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The Clerk
Justice and Electoral Committee
Parliament House
WELLINGTON

Video Camera Surveillance (Temporary Measures) Bill

1. I write this submission which I am assuming unlike the majority does not the issue of the legislation form an International Human Rights concept.
2. I seek to be heard on the submission.
3. New Zealand has obligations under the International Covenant on Civil and Political Rights which for present purposes can be seen to mirror the European Convention on Human Rights a regional treaty applying to an extended Europe of about 800 million persons.
4. I ask the simple question is this legislation permissible in a free and democratic society? And conclude—no.
5. If correct, that the legislation is not justified in a free and democratic society what society is it justified in? A totalitarian or fascist state?
6. 4 judgments are relevant, 3 of the European Court of Human Rights, and one from the Inter-American Court of Human Rights. See *Burdov v Russia*¹ *Smokovitis and Others v. Greece*² *Stran Greek Refineries and Stratis Andreadis v. Greece*³ and *Bulacio v. Argentina*.
7. The essence of these cases is by intervening in the legislative arena in a case which the Government was a party to was a violation of Article 6(1) [right to a fair trial] of the European Convention, and from the *Golder v UK*⁴ judgment quoted in **Stran Greek Refineries** *indissociable from the danger of arbitrary power and The State had determined by legislative action a case in which it was a party. "Legislative legerdemain" had resulted in wholesale inequality of arms in the proceedings in issue.*

¹ ECHR, Application 59480/00, 7 May 2002

² ECHR, Application no. 46356/99 11 July 2002

³ ECHR Application 13427/87, 9 December 1994.

⁴ 21 February 1975 (Series A no. 18).

8. **Prof Dinah Shelton**,⁵ is a leading commentator on international human rights remedies. She comments:⁶

In redressing human rights violations it must be recognized as well that actions against the state, whether undertaken in a national or international forum, differ from private proceedings, and for a number of reasons. First, there is the added importance of ensuring the rule of law by institutions created in large part for that purpose.

In a government of laws, the existence of the government will be imperilled if it fails to observe the law scrupulously ... For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.⁷

...

Human rights violations committed by the state are qualitatively different from private injury because of the motives and nature of the conduct as well as the identity of the wrongdoer. Individuals expect protection from the state; indeed, one of its fundamental purposes is to provide the institutional and other means to ensure the safety and well-being of those within its power. For the government itself to cause harm adds an element of outrage generally not present in purely private wrongdoing. The Inter American Court of Human Rights recognized the profound impact that such violations can have. In the *Loayza Tomayo v. Peru* (Reparations) decision, it pointed out that the very existence and conditions of life of a person are altered by unfairly and arbitrarily imposed government actions taken in violation of existing norms and the trust that is placed in the hands of public power, whose duty is to protect and provide security in order for individuals to exercise their rights and satisfy their legitimate personal interests. The remedies afforded should reflect the breach of trust involved, because, in general, the more outrageous the wrongdoer's conduct, the more outraged and distressed the victim will be and the more the harm that will be suffered.

Impunity, particularly governmental immunity that leaves human rights victims without a remedy, calls into serious question the integrity of human rights guarantees and the rule of law. A primary purpose of legally protecting rights is to affect the distribution of power between individual and state, specifically, to protect individuals from the abuse of state power. Rights without remedies are ineffectual, rendering illusory the government's duty to respect such rights. Even the symbolic value of rights would disappear if it becomes obvious that rights can be violated with impunity. Structural limits on the powers of government would exist

⁵ *Remedies in International Human Rights Law*, 2nd Ed, OUP, (paperback) 2006.

⁶ *ibid* pp 99/100

⁷ *Olmstead v. United States*, 177 U.S. 438,485 (Brandeis.J, dissenting).

only in the unlikely event that those with governmental power did not seek to aggrandize it.

If society as a whole is injured by human rights violations, so also may society as a whole benefit from public remedies. Any action the state is required to take to remedy human rights violations will likely have effects beyond the individual plaintiff. Remedies for public wrongs must be seen, the public policy, as an important means of promoting compliance with the human rights norm.

