

**Government Response to Law Commission report on
*Invasion of Privacy: Penalties and Remedies***

Presented to the House of Representatives

Government response to Law Commission report on *Invasion of Privacy: Penalties and Remedies*

Introduction

The Government has considered the Law Commission's report *Invasion of Privacy: Penalties and Remedies* (NZLC 113) published on 26 February 2010 and responds to the Report in accordance with Cabinet Office Circular CO (09) 1.

The Government wishes to thank the Law Commission for the report and for its extended efforts throughout its comprehensive review of privacy law.

Executive Summary

The Government will consider the Law Commission's proposed Surveillance Devices Bill; amendments to the Harassment Act 1997; and any review of data surveillance after the Government has responded to the Law Commission's report on the Privacy Act 1993.

At the time the Government considers the Law Commission report on the Privacy Act it will consider whether:

- Closed-Circuit Television (CCTV) and Radio-Frequency Identification (RFID) should be regulated within the Privacy Act framework; and
- the Privacy Commissioner should report regularly to Parliament on developments in surveillance and surveillance technologies.

The Government has agreed to leave any tort of privacy to the Courts to develop as justice requires.

The Government has made progress implementing the Law Commission's recommendations relating to private investigators and private security personnel.

The Government has agreed to consider whether criminal offences for disclosure of information and civil remedies in relation to the computer misuse offences are needed the next time the relevant statutes are reviewed. From now on penalties for disclosure of information that are contained in proposed legislation will be assessed for consistency with existing information disclosure penalties.

Law Commission report and Government Response

Recommendations 1-3, 5-14, 16, 17, 21-24

Proposed Surveillance Devices Act, other statutory amendments and data Surveillance review

The Law Commission's major recommendation is that Parliament should enact a Surveillance Devices Bill which would:

- establish new offences for misusing visual surveillance, tracking or interception devices
- create a new offence for disclosing information in breach of the Act
- create offences relating to making, selling, supplying and promoting surveillance devices to breach the Act
- consolidate the existing intimate visual recording and interception offences
- provide a right of civil action for any person affected by a breach of any of the criminal provisions in the Act.

The Law Commission recommends that the Harassment Act 1997 be amended. The definition of 'harassment' would be extended so that a pattern of behaviour can be constituted either by a single protracted act or by doing a specified act on at least two separate occasions within a period of 12 months. The Law Commission has also recommended that data surveillance laws be reviewed. A voyeurism offence would also be established.

Response

The Government considers that it is too early in the review of privacy laws to comprehensively consider these recommendations. The Law Commission has not yet published its report on the Privacy Act. The outcome of the review of the Privacy Act may clarify and strengthen that Act's application to various forms of surveillance and the use of surveillance devices. In particular, the Law Commission may revise the definition of 'personal information' and the enforcement provisions in the Privacy Act. This may help clarify how the Privacy Act ought to apply to surveillance activities and the extent of its deterrent effect on undesirable surveillance activity.

It is the Government's view therefore that it is appropriate for the Government to consider these recommendations as priorities allow after the Government has responded to the Law Commission's report on the Privacy Act.

Recommendations 18 and 19

Amendments to the Privacy Act 1993

The Law Commission has recommended that CCTV and RFID should be regulated within the Privacy Act framework. It was also recommended that the Privacy Commissioner reports regularly to Parliament on developments in surveillance and surveillance technologies.

Response

These recommendations relate to the reform of the Privacy Act. The Government will consider these recommendations during its consideration of the Law Commission's report on the Privacy Act.

Recommendations 28 and 29

Tort of privacy

The Law Commission recommends that the tort of invasion of privacy confirmed by the Court of Appeal in *Hosking v Runting*¹ and any tort of intrusion into solitude, seclusion and private affairs should be left to the Courts to develop as justice requires.

Response

The scope of this area of tort law is still uncertain. Any effort to codify it in statute may create more problems than benefits. The Government therefore supports the recommendation of the Law Commission that the tort of privacy should be left to the Courts.

Recommendations 20 and 25-27

Private Investigators and Security Personnel

The Law Commission have also recommended three changes in relation to surveillance undertaken by private investigators and security personnel. First, the prohibition on private investigators taking or using photographs or audio-recordings without the subject's written consent should be removed. Second, there should be regulations prescribing a code of conduct for private investigators and security personnel to address some of the privacy issues related to the surveillance of individuals. Third, the existing intimate covert filming offences in the Crimes Act 1961 and the proposed offences for a Surveillance Devices Act should be added to the list of disqualifying offences in the Private Security Personnel and Private Investigators Bill currently before Parliament. This should be done only after a Surveillance Devices Act, the amendments to the Harassment Act and a code of conduct for private investigators and security personnel have been put in place.

¹ [2005] 1 NZLR 1 (CA)

Response

The Government has already agreed to amend the Private Security Personnel and Private Investigators Bill to remove the prohibition on private investigators taking or using photographs or audio-recordings without the subject's written consent. If the Private Security Personnel and Private Investigators Bill is enacted a code of conduct will, at a minimum, address the use of surveillance by private investigators. Cabinet has also agreed to amend the Bill so that licenses for private investigators will not be granted when applicants have committed an intimate covert filming offence.

Recommendations 4, 15, 30 and 31

Miscellaneous Recommendations

Along with the recommendation that the tort of privacy not be codified and the decisions in relation to private investigators, there are four other recommendations the Government can agree to at this stage of the review without pre-empting the Law Commission's final report on the Privacy Act. This will ensure that in future policy reviews the existing offences for unauthorised disclosure of information and civil remedies for the computer misuse offences are considered.

Response

The Government has agreed that:

- civil remedies and an information disclosure offence in relation to the computer misuse offences in the Crimes Act 1961 be considered the next time these offences are reviewed
- the offence for a provider of internet or other communication services to disclose information obtained by intercepting private communications when undertaking maintenance of a communication service be retained
- when legislation that currently imposes a criminal penalty for disclosing information is reviewed the relevant department will consider whether offence provisions are necessary or whether the Privacy Act provides adequate protection
- any criminal penalty for disclosing information that is contained in proposed legislation be assessed for consistency with existing information disclosure penalties.

Next steps for the privacy review

The Law Commission's stage 3 report is only one part of the wider review of privacy law. The other relevant parts of the review are the review of the Privacy Act (stage 4) and the review of the public registers (stage 2). The Government will respond to these parts of the review by taking the following steps:

- **Late 2010 – mid 2011:** consider and respond to the Law Commission's report on the Privacy Act including Recommendations 18 and 19 discussed above
- **After responding to the Privacy Act report:** consider the remaining recommendations in the *Invasion of Privacy: Penalties and Remedies* report as other priorities allow
- **After policy decisions on the Privacy Act are made:** consider and respond to the Law Commission's report on public registers.

This process will ensure that a clear direction for New Zealand's privacy law is established to help inform any law changes dealing with undesirable surveillance activities and the public registers.