

Legislative Council Panel on Home Affairs
Protection of Privacy

Purpose

This paper informs Members of the protection of privacy under existing laws and seeks Members' comments on the major recommendations made by the Law Reform Commission (LRC) in this regard. Members' views are also sought on the way forward in engaging stakeholders and the community at large in in-depth discussions on additional measures to safeguard privacy, noting the diverse opinions expressed during previous discussions on the matter.

Protection of Privacy under Existing Laws

2. There are three articles in the Basic Law which are particularly relevant to the issue of privacy, namely Article 28 (prohibiting arbitrary or unlawful search of the body of any Hong Kong resident, or deprivation or restriction of the freedom of the person), Article 29 (prohibiting arbitrary or unlawful search of, or intrusion into, the home and other premises of a Hong Kong resident) and Article 30 (providing that freedom and privacy of communication of Hong Kong residents shall be protected by law).

3. Section 8 of the Hong Kong Bill of Rights Ordinance, Cap. 383 also prohibits arbitrary or unlawful interference with a person's privacy, family, home or correspondence. The 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 (PDPO), Cap. 486 protects the privacy of individuals in relation to personal data. It is primarily concerned with the collection, handling and use of personal data and not privacy rights in general. Depending on the facts of the case, intrusive behaviour involving the collection of personal data of identifiable persons by unfair means may be covered by the Ordinance. However, the Ordinance does not, nor was it intended to, provide a comprehensive system of protection and redress for those whose privacy has been invaded.

5. In addition, prosecution action may possibly be taken against intrusion of privacy in respect of the following acts :

- (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 fine¹.

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

¹ 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. These include civil claim for compensation for contravention of a requirement under the PDPO, and actions for damages for trespass to the person or land, breach of confidence, defamation, negligence, etc.

The LRC Reports on Privacy

7. Bearing in mind amongst other things the following considerations :

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

the LRC published in the past few years several reports on various aspects of privacy, including:

- (i) the LRC Report on “Privacy : Regulating the Interception of Communications” released in December 1996 which recommended that it should be an offence intentionally to intercept or interfere with communications (i.e. a telecommunication, a sealed postal packet or a transmission by radio) in the course of transmission, other than where authorized by a warrant²;
- (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 unwarranted invasion of

² An integrated approach should be adopted in the regulation of interception of communications and of covert surveillance to provide effective protection against undue interference with privacy.

privacy;

- (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 print media; and
- (iv) the LRC Report on “Privacy : The Regulation of Covert Surveillance” released in March 2006 which recommended the creation of two new criminal offences against the obtaining of personal information through trespass into private premises, or by means of a surveillance device². Specifically, the LRC recommends that in respect of private premises used as living accommodation, there should be an express prohibition on covert surveillance in changing rooms, bedrooms, toilets, and shower or bathing facilities.

Summaries of major recommendations of these four LRC Reports are at Annexes 1 to 4.

Public Reaction

8. There were mixed response and divergent views from the media associations, women’s groups, various stakeholders and Legislative Council (LegCo) Members on the LRC recommendations on protection against intrusion of privacy. The performing arts sector and women’s groups supported the proposed creation of specific torts of invasion of privacy. Some Non-Government Organizations (NGOs) involved in social ethics supported the proposal as it would provide assistance to victims of privacy intrusion to claim damages through civil remedies. Media professionals expressed concern that small media companies might go bankrupt as they cannot afford the high litigation costs and compensation flowing from civil liability for invasion of privacy.

9. The recommendations on regulating covert surveillance have aroused strong reaction from stakeholders. The performing arts sector, women’s groups and NGOs involved in social ethics supported the proposal to regulate covert surveillance. Media practitioners considered that the

scope of defence proposed by the LRC, which would only cover prevention or detection of serious crime, too narrow and demanded a defence of “public interest” for the media to safeguard press freedom and investigative journalism in particular. Representatives of employers of foreign domestic helpers considered the proposal intrusive and impractical. Individual private detectives also expressed concern that the proposals would affect the conduct of their normal business.

