

Categories of surveillance with a device

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Executive summary

Surveillance without a device (for example, watching activity with the naked eye, or listening to a conversation without the aid of a listening device) is governed by the pre-existing law. In brief, such surveillance is lawful if no trespass is involved or in the particular circumstances is not unreasonable under section [21](#) of the New Zealand Bill of Rights Act 1990.

Surveillance by means of a device falls into four categories and these are explained in this part:

- surveillance that may be undertaken lawfully without a warrant ([category 1](#))
- surveillance that normally requires a warrant ([category 2](#))
- surveillance normally requiring a warrant that may be done without warrant in situations of emergency or urgency ([category 3](#))
- surveillance that is always unlawful ([category 4](#)).

Key, critical points for Police to note:

- The [Search and Surveillance Act 2012](#) applies only to surveillance using one of three specified devices:
 - interception device
 - tracking device
 - visual surveillance device.
- Surveillance without a device (for example, watching activity with the naked eye, or listening to a conversation without the aid of a listening device) is governed by the pre-existing law. In brief, such surveillance is lawful if no trespass is involved or in the particular circumstances is not unreasonable under section [21](#) of the New Zealand Bill of Rights Act 1990.
- Interception, tracking and visual surveillance devices are defined on page 3.
- A number of surveillance activities are generally lawful without warrant.
- In certain emergency situations surveillance that normally requires a warrant may be undertaken for a period without a warrant. The surveillance without a warrant in these situations of emergency or urgency must be for a period not exceeding 48 hours from the time the surveillance device is first used.

Surveillance devices

The Act regulates the use of three types of surveillance devices (interception, tracking and visual), and they are broadly defined. ([s3](#))

Interception device

Interception device is defined in section [3](#), and means:

- any electronic, mechanical, electromagnetic, optical, or electro-optical instrument, apparatus, equipment, or other device that is used or is capable of being used to intercept or record a private communication (including a telecommunication); but
- does not include a hearing aid or similar device used to correct subnormal hearing of the user to no better than normal hearing.

This definition covers all manner of listening devices, from sophisticated devices used to intercept communications through to simple audio recorders.

Tracking device

Tracking device in section [3](#) means:

- a device that may be used to help ascertain, by electronic or other means, either or both of the following:
 - the location of a thing or a person;
 - whether anything has been opened, tampered with, or in some other way dealt with; but
- does not include a vehicle or other means of transport, such as boat or helicopter.

If the device is being used to track the location of a thing or a person, it does not require that the device be installed in or on a thing. If the technology being employed allows a person or thing to be tracked remotely by means of a device that does not need to be installed on a thing being tracked or in the possession of the person being tracked, it comes within the definition of tracking device and is governed by the regime. Accordingly, it covers technology, for example, that enables a person's location to be determined from the [GPS](#) on their smart phone when it is turned on.

Visual surveillance device

Visual surveillance device is defined in section [3](#) to mean:

- 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; but
- does not include spectacles, contact lenses, or a similar device used to correct subnormal vision of the user to no better than normal vision.

This is a wide definition. It includes photographic and video cameras and binoculars, and it encompasses anything else that enhances normal vision.

Categories of surveillance with a device

Under the [Search and Surveillance Act 2012](#), surveillance by means of a device now falls into four categories:

- surveillance that may be undertaken lawfully without a warrant (category 1)
- surveillance that normally requires a warrant (category 2)
- surveillance normally requiring a warrant that may be done without warrant in situations of emergency or urgency (category 3)
- surveillance that is always unlawful (category 4).

Category 1: Surveillance using a device that is lawful without a warrant

Surveillance activities that are generally lawful

Apart from the activities that are permitted under section [48](#) (use of a surveillance device in some situations of emergency or urgency), the following surveillance activities are generally lawful without warrant:

- visual and audio surveillance without a device that does not involve trespass on land or goods (these are outside the scope of the surveillance device regime under the Act)
- observation of private activity in the curtilage of private premises, and any recording of that observation, if any part of the observation or recording is by means of a visual surveillance device, and the duration of the observation, for the purposes of a single investigation, or a connected series of investigations, does **not exceed**:
 - 3 hours in any 24-hour period; or
 - 8 hours in total ([s46](#))

Note: The stipulated time period beyond which a warrant is required relates to the whole period of observation if a visual surveillance device is used for any part of it. For example, if a constable in the course of keeping observations on a suspected 'tinny house' photographs a person entering the premises on a single occasion, a warrant is required once the total period of the observation exceeds 3 hours in 24 or 8 hours in total.

