

Legislative Council Panel on Information Technology and Broadcasting

Protection of Privacy

Purpose

This paper informs Members of the protection of privacy under existing laws and briefs Members on the various recommendations made by the Law Reform Commission (LRC) in this regard.

Protection of Privacy under Existing Laws

2. There are several provisions in the Basic Law of the Hong Kong Special Administrative Region that are relevant to the issue of privacy. In particular, Article 28 provides that arbitrary or unlawful search of the body of any Hong Kong resident, or deprivation or restriction of the freedom of the person is prohibited. Article 29 prohibits arbitrary or unlawful search of, or intrusion into, the home and other premises of a Hong Kong resident. Article 30 provides that freedom and privacy of communication of Hong Kong residents shall be protected by law.

3. The Hong Kong Bill of Rights Ordinance, Cap. 383 incorporates into domestic law relevant provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong, including Article 17 which prohibits arbitrary or unlawful interference with a person's privacy, family, home or correspondence. That Ordinance is binding on the Government and all public authorities. An individual whose right to privacy is arbitrarily or unlawfully infringed by the Government or a public authority may seek relief from the Court.

4. The Personal Data (Privacy) Ordinance, Cap. 486 (PDPO) protects the privacy of individuals in relation to personal data. It does not, nor was it intended to, provide a comprehensive system of protection and redress for those whose privacy has been invaded. The provisions of the PDPO are primarily concerned with the collection, handling and use of personal data and not privacy rights in general. Intrusive behaviour that does not involve the recording of information relating to identifiable individuals is not covered by the Ordinance.

5. Despite the lack of statutory laws against the intrusion of privacy in general, prosecution action may possibly be taken against such acts committed for -

- (a) Loitering causing concern, contrary to section 160(3) of the Crimes Ordinance, Cap. 200 :

There must be sufficient evidence to prove that the accused loiters in a public place or in the common parts of any building and his presence there, either alone or with others, causes any person reasonable concern for his or her safety or well-being (such as the accused taking under skirt photo of a female person and such act alarms the female person). The maximum penalty is imprisonment for 2 years;

- (b) Disorderly conduct in public place, contrary to section 17B of the Public Order Ordinance, Cap. 245 :

There must be sufficient evidence to prove that the accused did the offensive act (such as taking under skirt photo of a female person) in a public place whereby a breach of the peace is likely to be caused. The maximum penalty is a fine of \$5,000 and imprisonment for 12 months;

- (c) Outraging public decency, contrary to the Common Law and punishable under section 101I of the Criminal Procedure Ordinance, Cap. 221 :

There must be sufficient evidence to prove that the act complained of was committed in public. Further, the act must be of such a lewd, obscene or disgusting character as constitutes an act of outrage of public decency. The maximum penalty is imprisonment for seven years or a fine⁺.

6. There are existing causes of action which may afford some protection of the personal privacy interests of an individual and his

⁺ The maximum fine is not specified in section 101I of the Criminal Procedure Ordinance (i.e. for all common law offences). However, if the offence is dealt with in the Magistracy (which is the usual venue for trial of this type of cases), the maximum fine specified in section 92 of the Magistrates Ordinance, Cap. 227 is \$100,000.

property.

The LRC Reports on Privacy

7. Recognising that :
- (a) privacy is an important value which should be protected by law as a right in itself and not merely be incidental to the protection of other rights;
 - (b) the absence of legal protection against invasion of privacy by private parties;
 - (c) there was a pressing social need to protect members of the public from unwarranted invasion of privacy by the printed media; and
 - (d) voluntary self-regulation by the printed media itself was unlikely to succeed in the near future;

the LRC published a series of reports on various aspects of privacy. These include :

- (i) the LRC Report on Stalking released in October 2000 which proposed the introduction of anti-stalking legislation to render the pursuit of a course of conduct causing another person alarm or distress a criminal offence and a civil wrong;
- (ii) the LRC Report on Civil Liability for Invasion of Privacy released in December 2004 which recommended the creation of specific torts of invasion of privacy by statute to enable an individual to seek civil remedies for invasion of privacy that is unwarranted in the circumstances;
- (iii) the LRC Report on Privacy and Media Intrusion released in December 2004 which proposed to establish an independent and self-regulating press commission by statute to deal with complaints from members of the public against unjustifiable infringements of privacy perpetrated by the printed media; and

- (iv) the LRC Report on Covert Surveillance released in March 2006 which recommended the creation of two new criminal offences against covert surveillance and the obtaining of personal information through intrusion into private premises. The objective is to provide adequate and effective protection and remedies against arbitrary or unlawful intrusion into the privacy of an individual by private parties.

