

THE LAW REFORM COMMISSION OF HONG KONG

**Supplementary paper on the
Law Reform Commission Reports on Privacy**

- (1) PRIVACY AND MEDIA INTRUSION**
(2) CIVIL LIABILITY FOR INVASION OF PRIVACY

**for the Legislative Council Panel on Home Affairs
Meeting on Friday 14 January 2005**

Law Reform Commission Secretariat

7 January 2005

1. The first part of this paper explains the key points in the Law Reform Commission's Report on *Privacy and Media Intrusion* published in December 2004. The second part corrects a number of misconceptions about the Law Reform Commission's proposals which have been voiced since the publication of the two privacy reports.

Part I – The *Privacy and Media Intrusion* Report

2. The main criticisms of the original proposals put forward by the Law Reform Commission's (LRC) Privacy sub-committee in its 1999 consultation paper on this subject were that:

- a) media intrusion in Hong Kong is not serious enough to warrant additional regulatory measures;
- b) industry self-regulation is preferable to statutory regulation;
- c) the statutory complaints body proposed by the Privacy sub-committee would be indirectly appointed by the Chief Executive;
- d) the power of the statutory body to impose a heavy fine on offending newspapers would undermine press freedom;
- e) the creation of the new body would be the thin end of the wedge as far as press freedom was concerned, and the body's remit would in due course be expanded from privacy to censorship.

3. The revised proposals in the LRC report address all these concerns.

- a) The report provides numerous clear examples of unwarranted intrusion by the local press. The findings of opinion polls conducted since the publication of our consultation paper also support the Commission's view that press intrusion is widespread in Hong Kong.
- b) While the LRC welcomes the formation of the HK Press Council, and commends the efforts of the Newspaper Society in establishing and maintaining the Council, the fact remains that the existing Press Council has no jurisdiction over magazines or the three most popular newspapers which account for over 75% of readership in Hong Kong. It cannot enforce its adjudications against newspapers and magazines that are not its members, and the Council members and local newspapers may be sued for libel if they criticise a non-member newspaper or magazine for breach of professional ethics.
- c) Under the LRC's revised proposals, the Chief Executive must appoint any member nominated by the various constituencies on the new statutory Commission unless there has been a procedural impropriety in the nomination process. The Chief Executive has no power or role to play in respect of the Commission other than this formal appointment of members nominated by others.

- d) The powers of the new statutory Commission under the LRC's revised proposals no longer include a power to fine.
- e) The LRC's proposals relate specifically to privacy, and to privacy alone. The LRC has made it crystal clear in its report that the issues considered in the report, the examples of media conduct referred to, and the arguments which satisfied the LRC of the need for a statutory body are all privacy-related. They do *not* provide any basis for expanding the new body's remit beyond the scope of privacy.

4. The LRC believes that in order to ensure that victims of press intrusion have an effective remedy it is necessary to create a statutory Commission to deal with complaints about unwarranted press intrusion. The proposed Commission would be **independent, self-regulating** and with a **limited range of sanctions** available to it. The Commission would be under a duty to draw up a Press Privacy Code (in consultation with the press and the public), and it would only be breaches of that code which would be subject to the Commission's sanctions. The LRC also recommends the inclusion of a number of **safeguards against abuse**.

5. The proposed Commission would be **an independent body** because:

- a) the nomination of Commission members would have no Government involvement;
- b) the Chief Executive must appoint those nominated unless there is any procedural impropriety in the nomination process;
- c) members of the Executive and Legislative Councils, civil servants and other public officers would be disqualified from membership; and
- d) the actions of the Commission would be subject only to the supervision of the Court.

6. The proposed Commission would be **a self-regulating body** because:

- a) half of its members would be selected by the representatives of the press industry and the journalistic profession;
- b) the other half would be nominated by professional bodies and non-governmental organisations;
- c) the Chairman would be elected by all Commission members;
- d) the standards in the Press Privacy Code would be set by the Commission itself;
- e) the Commission would be free to decide whether to accept a complaint and whether to initiate an investigation;
- f) the Commission would be able to adjudicate complaints and decide on the sanctions without outside interference; and
- g) the Commission may regulate its procedure, subject to the rules of natural justice.

