

# **Video Camera Surveillance (Temporary Measures) Bill**

Government Bill

As reported from the Justice and Electoral  
Committee

## **Commentary**

### **Recommendation**

The Justice and Electoral Committee has examined the Video Camera Surveillance (Temporary Measures) Bill and recommends by majority that it be passed with the amendments shown.

### **Introduction**

The bill introduces temporary measures to provide a framework for the use of covert video surveillance in the wake of the decision in *Hamed and Ors v R* [2011] NZSC 101, 2 September 2011 (the Hamed decision).

Before the Hamed decision, the use of covert video camera surveillance by State agents had been considered by New Zealand courts, and was found to be permissible under common law whether the surveillance was conducted on private property entered pursuant to a search warrant, or from a place not requiring a warrant to enter.

We note the Law Commission's 2007 report questioned the legal basis of trespassory video camera surveillance. We note that this re-

port was issued prior to three Court of Appeal decisions that we are advised affirmed the lawful use of such surveillance.

In the Hamed decision the Supreme Court decided that covert video camera surveillance conducted on land entered pursuant to a search warrant and without any form of “prior judicial authorisation” that specifically authorised the use of video cameras was a trespass, and therefore unlawful. The Court’s decision has immediate effect and has had a substantial impact on past and present criminal and proceeds of crime proceedings and current police investigations into very serious crime. We were advised by the New Zealand Police that they have stopped all covert video surveillance following the Hamed decision.

We believe that in the wake of the Hamed decision three distinct questions are posed:

- 1 What prospective powers should state agents who seek to use covert video camera surveillance be granted, and how should those powers be authorised?
- 2 What effect does the Hamed decision have on proceedings awaiting trial and current police investigations?
- 3 What effect does the Hamed decision have on decisions made before 2 September 2011 in cases which involved evidence obtained through covert video surveillance?

Consideration of the bill and these questions has been limited by the short time available before Parliament dissolves for the general election. In the brief time the bill was before the committee we received 438 submissions and heard 20 submissions. We were greatly assisted in our consideration by the submissions we received.

This commentary covers the major amendments we recommend to the bill. It does not cover minor or technical amendments.

### **Types of surveillance**

Covert video camera surveillance can be broadly divided into two categories—trespassory and non-trespassory.

Trespassory surveillance generally means covert surveillance conducted on private property as part of a search warranted under section 198 of the Summary Proceedings Act 1957. This type of surveillance was ruled upon in the Hamed decision.

Non-trespassory surveillance, or “over the fence” surveillance, is conducted from a position such as public land, or a neighbouring property with the full knowledge and consent of the property owner. Non-trespassory surveillance was not ruled upon directly in the Hamed decision, and there is a view that nothing in the judgment could affect the use of non-trespassory surveillance.

### **Prospective surveillance powers**

We believe that the Police require prospective surveillance powers in some form. Surveillance is an important investigatory tool, particularly as criminal networks become more sophisticated. The bill would allow the Police and other State agents to continue to rely on a section 198 search warrant until the Search and Surveillance Bill is enacted and a more comprehensive framework can be established.

In the case of trespassory surveillance the current practice of the Police is to obtain a warrant pursuant to section 198 of the Summary Proceedings Act, in order to authorise their entry onto private property without consent. We expect this practice to continue, and any application for such a warrant to expressly indicate the intention to perform video camera surveillance, and to be made to a District Court Judge.

Non-trespassory video camera surveillance, by its very nature, does not require the authorisation of a search warrant. Its admissibility as evidence will remain subject to the judgment of the court on the basis of the reasonableness requirements of section 21 of the New Zealand Bill of Rights Act 1990 and section 30 of the Evidence Act 2006.

We are aware of concern that the bill would significantly widen the surveillance powers available to the Police and other State agents to potentially include audio recording. We were advised and assured that the video cameras currently in use by law enforcement agencies have the sound recording function disabled, so this appears not to be the case. Obtaining audio recording without an appropriate interception warrant remains unlawful.