10. There was mixed reaction in the community to the proposal to establish an independent and self-regulating press commission by statute. The proposal had the support of women’s groups as they found voluntary self-regulation by the media ineffective. Media associations objected to the proposal, on the ground that it would undermine press freedom or might even lead to Government intervention of press freedom. Most media associations advocated enhanced voluntary self-regulation by the media trade as an alternative. An NGO involved in human rights opposed the establishment of a press commission for the fear that this might weaken the ability of media in scrutinizing the Government. Given the concerns with regard to freedom of expression and of the press, a considerable number of LegCo Members did not support regulation of the media through legislation, and opined that the media should continue to self-regulate.

Latest Development

11. The LegCo passed a motion on 19 October 2006 urging the Government to, among others, study the proposals on criminalizing the invasion of privacy, establishing a self-regulating press commission and enacting additional civil tort law on privacy on the basis of the recommendations made by the LRC on the protection of personal privacy in March 2006 and December 2004; and encourage in-depth discussion among the media, the performing arts sector and the general public about the contents of the bill concerned.

12. During the motion debate, quite a number of LegCo Members expressed reservations about criminalizing invasion of privacy in view of its potential repercussions on press freedom, and on investigative journalism in particular. Some Members were receptive to the proposal to criminalize covert surveillance, while some expressed support for in-depth discussions of the proposal. There appeared to be less concern on the proposal to create

civil torts for invasion of privacy, although a few Members doubted its effectiveness in protecting the privacy of the general public. As regards the recommendation to set up a statutory self-regulatory press commission, some Members were receptive to this proposal while some expressed serious reservations in view of its impact on press freedom. Some Members pointed out that self-regulation by the media industry has thus far proved to be ineffective. The general sentiments of LegCo Members were that the media should exercise more self-discipline.

Considerations

13. The LRC recommendations on protection against intrusion of privacy are controversial. The Government attaches great importance to both protection of individual privacy rights and press freedom. While the protection of individual privacy may impinge on press freedom, the exercise or abuse of the latter may infringe the privacy right of individual citizens. The Government fully recognizes the important role played by the media in scrutinizing the Government and imparting information of public interest to the community, and will continue to preserve this important pillar which has contributed to the success of Hong Kong. However, we are equally cognizant of the serious public concern over repeated incidents of serious invasion of privacy by individual media organizations and the strong call from some sectors of the community for the enactment of new laws to afford better protection to individuals against serious invasion of privacy like clandestine photo-taking in private place. We are fully aware of the need to strike a good balance between upholding press freedom and protection of individual privacy rights in mapping out the best way forward.

14. Regulation of invasion of personal privacy is a new area for the Hong Kong Special Administrative Region. We need to draw reference from overseas experience in legislating and regulation on this front with a view to coming up with feasible options for discussion in Hong Kong. On civil liability for invasion of privacy, quite a number of jurisdictions (e.g. Germany, New Zealand, Macao) have provided for a right to the legal protection of individual privacy in one way or another. But some common law jurisdictions (e.g. Australia, England and Wales, Singapore) do not have explicit/specific legislation offering a right of action for breaches of privacy. We plan to conduct further research to get a better understanding of the

respective regulatory regime. As regards regulation of interception of communications and covert surveillance, we need to research into overseas practices with regard to the extent of regulation, and in particular that for covert surveillance.

15. The Administration maintains an open mind on the proposal to set up a statutory self-regulatory press commission but notes that views on this subject remain rather divided. We will continue to listen to views from stakeholders. In this regard, the LRC proposal can form the basis of public consultation. However, we will only be able to seriously work on this subject as and when the community has reached a consensus.

Civil Claim for Compensation under the PDPO

16. According to Section 66 of the PDPO, an individual who suffers damage by reason of a contravention of a requirement under the PDPO, including the data protection principles (DPPs), shall be entitled to compensation from that data user for that damage. The PDPO however does not empower the Privacy Commissioner to provide assistance to aggrieved individuals in respect of proceedings under Section 66. These individuals would have to bear all the legal costs themselves unless they are qualified for and have successfully obtained legal aid. This might have deterred some individuals from instituting proceedings under the PDPO. Having regard to the fact that a person could apply for legal assistance from the Equal Opportunities Commission in respect of proceedings under the Sex Discrimination Ordinance, Cap. 480, or the Disability Discrimination Ordinance, Cap. 487, the LRC has recommended in the Report on Civil Liability for Invasion of Privacy that PDPO be amended to empower the Privacy Commissioner to offer similar legal assistance (including giving advice, arranging for the giving of advice or assistance by a solicitor or counsel, and arranging for representation by a solicitor or counsel) to data subjects who have suffered damage by reason of a contravention of a DPP and intend to institute proceedings. The proposal has the support of both the Administration and the Privacy Commissioner and we will in due course introduce legislative amendment in this regard. This amendment, if approved by LegCo, could also strengthen deterrent effect on likely offenders of personal data privacy law, thereby affording the public better

protection to intrusion of privacy.