9. With respect Parliament must recognise potential effects on the judiciary, and don the Rule of Law by reversing the law retrospectively, and the consequences of a Government failing to respect rights, and of creating an atmosphere of impunity.
10. The Government by this proposed legislation has not just created an unlevelled playing field, but has created two playing fields, so that they play on the new rigged playing field, whilst those unlawfully subjected to Video surveillance play on the original. This legislation is retrospective, and not necessary in a free and democratic society, indeed it weakens a free and democratic society.
11. Whilst Dr Richard Worth may have fallen into disfavour, he did have a grasp of constitutional principle, When as he then was National Party spokesman on Justice who stated during urgency on the Prisoners' and Victims Claims Act in 2007:

Dr RICHARD WORTH (National—Epsom): I would like to pose a question to the Minister in the hope that he may answer it. About 150 metres away from here is the Court of Appeal, in Molesworth Street. Effectively, it is our final appellate court, because the Supreme Court is accessible only by leave. In the last 2 days the Court of Appeal has been hearing the case that has established the so-called mischief that this Government seeks to deal with in the Prisoners' and Victims' Claims Bill. It is bad practice and bad policy for the Government to seek to pre-empt whatever decision the Court of Appeal may make.

...This Government—in my view, incredibly unwisely—has tried to head off and pre-empt the decision of the Court of Appeal by putting Parliament into urgency. The doctrine of the separation of powers, based on what Montesquieu said—which the Minister may well be familiar with—states that government has three elements: the legislature, the executive, and the judiciary. **This Government has plunged Parliament into urgency in order to cross a very clear constitutional threshold that it should never cross.** It is quite acceptable for Parliament in the exercise of its sovereign powers to reverse decisions of the courts. That has been done on a number of occasions. But we are not talking about that in this case. We are talking about this Government pre-empting the power of the Court

of Appeal to make an effective decision in respect of the issues that are before it. **That is constitutionally reprehensible.**

I was interested to hear the Minister say that what is going on in the Court of Appeal with regard to the decision currently under appeal would be "captured by the legislation". He has not exactly spelt out what he means by "captured by the legislation", but one assumes that he is talking about the very issue about which I have underscored a concern: that Parliament in this instance is trespassing on judicial process. So the Minister should tread very carefully as he advances this bill.

12. The following day he said:

Dr RICHARD WORTH (National—Epsom): There is a race on at the moment. It is a race between the Government and the Court of Appeal, because the Court of Appeal is hearing the very issues that gave rise to this legislation. After a quick flick through the *New Zealand Herald* this morning, I see that what is going on in the Court of Appeal is being reported. The argument that the Government lawyers are advancing is that there should be no compensation in cases of this kind; that it should be enough that a declaration is made that a particular prisoner's rights have been offended.

I made comment last night, when we were talking about Part 1, about the seriousness of what the Government is doing in constitutional terms. It is, of course, worse than that, because both the paper this morning and the Associate Minister of Justice last night indicated that whatever the Court of Appeal decides will be captured in this legislation.

13. The current actions of the Government reversing a Supreme Court are even worse, and indeed the phrase used by Dr Worth *constitutional reprehensible*, is adopted with vigour.
14. Whatever happened to a National Party believing in individual rights, and defending against the constitutionally reprehensible?
15. It does seem ironic, that now the Labour Party seeks to oppose the very type of legislative constitutionally reprehensible legislation they had no problem supporting when in office.
16. This sort of constitutionally reprehensible legislation ought to be transcended by any party ever.
17. The very axioms of justice, and civil liberty are being trampled upon by this Government's action, contrary to the rule of law.

Article 15

18. New Zealand international obligations under the ICCPR Articles 15 and

26 as reflected in ss 26, and s27 NZBORA are also relevant.

19. The relevant part of Article 15(1) reads:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

20. By changing the law retrospectively Parliament is potentially creating something that was possibly not a criminal offence into one, as Video evidence could and would have been inadmissible in certain circumstances on the Supreme Court recent findings.

21. This complex topic is not assisted by rushed an ill-considered legislative reform.

Article 26

22. The legislation would also appear to create a special status for those the retrospective legislation is aimed at. In terms of discriminatory practice, the legislation may not breach s19 NZBORA, but it breaches the common law principle of equality before the law, it is also in breach of Article 26.

23. Article 26 states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

[**Bold added**]

Conclusion

24. If passed this legislation deserves international challenge.

25. Parliamentarians need to stand up and be counted on this constitutionally reprehensible legislation, and reject it.



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