LEGISLATION NOTE

Search and Surveillance Act 2012

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I INTRODUCTION

On 18 April 2012, pt 3 of the Search and Surveillance Act 2012 came into force. After an extensive review of search and surveillance powers by the Law Commission,[1] as well as the recent Supreme Court decision of *Hamed v R*,[2] it had become increasingly apparent that statutory intervention was required to clarify and protect the interests of both state enforcement agencies and citizens. Of particular note, *Hamed* highlighted the need for the regulation of visual surveillance — an area that had been left largely untouched by statute.Consequently, one of the key purposes of the Act was to "modernis[e] the law of search, seizure, and surveillance to take into account advances in technologies and to regulate the use of those technologies".[3]

This legislation note focuses on the new surveillance warrant regime with a particular emphasis on visual surveillance. The goal of this note is to outline the scope of the regime and determine whether it creates a sufficiently certain environment for police to exploit modern surveillance technology while remaining suitably sensitive to human rights values.

II *HAMED V R*: THE NEED FOR CLARITY

As the law stood in 2010, no statutory regime existed for the use of visual surveillance devices. Rather, their use could only be challenged pursuant to s 21 of the New Zealand Bill of Rights Act 1990 (NZBORA). This was undesirable for both citizens and police. For citizens, the absence of specific statutory regulation meant that the prospective protection "inherent in a warrant regime" was unavailable.[4] Rather, a citizen had to rely on a court's ex post facto assessment of whether police activity amounted to an unreasonable search. Meanwhile, police ran the risk of investing heavily in large-scale surveillance operations only to have any evidence obtained rendered inadmissible at a later stage.[5]

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

2 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305. See also Samuel Beswick "Perlustration in the Pathless Woods: *Hamed v R*" (2011) 17 Auckland U L Rev 291.

3 Search and Surveillance Act 2012, s 5(a).

4 Law Commission, above n 1, at [11.39].

5 *R v Gardiner* (1997) 15 CRNZ 131 (CA) at 136.

This uncertainty came to a head in *Hamed* where the Supreme Court was divided as to when visual surveillance would actually amount to a search. Blanchard J held that visual surveillance would only amount to a search when it infringed on a person's reasonable expectations of privacy.[6] In assessing those expectations, the *place* of surveillance was emphasised. Public visual surveillance could not generally be regarded as a search because people do not expect to be free from observation in the public space.[7] However, the position may differ if the police used equipment that captured images not available to the naked eye such as infrared imaging.[8]

Elias CJ, however, took perhaps a more nuanced approach. While reasonable expectations of privacy will play a role in the analysis, s 21 should not be constrained to notions of property ownership. Rather, it is aimed at regulating the space between private citizens' "right to be let alone" and the legitimate goals of state agencies.[9] As such, even when in public, if a person considered himself or herself to be out of earshot or sight, then covert surveillance might well intrude upon their personal freedom, even when not technologically enhanced.[10]

Lastly, Tipping J favoured an even more liberal interpretation. The court's work should primarily be done in the unreasonableness criterion of the analysis.[11] On this basis, a public place may well constitute a search. Expectations of privacy would help determine whether that search was reasonable.[12]

III SEARCH AND SURVEILLANCE ACT 2012 — SURVEILLANCE WARRANTS

It was against this background that the Search and Surveillance Act 2012 created a broad based surveillance warrant. This new warrant consolidates and replaces previous interception and tracking regimes while also providing statutory authority for the use of visual surveillance devices.[13]

The Process

Under s 46, an enforcement officer must apply for a surveillance warrant: to use an interception device to intercept a private communication; to use a

6 *Hamed v R*, above n 2, at [163].
7 At [167].
8 At [167]–[168].
9 At [10].
10 At [12].
11 At [223].
12 At [224].
13 See Crimes Act 1961, pts 9A and 11A; Misuse of Drugs Amendment Act 1978, ss 14–29; and Summary Proceedings Act 1957, ss 200A–200P.