7. The proposed Commission would have **limited sanctions** at its disposal:
- a) it may advise, warn or reprimand a newspaper or magazine which is found to have breached the Press Privacy Code;
 - b) it may order the offending publication to publish its findings and decision;
 - c) if the offending publication fails to publish the findings or decision, the Commission may apply to the court for an order requiring the offending publication to do so;
 - d) it does not have the power to order an apology; and
 - e) it does not have the power to impose a fine or to award compensation
8. The LRC has also recommended certain **safeguards against abuse**:
- a) newspapers and magazines (but not the complainants) would have a right to appeal to the Court of Appeal against the Commission's decisions;
 - b) the decisions of the Commission would be subject to judicial review;
 - c) the Commission would have a duty to publish annual reports and to make public its findings and decisions;
 - d) it would have a duty to give reasons in writing when adjudicating complaints;
 - e) its procedure would have to comply with the rules of natural justice;
 - f) it would have no power to compel a journalist to give evidence or disclose his sources of information; and
 - g) the Commission (as opposed to its members) would still be liable for making defamatory remarks.

Part II – Some common misconceptions about the LRC's proposals

“Media intrusion on privacy is not a major problem and is not perceived as a problem by the public”

9. Both aspects of this statement are wrong.
- a) The numerous *prima facie* examples of unwarranted media intrusion in Annex 2 of the *Privacy and Media Intrusion Report* indicate that press intrusion is widespread in Hong Kong.
 - b) A significant percentage of the media professionals who responded to the survey commissioned by the four major journalists' associations in 1999 considered that “untrue or exaggerated reports” (59%), “not paying enough respect to individual privacy” (44%), and “using unfair means to obtain news materials or photographs” (30%) are major problems.

- c) Public opinion polls conducted by independent market research organisations produced the following findings:
- The poll commissioned by the HK Press Council and conducted in October 2004 reveals that (a) 55% of the respondents considered that privacy intrusion by newspapers was either serious or very serious; and (b) 43% of the respondents considered that the problem of inaccurate reportage in local newspapers was either serious or very serious. The Press Council did not ask the same questions with regard to magazines.
 - The poll commissioned by the HK Press Council and conducted in January 2002 revealed that (a) 58% of the respondents considered that privacy intrusion by newspapers was either serious or very serious; and (b) 52% of the respondents considered that the problem of inaccurate reportage in local newspapers was either serious or very serious. The Press Council also did not ask the same questions with regard to magazines in the 2002 survey.
 - The poll commissioned by *Apple Daily* and conducted in August 1999 revealed that 60% of the respondents considered that abuse of press freedom and infringement of privacy were serious, and 44% of the respondents generally did not believe what local newspapers reported.
 - The findings of the polls conducted by the HK Policy Research Institute in September, October and November 1999 showed respectively that 42%, 49% and 52% of the respondents agreed that media intrusion was serious.

“This is just a Government plan to muzzle the press. Members of the proposed Commission would be appointed by the Government, and the Government would have a hand in choosing the members.”

10. This is completely wrong. As with any LRC study, the current proposals are the result of a detailed, objective, study by an independent group of experts over a number of years. The Government played no part in the formulation of the LRC’s proposals, and the Government has no role to play in relation to the Commission. In particular:

- a) None of the members of the proposed Commission would be appointed by the Government.
- b) Under the LRC proposals, newspaper members, magazine members, journalist members and academic members would be nominated by the newspaper industry, the magazine industry, the professional journalists’ associations and journalism academics respectively, while public members (excluding the retired judge who should be nominated by the Chief Justice) would be nominated by professional bodies and non-governmental

organisations (such as the HK Bar Association, the Law Society of HK, the HK Psychological Society and the HK Performing Artistes Guild).