- interception of a communication that is not 'private' ([s46](#))
- the use of a tracking device for the sole purpose of determining whether a thing has been opened, tampered with or in some other way dealt with, if its installation does not involve a trespass
- the recording of what an officer **could** see or hear without the assistance of the device in private premises that he or she has lawfully entered (for example, a digital recording or a written account of a conversation that an officer overhears, or a video recording of the interior of a house that the officer observes) ([s47](#))
- the covert recording of a voluntary conversation between two or more persons with the consent of at least one of them (for example, the covert recording by an officer of a conversation in which he or she is participating, or the installation of a listening device on a CHIS that enables the officer to record a conversation between the CHIS and a third party) ([s47](#))
- activities carried out:
 - under section [4A\(1\)](#) or [\(2\)](#) of the [New Zealand Security Intelligence Service Act 1969](#); or
 - under section [15A\(1\)\(a\)](#) of the [Government Communications Security Bureau Act 2003](#); or
 - by the enforcement officer's use of a surveillance device, if that use is authorised under an enactment other than the Search and Surveillance Act 2012. ([s47](#))

Surveillance activities must be lawful and reasonable

Although these activities are lawful and may be undertaken without a warrant, they are still subject to section [21](#) of the New Zealand Bill of Rights Act and must therefore be reasonable.

Nevertheless, the fact that Parliament has stated that the activities falling within category 1 can lawfully be undertaken without a warrant can give you some confidence that they will normally be reasonable. The question of reasonableness is only likely to arise if there is something unusual about the particular circumstances in which the activity is being carried out.

If you digitally record a conversation that you overhear in a house, and you subsequently use technology to make a muffled conversation clearer, it is doubtful whether this is lawful without a warrant. Similarly, it is doubtful whether it is lawful for you to use the zoom function on a video camera at a later date to view more closely particular parts of the scene of a house that you have lawfully entered ([s47\(1\)\(a\)\(ii\)](#)). Note, however, for the second scenario involving use of a visual surveillance device, there may be circumstances when this is permitted (ss [110\(j\)](#) and [123\(3\)](#)). In both these situations you should err on the side of caution and obtain a warrant beforehand unless a warrantless power can be exercised.

Example of category 1 activity that is lawful without a warrant

The use of Police owned [CCTV](#) in cell blocks, watch houses and the exterior of Police premises is surveillance using a device that is lawful without a warrant because visual observation/recording:

- is not of private activity ([s46](#))
- is not on private premises and to the extent it is, is not covert ([s46](#))

- does not involve trespass to land or goods (s46)
- is not unreasonable (section 21 of the New Zealand Bill of Rights Act) for the following reasons:
 - health and safety (preventing harm) of employees, public and prisoners
 - investigating complaints of assault by one prisoner on another prisoner
 - investigating complaints against Police
 - clarifying allegations about property handling and security.

Category 2: Surveillance using a device that requires a warrant

Types of activities requiring a warrant

There are five types of activities involving a device that, **subject to the use of the emergency warrantless power** (i.e. category 3), require a warrant under section [46](#):

- interception of a private communication by means of an interception device
- use of a tracking device (unless it is solely for the purpose of ascertaining whether something is opened, tampered with or dealt with and the installation of the device does not involve a trespass to land or goods)
- visual observation and/or recording of private activity in private premises and any recording of that observation by means of a visual surveillance device
- visual observation and/or recording of a private activity in the curtilage of private premises by means of a visual surveillance device for longer than the specified time thresholds
- visual observation and/or recording by means of a visual surveillance device that involves trespass to land or goods.

It should be noted that law enforcement agencies other than Police must have approval from the Governor General, by Order in Council made on the recommendation of the Minister of Justice, before they can undertake any visual surveillance involving trespass or use an interception device. ([s50](#))

Interception of a private communication by means of an interception device

A warrant must be obtained to use an interception device to intercept a private communication (whether in oral, written or in the form of a telecommunication). It does not matter where the communication or conversation occurs. If it is 'private', a warrant to intercept it is required even if it is occurring in a public place. Exceptions to the requirement to obtain a warrant can be found in [s47\(1\)\(a\)](#) and (b). ([s46](#))

There are two criteria that must be satisfied before a communication or conversation will be regarded as 'private':

- 1 It must occur in "circumstances that may reasonably be taken to indicate that any party to the communication desires it to be confined to the parties to the communication" - in other words, there must be something in the situation or surrounding circumstances that might reasonably lead you to believe that the parties intend it to be confidential. If there is not, the communication cannot be private.
- 2 Even if there is evidence that parties intend the communication to be confidential, it must not occur in "circumstances in which any party to the communication ought reasonably to expect that the communication may be intercepted by some other person without having the express or implied consent of any party to do so". If they ought reasonably to expect interception, the communication is not private even if they intend it to be confidential. For example, people cannot reasonably expect to have confidential conversations in a crowded public place or cafe where they can readily be overheard. It should be emphasised that the test here, is what the participants' 'reasonable expectation' ought to be. If offenders are having a confidential conversation in circumstances in which they have a right to expect that it will not be intercepted, it will be a private communication even if they suspect that it is in fact being intercepted.