tracking device;[14] and to undertake any surveillance that involves trespass or the use of a visual surveillance device to observe private activities on private premises (or on the curtilage of private premises for an extended period of time).[15]

A warrant will only be granted by a judge if the enforcement officer shows that they have reasonable grounds to suspect an offence has been committed and reasonable grounds to believe that the surveillance device will obtain evidence in respect of the offence.[16] This bi-partite test is the same as the one for the granting of a search warrant in the new Act.[17] While one might argue that a more exacting test is required due to the potentially prolonged and covert nature of surveillance,[18] the Law Commission rejected these concerns. Different circumstances were said to demand different investigatory measures.[19]

An application must contain reasonable detail of the type of surveillance being used and the name or description of the person, place or thing that is the object of the proposed surveillance.[20] It must also describe the evidential material believed to be able to be obtained by the use of the device.[21]

However, Parliament has recognised that specificity on all aspects may not always be possible. For instance, in applying to observe the premises of a known drug dealer, the police may not know the identity of all the persons involved in the transaction or the range of offences that may be committed during observation. In those circumstances, an enforcement officer need only state the circumstances in which the surveillance is to be undertaken in enough detail to identify the parameters and objectives of the use of the device.[22] This is a pragmatic response to ensure police are not prevented from using these devices simply because not all possible details are known.

Enforcement Officer

Unlike the restrictive nature of previous interception and tracking device regimes, surveillance warrants are available to a broad range of state agencies as long as their employees fall within the broad definition of "enforcement officer".[23] This includes Fishery Officers and employees of the Commerce Commission.

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14 Section 46(1)(b): "except where a tracking device is installed solely for the purpose of ascertaining whether a thing has been opened, tampered with, or in some other way dealt with, and the installation of the device does not involve trespass to land or trespass to goods".

15 Section 46.

16 Section 51.

17 Section 6.

18 A surveillance warrant can be for as long as 60 days: s 55(1)(c).

19 Law Commission, above n 1, at [11.79].

20 Section 49(1)(f).

21 Section 49(1)(g).

22 Section 49(2).

23 Section 3(1).

Creating a regime that encompasses all enforcement agencies makes sense in respect of visual surveillance. With no existing regime in place, providing a regime that only regulated police activity would lead to the bizarre position where the police were more constrained than other agencies in using visual surveillance devices. That is, while the police would be required to seek judicial authorisation *prior* to use, the use of visual surveillance by other agencies would only be subject to a retrospective s 21 NZBORA challenge.

However, concern has been raised over the extension of interception and tracking device powers to a broad range of state enforcement agencies.[24] The Law Commission definitively rejected these concerns for several reasons.[25] First, there was said to be no intrinsic difference between the intrusiveness of visual surveillance and any other type of surveillance.[26] Secondly, with a significant resource commitment required, it was not anticipated that surveillance would become a widespread practice.[27] Thirdly, as it stood, non-police agencies were simply asking the police to obtain a warrant on their behalf.[28] This position was both inefficient and artificial. Lastly, the development of multi-purpose devices has rendered it increasingly difficult to differentiate between the forms of device used.[29]

Trespass Visual Surveillance and Interception Devices

Even under this broad warrant regime, Parliament has recognised the high level of intrusiveness of some methods of surveillance. Where an enforcement officer wants to undertake trespass surveillance or use an interception device (irrespective of whether it involves trespass), a warrant can be granted only if the evidential material they seek to obtain relates to an offence that is punishable by at least seven years' imprisonment or is against various sections of the Arms Act 1983.[30]

Section 45 therefore appears to mark interception devices as the most intrusive form of surveillance. By restricting their use in the same manner as trespass surveillance, Parliament has effectively decided that a citizen's expectations of privacy in their conversations are equivalent to their expectations when surveillance infringes on territorial privacy rights. However, Heron and La Hood have questioned the distinction, arguing that it largely rests on a mere historical belief that words are inherently more private than actions.[31] Similarly, the Law Commission saw no intrinsic difference between the three forms of surveillance device.[32] In the author's view,

24 These powers were previously only available to Police and Customs Officers.

25 Law Commission, above n 1, at [11.81].

26 At [11.82].

27 At [11.83].

28 At [11.84].

29 At [11.85].

30 Search and Surveillance Act, s 45.

31 Michael Heron and Dale La Hood "Search and Surveillance Act 2011 — new powers" (paper presented to New Zealand Law Society Seminar, June 2012) at 41.

