

## PRESENTERS

### **Michael Heron, Russell McVeagh, Auckland**

Michael is a litigation partner at Russell McVeagh, based in the Auckland office. He specialises in regulatory matters, health, media and sport law. He currently represents a range of clients in respect of regulatory investigations and prosecutions. Michael was formerly a partner in the Auckland Crown Solicitor's office.

### **Dale La Hood, Luke, Cunningham and Clere, Wellington**

Dale is a partner and Crown prosecutor at Luke, Cunningham and Clere, Wellington. In addition to prosecuting serious crime, he represents government departments, Crown entities and insurers in regulatory enforcement, public law, medico-legal and serious fraud matters. Dale has been involved in a number of notable Bill of Rights cases at all levels including the Supreme Court and was a defence lawyer for many years before joining Luke, Cunningham and Clere.

### **Acknowledgement**

The authors wish to acknowledge the invaluable assistance and input from Benedict Tompkins of Luke, Cunningham and Clere, Wellington (co-author of chapters one, two and six) and Monique Woods of Russell McVeagh, Auckland (co-author of chapters three, four, five and seven) for their substantial contribution to this booklet.

*The statements and conclusions contained in this booklet are those of the author(s) only and not those of the New Zealand Law Society. This booklet has been prepared for the purpose of a Continuing Legal Education course. It is not intended to be a comprehensive statement of the law or practice, and should not be relied upon as such. If advice on the law is required, it should be sought on a formal, professional basis.*

# CONTENTS

<b>INTRODUCTION .....</b>	<b>1</b>
<b>1. SEARCH WARRANTS .....</b>	<b>3</b>
IN ACCORDANCE WITH ITS GENERAL STRUCTURE, THE ACT CREATES A POWER OF WARRANTED SEARCH, AND REGULATES SEARCH WARRANTS GENERALLY .....	3
SECTION 6: THE NEW GENERAL SEARCH WARRANT PROVISION .....	3
<i>The threshold for issue of a warrant (and for engagement of other powers under the Act)</i> .....	3
<i>Applications can only be made by constables</i> .....	5
<i>The new target of searches: “evidential material”</i> .....	5
GENERAL REGULATION OF SEARCH WARRANTS .....	7
<i>What powers are regulated?</i> .....	7
<i>Who can apply for warrants?</i> .....	7
<i>Important practical features of applications for search warrants governed by the Act</i> .....	8
<i>Issuing of warrants, and the warrants themselves</i> .....	10
<b>2. WARRANTLESS POWERS.....</b>	<b>13</b>
THE STRUCTURE OF THE ACT .....	13
THE PHILOSOPHY OF THE ACT .....	13
<i>The exception rather than the rule</i> .....	13
<i>Triggers for warrantless searches: urgency, risk, and type of target</i> .....	13
<i>Reporting</i> .....	14
WARRANTLESS ENTRY AND SEARCHES OF PLACES .....	15
<i>To arrest and/or preserve evidence</i> .....	15
<i>Incidental to arrest, to preserve evidence</i> .....	16
<i>For evidence of serious crime, in urgent circumstances</i> .....	16
<i>For arms</i> .....	17
<i>For drugs</i> .....	17
WARRANTLESS SEARCHES OF PEOPLE .....	18
<i>Incidental to arrest</i> .....	18
<i>In Police custody</i> .....	19
<i>Incidental to search</i> .....	19
<i>In public places for evidence of serious crime</i> .....	20
<i>For dangerous things</i> .....	20
<i>For drugs</i> .....	20
WARRANTLESS SEARCHES OF VEHICLES .....	21
<i>To arrest and/or preserve evidence</i> .....	21
<i>Incidental to arrest</i> .....	21
<i>For evidence of serious crime</i> .....	22
<i>For drugs</i> .....	22
<i>For stolen goods</i> .....	22
<i>Following stopping at a road-block</i> .....	22
CONSENT SEARCHES: A NEW PRO-DUE PROCESS REGIME .....	22
<i>Availability of consent searches</i> .....	23
<i>A limited range of purposes</i> .....	23
<i>Mandatory advice</i> .....	24
<i>Who can consent?</i> .....	25
<i>Exceptions</i> .....	25
RESPONDING TO CIRCUMSTANCES OF GENERAL NECESSITY .....	25
<b>3. COMPUTERS .....</b>	<b>27</b>
COMPUTER SEARCHES .....	27
<i>Specificity of searches</i> .....	27
<i>Seizure of material</i> .....	28
<i>Assistance</i> .....	29
REMOTE ACCESS SEARCHES .....	31
<i>Notification</i> .....	32
<i>Jurisdictional issues</i> .....	32
<b>4. SURVEILLANCE AND INTERCEPTION.....</b>	<b>35</b>