If the communication is 'private', a warrant to use an interception device to intercept it is available only when:

- there are reasonable grounds to suspect that an offence punishable by 7 years imprisonment or more, or against section [44](#), [45](#), [50](#), [51](#), [54](#) or [55](#) of the Arms Act 1983, or against section [25](#), [26](#), or [70](#) of the Psychoactive Substances Act 2013, or against section [308A](#) (discharging firearm to intimidate), has been, is being or will be committed; and
- there are reasonable grounds to believe that the interception will obtain evidential material in respect of the offence.

([s45](#))

A warrant to intercept a 'private' communication in order to gather evidential material in relation to any lesser offence, or for any other purpose, is not available and any such interception will be unlawful.

Use of a tracking device

A warrant must be obtained to use a tracking device in the following circumstances:

- when it is being used in any way to ascertain the location of a person or thing
- when it is being used to determine whether anything has been opened, tampered with or in some other way dealt with, and its use involves trespass on land or goods (so that, for example, the installation of motion sensors around the perimeter of a cannabis plantation on private land requires a warrant, since this involves trespass, whereas the installation of an alarm with the consent of the owner in order to detect unauthorised entry does not).

Under section [51](#) a warrant is available only when:

- there are reasonable grounds to suspect that an imprisonable offence (or an offence for which a search warrant could be obtained under other specific legislation) has been, is being or will be committed; and
- there are reasonable grounds to believe that the use of the tracking device will obtain evidential material in respect of the offence.

The offence penalty threshold in section [45](#) that restricts some forms of trespass surveillance, does not apply to the use of tracking devices.

Where the device is being used to track the location of a thing or person, it may not be necessary for that device to be installed in or on the thing being tracked, though this will often be the case. A warrant is also required where the tracking technology employed does not depend on the installation of the device; for example, the use of technology to determine the whereabouts of a person through their mobile phone.

Visual surveillance of private activity in private premises by means of a visual surveillance device

A warrant must be obtained to use a visual surveillance device to observe, or to observe and record, private activity in private premises.

Two criteria must be satisfied before this warrant requirement applies:

- 1 The activity being observed must be 'private'. That means that it must be "activity that, in the circumstances, any one or more of the participants in it ought reasonably to expect is observed or recorded by no one except the participants". As with the second criterion in relation to 'private communication', the test here is what the participants' reasonable expectation ought to be, rather than what their expectation as to privacy actually is.
- 2 The activity must be occurring in 'private premises'. These are defined in section [3](#) to mean "a private dwelling house, a marae and any other premises that are not within the definition of non-private premises". The latter are defined to mean "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". In short, therefore, the warrant requirement covers activity that occurs in any building other than a building to which the public frequently have access. Of course, the public may have general access to a building (such as a shop) at some times of the day but not others. Similarly, the public may have access to one part of a building (such as a hospital) but not another. Some premises may therefore be private premises at some times and non-private premises at others. Some may also be partly private premises and partly non-private premises. If you are intending to mount a surveillance operation in respect of a building other than a dwelling house, therefore, you should think carefully about the parts to which, and the times at which, the public have access when you determine whether a warrant is required.

If these criteria are met, a warrant is available only when:

- there are reasonable grounds to suspect that an offence punishable by 7 years imprisonment or more, or against section [44](#), [45](#), [50](#), [51](#), [54](#) or [55](#) of the Arms Act 1983, or against section [25](#), [26](#), or [70](#) of the Psychoactive Substances Act 2013, or against section [308A](#) (discharging firearm to intimidate), has been, is being or will be committed ([s45](#)); and
- there are reasonable grounds to believe that the surveillance will obtain evidential material in respect of the offence ([s51](#)).

The use of a visual surveillance device to observe/record private activity on private premises for offences that do not meet the thresholds in section [45](#) is unlawful.

