

## **Part 4 - Consent searches**

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## Executive summary

Key points to note:

- Before using a consent search, first consider using a search warrant, or if that's not practicable, a warrantless search power.
- You must have a reason to justify asking a person to consent to a search and the search must not be used to go on 'a fishing expedition'.
- You must advise the reason for the search and that they can refuse consent or withdraw it at any time.
- A person under 14 years of age cannot consent to the search of a place, vehicle, or other thing - unless they are found driving a vehicle and there is no passenger 14 years or over with authority to consent to the vehicle's search.
- Exceptions to consent search rules include:
  - search conducted as a condition of entry to any public or private place
  - search conducted under a power conferred by an enactment
  - entry to property under an [implied licence](#).

## Search hierarchy

If you are considering a consent search, observe the general principle relating to "**search hierarchy**" - i.e. first consider using a search warrant and if that isn't practicable, a warrantless search power. See "[General principles applying to searches](#)" in the Search introduction chapter.

## Application of rules about consent searches

### Under the 'Act'

Section [91](#) codifies the rules and restrictions applying to consent search by an enforcement officer, where a warrant or warrantless power would have been available if the officer held a particular belief or suspicion of one of the purposes outlined in section [92](#). See '[Purposes for which consent may be undertaken](#)'.

### Common law

At common law a consent search in other circumstances (that is, where the search is being undertaken for a purpose for which a power would not have been available even with a reasonable suspicion or belief) will be lawful whenever voluntary and informed consent is provided by a person with the capacity and authority to give it. See [Wanoa v R](#) NZCA 33 at [25] and [R v Rodgers](#) CA65/06, 29 May 2006 at [19]-[21]. The consent will be ineffective and the search unlawful, if the consent is obtained by deception or misrepresentation. See [R v Hjelmstrom](#) (2003) 20 CRNZ 208 (CA) at [15] and [R v Anderson](#) (1997) 4 HRNZ 165(CA).

### Implied licence to enter not affected

If an enforcement officer, having entered property under an [implied licence](#), then wishes to undertake a consent search in circumstances that fall within the ambit of subpart [2](#) of Part 4, the restrictions in sections 92-95 apply.

## Purposes for which consent search may be undertaken

You may ask a person to consent to undergo a search, or a search being made of a place, vehicle, or other thing apparently in the person's control for one or more of these purposes:

- to prevent the commission of an offence
- to protect life or property, or to prevent injury or harm
- to investigate whether an offence has been committed
- any purpose in respect of which you could exercise a power of search conferred by an enactment, if you held a particular belief or suspicion specified in the enactment.  
([s92](#))

You must have a reason to justify asking for the person's consent to a search in any of the above situations. You cannot randomly conduct a consent search and must not use a consent search to go on a 'fishing expedition' to see what might be located.

## Advice that must be given before searching

Before conducting a search by consent, you must:

- determine that the search is for a purpose listed in section 92
  - advise the person from whom consent is sought:
    - of the reason for the proposed search
    - that they may consent or refuse to consent to the search.
- (s93)

See [Wilkie v R](#) [2019] NZCA 62 for commentary about consent searches undertaken under section 93 requiring officers to advise the person that they may withhold consent to a search. A failure to comply with this requirement is likely to render the search unlawful. The case also demonstrates, there is likely to be flow on consequences for any evidence obtained in relation to the admissibility of text messages obtained via unlawful search of third party.

You are not exercising a search power when searching by consent so [subpart 4](#) of Part 4 does not apply. Good practice is to identify yourself by name, give the reason for your search and if not in Police uniform produce evidence of your identity.

## Withdrawal of consent

A person who consents to a search of themselves or a place, vehicle or thing in their control may withdraw their consent at any time. In this situation, stop the search immediately, unless a warrantless search power can be invoked to continue the search.

See [Warrantless powers to search places, vehicles and things](#) and [Searching people](#) for your warrantless powers to search people.

## Circumstances where search by consent is unlawful

A search by consent is unlawful if:

- it is not for a [purpose](#) set out in section 92, or
  - you fail to give the [required advice](#) set out in section 93, or
  - you undertake a search relying on consent given by a person who does not have authority to give that consent.
- (s94)

## Restrictions on persons under 14 years to consent

A person under 14 years of age cannot consent to the search of a place, vehicle, or other thing. An exception is when they are found driving a vehicle and there is no passenger of or over the age of 14 years with authority to consent to the vehicle's search.

(s95)

Section 95 does not prevent a person under 14 years from consenting to a search of themselves or anything in their immediate possession or control. (See [Extent of consent searches of persons](#) for what can be included in a search).

## Exceptions to consent search rules

Consent search rules do not:

- apply to a search conducted:
    - as a condition of entry to any public or private place (e.g. a condition of entry to a sporting fixture or concert), or
    - in accordance with a power conferred by an enactment, or
  - affect the rule of law relating to the [implied licence](#) to enter property.
- (s96)

## Implied licence

It is assumed that members of the public, including police officers, can enter private property (e.g. go to the door of private premises) so far as is necessary to make an inquiry of an occupier, for any reasonable purpose or in the course of any lawful enquiry. Such an implied licence can be revoked by the occupier at any time.

## Carrying out consent searches

When carrying out a consent search, you should carry it out in the same manner as when using a search power.

See [Carrying out search powers \(with or without a warrant\)](#) for procedures relating to searches of places, vehicles and things and [Searching people](#).

## Consent to search mobile phone and/or access cloud-based accounts

If verbal consent to carry out a search of a mobile phone and/or access cloud-based accounts is given, then complete the 'Consent to Extract Data from a Mobile Phone and/or Cloud Data' form (go to Police Forms > Search and Surveillance).

After filling out the form arrange the following:

- ask the consenter to read the form, or read the form to the consenter, should they have reading difficulties
- explain the content of the form to ensure the consenter understands their rights, the extent of the search that they have authorised the Police to carry out
- invite consenter to sign and date the form
- Police employee to witness consenter's signature and sign the form.

**Note:** Consentor may withdraw consent at any time and the search must be stopped immediately.

## Extent of consent searches of persons

If a person consents to a search of themselves, you may extend the search to any item that:

- the person is wearing or carrying, (e.g. a bag), or
- is in the person's physical possession or **immediate** control

**provided** the person consents to these items being searched.

## Disadvantages of using consent searches

If you have a particular belief or suspicion that is sufficient to exercise a warrantless power or to obtain a search warrant, you must exercise the power or obtain a warrant rather than rely on a consent search.

The disadvantages of using a consent searches are:

- the person being searched by consent can withdraw their consent at any time, which means the search must stop immediately, unless a search power can be invoked to continue the search
- if a search power is invoked after withdrawal of consent, the initial request may be seen to be token and meaningless
- the existence or validity of any consent given may be challenged in court.