

## **Part 11 - Declaratory Orders**

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## Executive summary

Key points to note:

- Declaratory orders provide judicial clarification that an intended device (other than a surveillance device), technique, procedure or activity is lawful and reasonable.
- Orders do not confer any special status on evidence collected using the authorised device, technique, procedure or activity - the evidence, and the way it is collected, must still comply with the New Zealand Bill of Rights Act and is subject to normal evidential tests at trial.
- Any constable may apply for a declaratory order. Their application must be approved by an Inspector or above and by the Director: Legal Services.
- There does not always have to be a reasonable suspicion of an offence or a reasonable belief that evidential material relevant to a current investigation will be collected when applying for a declaratory order - In some circumstances a new technology or procedure may legitimately be used for general intelligence gathering.

## Overview

### Purpose

This part of the '[Search](#)' chapter:

- describes declaratory orders and their purpose
- outlines [application procedures](#).

Requirements for reporting declaratory order applications are detailed in the [Reporting](#) chapter.

### What is a declaratory order?

A declaratory order is a statement by a judge that they are satisfied that the use of a device, technique, or procedure, or the carrying out of an activity, specified in the order is, in the circumstances of the use or the carrying out of the activity specified in the order, reasonable and lawful.

A declaratory order is advisory in character and does not affect the jurisdiction of any court to determine whether the activity that was the subject of the order was reasonable and lawful.

### Background and likely use

The declaratory order regime under sections [65](#) to [69](#) of the Search and Surveillance Act 2012 simply provides judicial clarification that the intended device (other than a surveillance device), technique, procedure or activity is lawful and reasonable.

A declaratory order is not a power as it does not authorise an enforcement officer to do anything that is unlawful. Rather it provides a mechanism by which an enforcement officer may test the reasonableness of a novel investigative device, technique, procedure or activity prior to employing that investigative tool to obtain evidence. Declaratory orders are likely to be used for surveillance purposes rather than for search activities. For example surveillance using heat or smell detectors may possibly be covered under declaratory orders.

### Compliance with the New Zealand Bill of Rights Act

Declaratory orders facilitate a regime under which enforcement agencies can undertake the investigation of crime in the modern era and keep pace with technological advancement, whilst ensuring novel technologies are employed in a way that is reasonable and appropriately respects those civil liberties and human rights codified in the [New Zealand Bill of Rights Act 1990](#).

The granting of a declaratory order does not confer any special status on evidence collected using the device, technique, procedure or activity authorised under the order. The evidence, and the way it is collected, must still comply with the New Zealand Bill of Rights Act and is subject to normal evidential tests at trial.

## Applications for declaratory orders

### Who may apply for a declaratory order?

Any constable may apply for a declaratory order.

### Approval to apply

The application must be approved by a constable with the position level of Inspector or above and by the Director: Legal Services.

### When to apply for a declaratory order

You may apply for a declaratory order when:

- you wish to use a device, technique, or procedure, or to carry out an activity, that is not specifically authorised by another statutory regime, and
- the use of the device, technique, or procedure, or the carrying out of the activity, may constitute an intrusion into the reasonable expectation of privacy of any other person.

(s66(2))

Unlike applications for search warrants or surveillance device warrants, there will not always be a need to have any reasonable suspicion as to an offence or any reasonable belief that evidential material relevant to a current investigation will be collected. Whether this is required will depend entirely on the nature of the circumstances. Many activities that involve the use of a new technology or procedure may legitimately be used for general intelligence gathering if they do not involve an unjustified intrusion on a reasonable expectation of privacy.

### Who may make declaratory order?

A judge may make a declaratory order if satisfied that the use of a device, technique, or procedure, or the carrying out of an activity, in the circumstances of the proposed use or carrying out of the activity, is reasonable and lawful.

(s68)

### Application procedures for a declaratory order

The following procedures reflect those agreed between Police and the Chief High Court Judge and the Chief District Court Judge for declaratory order applications. (These are recorded in the 2012 Practice note: Procedures for processing surveillance device warrant applications):

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 2012\_Practice\_Note\_(SS\_Act\_2012).pdf

288.03 KB

Step	Action
1	Obtain the appropriate approval to apply for a declaratory order.
2	<p>The application must be made in writing using the declaratory order application and order forms available in Police Forms &gt; Search and Surveillance &gt; Declaratory Orders.</p> <p>Ensure the <a href="#">information required</a> by section 67 is adequately covered in the application. However, <b>keep the amount of evidence "within reasonable bounds"</b> - this is part of the Police agreement with the judiciary.</p>
3	The application must be checked and authorised by a Police legal adviser. <b>Note:</b> The legal adviser will record the application in a central repository for declaratory orders at Legal Services.
4	Notify the designated registry contact person at the relevant High Court Registry or District Court of the impending application and any degree of urgency associated with it.
5	Provide the written application for the order, along with two copies of the declaratory order to the designated registry contact person at the relevant court in a secure envelope. (See <a href="#">Form and content of declaratory orders</a> below).
6	All applications for declaratory orders will be determined on the papers. If having considered the written application, the judge requires further information or clarification on any matter, a minute should be issued to that effect.
7	If the judge is prepared to make the declaratory order, the judge will sign the order and advise the nominated contact person.
8	If the application is successful, one signed copy of the order will be returned to the applicant and the other retained with the application.
9	All application documents, including any notes made by the judge, will be kept in a secure envelope, sealed, dated and signed by the judge before being returned for safe-keeping in secure storage in the court registry.

**Note:** There is no:

- requirement to provide history of previous applications within 3 months of search and surveillance device warrants or declaratory orders
- time limit set for undertaking the use of the device, technique, procedure or activity from the issuing of the order
- requirement to confirm truth and accuracy of the contents of the application

## Information required in declaratory order applications

The application must be made in writing and set out in reasonable detail:

- the applicant's name
- a description of the device, technique, procedure, or activity with enough detail to enable the judge to understand what is proposed to be used or undertaken
- the name, address, or other description of the person, place, vehicle, or other thing that is the object of the proposed use of the device, technique, procedure, or activity
- the circumstances in which the device, technique, or procedure is proposed to be used or the activity undertaken
- the purpose for which the device, technique, or procedure is to be used or the activity undertaken.

([s67](#))

## Information about informants

See the section titled, '[Including informant information in search warrant applications](#)' in '[Search warrants](#)' for information about the definition of informant, revealing identity of informants and including Covert Human Intelligence Sources (CHIS) information in your declaratory order application.

## Form and content of declaratory order

Every declaratory order must be in the prescribed form and contain, in reasonable detail, these particulars:

- the name of the judge making the order and the date it is made
- a description of the device, technique, procedure, or activity that the order relates to, with enough detail to enable the enforcement officer using the device, technique, or procedure, or carrying out the activity, to understand what is covered by the order
- the name, address, or other description of the person, place, vehicle, or other thing that is the object of the use of the device, technique, procedure, or activity (if available)
- the circumstances in which the device, technique, or procedure is to be used or the activity undertaken
- the purpose for which the device, technique, procedure, or activity is to be used, or for which the activity is to be undertaken.

(s69)

Note: The Judge making the order must be named.

## Reporting

### Reporting to the Commissioner and in annual reports

See the [Reporting](#) chapter for information about the requirements for reporting declaratory orders to the Commissioner and in Annual Reports.

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