Visual surveillance of private activity in the curtilage of private premises by means of a visual surveillance device

A warrant must be obtained to use a visual surveillance device to observe, or to observe and record, private activity in the curtilage of private premises if the visual surveillance being undertaken is for longer than the prescribed time periods of:

- 3 hours in any 24-hour period; or
- 8 hours in total. (s46(1)(e))

Note:

- If no surveillance device used and no trespass occurs, then no warrant is required.
- If a trespass is to occur, but a device is not used, then a search warrant is required.
- If a device is used to record, say, activities at a 'tinny house', a surveillance device warrant should be obtained even though those activities can be observed by passersby.
- When using a visual surveillance device the time starts when initial observations commence (this applies whether or not a device was used to commence initial observations).
- There is no requirement to commence an application for a surveillance device warrant when it is known beforehand the observation will not extend beyond the statutory time periods. Should any doubt exist about the period of observation required, then err on the side of caution and commence an application for a surveillance device warrant immediately.
- **Remember:** You must stop the observation at the expiry of the time period, unless you have obtained a surveillance device warrant authorising the visual surveillance or have invoked the emergency or urgency powers under section 48 of the Act.

Three criteria need to be satisfied before this warrant requirement applies:

1	The activity being observed must be 'private', as discussed above.
2	The activity must be occurring in the 'curtilage' of private premises. The 'curtilage' means the land immediately surrounding a house or building, including any closely associated buildings and structures but excluding any associated open fields beyond them. It defines the boundary within which the owner of a building can have a reasonable expectation of privacy and where common daily activities take place. For example, in relation to a residential dwelling, the curtilage is the ground between the fence, garden, hedge or mowed grass border and the house. In other words, it is a garden, front or back yard, lawn or other equivalent piece of ground near to or belonging to a home. The curtilage of the dwelling does not necessarily equate with the boundary of the property, although in the vast majority of cases the boundary and the curtilage exactly coincide. Thus, the curtilage of a suburban home is likely to be clearly defined by a fence line, whereas the house and curtilage on a farm will form a small part of the whole property.
3	In respect of a single investigation, or a connected series of investigations, the surveillance must not exceed 3 hours in a 24-hour period or 8 hours in total. Surveillance of a curtilage by means of a device that does not exceed these time periods does not require a warrant. The time starts when initial observations commence (this applies whether or not a device was used to commence initial observations).

If these criteria are met, a warrant is available only when:

- there are reasonable grounds to suspect that an offence punishable by 7 years imprisonment or more, or against section 44, 45, 50, 51, 54 or 55 of the Arms Act 1983, or against section 25, 26, or 70 of the Psychoactive Substances Act 2013, or against section 308A (discharging firearm to intimidate), has been, is being or will be committed (s45); and
- there are reasonable grounds to believe that the surveillance will obtain evidential material in respect of the offence (s51).

The use of a visual surveillance device to observe/record private activity on private premises for offences that do not meet the thresholds in section 45 is unlawful.

Visual surveillance by means of a visual surveillance device that involves trespass on land or goods

A warrant must be obtained to use a visual surveillance device to observe, or to observe and record, any activity (private or otherwise) if the installation or use of that device involves trespass on land or goods. You are trespassing if you enter onto any private land, or handle any private goods (for example, by installing a device on a vehicle), without the explicit or implied consent of the owner.

A warrant is available only when:

- there are reasonable grounds to suspect that an offence punishable by 7 years imprisonment or more, or against section 44, 45, 50, 51, 54 or 55 of the Arms Act 1983, or against section 25, 26, or 70 of the Psychoactive Substances Act 2013, or against section 308A (discharging firearm to intimidate), has been, is being or will be committed (s45); and
- there are reasonable grounds to believe that the interception will obtain evidential material in respect of the offence (s51).

A warrant to observe any activity involving trespass on land or goods, in order to gather evidential material in relation to any lesser offence or for any other purpose is not available and any such observation will be unlawful.

In contrast, no warrant is required to observe activity on private land that is not private premises or the curtilage of private premises if no trespass is involved. For example, you can without a warrant observe farmland with binoculars or a video camera from a road or other public place.

Category 3: Surveillance using a device that normally requires a warrant but may be done without warrant in situations of urgency or emergency

Section [48](#) of the Act makes provision for surveillance that normally requires a warrant to be undertaken for a period without a warrant. The surveillance must be for a period not exceeding 48 hours from the time the surveillance device is first used in some specified situations of emergency or urgency.

There are two conditions that must be met before you can use this warrantless power:

- you must be entitled to apply for a surveillance device warrant in that situation that you are presented with
- obtaining a warrant beforehand is impracticable in the circumstances.

