

New Zealand Law Society

VIDEO CAMERA SURVEILLANCE (TEMPORARY MEASURES) BILL [CONSULTATION DRAFT]

Introduction

1. The New Zealand Law Society (Law Society) has been invited to make a submission on the draft Video Camera Surveillance (Temporary Measures) Bill (Bill).
2. The Law Society finds the proposed law objectionable because:
 - (a) It misrepresents the legal position, both as it existed before the decision of the Supreme Court in the recent *Hamed* case and as it was determined to be in that case.
 - (b) It would effectively amend the New Zealand Bill of Rights Act 1990 (both retrospectively and prospectively) by over-riding and attenuating a fundamental human right, and would do so in a way that appears disproportionate to any demonstrable need.
 - (c) If enacted under urgency, as is intended, it would lack both the degree of consultation within the community and the level of careful deliberation by Parliament that is appropriate for a significant constitutional amendment.
 - (d) A pressing and demonstrable need for such a serious departure from constitutional principle has not been demonstrated.
 - (e) It would comprise legislative interference in the judicial process in respect of cases that are currently before the courts or which are about to come before the courts.
 - (f) It is inconsistent with the rule of law and the principles upon which the rule of law is based.
3. For these reasons, as amplified below, the Law Society is opposed to the enactment of the proposed law. The Law Society recommends the following as a preferred alternative to the proposed law:
 - (a) Section 30 provides a more principled means of addressing the concerns that have been raised in the current debate than does the proposed law as set out in the draft Bill.
 - (b) If urgent legislative intervention is considered necessary, and if section 30 in its current form is thought to provide an insufficient answer to the problem, it would be more appropriate to amend section 30 than to over-ride section 21 of the New Zealand Bill of Rights Act.
 - (c) If the government were to accept this position, the Law Society would be willing to address the question of an amendment to section 30 on an urgent basis.

Misrepresentation of the law

4. The purpose of the Bill is to "provide a temporary period that will enable Parliament to address in a comprehensive way the matters raised in the *Hamed* decision" (clause 3(b)) and to "uphold during the temporary period ... the lawful status of certain uses of video camera surveillance in accordance with the laws that have been articulated and applied prior to the decision" (clause 3(c)).
5. The operative clause in the draft Bill is clause 5 which is headed "Temporary continuation of lawfulness of certain uses of video camera surveillance". This clause is preceded by a heading and sub-heading that respectively read: "Temporary continuation and savings" and "Declaration of continued lawfulness".
6. These provisions imply that, until the Supreme Court reached its decision in *Hamed*,¹ covert video camera surveillance was lawful and that the *Hamed* decision changed the law by making covert video camera surveillance unlawful.
7. It is incorrect to suggest that covert video camera surveillance was lawful prior to *Hamed*. It is equally incorrect and misleading to suggest that *Hamed* reversed the previous position by making covert video camera surveillance unlawful.
8. The legal position before the *Hamed* case was summarised by the Law Commission in its 2007 paper *Search and Surveillance Powers*.² Throughout that paper, a careful distinction was made between covert camera surveillance which involved trespass, and non-trespassory surveillance.
9. The paper correctly assumes (in accordance with the previously decided case law) that covert camera surveillance which involves a trespass to land will be regarded as unlawful conduct and this, in turn, may lead to a finding of unreasonableness under section 21 of the New Zealand Bill of Rights Act, with exclusion of evidence as a possible consequence.
10. An area of uncertainty to which the Law Commission drew attention was the situation where the police surveillance did *not* involve an unlawful trespass to land. In relation to this issue the Law Commission said:

[11.25] There has been little case law to date on the impact of section 21 of the Bill of Rights Act on non-trespassory surveillance. The Court of Appeal has even refrained from expressing a definitive view on whether or not non-trespassory audio and visual surveillance amount to searches or seizures for section 21 purposes. Moreover, the court has resisted calls from defence counsel (based on

¹ *Hamed & Ors v R* [2011] NZSC 101, 2 September 2011

² Law Commission *Search and Surveillance Powers* (NZLC R97, 2007)

European and Canadian precedents) to use section 21 as the source of a principle that non-trespassory surveillance that is not specifically authorised by statute must necessarily be unlawful. Rather, in the absence of statutory regulation, the court has preferred to adopt a case-by-case assessment of reasonableness under section 21.

