

Regulatory Impact Statement

AGENCY DISCLOSURE STATEMENT

This Regulatory Impact Statement has been prepared by the Ministry of Justice (the Ministry). The Private Security Personnel and Private Investigators Act 2010 comes into force on 1 April 2011.

A surveillance code of conduct for private investigators must be in place at all times as a matter of law. Regulations prescribing forms must also be in place to allow the Act to operate.



Sarah Turner
General Manager, Public Law

Signature:

Date:

EXECUTIVE SUMMARY

The Private Security Personnel and Private Investigators Act 2010 modernises the regulation of the private security industry. The objective is to ensure that security personnel are suitably qualified and do not behave in ways that are contrary to the public interest. This will be achieved by means of a licensing regime which screens out unsuitable people, such as those with serious convictions and allows training requirements to be imposed. The Act comes into force on 1 April 2011 and regulations are needed to implement it.

The Act leaves the detail of the licensing process to regulations. Private security businesses require a licence and individuals who work for licence holders (or as crowd controllers) require a certificate of approval. The preferred option is to prescribe forms which specify additional information that must be included with an application to the Private Security Personnel Licensing Authority (Licensing Authority) and matters that must be included on a licence or certificate issued by the Licensing Authority. No variations of the preferred option were considered.

The Act requires regulations prescribing a code of conduct for private investigators to be in force at all times. The code of conduct must address the surveillance of individuals by private investigators. It will replace an outdated statutory provision which prohibits private investigators from taking or using photographs and other recordings of a person without their written consent. Removing this prohibition may increase the risk of unreasonable intrusion into the privacy of individuals who are under surveillance. The preferred option would prohibit surveillance in locations where there is a high expectation of privacy (such as in a private home) or which involves entering or interfering with private property without consent. Two more restrictive options were considered.

ADEQUACY STATEMENT

The Internal Ministry of Justice Quality Assurance Panel has reviewed the attached Regulatory Impact Statement prepared and considers that it meets the quality assurance criteria.

PROBLEM AND STATUS QUO

Code of conduct regulations are necessary to address the increased risk that individuals' privacy will be infringed as a result of removing the current prohibition on private investigators taking photographs and other recordings of a person without their consent. Without a code of conduct, there will be no restrictions on private investigators carrying out surveillance (other than those that apply to the general public) from 1 April 2011.

Private investigators do not have any greater powers than any other member of the public. However, their work is often intrusive and therefore warrants some restrictions. There are existing protections under other law such as the Privacy Act 1993. However, the remedies will not always be as appropriate as the Act's disciplinary regime.

Any unreasonable intrusion into a person's privacy by a private investigator could result in the Licensing Authority taking disciplinary action. This could range from a formal reprimand to cancelling a licence. However, specific restrictions in a code of conduct would give certainty to private investigators, their clients and members of the public as to what conduct is permissible. This would assist in preventing harm from occurring rather than relying on the disciplinary process after the person has made a complaint.

Licensing regulations are necessary to allow the Act to operate as intended. The Act leaves much of the detail of the application process and other procedural matters to regulations.

OBJECTIVE

The objective of the proposed regulations is to:

- address the privacy risks of private investigators using surveillance techniques to obtain information about individuals; and
- ensure the Licensing Authority has sufficient information to make decisions on applications under the new licensing regime.

CODE OF CONDUCT FOR PRIVATE INVESTIGATORS

The Act will remove the current prohibition on private investigators taking or using photographs or other recordings of a person without their consent. This provision has been controversial for many years as it is outdated, too broad in its application and makes it difficult for private investigators to obtain the evidence they need to do their work effectively. Private investigators' work is legitimate and often in the public interest, such as assisting with law enforcement and detecting insurance fraud.

Although private investigators have no greater powers than any other member of the public, the nature of their work is that it intrudes into people's personal affairs. Removing the current prohibition on photographs and other recordings may increase the risk of private investigators' surveillance activities intruding into a person's privacy. The Act addresses this risk by requiring code of conduct regulations to be in force at all times.