Way Forward

17. We shall in the coming months engage stakeholders and the community in more focused discussions on various aspects of the LRC recommendations. To this effect, we propose to hold a series of LegCo Home Affairs Panel meetings with deputations to discuss selected aspects of the LRC recommendations, supplemented by meetings with certain stakeholders as necessary. To facilitate discussions with the stakeholders, we shall produce papers (supported by research findings) on the specific areas for discussion.

Views Sought

18. Members are invited to advise whether they have any views on the proposed approach in paragraphs 14-17 and particular interest areas in the LRC reports which the Government should accord priority in the upcoming public consultation, and comment on the various major LRC recommendations at Annexes 1 to 4.

Home Affairs Bureau
February 2007

**Major Recommendations* of the LRC Report on
“Privacy : Regulating the Interception of Communications”
(Released in December 1996)**

- It should be an offence intentionally to intercept or interfere with –
 - (a) a telecommunication;
 - (b) a sealed postal packet; or
 - (c) a transmission by radio on frequencies which are not licensed for broadcast,while the telecommunication, postal packet or radio transmission is in the course of transmission. (*para. 4.56*)
- “Interference” for the purposes of the proposed offence should include destruction, corruption or diversion. (*para. 4.57*)
- Anyone who contravenes the proposed offence should be liable to a fine or a term of imprisonment not exceeding 5 years or both. (*para. 4.59*)
- A person should not be guilty of the proposed offence if :
 - (a) one of the parties to the communication has consented to the interception; (*para. 4.86*)
 - (b) the communication is intercepted for purposes connected with the prevention or detection of radio interference or for ensuring compliance with a licence issued under the Telecommunication Ordinance; (*para. 4.96*) or
 - (c) the communication is intercepted for purposes connected with

* The Interception of Communications and Surveillance Ordinance was enacted on 9 August 2006 to regulate the conduct of interception of communications and the use of surveillance devices by or on behalf of public offices. In the circumstances, the major recommendations listed hereto focus on those affecting non-Government parties.

the provision of telecommunication service or with the enforcement of any enactment relating to the use of that service. (*para. 4.99*)

- The LRC has considered whether interception of children's communications by parents should be exempted from regulation. The LRC sees no justification for derogating from the general right of protection the Commission proposes against interception of communications simply because one of the parties involved is a child. Equally, the LRC thinks that reliance can safely be placed on the good sense and discretion of the prosecuting authorities to ensure that inappropriate prosecutions are not brought in such domestic circumstances. However, since what amounts to arbitrary or unlawful interference with children's communications raises social issues such as parental responsibility and the rights of the child, the LRC suggests that the questions relating to the interception of children's communications be further examined by the Administration. (*para. 4.94*)
- Only the Administration and its law enforcement agencies may apply for a warrant authorizing interception of communications. (*para. 6.102*)
- The LRC has examined the view that journalists should be allowed to use intrusive techniques to infringe an individual's right to privacy whenever the disclosure of information obtained by such means can be justified in the public interest. The LRC is of the opinion that the means of news-gathering and the disclosure of information obtained by such means are two separate issues which should not be confused. The media should always gather news by fair and lawful means. That is the case even though the information to be obtained can be disclosed in the public interest. The LRC concludes that the media should not be exempted from the regulatory framework. (*para. 9.1-3*)

Source : Extracted from Chapters 4, 6 and 9 of the LRC Report on "Privacy : Regulating the Interception of Communications" which can be accessed at <http://www.hkreform.gov.hk/en/docs/rintercept-e.pdf>

**Major Recommendations of the LRC Report on
“Civil Liability for Invasion of Privacy”
(Released in December 2004)**

The LRC proposed to create the following two specific torts of invasion of privacy :