- c) The Chief Executive *must* appoint those nominated unless there is any procedural impropriety, such as fraud or bribery.
- d) The role of the Government would be confined to ensuring that the nomination process is in accordance with the law, and to putting up the necessary funds to pay for the Commission's legal costs, its costs of education and research, and any compensation payable by the Commission.
- e) The Government would have no role to play in the drafting of the Press Privacy Code, in determining whether to accept a complaint, in adjudicating a complaint, and in determining how an offending or defaulting newspaper or magazine should be dealt with. There would be no room for the Government to manipulate the Commission or to interfere with its day-to-day operation.

“The proposed Commission may start off as only dealing with privacy matters but it will provide an easy way for the Government later to impose moral standards and censorship by extending the Commission’s remit.”

- 11. a) The examples of media conduct to which the LRC report refers, the issues considered, and the arguments which satisfied the LRC of the need for a statutory body are all privacy-related. They do *not* provide justification for the creation of a body with a wider remit, and are not intended to do so.
- b) The LRC report states clearly that any proposal to extend the new Commission's powers beyond the realm of privacy would require specific justification for such a limitation on freedom of speech and of the press. In particular, it would require a study as rigorous as that undertaken by the LRC, including evidence of a significant problem, a study to find out whether the restrictions can be justified on one of the grounds specified in the International Covenant on Civil and Political Rights, an examination of the approach followed in other jurisdictions, and an analysis of alternative solutions.
- c) The powers of the Commission would be granted by legislation passed by the Legislative Council. Legislation targeted specifically at privacy concerns could not be arbitrarily expanded to cover matters such as decency and taste.
- d) By virtue of Article 39 of the Basic Law, any restrictions on freedom of speech and of the press cannot contravene the provisions of the International Covenant on Civil and Political Rights.

“In the four years since the setting up of the existing Hong Kong Press Council, there have been significant improvements in relation to media intrusion on privacy, and this is confirmed by public opinion.”

12. Not so.

- a) The opinion poll commissioned by the HK Press Council and conducted in October 2004 shows that 48% of the respondents considered that the situation in regard to privacy intrusion by newspapers had not improved in the previous three years, while 33% of the respondents considered that the situation had worsened. Only 14% believed that the situation had improved.
- b) In relation to inaccurate reportage in newspapers, the poll in 2004 reveals that 54% considered that the situation had not improved in the previous three years, while 27% considered that the situation had worsened, and only 13% believed that the situation had improved.
- c) Although only three of the mass-circulation newspapers are not members of the HK Press Council, they accounted for 75% of newspaper readership in 2002/03. Further, no local magazines are willing to become members of the Council.
- d) Although Press Council members may be willing to publish adjudications against non-member newspapers and magazines, the adjudications are usually ignored by, and not reported or published in, the offending (non-member) newspapers and magazines. Hence, the Press Council’s critical adjudications against non-member newspapers and magazines are not made known to their readers. Readers of non-member newspapers account for about 75% of newspaper readers in Hong Kong.

“The Law Reform Commission wants to replace the Press Council with a statutory body with the same powers, composition and functions.”

13. This is wrong on two counts.

- a) Firstly, the LRC has not recommended that the proposed new Commission should replace the existing HK Press Council. The two bodies can exist side by side.
- b) Secondly, the proposed Commission differs significantly from the existing HK Press Council. In particular:
 - o Whereas the HK Press Council does not have jurisdiction over non-member newspapers and magazines, the proposed Commission would have jurisdiction over all local newspapers and magazines, regardless of membership. The Press Council may deal with complaints against non-member newspapers and magazines, but it has no power to compel a non-member publisher to publish a critical adjudication

against him in his own newspaper or magazine. In contrast, the proposed Commission would have the authority to order *any* offending newspaper or magazine to publish a correction or the Commission's findings and decision with due prominence whether the newspaper or magazine concerned is willing to participate in the nomination process or not. Such an order could be enforceable by the Commission on application to the Court if the newspaper or magazine concerned does not act in compliance with the order.

