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Submission to the Justice and Electoral Committee on the Search and Surveillance Bill 2009

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- [1] This submission addresses the surveillance regime created by the Search and Surveillance Bill 2009.
- [2] In June 2010 I completed a Law Honours Dissertation, supervised by Associate Professor Scott Optican, which analysed and critiqued the bar-1 version of the Bill. (A copy of the Dissertation is included as an appendix.)¹ I write this submission to the Committee in light of the conclusions reached from my research on the Bill.

Tracking Devices

- [3] A warrant is needed only when officers commit a physical trespass to attach a tracking device.² But advances in technology increasingly enable electronic tracking of targets without the need to place a device on a target. For example, aerial surveillance drones (as used by police in the United Kingdom) and satellites can conceivably be utilised to track targets electronically. Neither of these devices require a physical trespass to occur.
- [4] If the mischief that cl 42(b) aims to prevent is the state unreasonably (ie warrantlessly) watching/tracking its citizens, cl 42(b) falls short because sophisticated warrantless tracking can continue under the Bill in the absence of a trespass.³

Recommendation:

- Redraft cl 42(b) and/or the definition in cl 3 so that electronic tracking *techniques*, rather than the physical placement of devices, are subject to the warrant regime. (If necessary, non-trespassory electronic tracking techniques could be qualified with a short-term warrantless leeway, such as that found in cl 42(d).)

Visual Surveillance

- [5] In terms of visual surveillance, the Bill requires officers to obtain a warrant when observing private activity in or around (the curtilage of) private premises, or where the surveillance involves a physical trespass to private property.⁴
- [6] The Bill does not prescribe a mechanism for obtaining a warrant in relation to (a) non-trespassory visual surveillance of private property beyond (the curtilage of) private

¹ Samuel Beswick “Targeted Covert Surveillance in New Zealand: An Analysis and Critique of the Search and Surveillance Bill” (LLB(Hons) Dissertation, University of Auckland, 2010) (hereafter “TCSNZ”).

An abridged version is published in the 2010 New Zealand Law Students’ Journal at 239–266.

See: <http://www.samxpx.com/TargetedCovertSurveillanceinNZ.pdf>

² See cl 42(b) and the definition of ‘tracking device’ in cl 3.

³ TCSNZ at 12–13.

⁴ Cls 42(c)–(d). The amendment in cl 42(ca) is welcomed, and fixes the anomalous situation that the Bill did not originally provide for surveillance warrants where ‘premises’ were not involved. This was an issue because warrantless surveillance of private property can be an unreasonable search and seizure under s 21 of the New Zealand Bill of Rights Act 1990, as was found in the Tuhoe ‘terrorist training camps’ case: *R v Bailey* HC Auckland CRI-2007-085-7842, 7 October 2009, Winkelmann J at [98]–[101], [165]. TCSNZ at 20–22.

premises; and (b) non-trespassory visual surveillance of vehicles. The inference is that the Committee does not intend that these activities will ordinarily amount to an unreasonable search and seizure under s 21 of the New Zealand Bill of Rights Act 1990.

- [7] There are several problems. First, the term ‘curtilage’ is not defined in the Bill and there is currently no adequate definition in law. By contrast, the Law Commission’s Report did include a definition.⁵ The absence of a statutory definition may result in unnecessary litigation on this point (as the definition will determine when officers may and may not conduct short-term warrantless surveillance).
- [8] Secondly, the non-exhaustive definition of ‘private premises’ adopted in cl 3 only explicitly specifies dwellinghouses and marae as falling within its scope. This calls into question the status of private offices and commercial premises, which the Law Commission recommended should be included in the definition.⁶
- [9] On a similar note, the Bill does not address the status of vehicles under the warrant regime. Vehicles are generally considered places where people hold a reasonable expectation of privacy (especially mobile homes). Protection under the Bill may be appropriate when it comes to the visual surveillance of vehicles, as it is for the electronic tracking of vehicles.⁷
- [10] Thirdly, technological advances make it increasingly easier to surveil targets without requiring a trespass to private property. Cameras with powerful zooms, aerial surveillance drones, infrared cameras, and satellites all have the potential to invade privacy without committing a physical trespass. Again, if the concern is to protect citizens’ reasonable expectations of privacy, a warrant regime centred around physical trespass may fall short.⁸
- [11] Finally, the wording of cl 42 restricts the warrant requirement only to observation of ‘private activity’ (on private property). It is not clear why the activity must be considered ‘private’, or how one determines whether it is private. This may create difficulties for officers in determining prospectively whether certain activity is ‘private’ (and thus whether a warrant is necessary). It may also create difficulties for the Courts retrospectively to determine whether certain surveilled activity was private. The term is largely unnecessary (given that the definition is based on a ‘private property’ framework).⁹