(I) Any person who intentionally or recklessly intrudes, physically or otherwise, upon the solitude or seclusion of another or into his private affairs or concerns in circumstances where that other has a reasonable expectation of privacy should be liable in tort, provided that the intrusion is seriously offensive or objectionable to a reasonable person of ordinary sensibilities (*para. 6.84*) :

- The legislation should specify the factors that the courts should take into account when determining :
 - (a) whether the plaintiff had a reasonable expectation of privacy at the time of the alleged intrusion; and
 - (b) whether an intrusion was seriously offensive or objectionable to a reasonable person. (*para. 6.84*)
- The legislation should provide guidelines as to what factors the Court should take into account when determining whether a plaintiff has a reasonable expectation of privacy in the circumstances of the case. The following factors are relevant for this purpose :
 - (a) the place where the intrusion occurred;
 - (b) the object and occasion of the intrusion;
 - (c) the means of intrusion employed and the nature of any device used; and

- (d) the conduct of the plaintiff prior to or at the time of the intrusion. (*para. 6.27*)
- The Court should take the following factors into account in determining whether an intrusion was seriously offensive or objectionable to a reasonable person :
 - (a) the magnitude of the intrusion, including the duration and extent of intrusion;
 - (b) the means of intrusion;
 - (c) the type of information obtained or sought to be obtained by means of the intrusion ;
 - (d) whether the plaintiff could reasonably expect to be free from such conduct under the customs of the location where the intrusion occurred;
 - (e) whether the defendant sought the plaintiff's consent to the intrusive conduct;
 - (f) whether the plaintiff has taken any actions which would manifest to a reasonable person the plaintiff's desire that the defendant should not engage in the intrusive conduct; and
 - (g) whether the defendant had been acting reasonably in the interests of the plaintiff. (*para. 6.74*)
- It should be a defence to an action for the intrusion tort to show that :
 - (a) the plaintiff expressly or by implication authorised or consented to the intrusion; (*para. 6.91*)
 - (b) the act or conduct in question was authorised by or under any enactment or rule of law; (*para. 6.109*)

and

(c) the act or conduct constituting the intrusion was necessary for and proportionate to –

(i) the protection of the person or property of the defendant or another;

(ii) the prevention, detection or investigation of crime;

(iii) the prevention, preclusion or redress of unlawful or seriously improper conduct; or

(iv) the protection of national security or security in respect of the Hong Kong SAR. (*para. 6.113*)

(II) Any person who gives publicity to a matter concerning the private life of another should be liable in tort provided that the publicity is of a kind that would be seriously offensive or objectionable to a reasonable person of ordinary sensibilities and he knows or ought to know in all the circumstances that the publicity would be seriously offensive or objectionable to such a person (*para. 7.45*):

- The legislation should specify the factors that the Court should take into account when determining whether the publicity would be seriously offensive or objectionable to a reasonable person. These factors may include :

(a) whether the facts pertaining to an individual are very intimate;

(b) whether the defendant used unlawful or intrusive means to collect the facts;

(c) the manner of publication;

- (d) the extent of the dissemination;
 - (e) the degree of harm to the plaintiff's legitimate interests;
and
 - (f) the motive of the defendant. (*para. 7.44*)
- It should be a defence to an action for unwarranted publicity to show that :
 - (a) the plaintiff has expressly or by implication authorized or consented to the publicity; (*para. 7.50*)
 - (b) the publicity has been authorized by or under any enactment or rule of law; (*para. 7.51*)
 - (c) the publicity would have been privileged had the action been for defamation; (*para. 7.53*) and
 - (d) the publicity was in the public interest. (*para. 7.78*)

In respect of (d) above, the LRC recommends that any publicity given to a matter concerning an individual's private life should be presumed to be in the public interest if the publicity was necessary for :

- (i) the prevention, detection or investigation of crime;
- (ii) the prevention or preclusion of unlawful or seriously improper conduct;
- (iii) establishing whether the plaintiff was able to discharge his public or professional duties;
- (iv) establishing whether the plaintiff was fit for any public office or profession held or carried on by him, or which he sought to hold or carry on;