INTRODUCTION .....	35
SCOPE .....	35
ACTIVITIES NOT REQUIRING A WARRANT .....	36
ACTIVITIES REQUIRING A WARRANT .....	37
PREVIOUS LAW.....	39
LIMITS OF PRIVACY .....	39
RESTRICTIONS.....	40
EMERGENCY USE .....	42
RELEVANCE OF OTHER LEGISLATION .....	45
KEY TERMS .....	46
PROCEDURAL REQUIREMENTS.....	48
REPORTING .....	50
DATA RETENTION.....	51
DECLARATORY ORDERS .....	52
<b>5. EXAMINATION AND PRODUCTION ORDERS.....</b>	<b>53</b>
EXAMINATION ORDERS .....	53
PRODUCTION ORDERS .....	57
<b>6. EXECUTION.....</b>	<b>61</b>
HUMAN RIGHTS REGULATION OF THE CONDUCT OF SEARCHES: S 21 OF THE NEW ZEALAND BILL OF RIGHTS ACT 1990 .....	61
THE ACT’S PROVISION OF BASIC POWERS AND DUTIES INCIDENT TO THE EXECUTION OF SEARCHES .....	61
<i>Basic powers</i> .....	62
<i>Assistance</i> .....	62
<i>Use of force and exclusion and detention of persons</i> .....	62
<i>The duties to give notice and to identify</i> .....	63
SEIZURE OF ITEMS IN PLAIN VIEW .....	66
<i>What can be seized, and by who</i> .....	66
<i>Notice of seizure</i> .....	67
<i>A case study</i> .....	67
SEARCHES OF PERSONS .....	68
SEARCHES OF VEHICLES .....	69
<i>A uniform definition of “vehicle”</i> .....	69
<i>Power to stop for the purposes of search</i> .....	69
<i>Power to move vehicles</i> .....	70
<i>Power of entry incidental to search warrants for vehicles</i> .....	71
<b>7. PRIVILEGE .....</b>	<b>73</b>
LAW COMMISSION REPORT AND SELECT COMMITTEE REPORT .....	73
SURVEILLANCE .....	74
SEARCH WARRANTS AND OTHER SEARCH POWERS .....	74

## INTRODUCTION

The Search and Surveillance Act 2012 is a major change to New Zealand criminal procedure law. While it draws on and in some cases codifies the previous law, it also introduces totally new powers and regulation. Even in relation to those areas of the law that remain broadly unchanged police officers, departmental enforcement officer, lawyers and judges alike will have to come to terms with new statutory details. In this respect the Act is similar to the reform brought about by the Evidence Act 2006: a few large changes; many small changes; and a new and comprehensive point of reference for enforcement action and legal argument.

Broadly speaking, the Act does two things: first, it creates powers, some new and some similar to the previous law to greater and lesser extents; and secondly, it regulates powers, both those created by the Act itself, and those contained in other (pre-existing) enactments. Evident throughout is a balancing of two major competing purposes: the requirements of law enforcement on the one hand and those of human rights on the other (see ss 5(b) and 5(c) respectively).

The structure of the paper is functional, rather than conforming the structure of the Act (although there are some common boundaries). Chapter 1 discusses both the Act's new general search warrant (replacing s 198 of the Summary Proceedings Act 1957) and its regulation of search warrants generally. Chapter 2 discusses warrantless powers of entry and search, most of which are available to police only. Chapter 3 looks in detail at the specialist area of computer searches, for which the Act makes new and technologically up-to-date provision. Chapter 4 analyses the new regime under the Act for surveillance and interception by law enforcement officers, which is perhaps the biggest area of reform (and, after *R v Hamed* [2011] NZSC 101, (2011) 25 CRNZ 326, the most controversial). Chapter 5 analyses the new regime for production and examination orders, while Chapter 6 discusses the Act's detailed regulation of the execution of various powers under it (sitting alongside the high-level human rights regulation of s 21 of the New Zealand Bill of Rights Act 1990). Finally, Chapter 7 discusses privilege, immunities and other miscellaneous matters.

Through the discussion of the above areas, the booklet seeks to present a comprehensive introduction to the substantive provisions of the Act, with a particular emphasis on those sections likely to be of the most practical importance. In addition, it identifies some of the legal issues that are likely to arise and potential problems or deficiencies of clarity in the new provisions, and attempts to place the Act in its wider legal, law enforcement and human rights context.