



Office of the Attorney General

21 September 2011

To:

All Party Leaders
All Party Justice Spokespeople

Re: Video Camera Surveillance (Temporary Measures) Bill

Please find attached a draft copy of the Video Camera Surveillance (Temporary Measures) Bill. I am sending the draft bill to all parliamentary political parties. I am also sending it to the New Zealand Law Society, Law Commission, New Zealand Bar Association and New Zealand Criminal Bar Association.

I would appreciate any comments you have on the bill. They can be emailed to christopher.finlayson@parliament.govt.nz. I am also available to meet with you to discuss the bill and answer any questions. A time can be arranged via james.christmas@parliament.govt.nz or on 021 243 7824.

The Minister of Police is also able to arrange briefings from the New Zealand Police. Should you wish to receive a briefing from the Police, in the first instance please contact Megan Wallace at megan.wallace@parliament.govt.nz

Yours sincerely

A handwritten signature in black ink that reads "Christopher Finlayson".



Office of the Attorney General

21 September 2011

Charles Chauvel MP
3.072
Parliament House

Dear Charles

I attach a letter I am sending to all parties' leaders and justice spokespeople attaching a draft copy of the Video Camera Surveillance (Temporary Measures) Bill. The following is a separate response to the points you raise in your letter of 21 September 2011.

Section 30 Evidence Act

You suggest the Supreme Court ruling leaves the door open for illegally obtained evidence to be admitted “[i]f charges are very serious and video evidence crucial to the case...”.

With respect, that is wrong. It is true that three of the five Judges admitted the evidence in relation to the s 98A charges. In broad terms they did so in recognition of the fact that, as Justice McGrath put it, the law had been “clarified”. And the Police had some justification for the view they were not acting unlawfully only because of the video camera use.

But there were two other factors in play that will not be necessarily present in other cases. First, there was some recognition of the fact that the Police initially, reasonably, believed that a very serious danger to life had arisen and there were no other investigative tools at their disposal. Second, there was “a reduced” expectation of privacy in the areas under surveillance.

The critical point now is that the Supreme Court has ruled video surveillance to be illegal in the absence of prior authorisation. Any Court dealing with the present trials will have to factor in that determination. If a search is illegal it is almost certainly unreasonable in terms of s 21 of the New Zealand Bill of Rights Act 1990. It then follows that it will have been “improperly obtained” in terms of s 30 of the Evidence Act.

Of course, you are right to say the evidence may still be admitted. But in cases where there was a high degree of expected privacy and other investigative techniques were available (however difficult to deploy) the risk of exclusion is much higher than it was in respect of Operation 8. In that case, despite the objective seriousness of the criminal offending, the evidence was admitted only after some “knife edge” balancing.

In any event, the existing trials are one thing and the current operations are another.

The Police have informed government that they are currently investigating a significant number of serious drug dealing and other serious criminal cases using both search warrant-based and “over the fence” covert video surveillance.

Because the Supreme Court has declared this investigative technique to be illegal, the Solicitor-General, on the basis of the principle of legality, gave advice that the covert video surveillance should cease. The Police have acted on that advice. The net result is that until legislation is enacted, the Police must not use covert video surveillance. The significance of this position needs little amplification.

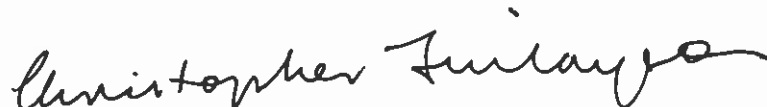
As you will, of course, know, the Police cannot use an illegal means of evidence gathering, knowing it is illegal and hope to persuade a court that the case is sufficiently serious that the evidence should, despite the known illegality, admit the evidence.

Andrew Geddis’ Suggestion

I have already seen the suggestion made by Professor Geddis. I am this afternoon sending him a draft copy of the legislation and will be talking to him directly.

As I have written in my other letter to you, the New Zealand Police are able to provide briefings on any further detail. I am also happy to meet you in person to discuss anything further.

Yours sincerely

A handwritten signature in black ink, reading "Christopher Finlayson". The signature is written in a cursive style with a prominent flourish at the end of the name.

DRAFT FOR CONSULTATION

Video Camera Surveillance (Temporary Measures) Bill

Government Bill

Explanatory note

General policy statement

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause, and provides that the Act comes into force on the day after the date on which it receives the Royal assent.

Part 1

Preliminary provisions

Clause 3 sets out the purposes of the Act. These are, in brief, to give immediate effect to the Supreme Court decision in *Hamed & Ors v R* [2011] NZSC 101, 2 September 2011 (the **decision**), in regard to that proceeding. The Act also provides for a temporary period of a year during which Parliament may address the matters raised in the decision in relation to the relevant law. Further, the Act clarifies that some activities that occurred before the decision, and those that occur during the temporary suspension period, may be regarded as lawful.

Clause 4 is the interpretation clause.

Consultation draft

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**
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**
The purposes of this Act are—

- (a) to maintain for the benefit of the parties in the proceedings entitled *R v Hamed & Others* the decision of the Supreme Court in *Hamed & Others v R* [2011] NZSC 101, 2 September 2011; and
- (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
- (c) to uphold, during the temporary period referred to in **paragraph (b)**, the lawful status of certain uses of video camera surveillance in accordance with the law as it had been articulated and applied prior to the decision.

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

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

otherwise lawful, in relation to a search, means a search that would be lawful but for its use of covert video camera surveillance

search—

- (a) means a search that is carried out—
 - (i) pursuant to a search warrant issued under section 198 of the Summary Proceedings Act 1957; or
 - (ii) in circumstances in which a search warrant is not required; or
 - (iii) as an otherwise lawful exercise of a statutory power, duty, or authority; and
- (b) includes the acquisition, whether or not pursuant to a warrant, of information about any person, place, or thing

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, and savings

Declaration of continued lawfulness

- 5 Temporary continuation of lawfulness of certain uses of video camera surveillance**
- (1) This section applies to the use of covert video camera surveillance as part of, or in connection with, a search, if that use—
 - (a) occurred prior to the coming into force of this Act; or
 - (b) occurs before the close of the day that is 1 year after the date on which this section comes into force.
 - (2) The use of covert video camera surveillance as part of, or in connection with, a search—
 - (a) is lawful; and
 - (b) does not of itself render the search unreasonable.
 - (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.
 - (4) This section is subject to **section 6**.

Savings

- 6 Savings**
- Nothing in this Act affects the decision as it relates to any specified person.