A summary of the major recommendations of these LRC Reports is at **Annex**.

Public Consultation

8. The Legislative Council (LegCo) Panel on Home Affairs (HA Panel) discussed the LRC Report on Stalking with representatives of the LRC and the Administration at its meeting of 12 January 2001. Deputations invited to the meeting included a wide spectrum of media associations and women's groups. While women's groups were supportive of the proposed anti-stalking legislation, the media associations had expressed grave reservations over the proposal as it might render legitimate news-gathering activities unlawful. There were also concerns that the proposal might result in unwarranted curbs on press freedom and the freedom of expression. These concerns were shared by many LegCo members at the meeting.

9. The HA Panel discussed the LRC Reports on "Privacy and Media Intrusion" and "Civil Liability for Invasion of Privacy" with representatives of the LRC and the Administration at its meeting of 14 January 2005. Deputations invited to the meeting included media associations and the Society for Truth and Light. The media associations objected to the proposal of establishing an independent and self-regulating press commission by statute in view of its possible adverse impact on press freedom, but the Society for Truth and Light was receptive to the proposal. Given such concerns, most LegCo members were unconvinced of the need for regulation through heavy-handed means of legislation and remained to prefer self-regulation by the media.

10. As regards the LRC Report on Civil Liability for Invasion of Privacy, a LegCo member opined that the proposed creation of a new civil tort for privacy might be too big as an initial step since it was very difficult, to define "privacy". She considered that as a practical first step to enhance protection of privacy, punitive sanctions should be imposed on

specific acts committed by the media.

Public Reaction

11. Public reaction on the recommendations of the LRC Reports thus far was mixed. There were divergent views within the community on the LRC recommendations. In particular, the media and some LegCo members expressed concern that the LRC proposals would seriously affect legitimate news gathering activities, thus undermining press freedom. The Hong Kong Performing Artistes Guild welcomed the proposals to establish a press commission, create specific torts of invasion of privacy, and regulate covert surveillance as these would deter paparazzi and better protect the privacy of individuals. Private detectives also expressed concern that the LRC recommendations on covert surveillance would affect the conduct of their normal business. The proposed independent and self-regulating press commission was seen by some quarters as an attempt by the Government to interfere with press freedom.

Considerations

12. The LRC recommendations on protection against intrusion of privacy are controversial and involve many complicated legal concepts. The Government attaches great importance to the protection of freedom of expression and press freedom in Hong Kong. We also fully recognize the important role played by the press in scrutinizing the Government and imparting information of public interest to the community. However, we are equally cognizant of the public concern over repeated incidents of serious invasion of privacy by the media and the call from some sectors of the community for the enactment of laws against the invasion of privacy. There is therefore a need to strike a balance between upholding press freedom and protection of individual privacy rights in mapping out the best way forward.

Way Forward

13. To take the matter forward, we propose to use the concrete proposals of the LRC Reports as a basis for further discussions with all relevant stakeholders, including the LegCo, the media and the general public. As a first step, we will take the LRC proposals back to the

LegCo HA Panel for further discussion. We will work closely with the relevant organizations in engaging the public to discuss thoroughly these important issues, and hopefully to reach a consensus on the balance between press freedom and protection of privacy so as to provide a basis for the Government to put forward concrete legislative proposals to the LegCo for consideration.

Views Sought

14. Members are invited to note and comment on the proposed way forward.

Home Affairs Bureau
5 September 2006

Major Recommendations of the LRC Reports on Privacy

I. LRC Report on Stalking (Released in October 2000)

- The LRC Report proposed the introduction of anti-stalking legislation, which renders the pursuit of a course of conduct causing another person alarm or distress a criminal offence and a civil wrong.
- It should be a defence for a defendant who is charged with the offence of harassment to show that :
 - the conduct was pursued for the purpose of preventing or detecting crime;
 - the conduct was pursued under lawful authority; or
 - the pursuit of the course of conduct was reasonable in the particular circumstances.

