariat based in London.

Amnesty International is impartial. It is independent of any government, political persuasion or religious creed. It does not support or oppose any government or political system, nor does it support or oppose the views of the victims whose rights it seeks to protect

Amnesty International's policies and plans are discussed and decided at general meetings of the membership and meetings of their elected representatives held every two years (International Councils). In New Zealand their implementation is managed by the Chief Executive Officer overseen by an elected Governance Team. Between International Councils the international affairs of Amnesty International are managed by the Secretary General, who reports to an elected International Executive Committee of members from at least seven different countries.

Amnesty International is financed by its worldwide membership and the public. Strict guidelines exist to safeguard its independence of the organisation; AI does not accept government funds for its campaigning work or organisation.

Amnesty International has formal relations with the United Nations Economic and Social Council (ECOSOC), UNESCO, the Council of Europe, the Organization of American States, the Organisation of African Unity, and the Inter-Parliamentary Union.

Amnesty International was awarded the United Nations Human Rights Prize for "outstanding achievements in the field of human rights" on the 30th anniversary of the Universal Declaration of Human Rights. The movement received the Nobel Peace Prize in 1977 for its contribution to "securing the ground for freedom, for justice, and thereby also for peace in the world".

INTRODUCTION

1.0 Amnesty International Aotearoa New Zealand (AIANZ) welcomes the opportunity to make a supplementary submission on the Search and Surveillance Bill 2009 (“the Bill”) to expand further on our framework submission submitted on 18 September 2009.

2.0 Amnesty International acknowledges the law relating to search, surveillance and seizure needs updating.

3.0 Amnesty International believes the Bill must reflect the importance of both the fundamental human rights of individuals and provide adequate search and surveillance powers to protect society.

HUMAN RIGHTS VALUES

4.0 The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights both protect the right not to be subjected to arbitrary or unlawful interference with privacy, family, or correspondence.¹

5.0 Section 21 of the New Zealand Bill of Rights Act 1990 (BORA) provides for the right to be secure against **unreasonable** search or seizure, whether of the person, property, correspondence, or otherwise.² Section 21 mandates that all official intrusions for the purposes of search and seizure must be reasonable. The Court of Appeal held in *R v Jeffries* that the focus of enquiry under section 21 of the BORA was defending “those values or interest which make up the **concept of privacy**”³

6.0 The effect of sections 4, 5 and 6 is that the BORA does not overrule other legislation, even if that legislation is inconsistent with the Bill of Rights Act; “justified limitations” on the rights enshrined in the BORA may be permitted in certain circumstances and, if an interpretation of legislation is available that is consistent with the BORA, then that interpretation is preferred. It is vital that these elements of the BORA remain in contemplation during the further development of the Bill to ensure that the right to be secure against unreasonable search or seizure is safeguarded.

7.0 Amnesty International concurs with the Law Commission’s Report on Search and Surveillance Powers that the foremost human rights values relevant to the Bill are:

- the protection of privacy;
- the protection of personal integrity;
- the protection of property rights; and

¹ Article 12 Universal Declaration of Human Rights (UDHR) and article 17 of the International Covenant on Civil and Political Rights 1966 (ICCPR)

² Section 21 BORA

³ *R. V Jeffries* [1994] 1 NZLR 290 (CA), p 319

- the maintenance of the rule of law.⁴

8.0 The importance of these human rights values needs to be given greater recognition within the Bill. Amnesty International therefore recommends that a ‘purpose’ clause be added to the Bill to emphasise the need to safeguard these fundamental human rights values within the context of search and surveillance powers.

SEARCH AND SURVEILLANCE OF ELECTRONIC INFORMATION

9.0 Amnesty International appreciates the need to provide clear guidelines for searching computers; however we are concerned with the broad nature of the powers provided for in the Bill that can aid official investigative activity.

10.0 Under clause 125 of the Bill, owners of computers will be required to provide access codes, passwords and encryption keys in order for their computers to be accessed during searches.⁵ This duty to assist in complying with the search order is questionable when dealing with computers and other devices that may contain personal information. A reasonable expectation of privacy is attached to such devices, especially computers, and this power could create an inconsistency with section 21 of the BORA.