11. The Law Commission went on to comment on the two most important cases concerning non-trespassory surveillance as follows:

Video surveillance

[11.26] In *R v Fraser*, the Court of Appeal closely examined police operations which involved placing the external door of a house under video surveillance for a period of three months. The court held that the area could be observed by the naked eye, from neighbouring properties. The court considered that there was nothing objectionable in the police employing a video camera to record that which could have been seen by the eye. In so concluding the court stated:

“Reasonable expectations of privacy for activities readily visible from outside the property must be significantly less than, for instance, for activities within buildings”.

[11.27] Subsequently in *R v Gardiner*, the Court of Appeal stated:

“Such is the importance of personal privacy that it will be a case out of the ordinary where surveillance by video is reasonable when it encompasses the interior of a dwelling”.

In the absence of statute on the point, the court held that its task was to conduct a case-by-case assessment of all the circumstances. In the instant case, the court upheld the reasonableness of the video surveillance (even though it captured activity taking place within the target house) on the grounds that: substantial drug dealing was reasonably suspected; the occupants had taken precautions to prevent oral communications from being intercepted by listening devices; no warrant or other process existed for the police to legitimate their use of video surveillance.

12. In short, therefore, before *Hamed* the law did not say that covert video camera surveillance was lawful. It could be unlawful because (for example) it involved a trespass to land and it could be unlawful because it was unreasonable, even if no trespass was involved, because an unreasonable search breaches section 21 of the New Zealand Bill of Rights Act.

13. Importantly, as the Court of Appeal made clear in *Gardiner*, video surveillance of the interior of a building was likely to be unreasonable (and therefore in breach of the law) in all but exceptional circumstances.
14. This leads to the question whether it can be said that surveillance falls into the non-trespassory category if the police have authority under a search warrant to go onto private property but act beyond what the warrant authorises by installing covert surveillance cameras on the property.
15. The *Hamed* judgments make it clear that such conduct is unlawful (and will usually be unreasonable). But the finding of unlawfulness does not involve a novel legal proposition. On the contrary, the principle that a person lawfully on property may become a trespasser by carrying out an unauthorised act has been recognised since at least 1610 when the famous *Six Carpenters Case* was decided.³ The principle that a person can become a trespasser by carrying out an unauthorised act is an elementary principle.
16. As the Supreme Court majority judgments make clear, it is significant that the police either knew there was no lawful authority to install covert surveillance equipment on private property or were reckless on the point.
17. In any event, in the *Hamed* case it was not merely the use of covert video surveillance equipment that took the police outside the scope of their lawful authority. Search warrants upon which they relied for their authority were held to be invalid because of their prospective character.
18. Having no lawful authority to be on the land, the police were trespassers there and the searches they conducted, whether with or without surveillance equipment, were unlawful.
19. It is not known whether the same issue arises in the cases currently before the courts or under investigation. If that issue does arise, and the search warrants are therefore invalid, it is difficult to see how the proposed law will validate those searches.
20. This is so because the proposed law only applies to searches that, apart from the use of covert video camera surveillance, are otherwise lawful.

Amending the Bill of Rights

21. If enacted, it is clear that the provisions contained in the proposed law would both over-ride and severely attenuate section 21 of the New Zealand Bill of Rights Act. The proposed law would

³ 8 Coke, 146; 1 Smith's Ld. Cas. 217

have the effect of amending what is probably our most important constitutional statute, on an *ad hoc* basis.

