

Tēnā koe

We are seeking your involvement in a **review of the Search and Surveillance Act 2012 (the Act)**.

The Act controls how Police and other law enforcement agencies can search people or property and carry out surveillance, and includes rules to safeguard human rights.

There are two main drivers for the review:

1. Recommendation 18 from the Royal Commission of Inquiry into the Terrorist Attack on Christchurch Masjidain to review all legislation related to the counter-terrorism effort to ensure it is current and enables public sector agencies to operate effectively.
2. A statutory review of the Act completed by the Law Commission and the Ministry of Justice in 2017, which made 67 recommendations for improvement. The government has not yet considered whether to accept these recommendations.

It is important that those who represent affected communities and interested organisations have an opportunity to take part in the review and help us to get the settings right. That is why we have got in touch.

The first phase of engagement - with groups such as yours - is during the first half of this year. We will be making the most of electronic technology to engage with you, so as to keep everyone safe in the current COVID-19 environment. That means you won't have to attend any meetings or discussions in person.

We will seek the wider public's views after we have heard from you, in a second phase of engagement, late in 2022.

How to take part

There are several ways to take part.

- You can [have your say online through the Ministry of Justice Citizen's Space engagement platform](#)
- or by emailing ssareview@justice.govt.nz
- In May we will be hosting two online workshops and we will send you invitations to those events separately
- We would also be happy to set up an online meeting. We will phone you within the next two weeks to confirm you have received this email and to see if you would like to make a time to meet.

To guide your input, we have identified some key discussion points which are set out in the engagement platform and [on the Ministry of Justice website](#). We don't intend that you limit feedback to these points, and welcome hearing from you on [any issue](#) related to the Act, how it works and how it affects your community and how that might be improved.

To learn more about the review, please watch this short [video](#).

The Rainbow Support Collective is an alliance of organisations which primarily work to support the human rights, health, and well being of rainbow populations in Aotearoa. The collective comprises both national and regional organisations. All together, this collaboration represents 11 organisations with over 450 rainbow community workers and regular volunteers. These organisations include InsideOUT Kōaro, Gender Minorities Aotearoa, RainbowYOUTH, Rainbow Hub Waikato, Intersex Aotearoa, OutLine Aotearoa, Te Ngākau Kahukura, Burnett Foundation Aotearoa, Q-Youth, Dunedin Pride and Qtopia

We would like to open our submission with the recognition that all surveillance and security systems are primarily about recognising difference, and that this fundamentally places a higher burden of risk on transgender and other LGBTQI+ populations.

In particular, transgender people are seen as different both visually and on paper when their documents are mismatched. The current systems are not developed in ways that can manage this effectively, and therefore security efforts disproportionately infringe on the right to privacy and freedom from discrimination for transgender people.

The following are our recommendations.

1. Human rights legislation

It is critical that search and surveillance laws and enforcements uphold human rights to privacy, freedom from discrimination, and freedom from unfair detainment. As part of upholding these and other human rights, it is crucial that any use of search and surveillance law enforcement takes active steps to avoid breaches of human rights arising from targeting difference.

We believe it is necessary to target high risk groups rather than groups with a high degree of difference, and that the failure to take this approach in the past has contributed to not only harassment of LGBTQI+ people, but the enabling of white supremacist and anti-trans extremists, as we saw in the terror attacks in Christchurch.

2. Accountability

To uphold human rights, it is imperative that search and surveillance enforcement foreground accountability and transparency.

During the 2007 Operation 8 incident we saw a distinct lack of process followed, lack of transparency, blatant human rights abuses, and extreme examples of anti-terrorism efforts dishonouring Te Tiriti o Waitangi.

There must be systems put in place to ensure that this is not possible going forward.

Reporting, auditing and accountability processes must be central to operations, and not contingent on cost.

The reporting itself should track demographic information to enable ongoing monitoring of the extent to which different demographic groups are being surveilled, to maintain accountability of how these powers are used to monitor different populations.

All non-warranted covert operations should be subject to external audit, to ensure that this greater power with less initial oversight is not being abused.

There should be independent (non-state) mechanisms in place for monitoring the use of search and surveillance warrants and orders, monitoring the role bias may be playing in the application of these powers, and for making complaints about search and surveillance activities. This is important to ensure restitution for unjustified search and surveillance is available, particularly for marginalised communities. This external monitoring body should have Rainbow competence (as well as competence in other areas) as central to its functioning.

3. Prejudice

Upholding human rights during search and surveillance activities requires recognition of prejudice, how it manifests in practice, and its impacts at every level.

Active work must be done systems-wide to address prejudices against all minority groups.

Transgender and LGBTQI+ competence training and systems review for Police and associated state actors must be required. Competence training should address issues specifically relevant to search and surveillance, and should be carried out by the organisations which provide direct support to transgender and LGBTQI+ community members 365 days a year, not by any organisation which has limited direct contact with these communities. It cannot be internal.

See the “Police and Detention” section of the Counting Ourselves Report (2019) for further information on current prejudice.

4. Dignity and privacy

The right to dignity and the right to privacy - are routinely not upheld during search and surveillance of transgender people in Aotearoa.