In addition to the issue of sound recording we were concerned to ensure that any search or gathering of evidence that could have been challenged as to its legality prior to, and without reliance on the issues raised in the Hamed decision would have all such challenge grounds preserved. We are satisfied that this is the case however the com-

mittee is also recommending the inclusion of new clause 3(d) in the purpose clause of the bill to reinforce this.

At the same time the committee was also concerned to ensure that the effective parts of this legislation would provide sufficient certainty to enable prospective covert video camera surveillance to continue, subject to other challenge grounds, for the 6 month period created by the bill. We are advised that the bill as reported provides a sufficient framework for law enforcement agencies to recommence covert video camera surveillance (both trespassory and non trespassory) with some expectation that if no other challenge grounds are established the evidence so collected will be considered to have been lawfully acquired.

### **Current investigations and operations**

We believe that the judicial process can be relied upon to determine the lawfulness of evidence obtained by the use of covert video camera surveillance case by case. This would apply only to cases that were before the courts or waiting to go before the courts and investigations that were active at the time of the Hamed decision.

### **Past court decisions**

The Hamed decision was issued on 2 September 2011. Prior to that date, covert video camera surveillance was not prohibited under common law, and convictions were lawfully obtained on the basis of its results. We asked the Human Rights Commission if it would be undesirable or a breach of human rights to prevent the reopening of such convictions, and the commission told us that it would not be. We have inserted a provision accordingly, which makes it clear that appeals on other grounds are unaffected.

### **Sunset clause**

We recommend reducing the period to which the provisions of this bill apply from 12 to 6 months after the date on which the Act comes into force. This bill is intended to provide only a temporary solution until the passage of the Search and Surveillance Bill, which we believe should occur as soon possible in the new Parliament.

## **Passage of Search and Surveillance Bill**

We strongly recommend that the new Parliament make the Search and Surveillance Bill a priority and expedite its passage. That bill has had the benefit of a full select committee process, and has been thoroughly tested and reviewed in a way that has not been possible with this bill.

## **Definition of search**

We are aware of concern that the definition of search in the bill as introduced is too wide. We recommend removing paragraph b from the definition in order to make it narrower.

## **Bill of Rights**

The bill would in no way limit the rights conferred by the New Zealand Bill of Rights Act 1990. Its role is preserved, and the unreasonableness test, which has previously been applied to the use of covert video camera surveillance, remains.

## **Savings**

We would point out that the bill as introduced would have no effect on the implications of the findings of the Hamed decision regarding any specified person.

## **New Zealand National Party view**

National Party members support and would have preferred to preserve the retrospective application contained in the bill as introduced to guard against the risk of accused persons escaping criminal responsibility as a result of this legal uncertainty alone. However, other committee members were convinced by the evidence presented by submitters which asserted that retrospectivity was both unnecessary and undesirable. The bill as amended is largely prospective in its application because of the need for the matter to be resolved on a temporary basis before the House rises and the Parliament ends.

## **New Zealand Labour Party minority view**

### **The lawfulness of covert video surveillance**

There has been much discussion about whether covert video camera surveillance is lawful. Labour members think the fairest summary of the position is that, while it had generally been considered permissible, an influential body of opinion had been growing prior to the Hamed decision that covert video camera surveillance had an unsatisfactory legal footing. This is because in many cases it was not positively authorised by any statute or rule of law—it was simply not prohibited. This view is reinforced by the Law Commission report and its call for a statutory basis for the activity, which we hope will be provided as soon as possible with the prompt passage in acceptable form of the Search and Surveillance Bill.