Recommendations:

- The term ‘curtilage’ should be defined in the Bill to remove ambiguity.
- The definition of ‘private premises’ should be reworded clearly to include private offices and commercial premises.
- The position in relation to visual surveillance of vehicles should be addressed in the Bill. This could be achieved simply by amending the definition of ‘private premises’ to include private vehicles and mobile homes, or by amending cl 42.
- A short-term warrantless surveillance leeway, similar to that found in cl 42(d), should be adopted to address non-trespassory visual surveillance of private property generally, where the targeted activity could not be observed without a surveillance device. For surveillance lasting beyond the leeway a warrant should be required. This would act as a complement to cl 42(ca), just as cl 42(d) is a complement to cl 42(c).

⁵ TCSNZ at 19–20; Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at 329.

⁶ TCSNZ at 13–15; Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at 329.

⁷ TCSNZ at 14–15.

⁸ TCSNZ at 13–22.

⁹ TCSNZ at 15–18.

- The term ‘private activity’ in cls 42(c)&(d) should be replaced with simply ‘activity’. Whether surveilled activity is prospectively considered to be private should be irrelevant to the consideration.

Threshold Tests

- [12] Cl 42AA, which creates a minimum surveillance threshold for offences carrying an imprisonment term of at least 7 years, is a welcome addition to the Bill. It better addresses concerns that the Bill would create invasive surveillance powers out of all proportion to the suspected offending. It is in line with similar provisions adopted in Australia and with concerns raised by the Courts about the invasiveness of surveillance.¹⁰
- [13] Similarly cl 45(5), which restricts applicants for surveillance warrants primarily to constables, is an appropriate amendment to the Bill.
- [14] However, the test for issuing a surveillance warrant is more relaxed than that recommended by the Law Commission. The Commission recommended that ‘reasonable belief’ should be the test for issuing a warrant and undertaking certain emergency surveillance. Cls 44 and 46 instead contain a bipartite test: that an officer has a reasonable *suspicion* of illegality, coupled with a reasonable *belief* that relevant evidence will be obtained. I agree with the Law Commission’s recommendation that, due to the invasiveness of state surveillance, officers should have to have a reasonable belief of illegality, rather than merely a suspicion, in order to get a warrant or conduct emergency surveillance.¹¹
- [15] The words that have been inserted into cl 44(1) (ie “intermittently or continuously” and “in total”) add ambiguity to the previously straightforward clause. It may be that the words were added simply to clarify that, in an emergency, officers will be permitted to use a surveillance device “intermittently” for a set period not exceeding 72 hours. Alternatively, the words may be intended to broaden the clause, so that up to 72 hours of *use* of the device is permitted. This alternative interpretation would be an unsatisfactory broadening of cl 44(1).

Recommendations:

- The bipartite tests in cls 44 and 46 should be amended to the ‘reasonable belief’ threshold (except for certain serious emergency surveillance as discussed by the Law Commission),¹² which achieves a better balance of privacy versus law enforcement values.
- The ambiguity in cl 44(1) should be resolved (perhaps by removing the added words).