The code of conduct must contain matters that the Minister considers are necessary or desirable in relation to the surveillance of individuals by private investigators.

Breaching the regulations would constitute "misconduct" as defined in the Act ie, conduct which a reasonable person would consider to be disgraceful or that breaches the Act or regulations. This could lead to disciplinary action such as cancellation of a licence. There may be situations in which there is an unreasonable intrusion into a person's affairs that is not covered by the code. However, the Act treats misconduct in the same way as a breach of the code. Whether or not the conduct of a private investigator constitutes misconduct will often depend on the circumstances. The Licensing Authority will be responsible for considering complaints about misconduct, including breaches of the code of conduct, on a case by case basis.

Preferred option

The preferred option is to prohibit private investigators from carrying out surveillance of a person in locations where there is a high expectation of privacy. This would include surveillance of a person who is:

- inside a private dwelling or similar place such as a rented hotel room; or
- in an area where the person could reasonably expect that their conduct would not be observed by others (eg in a courtyard concealed by a high fence).

These restrictions would not extend to unaided surveillance by a private investigator who is in a publicly accessible area (ie surveillance that does not involve recording what is observed or using any surveillance equipment which allows them to observe something that they could not otherwise observe). The code would not prohibit private investigators from recording conversations to which they are a party, regardless of the location.

Private investigators would also be prohibited from carrying out surveillance that involves entering, or installing a surveillance device on, private property without the consent of the lawful occupier (eg installing a camera in a garden or planting a tracking device on a car or personal item).

The preferred option is the least restrictive of the three options considered. There was broad support in the submissions on the Ministry's recent consultation document for restricting surveillance in private homes and similar areas, regardless of the purpose of the investigation. However, a strong theme came across in the submissions that the purpose of the investigation is important in other locations and circumstances.

There may be situations in which there is an unreasonable interference with a person's privacy that falls outside the proposed restrictions. Whether or not the surveillance can be justified would depend on the circumstances (eg purpose of the investigation, intensity and duration of the surveillance) and would be appropriately dealt with by the Licensing Authority on a case by case basis.

The advantages of this option are:

- private investigators, their clients and members of the public will have certainty about what conduct is prohibited, while leaving more complex scenarios to be determined by the Licensing Authority on a case by case basis

- individual privacy is protected in locations where a person can reasonably expect that their activities will not be observed by other members of the public
- it would not impose unnecessary restrictions on private investigators.

The disadvantage of this option is that it may be perceived to provide insufficient protection against intrusions into privacy that are not covered by the code of conduct. Although the Act provides for the Licensing Authority to discipline a licensee or certificate holder for misconduct, this may not provide the same deterrent value as the certainty of specific restrictions in the code of conduct.

There is currently limited evidence about the prevalence of private investigators undertaking unreasonable surveillance of individuals. The new Act increases the emphasis on enforcement and introduces a formal complaints process which allows the Licensing Authority to refer complaints to a new enforcement unit for investigation. If this option is chosen, the complaints process would provide a useful tool to identify any privacy or other issues that warrant further regulation.

Alternative options

Two alternative options were considered. The status quo was not considered as a viable option because the Act requires that code of conduct regulations be in place at all times. There are no non-regulatory options.

Option 1 – Extend the restrictions on surveillance to all private property which excludes the general public

This option is more restrictive than the preferred option because it extends the locations in which surveillance is prohibited to areas such as gyms and workplaces which can only be accessed by other members of the public in certain circumstances. Although other gym members and occupants of a workplace are members of the public, they have access to the premises for legitimate reasons. Because of the entry restrictions, it seems reasonable that a higher level of privacy would be expected in these locations than in a place that can be freely accessed by anyone, such as a train station.

There would be an exception for situations in which the investigation relates to the premises themselves (eg theft in a workplace) and the lawful occupier has given consent to the private investigating entering for the purposes of surveillance.