### **Benefit of select committee hearing**

It was appropriate to hold a select committee process, however abbreviated, for this bill. It is clear to us that as opposition MPs we would not have been able to scrutinise the bill in any adequate way without having heard from the submitters to the committee. We listened carefully to all the evidence and we particularly welcome the fact that the evidence persuaded the committee of the following:

- It was justifiable to apply a short-term, forward-looking only, fix to the gap in surveillance powers left by the Hamed decision.
- That fix should apply for the shortest possible time—and that 6 months was far preferable to 12 months.
- That fix should strictly limit surveillance powers to those that applied prior to the Hamed decision, not expand them in any way, and ensure that all searches would remain subject to the section 21 Bill of Rights Act reasonableness standard, to be enforced by the courts.
- It was not a breach of human rights standards to declare that judicial decisions prior to the Hamed decision should not be able to be relitigated by reason only of Hamed.

**Warranting procedure would have been preferable**

We take the view that a warranting procedure should exist for all types of covert video camera surveillance. We sought to have such a procedure, based on the reported-back provisions of the Search and Surveillance Bill, included in the bill. A draft was produced, but we were advised that in the time available, officials could not guarantee that the outcome would be of a satisfactory standard to merit inclusion in an Act. Since the bill will now be in force for only 6 months, since it is agreed that the bill will be amended so as to be clear that it confers no new powers, and since it appears that there is now widespread agreement that the Search and Surveillance Bill should be enacted, we have (reluctantly) agreed not to press for the insertion of this warranting procedure.

**Appropriateness of not retrospectively interfering with existing investigations**

Labour members note that, specifically, submitters including the New Zealand Law Society, the New Zealand Bar Association and the Criminal Bar Association took the strong view that the discretion available to the courts under section 30 of the Evidence Act would allow evidence of the most serious wrongdoing still to be admitted, even where covert video camera surveillance of the type criticised in the Hamed decision had been used. We also note that the Commissioner of Police stated in his evidence that his priority was achieving certainty as to powers going forward. We are satisfied that serious offending under investigation or prosecution will continue to be able to be dealt with satisfactorily without the need for retrospective legislation, and we welcome the removal of these aspects of the proposed bill.

**Consistency of the bill with the New Zealand Bill of Rights Act 1990**

We are surprised that the House received no report from the Attorney-General under section 7 of the Bill of Rights Act on the bill's inconsistency with the Bill of Rights. We accept that this is consistent with officials' advice, but we find it difficult to follow their reasoning.

The Supreme Court found that existing video camera surveillance as an adjunct to a search warrant is illegal and in breach of section 21 of the Bill of Rights Act given the absence of express statutory authority to do so. The effect of the bill as it came to select committee overruled that, and did so retrospectively. Given that the Supreme Court found the actions now to be temporarily permitted are in breach of section 21 of the Bill of Rights Act, it seems axiomatic that retrospectively reinstating those infringements on the rights of New Zealanders (which will almost certainly result in New Zealanders being convicted on the basis of that illegally obtained evidence) must be a breach of section 21.

To maintain otherwise seems to us to challenge the analysis of the Supreme Court in the very case that has caused this issue to come before Parliament. We think better advice under section 7 would have highlighted to Parliament that care was needed in how far this legislation should go in permitting what had been declared unlawful.

### **Green Party minority view**

The Green Party does not believe this bill is necessary, and we are very concerned at the way it has been rushed through Parliament. The public was given less than two days to prepare and present submissions to the committee after the bill was tabled in Parliament. This is clearly inadequate, particularly for a bill dealing with such important and complex legal issues.

While there have been some improvements to the bill, as it is being reported back by the committee, they do not make the bill acceptable to us. Nor do we judge that the bill, as amended, meets the objections of most submitters. It should be noted that virtually all submitters, bar the Police, were strongly opposed to the bill in its original form. One common objection, which the Green Party agrees with, is that this is retrospective legislation, which should only apply in exceptional circumstances and this is not one of them. The Supreme Court, in the Hamed decision, ruled that covert video camera surveillance which involves trespass is unlawful. In the Green Party's opinion, this was consistent with existing case law as noted in the New Zealand Law Society's submission, where it agreed as follows with the Law Commission's 2007 paper *Search and Surveillance Powers*: "The paper correctly assumes (in accordance with the previously

decided case law) that covert camera surveillance which involves trespass to land will be regarded as unlawful conduct...”.