- (v) the prevention of the public being materially misled by a public statement made by the plaintiff;
- (vi) the protection of public health or safety; or
- (vii) the protection of national security or security in respect of the Hong Kong SAR

and was proportionate to the legitimate aim pursued by the defendant. (*para. 7.87*)

- The legislation should provide that the plaintiff in an action for unwarranted publicity about an individual's private life should not be precluded from obtaining relief by reason merely of the fact that the matter to which the defendant had allegedly given publicity :
 - (a) could be found in a register to which the public or a section of the public had access;
 - (b) has been disclosed by the plaintiff to his family members, friends, neighbours and/or other selected individuals;
 - (c) has been disclosed or published by a third party without the consent of the plaintiff;
 - (d) has been made available on the Internet by a third party without the consent of the plaintiff; or
 - (e) related to an occurrence or event which happened in a place which was visible or accessible to members of the public. (*para. 7.139*)

Source : Extracted from Chapters 6 and 7 of the LRC Report on "Civil Liability for Invasion of Privacy" which can be accessed at <http://www.hkreform.gov.hk/en/docs/rprivacy-e.pdf>

**Major Recommendations of the LRC Report on
“Privacy and Media Intrusion”
(Released in December 2004)**

The LRC recommended that an independent and self-regulating commission should be established by statute to deal with complaints of unjustifiable infringements of privacy perpetrated by the print media (the Commission). (*para. 14.29*)

Salient features of the proposed Commission are as follows :

I. Coverage

The Commission should have jurisdiction over all newspapers and magazines registered under the Registration of Local Newspapers Ordinance (Cap. 268). A “newspaper” is defined as a publication that usually publishes at least five times a week, while a “magazine” is defined as a publication that publishes less than five times a week. (*para. 15.3*)

II. Composition

The legislation should provide that the Commission must consist of :

- (a) members representing and nominated by the press industry and the journalistic profession (Press Members), including :
 - (i) members representing newspaper publishers (newspaper members);
 - (ii) at least one member representing magazine publishers (magazine member);
 - (iii) members representing the journalists’ associations

(journalist members); and

(iv) at least one member representing journalism academics at the tertiary institutions (academic member); and

(b) members representing the public and victims of press intrusion (Public Members), who have not engaged in, or been connected with, the journalistic profession or the press industry in the three years prior to their being nominated to the Commission, including at least one retired judge who should be nominated by the judiciary. (*para. 15.12*)

The legislation should provide that the number of Press Members must not exceed the number of Public Members. (*para. 15.12*)

The legislation should provide that the Chairman of the Commission must be a Public Member elected by all members of the Commission. (*para. 15.38*)

III. Nomination of Commission members

The legislation should ensure that :

(a) the procedure for the nomination of Commission members is fair and transparent without any Government involvement;

(b) the Press Members are nominated by representatives of the newspaper industry, the magazine industry, the journalistic profession and the journalism teaching profession; and

(c) the Public Members (other than the retired judge or judges, who should be nominated by the judiciary) are nominated by professional bodies and non-governmental organisations which are independent of the journalistic profession and the press industry, but have a professional, academic or real interest in press standards or have some experience in dispute resolution. (*para. 15.17*)

The legislation should set out detailed nomination procedures for each category of Press Members and Public Members.

The legislation should provide that the Chief Executive must appoint those nominated to be members of the Commission unless there is any procedural impropriety in the nomination process. *(para. 15.37)*

IV. Press Privacy Code

The legislation should provide that the Commission must draw up and keep under review a code of conduct on privacy-related matters (the Press Privacy Code) which gives guidance to the print media as to the principles to be observed, and the practices to be followed, in reconciling the right to freedom of expression and the right to privacy under the International Covenant on Civil and Political Rights. *(para. 15.43)*

The Code must make allowances for investigative journalism and publications that can be justified in the public interest. *(para. 15.43)*

The Code must be ratified by the Commission, but may be drafted and reviewed by the Press Members or by a Code Committee appointed by the Commission. The Code Committee may include experienced journalists or journalism academics who are not members of the Commission but could give expert advice on media ethics. *(para. 15.43)*

The press and the public should be consulted during the drafting and review processes. *(para. 15.43)*

The legislation should provide that the Press Privacy Code must require newspapers and magazines :

