



29 May 2009

Privacy Submissions
Law Commission
P O Box 2590
Wellington 6140.

Privacy Law Review Issues Paper

The Investment Savings and Insurance Association (“ISI”) appreciates the opportunity to comment on the Law Commission’s paper *Invasion of Privacy: Penalties and Remedies NZLC IP 14*.

ISI members are the companies that issue and manage life insurance, superannuation and managed funds in New Zealand. A list of members is attached at the end of this submission. Our life insurance company members have a particular interest in issues surrounding the use of covert photography and audio-recording by private investigators that are contracted for the investigation of potentially fraudulent insurance claims.

This submission focuses on that area of the review and comments on the specific references to private investigators in chapter 12.

ISI made a submission on the Ministry of Justice discussion document during the 2008 review of the legislation as it applies to private investigators and will make a similar submission to the Justice Select Committee currently considering the Private Security Personnel and Private Investigators Bill.

Chapter 12

Chapter 12 considers whether legal restrictions on surveillance by private investigators are appropriate. It notes that private investigators play a legitimate role in the services they provide for their clients and those services are often also for the benefit of the wider society. However, there are some restrictions on the actions of private investigators that do not apply to the general public and some inconsistencies in those restrictions.

Private investigators are not prevented from the use of visual surveillance devices or listening devices, as long as no recording is made. However, the Private Investigators

and Security Guards Act 1974 prohibits them from making a photographic, film or video recording of another person without the prior written consent of that person. No such prohibition applies to the general public.

Private investigators will often be endeavouring to collect information to assist in the detection or prosecution of criminal activities such as fraud. In those cases, the ability to provide recorded evidence will be more useful to the courts than solely oral evidence from the private investigator.

Private investigators are also subject to the Privacy Act 1993. Privacy Principles 2 (*source of personal information*) and 3 (*collection of information from subject*) allow for non-compliance with the Privacy Principles if the information is being collected for the conduct of proceedings before any Court or tribunal, or non-compliance would prejudice the purpose of collection.

We do not consider there is a principled basis for the restrictions in section 52 and we recommend that the legislation applying to private investigators should allow for the recording of information if it is to be used as evidence in proceedings before a Court or tribunal.

We respond to the specific questions in Chapter 12 at the end of this submission.

Insurance Claims

ISI members from time to time use private investigators to collect evidence where there is reason to suspect that an insurance claim is fraudulent. This is most likely to occur with income replacement policies, where the policyholder has claimed a benefit on the grounds of incapacity for work.

In such cases, the insurance company may have reason to suspect fraud by the policyholder but it is unlikely that the Police would agree to investigate unless or until the insurance company is able to supply evidence. The insurance company may therefore contract with a private investigator to obtain information that may be used in legal action against the policyholder.

The prohibition in the current law (Private Investigators and Security Guards Act 1974), which prevents licensed private investigators from photographing or audio-recording a person without that person's written permission, obviously prevents a private investigator from photographing an insurance claimant doing things that would indicate that the insurance claim was fraudulent.

If the collection of evidence to support legal proceedings for insurance fraud was carried out by the Police, rather than being commissioned by the insurance company, it would not be subject to the requirement to obtain the target's written permission.

We acknowledge that there is a legitimate expectation of privacy in the home, on private property or in a public place. However, there is a benefit to the insurance public in insurance companies being able to use private investigators to collect evidence of fraudulent activities and we recommend that the law should explicitly allow it. All policyholders share the cost of fraudulent claims and if they are unable to be pursued rigorously premiums will be higher than would otherwise be necessary.

Our view is that the public interest is best served by licensed private investigators being able to take photographs or make audio-recordings of a person without consent when they are collecting evidence for an insurance company investigation of insurance fraud. That ability should apply on public property, private property to which the public has access and private property that the person does not occupy.