II. LRC Report on Civil Liability for Invasion of Privacy (Released in December 2004)

- The LRC Report recommended, among others, that specific torts of invasion of privacy which clearly define the act, conduct and/or publication which frustrates the reasonable expectation of privacy of an individual without justification should be created by statute. The Commission recommended that :
 - any person who, without justification, intrudes upon the solitude or seclusion of another or into his private affairs or concerns in circumstances where the latter has a reasonable expectation of privacy should be liable under the law of tort if the intrusion is seriously offensive or objectionable to a reasonable person;
 - it should be a defence to an action for the intrusion tort to show that the act in question was necessary for :
 - a. the protection of the person or property of the defendant or another;
 - b. the prevention, detection or investigation of crime;

- c. the prevention, preclusion or redress of unlawful or seriously improper conduct; or
 - d. the protection of national security or security in respect of Hong Kong;
- any person who, without justification, gives publicity to a matter concerning the private life of another should be liable under the law of tort if the publicity is of a kind that would be seriously offensive or objectionable to a reasonable person, and he knows or ought to know that the publicity would be seriously offensive or objectionable to such a person;
 - it should be a defence to an action for unwarranted publicity to show that the publicity was in the public interest.

III. LRC Report on Privacy and Media Intrusion (Released in December 2004)

- The Report proposed to establish an independent and self-regulating press commission by statute to deal with complaints of unjustifiable infringements of privacy perpetrated by the print media. The Commission should have jurisdiction over all newspapers and magazines.
- The Commission would consist of “Press Members” representing and nominated by the press industry and the journalistic profession; and “Public Members” representing the public and victims of press intrusion, and nominated by professional bodies and non-governmental organizations specified in the legislation, except for the retired judge who should be nominated by the judiciary.
- The Commission must draw up a Press Privacy Code, which must make allowances for investigative journalism and publications that can be justified in the public interest.
- The Commission would have powers to deal with complaints about breaches of the Code by newspapers and magazines. However, it should not have a power to compel a journalist to give evidence and to disclose his source of information, award compensation to a victim, impose a fine on an offending publisher, or order an offending publisher to make an apology.

- The Commission may advise, warn or reprimand an offending publisher, and require it to publish a correction or the Commission's findings and decision. Where an offending publisher fails to publish a correction, or the Commission's findings and decision, the Commission may apply to the Court for an order requiring the publisher to take any specified action.
- A publisher aggrieved by an adverse decision of the Commission should have the right to appeal to the Court of Appeal.

IV. LRC Report on Covert Surveillance (Released in March 2006)

- The LRC Report recommended that a legislative framework should be set up to regulate covert surveillance and the obtaining of personal information through intrusion into private premises.
- Specifically, the Report recommended the creation of two new criminal offences :
 - it should be an offence to enter or remain on private premises as a trespasser with intent to observe, overhear or obtain personal information;
 - it should be an offence to place, use, service or remove a sense-enhancing, transmitting or recording device (whether inside or outside private premises) with the intention of obtaining personal information relating to individuals inside the private premises in circumstances where those individuals would be considered to have a reasonable expectation of privacy;

These offences will apply to all persons, though a law enforcement agency will not be liable where it has obtained a warrant or internal authorization for the surveillance in question.

- In respect of private premises used as living accommodation, there should be an express prohibition on covert surveillance in changing room, rooms used wholly or in part for sleeping accommodation, and any toilet, shower or bathing facilities, other than where authorized by a warrant or internal authorization.

- It shall be a defence to the proposed surveillance offences that the accused had an honest belief, and there were reasonable grounds for believing, that :
 - a serious offence had been, or was being committed;
 - the law enforcement agencies would not investigate or prosecute that offence;
 - evidence of the commission of that serious offence would be obtained through surveillance, and could not be obtained by less intrusive means; and
 - the purpose of the surveillance was the prevention or detection of a serious offence.