

18 September 2009

SUBMISSION ON THE SEARCH AND SURVEILLANCE BILL

To the Search and Surveillance Bill Select Committee

Introduction

This submission is from the New Zealand College of Clinical Psychologists (office@nzccp.co.nz; 04 472 4088)

Summary

We wish to make the following comments:

The bill appears to allow (in some cases without a warrant) access to any and all computer files and records and does not specifically and unconditionally exclude access to computerized medical records. The result is that there is no judicial balancing between the interests of society and the reliance of therapeutic relationships on confidentiality.

Recommendations

We note Sections 135 to 140 of the bill deal with the effect of privilege on search warrants and search powers and that clause 137 applies specifically to clinical psychologists.

We would also point out that clinical psychologists are protected under section 33 of the Evidence Amendment Act (see below) which addresses the disclosure of protected communications during criminal proceedings.

While the proposed Search and Surveillance Bill appears to apply more broadly to potential and future criminal situations, and the Evidence Amendment Act relates to criminal proceedings that are in progress, we recommend that any communication that is covered by the attached Evidence Amendment Act should also be covered by the "effect of privilege" in clauses 135 and 137 of the proposed Search and Surveillance Bill.

Clause 135: Effect of privilege on search warrants and search powers

- A person who has a privilege recognised by this subpart has the right, in accordance with sections 136 to 141,—
 - (a) to prevent the search under this Act of any communication or information to which the privilege would apply if it were sought to be disclosed in a proceeding;
 - (b) to require the return of any such communication or information to the person if it is seized or secured by a person exercising a search power pending determination of the claim to privilege.

Clause 137: Search warrant extending to certain other privileged materials

- (1) This section applies to the execution of a search warrant that authorises the search of professional material held by a minister of religion, medical practitioner, or clinical psychologist.

(2) If this section applies, the search warrant may not be executed unless—

- (a) the minister of religion, medical practitioner, or clinical psychologist is present; or
- (b) a representative of that person is present.

(3) If the person who is to execute the search warrant is unable to contact the minister of religion, medical practitioner, or clinical psychologist, or his or her representative, that person must instead contact the church or professional body to whom the minister, medical practitioner, or clinical psychologist belongs and request the church or body to appoint a person to represent the interests of the parishioners, patients, or clients of the minister, medical practitioner or clinical psychologist, in relation to the search.

(4) Before executing the search warrant, the person executing it must give the minister of religion, medical practitioner, or clinical psychologist, or his or her personal representative, or the person appointed by the church or professional body under subsection (3),—

- (a) the opportunity to claim privilege on behalf of parishioners, patients, or clients of the minister of religion, medical practitioner, or clinical psychologist; or
- (b) the opportunity to make an interim claim of privilege if the minister, medical practitioner, or clinical psychologist, or his or her representative or person appointed under subsection (3) is unable to immediately contact the parishioner, patient, or client.

Evidence Amendment Act (No 2) 1980 No 27 (as at 29 June 2009)

33 Disclosure in criminal proceeding of communication to medical practitioner or clinical psychologist

(1) Subject to subsection (2) of this section, no medical practitioner and no clinical psychologist shall disclose in any criminal proceeding any protected communication made to him by a patient, being the defendant in the proceeding, except with the consent of the patient.

(2) This section shall not apply to any communication made for any criminal purpose.

(3) In subsection (1) of this section, **protected communication** means a communication made to a medical practitioner or a clinical psychologist by a patient who believes that the communication is necessary to enable the medical practitioner or clinical psychologist to examine, treat, or act for the patient for—

(a) Drug dependency; or (b) Any other condition or behaviour that manifests itself in criminal conduct;— but does not include any communication made to a medical practitioner or a clinical psychologist by any person who has been required by any order of a Court, or by any person having lawful authority to make such requirement, to

submit himself or herself to the medical practitioner or clinical psychologist for any examination, test, or other purpose.

(4) In subsection (3)— **clinical psychologist**—

(a) means a psychologist who is, by his or her scope of practice, permitted to diagnose and treat persons suffering from mental and emotional problems; and

(b) includes any person acting in a professional character on behalf of the clinical psychologist in the course of the treatment of any patient by that psychologist

drug dependency means the state of periodic or chronic intoxication, produced by the repeated consumption, smoking, or other use of a controlled drug (within the meaning of section

2(1) of the Misuse of Drugs Act 1975) detrimental to the user, and involving a compulsive desire to continue consuming, smoking, or otherwise using the drug or a tendency to increase the dose of the drug **medical practitioner** includes any person acting in his or her professional character on behalf of a medical practitioner in the course of the treatment of any patient by that medical practitioner.