BELL GULLY

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

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BARRISTERS AND SOLICITORS

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Introduction

1. We set out below a submission to the Justice and Electoral Committee on the Search and Surveillance Bill 2009 (**Bill**). This submission focuses on the Bill's expansion of the power to apply for surveillance warrants to a wide range of government agencies such as the Commerce Commission, the New Zealand Meat Board, the Ministry of Labour, and Local Authorities.

2. Bell Gully is a leading supplier of legal services and advises many New Zealand and overseas businesses on regulatory matters. (Details of our experience are set out on our website www.bellgully.com).

Summary of submission

3. Bell Gully agrees with the Bill's legislative objective of ensuring that government enforcement agencies have adequate investigative tools to discharge their duties, subject to those tools being appropriate and proportionate, when balanced against the scope and nature of those duties. Nevertheless, we are concerned that the Bill proposes the extension of surveillance powers to a wide range of non-Police regulatory agencies and we submit that this:

   (a) raises concerns about the circumstances in which such intrusive powers will be used;

   (b) erodes the right to be free from unreasonable search and seizure under the New Zealand Bill of Rights Act 1990; and

   (c) is not supported by a sufficient explanation of why all of the agencies affected by the Bill require surveillance powers for the fulfilment of their statutory functions.

4. Bell Gully submits that the Bill's premise that each of the government agencies to which it applies ought to share common search and surveillance powers is flawed. In particular, we are concerned that this approach grants broad powers of surveillance to some regulatory bodies where such powers are not justified by either the scope of their responsibilities or the nature of the offences that they are tasked with investigating. We consider that the investigative powers of a government agency should be appropriately tailored to the relevant regulatory context.

5. Accordingly, Bell Gully respectfully submits that the Committee ought to assess the rationale for extending surveillance powers to government agencies on a case by case basis, having regard to the following considerations:

   (a) Whether the existing investigative powers of each of the affected government agencies are inadequate;

   (b) The relative seriousness of the regulatory contraventions with which each of the affected government agencies are concerned, compared to the crimes for which surveillance and interception warrants are now available;

   (c) Whether the concerns about covert criminal activity which give rise to Police surveillance powers apply to the same extent in the case of the affected government agencies;

   (d) Whether the investigative advantages of the proposed surveillance powers are proportionate to the expected social costs associated with the intrusion into New Zealanders' lives and businesses; and

   (e) Whether the proposed expansion of surveillance powers is consistent with the right to be free from unreasonable search and seizure, the protection of reasonable privacy interests, and the principle of limited government embodied by the New Zealand Bill of Rights Act.

6. Having regard to those considerations, we do not consider that it is appropriate to extend surveillance powers to non-Police agencies. Bell Gully therefore submits that:

   (a) the surveillance provisions of Bill should be amended to remove the power of non-Police agencies to apply for surveillance warrants; and

   (b) The Committee should consider the appropriateness of the current limits on Police surveillance powers under the Bill. For example, clause 42(d) of the Bill provides that a surveillance warrant is *not* required in relation to the observation and recording of private activity in the curtilage of private premises provided that the observation is for less than 3 hours in any 24 hour period. Bell Gully questions the appropriateness of this warrant-free period.

The relevant provisions of the Bill

7. It is helpful to begin by setting out an overview of how the Bill affects the surveillance powers of the affected government agencies.

8. Part 5 of the Bill amends other enactments by substituting any existing search provisions with the search procedures of the Bill. These procedures include those set out in Part 3 of the Bill, which allow a surveillance warrant to be issued when (among other things) there are reasonable grounds to suspect that an offence has been committed in respect of which a relevant enactment authorises an enforcement officer to apply for a search warrant.

9. Therefore the effect of Part 4 and Part 5 is to extend to non-police agencies (such as the Commerce Commission, the New Zealand Meat Board, the Ministry of Labour, and Local Authorities) the right to obtain a surveillance warrant, including the power to place a covert listening and/or recording device on private property.

Intrusion concerns

10. The installation of a covert surveillance device in a person's home or business premises is highly intrusive in a number of respects:

    (a) The installation involves the covert entry by a state agent into private property.

    (b) In addition to a company's reasonable expectations of privacy in its business information, the privacy interests of a company's directors, officers, and employees are also affected. For example, employees often discuss personal matters with their friends and families by email or telephone.

    (c) The ability of a government agency to carry out surveillance in the ways contemplated by the Bill fundamentally changes the character of the relationship between the regulator and the regulated. Unlike the Police in their interaction with criminals, government agencies and regulators interact frequently with people and businesses in the relevant industry. It is therefore important that government agencies and those subject to their jurisdiction work to maintain goodwill. Non-police agencies are heavily reliant on the voluntary supply of information from members of the public (including persons under investigation). They are therefore reliant on maintaining a good relationship with the public to complement their current statutory information-gathering powers. If they are given covert surveillance powers, their interaction and relationship with the public is likely to change, which may lead to reduced levels of cooperation and voluntary disclosure.

