

THE CONSULTATION PAPER ON STALKING - THE HKJA RESPONSE

Please note that this paper was prepared as a response to the Law Reform Commission consultation paper in 1998. The final paper, published in October 2000, alleviates a small number of our concerns.

In particular, the HKJA remains unconvinced that the proposed defences would be sufficient to prevent the law being used to harrass journalists doing genuine public interest reporting.

The defence of 'reasonable in the particular circumstances' may be subject to many interpretations, and the proposed guidance that courts should take into account Article 19 of the International Covenant on Civil and Political Rights falls short of the protection that would be offered by a public interest defence.

HKJA January 2001

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SUMMARY

The HKJA welcomes the Law Reform Commission's continuing work on privacy. The HKJA believes this is an important human right.

However, the sub-committee's proposals on stalking have caused some alarm among working journalists. The proposed ordinance is similar to the Protection from Harassment Act passed in the UK last year. This UK Act has already led to one journalist being charged and another held by police, both for filming protests.

The HKJA therefore strongly requests that the proposals be modified to ensure that journalists doing a legitimate newsgathering job are not at risk of arrest or imprisonment if the proposals are made law.

The proposals state that journalists should be safe because it will be a defence if "the pursuit of the course of conduct was reasonable in the particular circumstances". However the HKJA believes that this is inadequate.

The result could be a law that allows anyone to back up their "No comment" with a threat of arrest. It would be of great comfort to those hiding from public exposure for the wrong reasons.

The HKJA therefore proposes possible changes to the law to clarify the issue. If these changes, or others with similar effect, were not incorporated into any law the HKJA would be compelled to campaign strongly against its passing.

HKJA August 1998

Full text:

Privacy is an important human right. It is guaranteed in the Basic law, the Bill of Rights, and in international covenants that apply to Hong Kong. In an increasingly information-based society, it is vital that Hong Kong has modern laws that ensure that ordinary citizens can keep their privacy.

Therefore the HKJA welcomes, in general, the work of the Law Reform Commission's sub-committee on privacy. The media in a free society in general operate with the consent of those whose activities they cover. If they wish to keep things private, in general that right is respected.

However, there are those who wish to keep things private which rightly should be public. Businesses may cheat their customers, government officials may quit without reason, or politicians may abruptly and without explanation change their policies.

On all these occasions the media would be failing in its job if it simply accepted a "No comment" and went to the next assignment. Reporters must sometimes be persistent. In addition, someone who has refused to speak about a subject may change their mind as the day progresses.

To an outsider, a pack of reporters may appear a frightening prospect that could cause real harassment. TV footage of reporters in scrum-like formation may make it appear that the collective body-count of the Hong Kong media is high indeed.

In practice, there are a lot of reporters and TV crews simply because Hong Kong is still blessed with a diverse media scene. No assignment editor wants to waste staff time on a hopeless chase. If there is no news, and no prospect of news, a crowd of reporters can be pulled off a job in five minutes when they receive calls from their news desk.

The HKJA has already condemned the recent incident of extreme harassment against the judiciary. But this was an isolated incident - and one unlikely to be repeated given the consequences for all concerned.

So the HKJA agrees with the sub-committee in paragraph 4.37 that "normal newsgathering activities should not be affected by our proposals".

However, our analysis of the proposals has led to substantial fears that the proposals fall short of this target.

## HOW JOURNALISTS COULD BE CAUGHT

The proposals do not define harassment, preferring to let the courts use the ordinary meaning of the word. However the work of ethical journalists, pursuing an issue with persistence, could easily be construed as harassment.

### EXAMPLE

Suppose a journalist has the phone number of a business executive accused of cheating their customers. Every day new allegations may emerge about the company's business activities. When a reporter rings the executive, they may say that they never speak to the press and slam down the phone.

Nevertheless, if the next day's article has new disclosures about the firm, it is the duty of an ethical reporter to ring and try and put the allegations to the executive. They have the right to say once again they never speak to the press and slam down the phone.

Indeed, even after a week of similar incidents, with many newspapers being rebuffed for comments, it would be the right of the executive to slam down the phone.