This option provides more protection against intrusions into privacy than the preferred option and may reduce the risk that removing the prohibition on private investigators taking or using photographs and recordings will lead to greater intrusion into peoples' affairs. On the other hand, it would restrict the evidence that private investigators can obtain for the purposes of criminal or other investigations of public benefit.

Option 2 – Regulate the manner of surveillance

This option is a variation of either the preferred option or option 1. In addition to restrictions on surveillance in certain locations, private investigators would be prohibited from:

- intimidating or threatening behaviour, such as surveillance that is so intrusive that it is likely to prevent a person from going about their ordinary, lawful business
- attempting to influence the subject's behaviour or actions for the purposes of surveillance (eg posing as a potential customer to induce them to agree to take on work while they are on a sickness benefit)

This option provides greater protection against unreasonable intrusion into a person's affairs than the other options. It risks going too far towards restricting the evidence private investigators can obtain because their work sometimes necessitates misleading conduct or prolonged surveillance. However, whether or not the private investigators' conduct constitutes a breach of the code and warrants disciplinary action, would be considered on a case by case basis by the Licensing Authority.

The main disadvantage of this option is that these restrictions are more subjective than in the other options and may not provide sufficient certainty for the purposes of the code of conduct. For example, a person who knows they are being followed may feel intimidated and argue that the code has been breached, while the importance of the investigation may warrant prolonged surveillance in a particular case (eg, an insurance fraud investigation versus a personal dispute).

On balance, this option is not preferred because it goes further than necessary to address the specific risk arising from removing the current prohibition on photographs and other recordings. There is insufficient evidence at this stage that unreasonable behaviour by private investigators is widespread enough to warrant intervention. Imposing the above restrictions would risk imposing unnecessary costs on private investigators and diverting resources from other compliance and enforcement activity. The need for further restrictions could be reassessed once the new regime and code of conduct regulations are in place and have been monitored.

Expected impact of the preferred option

Members of the public who are the subject of investigations will be affected by the operation of the code of conduct, which protects their privacy when they are in their own home and other private locations. Private investigators will be better equipped to do their job under the proposed code of conduct than they are currently, as they will be able to obtain better quality evidence by taking photographs and other recordings in public areas. Private investigators' clients will also be affected because it may restrict the extent of information that can be obtained and increase the cost of investigations.

LICENSING - FORMS

The preferred option is to make regulations prescribing forms which:

- require additional information to be provided with a licence or certificate of approval application, such as proof of compliance with any training or minimum competency requirements prescribed in regulations
- specify the information that must be included on a licence or certificate of approval issued by the Licensing Authority (eg, name, expiry date and any conditions)

- specify the information that must be included in a notice of intention to apply for a licence. The Act requires applications to be publicly notified for the purpose of allowing members of the public to object to an application.

The status quo is not a viable option because the Act leaves the detail of the licensing process and other procedural matters to regulations. This detail is needed to allow the Act to operate as intended. For the same reason, there are no non-regulatory options. No variations of the preferred option were considered.

CONSULTATION

A discussion document on the proposed code of conduct for private investigators was released for targeted consultation in November 2010. The document was also published on the Ministry's website. Eight submissions were received.

Due to time constraints, there was no consultation on the proposed forms regulations. The forms regulations are technical and operational.

DIA, Police, MSD, DoL, Treasury and MED were consulted on the proposal. The Law Commission and Office of the Privacy Commissioner were consulted on the policy of the proposed code of conduct. No significant concerns were raised.

IMPLEMENTATION

The Ministry will minimise regulatory costs by providing information on the new requirements to current licensees, certificate holders and potential applicants and encouraging the use of online applications (which will be simpler and cheaper to submit).

Compliance will be enforced through the disciplinary regime, which could be triggered through the complaints process or by the Licensing Authority. Non-compliance could lead to suspension or cancellation of a licence or certificate, or refusal of an application.

MONITORING, EVALUATION AND REVIEW

The regulations will be monitored by keeping data on complaints, disciplinary action, and feedback from the enforcement unit in the Department of Internal Affairs and Police.