32 Law Commission, above n 1, at [11.82].

intrusiveness will largely depend on the substance of the activity observed or heard rather than what device is used. For instance, one's expectations of privacy would be greater for intimate activities than phone conversations with friends.

Additionally, contrary to concerns regarding the "creep of state powers",[33] these methods of surveillance are only generally available to the police. While s 45 refers to any "enforcement officer", s 50 indicates that for another "specified agency" to use these methods,[34] that agency must be approved by an Order in Council on the recommendation of the Minister of Justice after consultation with the Minister of Police.[35] The agency must satisfy the Minister that they have the requisite technical capability, the necessary policies and procedures to maintain the integrity of the data, and the expertise to obtain and present appropriately that data to the court.[36] Concerns over the extension of the use of interception devices may therefore have been overblown.

Non-trespass Visual Surveillance

In contrast to trespass surveillance, any enforcement officer who wants to observe a person partaking in a private activity on private premises (or on the curtilage for a prolonged period) without trespassing can seek a warrant in respect of *any* criminal offence.[37]

Section 3 defines "visual surveillance device" as:

> ... any electronic, mechanical, electromagnetic, optical, or electro-optical instrument, apparatus, equipment, or other device that is used or is capable of being used to observe, or to observe and record, a private activity[.]

Consequently, rudimentary surveillance devices such as binoculars now appear to require a warrant.

1 Private Premises

"Private premises" is defined in s 3 as "a private dwellinghouse, a marae, and any other premises that are not within the definition of non-private premises".

33 At [11.86].

34 "Specified agency" is limited to the New Zealand Customs Service and the Department of Internal Affairs: s 50(4).

35 Section 50(2).

36 Section 50(3).

37 Sections 46(1)(c) and (e).

"Non-private premises" is defined as:[38]

> ... premises, or part of a premises, to which members of the public are frequently permitted to have access, and includes any part of a hospital, bus station, railway station, airport, or shop[.]

A private premises therefore appears to be a building or structure not generally accessible to the public. It is also likely to include commercial premises if those premises are not accessible to the public at large.[39]

Although this definition makes sense and is likely to be interpreted broadly, the test has been unnecessarily complicated by also requiring the observed activity to be private. While a private activity would usually encompass every activity within the home, that may not be the case in respect of every activity in a commercial building. Moreover, even if in the home, it could be argued that activities lose the indicia of privacy if the person has a suspicion they are being watched. In *R v Gardiner*, the Court held non-trespassing video surveillance to be reasonable under s 21 of the NZBORA partly due to the fact that the defendants suspected they were being filmed.[40] Enforcement officers therefore have less certainty as to when a warrant is required. In effect, this additional requirement undermines the provision of a simple and certain test and detracts from the main issue — the surveillance of the interior of a private place.

2 Curtilage

A surveillance warrant will also be required if private activity on the curtilage is observed for a prolonged period.[41] While the division between private premises and the curtilage is consistent with the idea that search is tethered to a citizen's reasonable expectations of privacy, Beswick notes that uncertainty may result through Parliament's failure to define curtilage.[42] The Law Commission said that it was likely to cover "the immediate surrounds of the buildings, including decks and gardens, whether or not they are fenced or enclosed".[43] However, no guidance is given as to whether an area such as a glass enclosed patio or one with a retractable roof comprises part of the house or curtilage.[44] Similarly, no guidance is given as to whether the extent of the curtilage is different for different types of residence. For instance, is a farmhouse's curtilage greater than a suburban house taking into account

38 Section 3, definition of "non-private premises".

39 Samuel P Beswick "Targeted Visual Surveillance in New Zealand: An Analysis and Critique of the Search and Surveillance Bill" (2010) 2 NZLSJ 239 at 242.