The right to dignity applies to basic dignity such as the use of correct names and pronouns, to dignity while being searched, detained, or incarcerated.

Section 126 of the Act references strip searches being carried out only by someone of the “*same sex*”. This may limit autonomy of, and facilitate discrimination against, trans or intersex individuals.

Under the Privacy Act, unnecessary disclosure of information related to sexuality, gender, or

variations of sex characteristics must be prevented. In cases where this information is relevant to a case or investigation, it should not be shared any more broadly than is required.

5. Surveillance without a warrant

It must be made clear exactly what constitutes/necessitates search and surveillance without a warrant. The guidelines should contain far more stringent recommendations than “*it is preferential to get a warrant*”. This should be a criteria rather than a guideline.

Historically, many state powers to be used in “*emergencies*” and “*when it is necessary*” have allowed greater room for discretion, and therefore prejudicial treatment of vulnerable minority communities (see Oranga Tamariki for examples).

This creates a significant risk to those communities if warrantless search and surveillance is made easier to carry out with less evidence of necessity.

We are concerned with the high degree of discretion available to officers when carrying out Search and Surveillance activities.

6. Technology

Social media surveillance, including use of algorithmic searches, and the purpose of this surveillance, must be made transparent to the public (i.e. through policy statements).

New technologies allow for greater surveillance in ways that do not always match the privacy expectations of people using these technologies, and the ability to use technologies to carry out greater surveillance shouldn't take place without consultation and consideration to ensure that privacy and other human rights are upheld.

There should be extra care taken around warrantless searches in this area, where the ease of virtual surveillance may increase the risk of expanded use of warrantless searches.

Transgender and LGBTQI+ people are significantly more likely to use pseudonymous, have different/changing names, or verify accounts with mismatched documents because they do not have matching documents, or to protect their safety from the significant anti-trans harassment, and other safety risks they encounter online*. Applying security systems to this population therefore shows “difference” and makes them a disproportionate target for surveillance.

*It is also common for anti-trans and other anti-LGBTQI+ harassment online to be a precursor to offline harm.

7. Policy Statements

With reference to recommendation 37 and 38 of the Law Commission Report; in drafting and finalising Policy Statements, there must be consultation with transgender and LGBTQI+ organisations to ascertain relevant considerations for these disproportionately affected populations.

Policy statements should be made publicly accessible.

8. Relevant data

From Counting Ourselves (2019), the first national survey of the health and wellbeing of trans and non-binary people living in Aotearoa:

- 7% of the survey's trans and non-binary participants had been detained, held in custody, arrested or charged by the police.
- Almost two-thirds of these participants reported that police did not ask their correct name, pronoun or gender, and almost half had been misgendered when police knew their correct name, pronoun or gender but would not use it.
- More than half of these participants were not given any choice by Police about whether a male or female officer searched them, and less than one in ten were given the choice of whether they were put in a police cell with women or men or on their own.
- Almost one-third were put in a cell with other people where they did not feel safe as a trans or non-binary person.
- Most participants who required a shower did not have access to a shower that they felt safe to use.
- Almost one in ten of these participants had been harassed or assaulted by police for being trans or non-binary

Counting Ourselves, Chapter 12

https://countingourselves.nz/wp-content/uploads/2020/01/Counting-Ourselves_Report-Dec-19-Online.pdf

9. Community engagement

Transgender and LGBTQI+ communities, and their representative organisations, often report that their experience of engaging consultative processes on security is one of being told that our community members pose a risk, and that we should be suspicious of difference and report this to Police.

This is the opposite of what we are interested in. The threat to our communities comes not from within, but commonly from white supremacist and anti-trans campaigners and their organised groups.

Because these groups are typically comprised of clean-cut white people, presenting no "difference" markers, they are not recognised as the threat.

If you want to meaningfully engage our communities, you need to begin to recognise the power dynamics and prejudices that contribute to the disproportionate harms we are experiencing.

Once this foundational understanding has been achieved:

Prioritise creating spaces which are respectful, dignity-promoting and non-judgemental when asking people to share their own experiences as part of any consultation. Discussing surveillance can mean discussing traumatising personal experiences which might be connected to intimate parts of identity.

Especially consider how this affects rainbow people who are more marginalised e.g. Takatāpui, rainbow asylum seekers, transgender people, rainbow migrants, rainbow disabled people.

It is critical to both engage with Rainbow communities, and to understand why it is important to be doing this, so that those doing this consultation are able to learn and action what they learn, so that this is not a tick-box activity or a waste of time for those being consulted.

Ensure any online consultation is moderated and supported to ensure it's not overtaken by hostile perspectives (e.g. anti-trans hate groups). It is often necessary to hold separate consultations with specific populations with rainbow communities - for example cisgender white gay men who own businesses may have different security interests from transgender Māori women who are homeless.

Ensure engagement with key organisations - the invitation to engage in this feedback process did not come to many relevant organisations and it was only by sharing within our own cross-organisational networks that others heard about this (despite being involved in prior relevant conversations about the Royal Commission into the Mosque Attacks with DPMC).

A wide range of topics are relevant for Rainbow communities. The best approach is early consultation with appropriate networks and organisations, to seek our expertise on the most appropriate ways forward.