- (a) to take care not to publish inaccurate (including fabricated) or misleading information about an individual; and

- (b) where a significant inaccuracy (including fabrication) or misleading statement about an individual has been published (whether deliberately or inadvertently), to publish a correction promptly when requested to do so and, as far as possible, with a prominence equal to that given to the original publication. (*para. 15.66*)

V. Powers of the Commission

Power to deal with complaints

The legislation should confer on the Commission the power to :

- (a) receive complaints about alleged breaches of the Press Privacy Code committed by a newspaper or magazine;
- (b) encourage the parties to effect a settlement by conciliation before making a ruling on a complaint; and
- (c) rule on alleged breaches of the Press Privacy Code. (*para. 15.67*)

Power to initiate investigations and accept third party complaints

The legislation should confer on the Commission a power to initiate an investigation without complaint or investigate a complaint made by a third party if the investigation can be justified on the grounds of public interest. The legislation should list the factors that the Commission must take into account in determining whether such an investigation can be justified. (*para. 15.83*)

Power to advise, warn, reprimand and require the publication of a correction or the findings and decision of the Commission

The legislation should confer the following powers on the Commission dealing with a newspaper or magazine that is found to have breached the Press Privacy Code :

- (a) to advise, warn or reprimand the publisher of the newspaper or magazine;
- (b) to require the newspaper or magazine publisher to publish a correction, and to approve or decide on its content;
- (c) to require the newspaper or magazine publisher to publish the Commissioner's findings and decision, or a summary thereof as approved by the Commission; and
- (d) to give such directions as to the time, manner, form and place of any publication under (b) or (c) above as are appropriate under the circumstances. (*para. 15.120*)

Limits of Power

The Commission should not have the power to :

- (a) compel a journalist to give evidence and to disclose his source of information; (*para. 15.109*)
- (b) award compensation against a newspaper or magazine publisher who is found to have breached the Press Privacy Code; (*para. 15.111*)
- (c) impose a fine on a newspaper or magazine publisher who is found to have breached the Press Privacy Code; (*para. 15.115*)
- (d) order a newspaper or magazine publisher who is found to have breached the Press Privacy Code to make an apology. However, the Commission should be able to include in its decision a recommendation that the publisher should publish an apology or tender a private apology to the complainant. (*para. 15.125*)

Enforcement of adjudications

The legislation should provide that, where a newspaper or magazine publisher fails to publish a correction or the Commission's findings and decision as required, the Commission will have the power to apply to the Court for an order requiring the publisher to take any specified action and to bear the costs of the application incurred by the Commission. (*para. 15.131*)

Duty to publish findings and decisions

The legislation should impose an obligation on the Commission to publish promptly its findings and decisions, and the reasons therefor. It should provide that the publication must contain, as regards every complaint that has been accepted by the Commission in the period covered,

- (a) a summary of the complaint and the action taken by the Commission on it;
- (b) where the Commission has adjudicated on the complaint, a summary of its findings, decisions and reasons therefor;
- (c) where a publisher is required to implement a decision of the Commission, a summary of any action taken by the publisher; and
- (d) any recommendations and comments the Commission thinks fit to make. (*para. 15.144*)

VI. Publisher's right of appeal

The legislation should provide that a publisher aggrieved by an adverse decision of the Commission is entitled to appeal to the Court of Appeal, and the Court of Appeal may thereupon affirm, reverse or vary the decision appealed against, or remit the case to the Commission for an, or another, investigation or hearing. The

Commission will be the respondent in such an appeal. (*para. 15.134*)

VII. Legal immunity for Commission members and employees

The legislation should provide that no member or employee of the Commission will be personally liable for any act done or omitted to be done by him in good faith in the performance of any function or the exercise of any power imposed or conferred on the Commission. However, the protection accorded to the members and employees of the Commission in respect of any act or omission will not in any way affect the liability of the Commission for that act or omission. (*para. 15.159*)

VIII. Media reports of the Commission's findings and decisions protected by qualified privilege

The categories of media reports that are protected by qualified privilege subject to explanation or contradiction in Part II of the Schedule to the Defamation Ordinance (Cap. 21) should be extended to a copy or a fair and accurate report of :

- (a) any findings or decision of the Commission; or
- (b) any official report, notice or other matter issued for the information of the public by the Commission. (*para. 15.168*)