Collection of evidence for the prosecution of fraudulent claims on insurance policies is a specialised area and there should be no concern that insurance companies would use the information for any other purpose. Insurance companies and their staff have very high standards of compliance with the Privacy Act requirements for the collection, storage and use of personal information.

Insurance companies should be able to rely on the standards of private investigators who have gone through the registration process and we would support specific standards and obligations being made by the Licensing Authority to ensure the highest standards are maintained.

Specific Questions

Q80 Should private investigators be subject to any greater legal restrictions than other members of the public in order to protect privacy?

We agree that private investigators should be licensed, trained and required to be of good character but we do not agree that it should be illegal for licensed private investigators to perform certain activities which are legal when performed by members of the general public.

Q81 Do any of the current laws relating to privacy, or any proposals for possible law reform, discussed elsewhere in this issues paper have particular implications for private investigators?

We note that the Private Security Personnel and Private Investigators Bill proposes separate categories of licencing and we would support the facility to collect and record personal information being limited to those holding a ‘private investigator’ licence.

Q82 Should additional privacy-related crimes be added to the list of “specified offences” in the Private Investigators and Security Guards Act 1974? Are there any other ways in which the licencing process could be used to protect privacy?

The Act should specifically require compliance with the Privacy Act 1993. As noted above, the Private Security Personnel and Private Investigators Bill proposes separate categories of licencing and this will allow specific powers for collection and recording of information to be limited to holders of a ‘private investigator’ licence.

Q83 Should section 52 of the Private Investigators and Security Guards Act 1974 be retained? If so, should it be modified in any way?

We recommend that section 52 should be removed. Failing that, we recommend that it should be modified to allow for the recording of information if it is to be used as evidence in proceedings before a Court or tribunal.

Q84 Should surveillance and other privacy-intrusive activities by private investigators be regulated by any of the following: a code of ethics made under the Private Investigators and Security Guards Act 1974; a Code of Practice made under the Privacy Act 1993; or a code of ethics developed and enforced by the industry itself?

We note that section 106(1)(1) of the Private Security Personnel and Private Investigators Bill proposes regulations prescribing codes of conduct for licence-holders and we consider that, if that provision is enacted, there will be no need for other codes of ethics or codes of practice.

Recommendations

We recommend that section 52 of the Private Investigators and Security Guards Act 1974 should be removed.

If that recommendation is not accepted we recommend that a licensed private investigator collecting evidence for an insurance company investigation into fraud or dishonesty in an insurance claim should be exempted from the provisions of section 52 of the Private Investigators and Security Guards Act 1974.

We would be happy to discuss these points with you if that would be helpful.

Yours faithfully,

Deborah Keating
EXECUTIVE OFFICER

List of ISI Members

ISI MEMBERS

AIG Life
AMP Financial Services
Asteron Life Ltd
AXA New Zealand
BNZ Investments and Insurance
CIGNA Life Insurance NZ Ltd
Dorchester Life
Equitable Group
Fidelity Life Assurance Co Ltd
Gen Re LifeHealth
Hannover Life Re of Australasia Ltd
ING New Zealand Ltd
Kiwibank Ltd
Medical Assurance Society NZ Ltd
Mercer
Munich Reinsurance Co of Australasia Ltd
Public Trust
RGA Reinsurance Co. of Australia Ltd
Sovereign Ltd
Southsure Assurance
Swiss Re Life & Health Australia Ltd
TOWER New Zealand
Westpac/ BT Funds Management Ltd

Associate Members

Bell Gully Buddle Weir
BNP Paribas
Bravura Solutions
Burrowes & Co
Chapman Tripp Sheffield Young
Davies Financial & Actuarial Ltd
Deloitte Touche Tohmatsu
Ernst & Young
InvestmentLink (New Zealand) Ltd
KPMG
Kensington Swan
Melville Jessup Weaver
Minter Ellison Rudd Watts
Morningstar Research Ltd
Phillips Fox
PricewaterhouseCoopers
Russell Investment Management
Russell McVeagh
Simpson Grierson