22. The proposed law would have the result that the use of covert video camera surveillance “as part of, or in connection with a search” has always been lawful and has never of itself rendered the search unreasonable. This situation would continue into the future for at least another year.
23. This approach violates elementary principles of the search and seizure jurisprudence that has been developed by our superior courts since the New Zealand Bill of Rights Act was enacted in 1990, not to mention the principles previously developed by the courts at common law.
24. Those principles include the proposition that we all have a basic right to be free from intrusion into our private lives, and the monitoring of our private conduct, by agents of the state, unless:
 - (a) There are proper grounds for the intrusion, objectively established;
 - (b) A process for obtaining prior authorisation is prescribed by law;
 - (c) The process is subject to the safeguard of prior consideration by a neutral officer (usually a judge);
 - (d) The officer has discretionary authority to authorise or refuse to authorise the intrusion on a case-by-case basis, after considering all the relevant circumstances.
25. In contrast to that approach, the proposed law would simply deem all uses of covert video surveillance equipment to be a neutral factor in search and seizure law. The use of such equipment would thus become a matter that the courts could not take into account in dealing with past cases (other than *Hamed*) and with any future cases that may arise during the next 12 months. But if such an extreme form of privacy intrusion is now to be regarded as a neutral factor, it seems legitimate to ask whether section 21 of the New Zealand Bill of Rights Act retains any real meaning at all.
26. The proposed law does not respond in any way to the issues of public policy and human rights protection at the heart of the Supreme Court's decision in *Hamed* and section 21 of the New Zealand Bill of Rights Act. It is not a narrowly tailored scheme which seeks to balance competing interests.
27. As an absolute minimum, the proposed law should be expected to:
 - (a) narrowly define the offences in respect of which this exceptional override of human rights was considered permissible;

- (b) only render lawful video surveillance that is undertaken pursuant to an otherwise valid warrant; and
- (c) be restricted to identified enforcement agencies (as is the case under the Search and Surveillance Bill).

28. Section 7 of the New Zealand Bill of Rights Act provides:

7. Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights

Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—

- (a) in the case of a Government Bill, on the introduction of that Bill; or
 - (b) in any other case, as soon as practicable after the introduction of the Bill,—
- bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

29. Section 7 obviously applies to the proposed law and, if the proposal proceeds, it is submitted that the Attorney-General will be responsible to provide a full, detailed and accurate explanation to Parliament of the way in which the proposed law will attenuate the operation of section 21 of the New Zealand Bill of Rights Act.

Consultation, deliberation and the need for urgency

- 30. Because the proposed law effectively amends the New Zealand Bill of Rights Act, and because it would involve a substantial attenuation of the operation of section 21, which affirms one of our most significant human rights (“the right to be let alone”), the proposed law should be the subject of consultation and adequate time should be allowed for interested groups to make submissions.
- 31. For the same reasons, such an important measure should be the subject of careful and fully informed deliberation by Parliament.
- 32. Use of Parliamentary urgency has been criticised in recent years, and the proponents of the draft Bill should consider carefully whether this is an appropriate occasion for it to be employed.
- 33. This leads to the question whether there is a genuine and urgent need for the proposed law. It has been asserted that there are currently 40 affected cases before the courts and another 50 under investigation. However, no information has been made available about those cases.

34. If the quoted number of cases is correct, it must mean that the police have been using covert video surveillance unlawfully in a wide range of cases over an extensive period. But if this is so, why have these unlawful activities not been disclosed to defence counsel in any of these other cases? To fail to make proper disclosure of such matters would almost certainly breach the obligations of the police under the Criminal Disclosure Act 2008 and, if there has been a widespread breach of those obligations, Parliament must be entitled to be properly informed about that subject before validating or condoning possibly widespread police misconduct *ex post facto*.
35. If, on the other hand, there has been no seriously unlawful activity on the part of the police, and therefore no real misconduct (whether deliberate or otherwise), why do the police need retrospective validating legislation when they already have the power to ask for improperly obtained evidence to be admitted by the courts under section 30 of the Evidence Act 2006?

Interference in the judicial process

36. In order to understand whether there is a genuine need for the proposed law and whether there is urgency to enact it, it is necessary to understand what kinds of situations have arisen posing evidentiary difficulties because of the *Hamed* case. No such details have been made available publicly.
37. Parliament should not enact measures that amount to an interference in the judicial process in cases that are currently before the courts or which may become the subject of criminal proceedings. It is a well-established constitutional convention that Parliament should not interfere in the judicial process.