Situations allowing the exercise of warrantless surveillance powers

The situations that allow the exercise of this warrantless power largely mirror those that allow the exercise of a warrantless search power. Under section [48](#), if you are:

in any one or more of these situations where you have reasonable grounds...	and you believe that use of the surveillance device...	then you may use a surveillance device...
to suspect that an offence punishable by a term of imprisonment of 14 years or more has been, is being, or is about to be committed;	would obtain evidential material in relation to the offence;	intermittently or continuously for a period not exceeding 48 hours in total without obtaining a surveillance device warrant, if:
to suspect that under section 14(2) : <ul style="list-style-type: none"> - an offence is being committed, or is about to be committed, that would be likely to cause injury to any person, or serious damage to, or loss of, any property; or - there is risk to the life or safety of any person that requires an emergency response; 	is necessary to prevent the offending from being committed or continuing, or to avert the emergency;	- you are entitled to apply for a surveillance device warrant in relation to these situations; but
to suspect that under section 18(2) : <ul style="list-style-type: none"> - a person is carrying arms; or - a person is in possession of arms, or has them under their control; and <ul style="list-style-type: none"> - they are in breach of the Arms Act 1983; or - they, by reason of their physical or mental condition (however caused): <ul style="list-style-type: none"> - is incapable of having proper control of the arms; or - may kill or cause bodily injury to any person; or - that, under the Domestic Violence Act 1995: <ul style="list-style-type: none"> - a protection order or a police safety order is in force against the person; or - there are grounds to make an application against him or her for a protection order; 	is necessary to facilitate the seizure of the arms;	- obtaining a warrant within the time it is proposed to undertake the surveillance is impracticable in the circumstances.
to suspect that a category 3 or 4 offence in relation to arms or an offence against the Arms Act 1983 has been committed, or is being committed, or is about to be committed;	would obtain evidential material in relation to the offence;	
to suspect that an offence has been committed, or is being committed, or is about to be committed in relation to a controlled drug specified or described in Schedule 1 , Part 1 of Schedule 2 , or Part 1 of Schedule 3 of the Misuse of Drugs Act 1975, or to a precursor substance specified or described in Part 3 of Schedule 4 of that Act;	would obtain evidential material in relation to the offence;	
to suspect that a person is in possession of any one or more of these things (section 81(2)): <ul style="list-style-type: none"> - a controlled drug - a precursor substance - a package in relation to which the Customs officer has replaced all or a portion of any controlled drug or precursor substance - evidential material in relation to the commission of an offence under section 6(1)(a) (dealing with controlled drugs) or 12AB (knowingly import or export precursor substances for unlawful use) of the Misuse of Drugs Act 1975; 	would obtain evidential material in relation to the offence;	

If these warrantless surveillance powers involve trespass surveillance (other than by means of a tracking device) or an interception device, they are available only when:

- there are reasonable grounds to suspect that an offence punishable by 7 years imprisonment or more, or against section 44, 45, 50, 51, 54 or 55 of the Arms Act 1983, or against section 25, 26, or 70 of the Psychoactive Substances Act 2013, or against section 308A (discharging firearm to intimidate), has been, is being or will be committed; and
- there are reasonable grounds to believe that the surveillance will obtain evidential material in respect of the offence. (s45)

Note: The power to use a surveillance device for a period not exceeding 48 hours without a warrant extends to all enforcement officers.

See:

- 'Internal approvals' in 'Surveillance device warrants' for guidance in the circumstances and level of approval required when using warrantless surveillance powers.
- 'Surveillance reporting' for notifying the Commissioner of the use of the warrantless surveillance power on the Search and Surveillance System.

Before using any surveillance device that would normally require a warrant, you should ask yourself the following questions:

- What type of surveillance is involved (i.e. interception, tracking, visual surveillance without a trespass, visual surveillance involving trespass)?
- Is the suspected offence of a type that would enable a warrant to be obtained for that type of surveillance?
- Does one of the six situations justifying the use of warrantless surveillance apply?
- Is it impracticable to obtain a warrant before the surveillance needs to commence?

How to apply the period of 48 hours without a warrant

The stipulated time period of 48 hours commences from the time the surveillance device is first used.

If you commence a warrantless surveillance activity, but think that the surveillance might continue for a sufficiently lengthy period then you should immediately commence the process of obtaining a warrant. If the application is refused, you must cease the surveillance activity immediately. In any event, you must never continue the warrantless surveillance beyond 48 hours from the time at which the surveillance device is first used.

Example of when s48 emergency or urgency powers should be used

s.6(c) OIA

Category 4: Surveillance using a device that is always unlawful

It follows that the use of a surveillance device is always unlawful if it is **not**:

- generally lawful without warrant ([category 1](#)); or
- authorised by warrant ([category 2](#)); or
- authorised by the emergency or urgency warrantless provision ([category 3](#)).

Unless the use of the device falls into category 1, all surveillance for intelligence gathering, or for evidence gathering in respect of offences for which a warrant is not available, is unlawful.