The bill retrospectively denies any person already convicted the right to use the Hamed decision as part of an appeal. That is contrary to a fundamental legal principle, that people engaged in court proceedings have resort to the law as it applied at the time of the alleged offence, in this case as determined by the Supreme Court in the Hamed decision. Although the bill purports not to affect the New Zealand Bill of Rights Act, it plainly does. It is constitutionally repugnant for Parliament to retrospectively remove by way of statute potentially valid appeal rights from persons convicted, as new section 5A of this bill does. This approach is contrary to various provisions of the New Zealand Bill of Rights Act, including sections 21 to 28 inclusive, which deal with the rights of accused persons.

Going to these lengths to prevent appeal proceedings using the Hamed decision also lacks justification in that the committee received evidence from barristers that court cases involving evidence collected by covert video camera surveillance involving trespass are rare. And, as happened in the Hamed decision, such evidence can be accepted by the court under section 30 of the Evidence Act, even when the evidence was unlawfully collected, if the charges are deemed serious enough.

The Green Party cannot see the need for Parliament to rush through this legislation when the Search and Surveillance Bill, awaiting its second reading, could be debated early in the next Parliament. While the Green Party has been critical of the Search and Surveillance Bill, including the power it gives to Police, Internal Affairs and Customs to engage in covert video surveillance involving trespass, the bill does provide a detailed framework for obtaining surveillance warrants. By contrast, the Video Camera Surveillance (Temporary Measures) Bill gives virtually free rein not only to the Police but to any State agency with search powers (Fisheries, Commerce, etc.) to engage in covert video camera surveillance, with or without trespass.

It is important to note that the Hamed decision did not determine the legality or illegality of covert video camera surveillance that did not involve trespass. If this bill was not passed courts would continue to judge the reasonableness of the covert video camera surveillance without trespass against section 21 of the Bill of Rights on a case by case basis, as they have done to date. In that respect there is no need

for this temporary measures bill, prior to the Search and Surveillance Bill being dealt with in the next Parliament.

## **Appendix**

### **Committee process**

The Video Camera Surveillance (Temporary Measures) Bill was referred to the committee on 27 September 2011. The closing date for submissions was 28 September 2011. We received and considered 438 submissions from interested groups and individuals. We heard 20 submissions.

We received advice from the Crown Law Office and the New Zealand Police.

### **Committee membership**

Chester Borrows (Chairperson)

Simon Bridges (Deputy Chairperson)

Amy Adams

Kanwaljit Singh Bakshi

Carol Beaumont

Charles Chauvel

Kennedy Graham

Paul Quinn

Carmel Sepuloni

For this item of business Hon Rodney Hide was a non-voting member and Dr Kennedy Graham was replaced by Keith Locke.

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Video Camera Surveillance (Temporary  
Measures) Bill

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**Key to symbols used in reprinted bill**

**As reported from a select committee**

text inserted by a majority

~~text deleted by a majority~~

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*Hon Christopher Finlayson*

## **Video Camera Surveillance (Temporary Measures) Bill**

Government Bill

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**The Parliament of New Zealand enacts as follows:****1 Title**

This Act is the Video Camera Surveillance (Temporary Measures) Act **2011**.

**2 Commencement**

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This Act comes into force on the day after the date on which it receives the Royal assent.

