

# Submission

to the

## Ministry of Justice/Law Commission

on the

## Issues Paper: Review of the Search and Surveillance Act 2012

16 December 2016

## About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.
2. The following fifteen registered banks in New Zealand are members of NZBA:
  - ANZ Bank New Zealand Limited
  - ASB Bank Limited
  - Bank of China (NZ) Limited
  - Bank of New Zealand
  - Bank of Tokyo-Mitsubishi, UFJ
  - Citibank, N.A.
  - The Co-operative Bank Limited
  - Heartland Bank Limited
  - The Hongkong and Shanghai Banking Corporation Limited
  - JPMorgan Chase Bank, N.A.
  - Kiwibank Limited
  - Rabobank New Zealand Limited
  - SBS Bank
  - TSB Bank Limited
  - Westpac New Zealand Limited.

## Background

3. NZBA welcomes the opportunity to provide feedback to the Ministry of Justice (**MOJ**) and the Law Commission (**the Commission**) on the Issues Paper: Review of the Search and Surveillance Act 2012 (**Issues Paper**), and commends the work that has gone into developing it.
4. If you would like to discuss any aspect of the submission further, please contact:

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## Production orders

5. NZBA wishes to provide feedback on Chapter 9 of the Issues Paper which relates to production orders.
6. NZBA supports measures to improve the clarity around, and the efficiency of, enforcement agencies (primarily the New Zealand Police (**Police**)) obtaining information from third party businesses via requesting voluntary disclosure of information and/or production orders.

7. NZBA agrees there should be greater certainty around the expectations on enforcement agencies in relation to the use of production orders, for many of the reasons covered in the Issues Paper. In particular, NZBA submits decisions to request information/obtain production orders should be managed centrally by enforcement agencies with appropriate oversight, as opposed to requiring third party businesses to consider requests in the context of the Privacy Act 1993 and common law duties.
8. In response to the specific questions posed in Chapter 9 of the Issues Paper, our views are set out below.

#### Q41 Should the Act specify when a production order must be obtained?

9. NZBA submits, in the interests of clarity and consistency it would be helpful for the Search and Surveillance Act 2012 (**Act**) to be clearer on the circumstances where a production order will be required. The Act could also provide more clarity around timeframes and what is required of third party recipients of production orders.
10. Because many third party businesses, including banks, have a duty of confidentiality to their customers first and foremost, NZBA submits the circumstances in which enforcement agencies should use production orders should be clarified by the Act, to reduce the uncertainty faced by third parties when receiving requests. NZBA submits that such circumstances could be kept relatively broad yet still deliver greater certainty.
11. NZBA submits that the wording of a production order must be very precise. Ambiguity in the wording of production orders currently leads to delays in third parties complying with them as they are presented with uncertainty and challenges as to what to release.
12. Section 76 of the Act states that a production order cannot be in force for a period exceeding 30 days after the date on which the order is made. However, the Police often ask our member banks for orders to be completed within a shorter timeframe. This leads to significant challenges in delivery, particularly where the request is large and seeks all information relating to a particular account/account holder (which is not unusual) rather than specific information such as individual transactions.
13. NZBA submits that a standard 30 days for delivering on a production order should be mandatory, with a shorter timeframe for genuinely urgent requests (for example five days). Alternatively, a standard 30 days should apply with the Act specifying circumstances in which a shorter time period is permissible. NZBA submits that this will help recipients prioritise the work required for delivering on production orders. Another alternative would be for the production order itself to contain the ability to stagger timeframes and types of information requested (for example, supply transactions for a specific bank account within 15 days, supply all account mandate information within 30 days, supply trust deeds and guarantees within 40 days etc.).
14. The Act should also clarify that production orders cannot be 'future looking'. NZBA does not consider that production orders should be able to request 'future transactions' (which sometimes occurs).

15. As production orders are also available to the Police under the Criminal Proceeds (Recovery) Act 2009, NZBA submits it may be worthwhile for any changes made to the regime under the Act to also be carried over to that legislative framework so as to ensure a single, uniform approach.
16. Another issue our members note that makes production orders difficult to complete is typographical errors (for example, where dates of birth are incorrectly typed), however we acknowledge this is not related to the requirements in the Act.

Q42 Should enforcement agencies be required to report annually on the number of production orders they have applied for and the outcome of those applications?

17. Yes. In the 2015 calendar year, the NZBA Chair Bank collated data on behalf of the banking industry. During that year the industry received 8189 information requests and 1237 production orders from the Police alone. This does not include requests received from other agencies with separate statutory powers.
18. NZBA submits that monitoring of the number and outcome of production orders would help to ensure better accountability and transparency around Police practices (and those of other enforcement agencies) in this regard. NZBA submits it would also be of value to understand the number of production order requests that are declined or granted with amendment from what was originally applied for.

Q43 Should the Act require or enable notification to a person whose information is disclosed under a production order?

19. NZBA submits that this is an issue which should be primarily addressed from the perspective of enforcement agencies.
20. NZBA submits any disclosure should be controlled centrally via the New Zealand Police to ensure any sensitive operations/investigations are not compromised.

Q44 If you do not favour notification, should the Act prohibit third parties from disclosing the fact of a production order to the person whose information is sought?

21. NZBA submits it would be inappropriate to require or allow third party recipients of production orders to notify the affected person due to the potential to compromise sensitive Police operations/investigations (and those of other enforcement agencies) and the additional burden this would impose operationally.

Q45 Is there a problem with data being unavailable by the time enforcement agencies have obtained a search warrant or production order?

22. NZBA submits that, based on our members' experience, data is generally kept for a reasonable period to prevent loss prior to timely search warrants or production orders. Our members do not consider there is any evidence of a systemic failure in this regard.

Q46 Should the Act be amended to include a preservation regime? If so, do you have views on the design of that scheme?

23. No. NZBA submits that a preservation regime would appear to impose an equal, if not greater, burden on an enforcement agency as is the case with an application for a production order. The efficient, timely and appropriate use of production orders should enable relevant information to be preserved.

### Additional comments

24. Third party businesses (including banks) often experience a difficult issue when subject to an information request, namely reconciling two positions:
- a. Assistance which may be in the public interest (voluntary disclosure of the information); and
  - b. Their duties of confidence and privacy to their customers (non-disclosure of the information).
25. Our members' experience demonstrates that disclosure of information (in the absence of statutory compulsion), creates both a risk of legal challenge to the right to do so, and a reputational risk to customer trust and confidence.
26. NZBA members submit that it would be preferable for Police access to information to be addressed in a more comprehensive and standardised way which grants express authority and provides certainty for all involved, by way of robust and appropriate revisions to the Act.