Warrantless Surveillance

- [16] Currently under the Bill warrantless surveillance of the curtilage¹³ and emergency surveillance¹⁴ is permitted for up to 8 hours and 72 hours respectively. The purpose is not to curtail ordinary police practice by allowing fleeting or urgent surveillance to occur. As a further safeguard on police surveillance activities, it may be appropriate to draft the clauses

¹⁰ TCSNZ at 25–27.

¹¹ TCSNZ at 27–29, 32–33.

¹² TCSNZ at 33; Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at 340–341.

¹³ Cl 42(d).

¹⁴ Cl 46.

in line with the Courts' general preference that search and surveillance activities be conducted pursuant to a warrant. A 'warrant preference rule' could be inserted, which would state that when targeting a particular person or property in circumstances where it is not impracticable to obtain a surveillance warrant, a warrant should be sought.¹⁵

Recommendation:

- A warrant preference rule should be introduced in relation to surveillance of the curtilage (cl 42(d)) and emergency warrantless surveillance (cl 46), to promote better the principle that state surveillance should be conducted pursuant to a warrant where possible.

Reporting Requirement

- [17] The reporting requirement deals with three aspects: reporting breaches of the Bill by officers, notification of persons targeted, and destruction of surveillance material. There are two significant problems with the reporting requirement as currently drafted in cls 53 and 54, which unjustifiably favour law enforcement interests over privacy values.
- [18] First, cls 55(1)(b) and 56(1)(b) give judges a discretion whether to report breaches by officers of warrant or emergency surveillance requirements. It is not apparent why reporting breaches is discretionary — it should be mandatory. The extent of the breach, or whether the officer intentionally or innocently committed it, are irrelevant considerations. Reporting breaches would facilitate (a) re-training or disciplining (where necessary) of the breaching officer; and (b) improvement of processes so that breaches are not repeated.¹⁶
- [19] Secondly, cls 55(1)(c) and 56(1)(c) give judges a discretion whether to order that the subject of state surveillance should be notified after the fact. There is no presumption in favour of notification. While it may be necessary to delay notification for on-going investigations, the test adopted in the Bill is much stricter than that recommended by the Law Commission.¹⁷ For instance, cls 55(2)(b) and 56(2)(b) (requiring illegality by the officer(s)) make the notification threshold test much too onerous on citizens, and are not necessary to guard against the risk of compromising ongoing investigations. Surveillance is intended to be undetectable; without an adequate notification requirement, subjects of surveillance will usually have no way of ever knowing when the state has been targeting them.
- [20] Finally, cls 56A and 56B have introduced a regime to deal with the retention and destruction of raw surveillance data collected by officers. This is a welcome addition to the Bill. It creates a presumption in favour of destroying raw surveillance material and excerpts at the expiry of criminal proceedings or after 3 years. It is appropriate that officers will have to seek a judicial order to extend the retention time period.
- [21] However cl 56A(3), which permits excerpts from raw surveillance data to be retained with judicial approval, does not prescribe an expiry period or state that a judge must give an expiry period on retention of excerpts. Unless there is some reason why excerpts should be retained indefinitely, it is appropriate that cl 56A(3) contain some mechanism for the (eventual) destruction of excerpts.¹⁸

¹⁵ TCSNZ at 20.

¹⁶ TCSNZ at 36–38.

¹⁷ TCSNZ at 38–40; Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at 341–342.

¹⁸ TCSNZ at 35–36.

[22] The change to cl 53(1), which creates a preference for the warrant-issuing Judge to be the same judge to receive the warrant report, is welcomed.

Recommendations:

- Redraft cls 55(1)(b) and 56(1)(b) so that there is a presumption in favour of reporting breaches of the Bill by officers.
- Redraft cls 55(1)(c) and 56(1)(c) so that there is a presumption in favour of notifying surveillance targets after the fact. The threshold test adopted by the Bill is unnecessarily strict. As a start, cls 55(2)(b) and 56(2)(b) should be removed from the Bill as they serve no justifiable purpose.
- Incorporate into cl 56A(3) a presumption that the Judge ordering a retention of excerpts should specify an expiry period when the excerpts are to be destroyed (subject to further judicial orders for extension).