The actions of the reporters involve no threat of violence, or risk of escalation. However, they could easily be construed as "harassing behaviour which disrupts normal life for the victim", which is one of the purposes of anti-stalking legislation proposed in section 4.4 - particularly if ten reporters from TV, radio and newspapers are all calling every day.

Should the executive have the right to have the reporters arrested? The HKJA believes not. But the reporters' activities seem quite likely to be classed as harassment going by the proposed definition.

### THE "REASONABLE UNDER THE CIRCUMSTANCES" DEFENCE

The sub-committee has agreed that normal, ethical media activities should not be covered by the law. However its proposed defence appears inadequate.

The proposed defence is that no offence is committed if "that the pursuit of the course of conduct was reasonable in the particular circumstances".

Any trial is unlikely to be before a jury, given the two-year maximum sentence for the offence. Thus it will fall to a district court judge or magistrate to decide what is "reasonable" as far as newsgathering is concerned. At best this will lead to substantial uncertainty as the courts repeatedly decide on the word "reasonable", a difficult word to decipher in the absence of any other guidelines. At worst the judiciary may decide that even the direst crook deserves solitude until proven guilty by the courts, allowing anyone to clear reporters out of their life by ringing 999.

In the example above, a court may decide it is not "reasonable" to ring someone every day for a comment when they have indicated their wish to be left alone. However, reporters must still ring. After all, they may change their mind at any time, and then may start complaining they cannot get their side of the story printed.

These fears are not without foundation. The proposals are very similar to the Protection from Harassment Act 1997 of the UK. The proposed defence is word-for-word the same. Yet two journalists have already been held under this Act.

#### CASE 1

Thames Valley Police charged Gerard O'Sullivan, a journalist with the Undercurrents news organisation, under the Protection from Harassment Act on April 18th while he was filming a cat farm protest near Newbury. He said that police were "being very heavy handed with a woman and I started to film it, when suddenly the police yanked the camera out of my hands and went for the tape.

"I heard an inspector say 'arrest him under section 2 of the Harassment Act'."

The National Union of Journalists in the UK, which provided details of the two cases to the HKJA, warned that the Act could be used against journalists, but none have as yet been convicted under it, according to NUJ lawyer Sally Gilbert.

Mr O'Sullivan said that officers dropped and damaged his equipment while he was in custody at Newbury.

#### CASE 2

Two days later another Undercurrents journalist was arrested. Roddy Mansfield was held by the Metropolitan Police while reporting on a protest at the International Chamber of Commerce in London. He was released without charge, but his camera and tapes were taken the tapes erased.

He said: "The officers left the microphone on while recording over the images and I have their voices on the soundtrack.

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Undercurrents, which is financed by the Body Shop, has its footage shown on BBC, ITN and networks across the world

The HKJA will undertake to inform the sub-committee of the progress of these two cases when it receives further information. But arresting a reporter at a news scene, this disabling themselves from doing their job, is already damage enough, even if no charges follow.

## SUGGESTIONS

The HKJA does not have a single, cure-all suggestion on improving the proposals. However it can offer the following ideas.

\* Tightening the definition of harassment to include only activities that caused, or could cause, alarm or distress. At present it only "includes" causing alarm or distress.

\* Public interest defence. This could be one aid to journalists - but it is by no means clear how the courts might interpret this phrase, and they may even decide its scope is narrower than "reasonable under the circumstances".

\* Introduction of a new defence based on the special characteristics of media activities. For instance, the difference between "harassment" by journalists and those by others is that journalists should identify themselves and thus put the subject's mind at ease over their intentions. There should no risk or threat that their activities will be arbitrarily extended, escalate, or be calculated to cause mental anguish. It could be made a defence that the harassment was such that the victim had no reasonable cause for alarm or fear under the circumstance.

\* Media exemption. This is highly unsatisfactory because many believe that it helps pave the way for a licensing system as the only practical way of deciding who is "media" and who is not. This option should only be chosen if more elegant solutions are unworkable.

## CONCLUSION

The HKJA has strong reservations about the proposals, but the road to solving them is not clear. We hope the sub-committee will return to its proposals and study carefully the example shown above and see how this type of ordinary reporting can be made safe from legal sanction.

Many of those who wish to escape media attention are not victims, but victimisers. They have good lawyers and should not be given a new weapon to harass reporters who are doing their job ethically.

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