IX. Sources of funding

The Commission should be funded partially by a levy on newspapers and magazines and partially by moneys appropriated by the Legislative Council. (*para. 15.180*)

Source : Extracted from Chapter 15 of the LRC Report on "Privacy and Media Intrusion" which can be accessed at <http://www.hkreform.gov.hk/en/docs/rmedia-e.pdf>

**Major Recommendations* of the LRC Report on
“Privacy : The Regulation of Covert Surveillance”
(Released in March 2006)**

- The LRC proposes the creation of the following two offences :
 - (I) entering or remaining on private premises as a trespasser with intent to observe, overhear or obtain personal information (*para. 1.12*) :
 - (a) The offence did not require the offender’s actions were covert. The proposed offence should equally be committed where there is an overt intrusion on private premises. (*para. 1.11*)
 - (b) Where a law enforcement agency wished to enter premises for these purposes, it would need to obtain a search and seizure warrant if its actions were to be overt, or a covert surveillance warrant if it intended to act covertly. (*para. 1.12*)
 - (II) placing, using, servicing or removing 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 (*para. 1.33*) :
 - (a) A person should not be guilty of the proposed offence if the act falling within the scope of that offence was carried out with the consent of a lawful occupant of the “private premises”. (*para. 1.44*)

* The Interception of Communications and Surveillance Ordinance was enacted on 9 August 2006 to regulate the conduct of interception of communications and the use of surveillance devices by or on behalf of public offices. In the circumstances, the major recommendations listed hereto focus on those affecting non-Government parties.

(b) The LRC recommends that in respect of private premises used as living accommodation there should be an express prohibition on covert surveillance in changing rooms, 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. (*para. 1.22*)

(c) The test for determining whether a person has a reasonable or justifiable expectation of privacy has two limbs. The first is whether the person's conduct exhibits a subjective expectation of privacy. The second is whether the person's subjective expectation of privacy is one that society is willing to recognize as reasonable. (*para. 1.41*)

(d) In assessing whether an individual's privacy expectation is reasonable, the following factors are relevant :

(i) the place where the intrusion occurred;

(ii) the object and occasion of the intrusion;

(iii) the means of intrusion employed and the nature of any device used; and

(iv) the conduct of the individual prior to or at the time of the intrusion. (*para. 2.43*)

- For the purpose of the two proposed offences, the definition of "private premises" includes "any premises, or any part of premises, occupied or used by any person, however temporarily, for residential purposes or otherwise as living accommodation; any room hired by the proprietor of a hotel or guesthouse to guests for lodging; or those parts of a hospital or nursing home where patients are treated or which are used as sleeping accommodation". Private premises should not include any common area to which an individual is allowed access in connection with his use or occupation of such premises. (*paras. 1.5 & 1.7*)

- As regards the provision of a defence of public interest, the LRC does not believe that the proposed offences would catch conduct which might legitimately be said to be in the public interest. Nevertheless, the LRC recommends that it should be a defence to either of the proposed surveillance offences that the accused had an honest belief, and there were reasonable grounds for believing, that :
 - (a) a serious offence had been, or was being, committed;
 - (b) the law enforcement agencies would not investigate or prosecute that offence;
 - (c) evidence of the commission of that serious offence would be obtained through surveillance, and could not be obtained by less intrusive means; and
 - (d) the purpose of the surveillance was the prevention or detection of a serious offence.

The defence will require both a subjective and an objective element (“honest belief” and “reasonable grounds for believing”). It will be available only to those who genuinely believe that their use of surveillance is in the public interest. An accused who does not believe that a serious crime had, or was being, committed, even though there are reasonable grounds for that belief, will not be able to plead the defence. Likewise, mere honest belief is not sufficient unless there were also reasonable grounds to support that belief. The defence will not be open to an accused who cannot show reasonable grounds for his honest belief. (*para. 1.59*)

- The right to apply for a warrant should be restricted to the Administration and its law enforcement agencies. (*para. 2.49*)

Source : Extracted from Chapter 1 and 2 the LRC Report on “Privacy : the Regulation of Covert Surveillance” which can be accessed at <http://www.hkreform.gov.hk/en/docs/rsurveillance-e.pdf>