40 *Gardner*, above n 5, at 135.

41 Where "the duration of the observation [of a private activity in the curtilage of private premises], for the purposes of a single investigation, or a connected series of investigations, exceeds — (i) 3 hours in any 24-hour period; or (ii) 8 hours in total": Search and Surveillance Act, s 46(1)(e).

42 Beswick, above n 39, at 245.

43 Law Commission, above n 1, at [11.73].

44 Beswick, above n 39, at 245.

the larger land area? Judicial definition of the curtilage will shape the circumstances in which private becomes public.[45]

3 A Satisfactory Solution?

By limiting the regime to cover only private premises and the curtilage, Parliament has failed to answer the difficult questions raised in *Hamed*. Although *Hamed* involved trespassing surveillance, the successful appellants were in a privately owned forest that does not easily fit into the definition of private premise or curtilage. As such, the new regime fails to account for surveillance of places that are not private premises, curtilage or public land but where a party may have reasonable expectations of privacy. Even Blanchard J noted that there might be exceptional circumstances in which a person in public has such reasonable expectations.[46]

While a person may still make a s 21 NZBORA challenge in these circumstances, any search is unlikely to be deemed unreasonable as Parliament has apparently legislated on the basis that no statutory authorisation is necessary for observation of a public place.[47] While it is possible for a lawful search to be deemed unreasonable, such cases will be rare and may now demand truly exceptional circumstances.[48]

Other Activities Not Requiring a Warrant

In addition, the Act recognises that in some circumstances it will be impracticable for an enforcement officer to obtain a warrant. If it is, and the officer is otherwise entitled to apply for one, s 48 details a number of emergency situations where an enforcement officer will be permitted to use a surveillance device anyway. These situations involve the most serious types of offending and include offences punishable by at least 14 years' imprisonment and offences where injury to a person or serious damage to property is likely. The strict detailing of these offences is consistent with a citizen's fundamental human rights and the presumption that "in all but the most exceptional situations the decision to use or allow surveillance should be vigorously reasoned in a public forum".[49]

IV CONCLUSION

In enacting the new surveillance regime, Parliament always knew that it would be precariously balancing the competing interests of effective law

45 Heron and LaHood, above n 31, at 40.

46 At [167].

47 *Lorigan v R* [2012] NZCA 264 at [38].

48 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [24] per Glazebrook J.

49 Donna-Maree Cross "Surveillance" in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (Brookers, Wellington, 2010) 133 at 159.

enforcement and human rights values. No doubt there will be some who argue that the new regime has gone too far while others will suggest it has not gone far enough. This legislation note has identified disagreement or uncertainty in the areas of: the perceived intrusiveness of each device; the enforcement agencies permitted to use each device; and the situations requiring a warrant.

In addition, there are definitional issues that still need to be resolved to determine the exact scope of the Act. Namely, issues exist as to what amounts to a private activity and where the curtilage ends and public space begins. It will be interesting to see how the courts interpret these terms in light of s 21 of the NZBORA. Particularly, this note criticised Parliament's failure to deal comprehensively with the issues raised in *Hamed* by restricting the Act's application merely to private places and failing to provide for new developments in technology that do not fall within any of the three established device categories. These issues could have been resolved by the enactment of a further residual warrant regime as recommended by the Law Commission.[50]

Although there are still issues to resolve, the author believes that the Search and Surveillance Act 2012 is a marked improvement on the previous law in the area of surveillance, especially visual surveillance. With fundamental rights at stake, it was wholly undesirable to allow police to use these powers without prospective safeguards via a warrant regime. Preservation of that residual anomaly would have continued to undermine the accountability that s 21 of the NZBORA intended to impose on the branches of government.

50 Law Commission, above n 1, at [11.130].