11.0 Accessing computers poses a serious threat to the right to be secure against unreasonable search or seizure. Clause 108 of the Bill deals with search powers and allows police and other enforcement officers to take a forensic copy of computer material. Police are able to gather evidential material on offences *other* than those specified in the search warrant if that material is in “plain view” under clause 119 of the Bill. This means that a forensic copy of “plain view” data, that was not intended to be searched for under the warrant, could be taken. Clause 101(4)(k) allows for police to remotely access computers. When these clauses are read together, there is a real risk that police could be permitted to read a person’s personal data, such as emails.

12.0 The risk of unreasonable search or seizure and an inconsistency with the BORA can be reduced by the Bill requiring the warrant to specify what information is sought from the computer or electronic device.

MULTIPLE EXECUTION OF A WARRANT

13.0 Amnesty International is concerned with the authorisation of a search warrant that is to be executed more than once. Recommendation 4.33 of the Law Commission’s Report suggests that:

“A search warrant should be executed only once, except where the issuing officer is satisfied that more than one execution is **reasonably required** for the purposes for which the warrant is being issued. The issuing officer should

⁴ Search and Surveillance Powers - NZLC R9 7 Published June 30 2007 (NZLC R 97)

⁵ Search and Surveillance Bill 45 – 1 (2009), Government Bill

specify in the warrant that more than one execution is permitted.”⁶

14.0 Clause 96(5) of the Bill implements this recommendation, however, the wording has been changed and states:

“The issuing officer may authorise the search warrant to be executed on more than 1 occasion during the period in which the warrant is in force if he or she is satisfied that this is required for the purposes for which the warrant is being issued.”⁷

15.0 This clause does not contain the objective test of an execution warrant being “reasonably required”. An issuing officer needs only to be “satisfied” that more than one execution is required. The Bill, in its current form, could therefore be interpreted as bestowing full discretion on the issuing officer.

16.0 Amnesty International therefore recommends that clause 96(5) of the Bill be amended so that an issuing officer must be satisfied that more than one execution is **reasonably required** for the purposes of the search warrant.

SAFEGUARDS FOR ITEMS OF UNCERTAIN STATUS

17.0 Clause 109 of the Bill allows for items of uncertain status to be seized:

“If a person exercising a search power is uncertain whether any item found may lawfully be seized, and it is not reasonably practicable to determine whether that item can be seized at the place or vehicle where the search takes place, the person exercising the search power may remove the item for the purpose of examination or analysis to determine whether it may be lawfully seized.”⁸

18.0 In its current form, there are no adequate safeguards included in the Bill for when a person, exercising a search power, is uncertain about whether an item found can be lawfully seized. This is inconsistent with recommendation 6.19 of the Law Commission Report which states that:

“Items removed for examination should be:

- examined or processed as soon as reasonably practicable;
- returned to the person from whom they were taken once the enforcement officer determines they are not to be seized and retained;
- subject to the provisions as to access applying to seized items that are retained.”⁹

⁶ NZLC R97, part 1, p 125

⁷ Search and Surveillance Bill

⁸ Search and Surveillance Bill

⁹ NZLC R 97, part 1, p 180

19.0 Amnesty International recommends that these safeguards are inserted into the Bill to adequately protect property that may be of uncertain status.

WARRENTLESS SEARCHES IN PUBLIC PLACES

20.0 Amnesty International is concerned that an unreasonable search, that would be inconsistent with section 21 of the BORA, may be permitted by Clause 16, which states:

“A constable may search a person without a warrant in a **public place** if the constable has reasonable grounds to believe that the person is in possession of evidential material relating to an offence punishable by imprisonment for a term of 14 years or more.”¹⁰

21.0 Recommendation 5.13 from the Law Commission’s Report does not include any reference to public places but instead states that:

“A police officer should be able to enter and search any place if he or she has reasonable grounds to believe that:

- evidential material relating to an offence punishable by 14 years’ imprisonment or more will be found; and
- the delay caused by obtaining a search warrant will result in the evidential material being concealed, destroyed or impaired.”¹¹

22.0 The Law Commission’s explanation behind recommendation 5.13 relies on existing warrantless powers under the Misuse of Drugs Act 1975 and argues that:

“when a police officer has reasonable grounds to believe that evidential material relating to the commission of a crime punishable by 14 years’ imprisonment or more will be found in a particular place and there is a risk that the material may be concealed, destroyed or impaired while a warrant is being obtained, we consider the officer should be able to enter to search for and seize the relevant material.”¹²