- While the HK Press Council considers complaints about articles of a prurient, indecent or sensational nature, the proposed Commission would have no authority to deal with these complaints. The Commission's remit relates only to privacy and nothing else.
- The existing Press Council neither accepts third party complaints nor initiates its own complaints, but the proposed Commission would have authority to initiate an investigation or investigate a complaint made by a third party if the investigation can be justified on the grounds of public interest.
- Whereas the constitution of the HK Press Council explicitly allows members of the journalist profession to be admitted as "Public Members", the LRC has recommended that a Public Member of the proposed Commission should be disqualified from membership if he engages in, or has a connection with, the journalistic profession or the press industry.
- Whereas journalism academics are admitted by the HK Press Council as "Public Members", the LRC has recommended that they should be nominated as Press Members instead.
- Whereas a newspaper member would not be bound by the Press Council's bylaws and decisions if it withdraws from the voluntary scheme or the Council cancels its membership, *all* newspapers and magazines would be subject to the jurisdiction of the proposed Commission, regardless of whether they support the legislative self-regulatory framework or not.
- Whereas the HK Press Council and its members are not immune from libel suits and may be held liable for the legal costs involved and any compensation awarded by the courts against them, the LRC has recommended that members of the proposed Commission (but not the Commission itself) should be immune from legal actions, while the legal costs and any compensation awarded against the Commission should be paid out of public funds.
- Decisions of the HK Press Council are final and are not subject to judicial review. However, under the LRC proposals, a publisher (but not the complainant) may appeal against an adverse decision of the

proposed Commission, and the Commission's decisions are subject to judicial review.

- The HK Press Council does not deal with complaints about inaccuracy and complaints about the use of intrusive news-gathering techniques. In contrast, the Press Privacy Code to be enforced by the proposed Commission would cover intrusive newsgathering activities. The Code would also require newspapers and magazines to publish a correction promptly and with due prominence where they have published a significant inaccuracy (including fabrication) or misleading statement about an individual.

14. In relation to this last point, the LRC believes that accuracy of facts about an individual is a core principle in the protection of privacy and has therefore recommended that the proposed Commission should be able to adjudicate on complaints about significant inaccuracies about an individual in the press. If this recommendation is not implemented, there should be statutory provision for a right to correct factual inaccuracies about an individual which have been reported in the press. The effect would be that inaccurate reports about an individual in the press could be corrected promptly and with the same prominence as the original publication.

“The press would be compelled to participate in the work of the new proposed Commission. That interferes with press freedom.”

15. There is no question of compelling anyone to participate against their will. All newspapers and the most widely read magazines would have a *right* to participate in the nomination process for members of the Commission, but they would not be forced to make a nomination against their will. However, in order to ensure that victims of unwarranted press intrusion have a proportionate remedy which would not unduly interfere with press freedom, a newspaper or magazine which is found to have breached the Press Privacy Code could be ordered to publish a correction or the findings and decision (but not to make an apology or pay compensation or a fine) regardless of whether it was willing to participate in the nomination process or not.

“The proposed levy to fund the operation of the proposed Commission is unfair and may force ‘weak’ newspapers to close.”

16. a) The press industry would only be required to meet the running costs of the proposed Commission, as the LRC has recommended that the legal costs of the Commission (other than the costs of providing ongoing legal advice to the Commission), the costs of education and research, and any damages payable by it should be met by public revenue.
- b) The running costs should be borne by the industry because the need to establish the proposed Commission arises out of the industry's own conduct.

- c) The LRC has also specifically recommended that any levy on newspapers and magazines must not be unduly onerous for existing newspapers and magazines, or act as a barrier to new entrants.

“Hong Kong has already established the Privacy Commissioner’s Office. If the privacy rights of a member of the public have been infringed, he can seek redress through that office, and there is no need to create a new statutory body.”