The rule of law

38. The Law Society has a statutory responsibility to uphold the rule of law in New Zealand. This is one of the most important roles of the Law Society and one that it takes very seriously, even though it is relatively rare for a situation to arise in which the principles that underpin the rule of law are not observed by our own government.
39. In the present case, however, and for the reasons outlined above, the Law Society considers that enactment of the proposed law would indeed infringe the basic principles upon which the rule of law ultimately depends.
40. Of most concern, from this perspective, is the fact that the proposed law would operate to deprive people who are currently before the courts, or who are about to be brought before the

courts, of a vested right which each of them is currently entitled to claim in any criminal proceedings against them.

41. It is no answer to say that these people are “serious criminals”, because the purpose of our criminal justice system is to determine, by due process, whether or not criminal offences have been committed and, until a valid conviction is entered against those concerned, they are entitled to the presumption of innocence.
42. For these reasons, the Law Society respectfully submits that the proposed measure should not be enacted in its current form.

An alternative approach

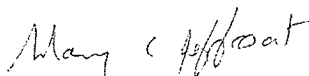
43. In *Hamed*, by a majority the Supreme Court ruled that some of the unlawfully obtained evidence was admissible against some of the accused, relying on section 30 of the Evidence Act 2006 which reads as follows:

Improperly obtained evidence

- (1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer evidence if—
 - (a) the defendant or, if applicable, a co-defendant against whom the evidence is offered raises, on the basis of an evidential foundation, the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue; or
 - (b) the Judge raises the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue.
- (2) The Judge must—
 - (a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and
 - (b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice.
- (3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:
 - (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it;
 - (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith;
 - (c) the nature and quality of the improperly obtained evidence;
 - (d) the seriousness of the offence with which the defendant is charged;
 - (e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used;
 - (f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant;
 - (g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others;
 - (h) whether there was any urgency in obtaining the improperly obtained evidence.

- (4) The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.
- (5) For the purposes of this section, evidence is **improperly obtained** if it is obtained—
 - (a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or
 - (b) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or
 - (c) unfairly.
- (6) Without limiting subsection (5)(c), in deciding whether a statement obtained by a member of the Police has been obtained unfairly for the purposes of that provision, the Judge must take into account guidelines set out in practice notes on that subject issued by the Chief Justice.

44. As noted above, the Law Society recommends the following as a preferred alternative to enacting the proposed law:
- (a) Section 30 provides a more principled means of addressing the concerns that have been raised in the current debate than does the proposed law as set out in the draft Bill.
 - (b) If urgent legislative intervention is considered necessary, and if section 30 in its current form is thought to provide an insufficient answer to the problem, it would be more appropriate to amend section 30 than to over-ride section 21 of the New Zealand Bill of Rights Act.
 - (c) If the government were to accept this position, the Law Society would be willing to address the question of an amendment to section 30 on an urgent basis.



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23 September 2011

New Zealand Law Society

30A Special circumstances

(1) In carrying out the balancing exercise required by section 30(2)(b), the Judge must determine whether special circumstances existed at the time the evidence was obtained.

(2) If the Judge determines that special circumstances existed at the time the evidence was obtained, the Judge must give substantial weight to that issue when carrying out the balancing exercise required by section 30(2)(b).

(3) In this section, **special circumstances** means a situation in which:

- (a) The evidence in issue was obtained as a result of a search within the meaning of section 21 of the New Zealand Bill of Rights Act 1990.
- (b) At the time the search was carried out there was no lawful means of obtaining a valid warrant to carry out a search of that particular kind; and
- (b) If a lawful means of obtaining a valid warrant to carry out a search of that particular kind had existed at the time the search was carried out, it is probable that a warrant would have been granted for the search if:
 - (i) An appropriate application had been made to a judicial officer with authority to issue the warrant; and
 - (ii) All material information had been disclosed to the judicial officer by the applicant.

(4) In assessing whether subsection 3(b) applies, the Judge must have regard to the legal principles that apply to issuing interception warrants under Part 11A of the Crimes Act 1961 and the Misuse of Drugs Amendment Act 1978.

(5) This section shall not apply in any court proceedings in which the admissibility of the evidence was in issue in the proceedings at any time before this section came into force.

28 September 2011