11. We note the Law Commission's observation that, "the Police themselves expressed reservations to us about the desirability of this, believing that the activity might become too widespread and uncontrolled."[1] The Law Commission does not provide a detailed summary of the basis for the

[1] NZLC R97, paragraph 11.81.

Police reservations. We suspect they reflect the fact that non-Police agencies do not have the checks and balances that exist in the Police culture of supervision, training and discipline, which constrain the misuse of surveillance powers. We share these reservations and suggest that the power to obtain surveillance warrants should only be granted where there is sufficient justification and robust supervision and training to minimise misuse. As we set out below, we do not consider that there is justification for extending this power to non-Police agencies.

12. We note that the Bill will come into effect at a date set by an Order in Council due to the "considerable administrative change, including the training of all affected law enforcement and regulatory officers, [that] will be required before the Bill can be brought into force."[2] We believe that the better approach may be for non-Police agencies to refer serious offending to the Police and request that the Police obtain a warrant on their behalf.[3]

13. As the Law Commission noted in its report, *Search and Surveillance Powers*:[4]

> [W]e acknowledge that the surveillance device warrant regime we propose is novel, and its extension to non-police agencies will raise concerns about the potential creep of state powers and the emergence of a "surveillance society".

14. It is also important to note that the expansion of surveillance powers is likely to lead to circumstances in which the powers are used in unexpected ways. Since government agencies are not infallible and issuing Judges must determine warrant applications as best they can on an ex parte basis, it is inevitable that the exercise of the surveillance powers will from time to time overreach. For example, it is helpful to consider the recently published report of the United Kingdom's Interception of Communications Commissioner for 2008 under the Regulation of Investigatory Powers Act (**RIPA**).[5] During the year ended 31 December 2008:

    - Public authorities made 504,073 requests for communications data from communications service providers and internet service providers. There were 595 errors associated with these requests (e.g., obtaining the wrong data).

    - There were 50 errors and breaches of the rules concerning the interception of private communications (e.g., transposing the telephone number inaccurately and therefore monitoring the wrong number or obtaining access to email from the wrong email address).

    - Some local authorities "were struggling to achieve the best possible level of compliance" and some had suspended the use of the powers due to non-compliance by local authority staff.

15. While the Interception of Communications Commissioner, Sir Paul Kennedy, was generally complimentary of the approach of government agencies under the communications interception regime, concerns have been expressed in the United Kingdom about the appropriateness of the surveillance.[6] In particular, the Home Office found it necessary to issue guidance to local authorities that it is not "appropriate or proportionate to use RIPA to investigate: dog fouling, domestic littering

[2] Explanatory Memorandum, page 2.

[3] NZLC R97, paragraph 11.84.

[4] NZLC R97, paragraph 11.86.

[5] The Rt Hon Sir Paul Kennedy, *Report of the Interception of Communications Commissioner for 2008* (21 July 2009). Available at http://www.official-documents.gov.uk/document/hc0809/hc09/0901/0901.pdf

[6] See, e.g., the reported comments of Chris Huhne, the Liberal Democrat Home Affairs spokesman, "We have sleepwalked into a surveillance state", *The Times*, 10 August 2009.

or dustbins"[7] and the Local Government Minister John Healey also found it necessary to write to all local authorities making that point on 24 November 2008.[8]

16. As the experience of the United Kingdom shows, where agencies are given powers such as those proposed in the Bill, those powers will be exercised – often in ways and for reasons beyond those initially contemplated. In light of this, the power to obtain surveillance warrants should only be granted where there is sufficient justification. As we set out below, we do not consider that there is justification for extending this power to non-Police agencies.

New Zealand Bill of Rights Act

17. Section 21 provides that everyone has the right to be free from unreasonable search and seizure. As the White Paper giving rise to the New Zealand Bill of Rights Act states:[9]

> The purpose of the Bill is to apply the protection against unreasonable search and seizure not only to acts of physical trespass but to any circumstances where state intrusion on an individual's privacy in this way is unjustified. Article 19 [now section 21] should extend not only to the interception of mail, for example, but also to the electronic interception of private communications, and other forms of surveillance.

18. As the New Zealand Court of Appeal explained in *R v Grayson and Taylor*:[10]

> A prime purpose of s 21 is to ensure that governmental power is not exercised unreasonably. A s 21 inquiry is an exercise in balancing legitimate state interests against any intrusions on individual interests. It requires weighing relevant values and public interests.
>
> The guarantee under s 21 to be free from unreasonable search and seizure reflects an amalgam of values. A search of premises is an invasion of property rights and an intrusion on privacy. It may also involve a restraint on individual liberty and an affront to dignity. Any search is a significant invasion of individual freedom. How significant it is will depend on the circumstances. There may be other values and interests, including law enforcement considerations, which weigh in the particular case.