**Part 1**  
**Preliminary provisions**

**3 Purposes of this Act**

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The purposes of this Act are—

- (a) to ~~maintain for the benefit of~~ leave unaffected, as far as the parties in the proceedings entitled *R v Hamed & Others* are concerned, the decision of the Supreme Court in *Hamed & Others v R* [2011] NZSC 101, 2 September 2011; and 15
- (b) to provide a temporary period that will enable Parliament to address in a comprehensive way the matters raised in the decision regarding the lawful and appropriate use of video camera surveillance as part of law enforcement; and 20
- (c) to uphold, during the temporary period referred to in **paragraph (b)**, the ~~lawful status of certain uses~~ deployment of video camera surveillance ~~in accordance with the law as it had been articulated and applied only to~~ the extent that it was considered to be not unlawful in decisions prior to the decision in *Hamed*; and 25
- (d) to ensure that the right to be secure against unreasonable search and seizure set out in section 21 of the New Zealand Bill of Rights Act 1990 is unaffected by the temporary measures put in place by this Act. 30

**4 Interpretation**

In this Act, unless the context otherwise requires,—

**covert video camera surveillance** means the use of a video camera for surveillance, from a fixed or mobile position, that is intended to be hidden from the view of ~~persons other than those deploying the camera~~ those who are to be observed

**decision** means the decision of the Supreme Court in *Hamed & Others v R* [2011] NZSC 101, 2 September 2011

**~~search~~**

~~(a) means an act done by a person or body referred to in section 3(b) of the New Zealand Bill of Rights Act 1990—~~

~~(i) that is, or is in connection with, a search in respect of which a search warrant has been issued;~~

~~or~~

~~(ii) that is a search where surveillance is conducted from outside the boundaries of the land or place under observation; and~~

~~(b) includes the acquisition of information about any person, place, or thing~~

**search** means an act done by a person or body referred to in section 3(b) of the New Zealand Bill of Rights Act 1990—

(a) that is, or is in connection with, a search in respect of which a search warrant has been issued; or

(b) that is a search where surveillance is conducted from outside the boundaries of the land or place under observation

**specified person** means any person charged with offences against the Crimes Act 1961 or the Arms Act 1983 following a police investigation into events in the Urewera ranges in 2006 and 2007 that is known as Operation 8

**use**, in relation to video camera surveillance, includes (without limitation) the positioning, installation, maintenance, and removal of the camera.

**Part 2****Temporary continuation, measures, past  
court decisions undisturbed, and savings***Declaration of continued lawfulness* *Temporary  
measures*

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**5 Temporary continuation of lawfulness of certain uses of  
video camera surveillance**

~~(1) This section applies to the use of covert video camera surveil-  
lance as part of, or in connection with, a search, if that use—~~

~~(a) occurred prior to the coming into force of this Act; or~~ 10

~~(b) occurs before the close of the day that is 1 year after the  
date on which this Act comes into force.~~

(1) This section applies to the use of covert video camera surveil-  
lance as part of, or in connection with, a search, if that use  
occurs on or after the commencement of this Act but before  
the close of the day that is 6 months after the date on which  
this Act comes into force.

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(2) The use of covert video camera surveillance as part of, or in  
connection with, a search does not of itself render the search  
unlawful.

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~~(3) Without limiting **subsection (2)**, evidence obtained by means  
of covert video camera surveillance as part of, or in connection  
with, a search is not to be treated as improperly obtained for  
the purposes of section 30 of the Evidence Act 2006 by reason  
only of its having been obtained by that means.~~

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(4) This section is subject to **section 6 sections 5A and 6.**

*Past court decisions undisturbed***5A Past court decisions undisturbed**

(1) Despite **section 5(1)**, the fact that covert video camera  
surveillance was used as part of, or in connection with, a  
search to obtain evidence that was admitted in a criminal  
proceeding is not of itself a reason for allowing an appeal  
against a conviction that was entered in that proceeding prior  
to the commencement of this Act.

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(2) This section is subject to **section 6.**

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**Video Camera Surveillance (Temporary  
Measures) Bill**

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*Savings*

**6 Savings**

Nothing in this Act affects the decision as it relates to any specified person.

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**Legislative history**

27 September 2011

Introduction (Bill 333–1), first reading and referral to Justice and Electoral Committee

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