23.0 Amnesty International believes that clause 16 of the Bill is inconsistent with recommendation 5.13 of the Law Commission’s Report as it allows warrantless searches in public places. Clause 16 also lacks the safeguard of the officer having to have reasonable grounds to believe that a delay caused by obtaining a warrant will result in evidential material being concealed, destroyed or removed. Clause 15 of the Bill grants sufficient powers by allowing a “constable to enter and search a place without a warrant”.¹³

¹⁰ Search and Surveillance Bill

¹¹ NZLC R 97, part 1, p 152

¹² NZLC R 97, part 1, p 152

¹³ Search and Surveillance Bill

24.0 Amnesty International recommends that clause 16 is removed from the Bill as it could lead to an unreasonable search and make the Bill inconsistent with section 21 of the BORA.

PLAIN VIEW SEIZES

25.0 Amnesty International welcomes the codification of “plain view” seizures in the Bill, however caution should be exercised in this area. The Law Commission’s recommendation 3.11 states that:

“The law relating to “plain view” seizures should be codified to provide that a **police officer** may seize anything that:

- he or she has reasonable grounds to believe is evidential material;
- comes into view while the officer is lawfully exercising a search power or is otherwise lawfully in the place or vehicle in which the thing is observed,

even if the seizure of the item is not authorised by the terms of any search power that is being exercised.”¹⁴

26.0 Clause 119 of the Bill, however, allows for the seizure of items in plain view by an enforcement officer or “any person assisting him or her”.¹⁵ Therefore, what is potentially in plain view is enlarged should more than one person be lawfully searching at the scene.

27.0 Amnesty International is further concerned by clause 119(2) that states:

“If an enforcement officer seizes any item or items under sub clause (1), in circumstances where he or she is not already exercising a search power, the enforcement officer may exercise any applicable power conferred by section 108 [which details what search powers authorises] in relation to the seizure of the item or items.”¹⁶

28.0 The Law Commission was clear that:

“our plain view recommendation relates only to the seizure of evidential material relating to offending *that is seen in the course of other lawful activities*. Legislation to implement this recommendation should explicitly state that it does not confer any additional search or entry power; if such powers need to be exercised to fully investigate or to effect the seizure, a warrant will need to be obtained.”¹⁷

¹⁴ NZLC R 97, part 1, p 87

¹⁵ Search and Surveillance Bill

¹⁶ Search and Surveillance Bill

¹⁷ NZLC R 97, part 1 p86, para 3.141

29.0 It appears that clause 119(2) goes against the recommendation made by the Law Commission and permits an enforcement officer to have the power that is granted under a search warrant for items in plain view without having to obtain a search warrant.

30.0 Amnesty International recommends that clause 119 be amended by removing the reference to “any person assisting him or her” and taking out sub clause 119(2). Amnesty further recommends that a sub clause is inserted stating that clause 119 does not confer any additional search or entry powers; and if such powers need to be exercised to fully investigate or to affect the seizure then a warrant will need to be obtained.

SUMMARY OF RECOMMENDATIONS

31.0 Amnesty International recommends the following changes to the Bill:

- A. Insert a ‘purpose’ clause to the Bill to emphasise the need to safeguard human rights values within the context of search and surveillance powers.
- B. The risk of unreasonable search or seizure and inconsistency with the BORA can be reduced by the Bill requiring the warrant to specify what information is sought from the computer or electronic device.
- C. Amend clause 96(5) of the Bill so that an issuing officer must be satisfied that more than one execution is reasonably required for the purposes of the search warrant.
- D. Insert the following safeguards into the Bill to adequately protect property that may be of uncertain status:

“Items removed for examination should be:

- examined or processed as soon as reasonably practicable;
- returned to the person from whom they were taken once the enforcement officer determines they are not to be seized and retained;
- subject to the provisions as to access applying to seized items that are retained.”¹⁸

- E. Remove clause 16 from the Bill as it could lead to an unreasonable search and make the Bill inconsistent with section 21 of the BORA.
- F. Amend clause 119 by removing the reference to “any person assisting him or her” and removing 119(2). Insert a sub clause to stating that clause 119 does not confer any additional search or entry powers; and if such powers need to be exercised to fully investigate or to affect the seizure then a warrant will need to be obtained.

CONCLUSION

¹⁸ NZLC R 97, part 1, p 180

32.0 Amnesty International appreciates the opportunity to put forward this supplementary submission. We hope the recommendations and explanation prove beneficial in the completion of the Search and Surveillance Bill.