19. We do not consider that the implications of the surveillance provisions of the Bill have been adequately addressed by the Crown Law Office's legal opinion to the Attorney-General. The Crown Law Office does not discuss the expansion of the surveillance powers separately from the search powers. Instead, it notes that the exercise of both the search warrant and surveillance powers is subject to "oversight by the Judge or other issuing officer for consistency with s 21 of the Bill of Rights Act."[11] Without further analysis, the Crown Law Office concludes: "Accordingly, the powers do not give rise to a risk of unreasonable search and seizure."[12] Bell Gully considers that the brevity of the Crown Law Office's analysis does not convey the significance of the expansion of surveillance powers under the Bill.

20. The installation and monitoring of a surveillance device on private property is an inherently intrusive step, notwithstanding that the issuing Judge plays an important supervisory role in relation to a government agency's application for the warrant[13] and the surveillance activities carried out under

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[7] http://security.homeoffice.gov.uk/ripa/about-ripa/RIPA-and-local-authorities/

[8] Ibid.

[9] *A Bill of Rights for New Zealand* (1985) AJHR A6, para 10.151.

[10] [1997] 1 NZLR 399 (CA) at 407.

[11] Crown Law Office, 12 June 2009, paragraph 12.

[12] Ibid.

[13] Search and Surveillance Bill 2009, clause 45 and 46.

the warrant.[14] The power to infringe upon a person's privacy and liberty in this way should only be given to protect against serious crimes and not simply regulatory offences. We further submit that this power should only be given to those agencies that have the experience and training to run surveillance operations appropriately, namely the Police.

Justification for powers

21. The justifications for the proposed expansion of surveillance powers to non-Police government agencies require careful scrutiny. In our view, the stated justifications for extension of surveillance powers do not outweigh those considerations that argue against non-Police agencies have such powers.

22. As a starting point, it is necessary to consider what "mischief" the surveillance provisions of the Bill are designed to address. The Law Commission does not address this issue in detail. Instead the Law Commission rationalises the expansion of surveillance powers on the basis that, "surveillance warrants ought to be available on the same basis as search warrants. The former are not intrinsically more intrusive than the latter; that depends entirely on their scope and manner of execution in the individual case."[15] The Law Commission therefore concludes: "It follows that the new regime should be available to any enforcement agency that has a search warrant power."[16] We disagree. Expansions to search and seizure powers ought to be carefully examined on their merits and by reference to the "mischief" which they seek to address.

23. Bell Gully considers that the Committee ought to have regard to the following considerations when evaluating the rationales for expanding surveillance powers:

    (a) Whether there is cogent evidence that the existing investigative powers of each of the affected government agencies are inadequate. At present, many government agencies enjoy very wide investigative powers (some of which are not available even to the Police). For example, the Commerce Commission can issue notices requiring the production of information and documents[17] or requiring a person to attend an interview and answer questions under oath.[18] The government agencies affected by the Bill also have the ability to obtain search warrants, arguably one of the most powerful tools available to a government agency. Given the wide-ranging and powerful procedures already available to government agencies, proposals to extend additional powers ought to be supported by clear evidence of the inadequacies of existing powers.

    (b) The relative seriousness of the regulatory contraventions with which each of the affected government agencies are concerned, compared to the criminal offences with which the Police are concerned. The Bill affects a wide range of government agencies, which regulate a range of different industries. It is necessary to assess whether surveillance powers are justified on a case-by-case basis for each of those agencies.

    (c) Whether the concerns about covert criminal activity, which give rise to Police surveillance powers, apply to the same extent in the case of the affected government agencies. While there is a risk of covert activity associated with any criminal offending or regulatory infraction, not all

[14] Search and Surveillance Bill 2009, clauses 53 and 55.

[15] NZLC R97, paragraph 11.79.

[16] NZLC R97, paragraph 11.80.

[17] See, e.g., Commerce Act 1986, section 98(a) and (b).

[18] Commerce Act 1986, section 98(c).

types of illegal behaviour carry the same likelihood of the wrongdoers taking elaborate measures to conceal their behaviour.

(d) Whether the proposed expansion of surveillance powers is proportionate to its social costs associated with the intrusion into New Zealanders' lives and businesses; and

(e) Whether the proposed expansion of surveillance powers is consistent with the freedom from unreasonable search and seizure, the protection of reasonable privacy interests, and the principle of limited government embodied by the New Zealand Bill of Rights Act.

24. Having regard to those considerations, Bell Gully does not consider that the Law Commission's report or the Explanatory Memorandum to the Bill contain an adequate justification for expanding surveillance powers to non-Police agencies. Accordingly, we submit that the surveillance provisions of the Bill should be amended to remove the power of non-Police agencies to apply for surveillance warrants.

25. Please contact Ralph Simpson, Peter Jenkins or Jesse Wilson if the Committee has any queries in relation to the above.

Bell Gully
14 September 2009