17. The existing statutory framework under the Personal Data (Privacy) Ordinance is not sufficient to deal with the problem of media intrusion:

- a) The object of the Personal Data (Privacy) Ordinance is to protect privacy in relation to personal data, not privacy rights in general.
- b) Intrusive behaviour that does not involve the recording of personal information relating to identifiable individuals does not engage the Ordinance.
- c) The Ordinance would not apply if a person collects data about an individual whose identity is unknown or there is no intention by that person to identify him.
- d) The provisions on the dissemination of corrections of inaccurate personal data do not apply to generally published personal data.
- e) The Ordinance does not restrain the publication of personal data collected by the media for journalistic purposes.
- f) The Ordinance has no application to data relating to deceased individuals.

18. In order to strengthen the protection available under the Personal Data (Privacy) Ordinance, the LRC has recommended that the Privacy Commissioner should be enabled to provide legal assistance to persons who wish to institute proceedings for a breach of that Ordinance, similar to the powers given to the Equal Opportunities Commission in relation to breaches of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance.

“The LRC proposals are not only unnecessary but would also be detrimental to freedom of speech and of the press.”

- 19. a) Article 2 of the International Covenant on Civil and Political Rights requires the HK Government to respect and ensure to all Hong Kong residents the right of privacy under Article 17 of the Covenant; to adopt such legislative or other measures as may be necessary to give effect to that right; and to ensure that any person whose right of privacy is infringed shall have an effective remedy.
- b) The LRC is of the view that the public do not have the right to know inaccurate, incorrect, misleading or fabricated information about an individual, nor do they have the right to know private information which is not a matter of legitimate public concern.

- c) The LRC recommends that any person who gives publicity to a matter concerning the private life of another should be liable in tort only if:
- the disclosure 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 disclosure is seriously offensive or objectionable to that person.

It would be a defence to an action for unwarranted publicity to show that:

- the plaintiff has expressly or by implication authorised or consented to the publicity; or
- the publicity was in the public interest. The publicity would be presumed to be in the public interest if it was necessary for:
 - ◆ the prevention, detection or investigation of crime;
 - ◆ the prevention or preclusion of unlawful or seriously improper conduct;
 - ◆ establishing whether the plaintiff was able to discharge his public or professional duties;
 - ◆ 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;
 - ◆ the prevention of the public being materially misled by a public statement made by the plaintiff;
 - ◆ the protection of public health or safety; or
 - ◆ 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.

- d) The LRC is not aware of any evidence that free expression has been unduly restricted in jurisdictions which recognise a tort action for infringement of privacy.
- e) In relation to the proposed self-regulating Commission, the LRC has recommended that the Press Privacy Code should be ratified by the Commission itself and may be drafted by their Press Members, and that the Code must make allowances for investigative journalism and publications that can be justified in the public interest.

“Very few jurisdictions impose civil liability for invasion of privacy”

20. a) The right to the legal protection of individual privacy (outside the realm of personal data privacy which is specifically protected by data protection legislation) is protected in the following jurisdictions in one way or another:
- o Austria, British Columbia, Manitoba, Newfoundland, Saskatchewan, Quebec, Mainland China, Macao, Taiwan, Denmark, Estonia, France, Germany, Hungary, Ireland, India, Italy, Lithuania, The Netherlands, New Zealand, Norway, The Philippines, Russia, South Africa, South Korea, Spain, Thailand, the various states in the United States, and most of the Latin American jurisdictions, including Brazil.
- b) Although the House of Lords in the United Kingdom has held that English common law does not recognise a right of privacy, by virtue of the Human Rights Act 1998, the United Kingdom courts must not act in a way which is incompatible with the rights under the European Convention on Human Rights, and would protect individuals against an infringement of their right to privacy under Article 8 of the Convention if a public authority (including a court) breaches that obligation.

LRC Secretariat
7 January 2005