

**Extract from the minutes of meeting of the
Panel on Home Affairs held on 8 November 1999**

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Action

IV. Consultation Papers on Regulation of Media Intrusion and Civil Liability for Invasion of Privacy published by the Subcommittee on Privacy of the Law Reform Commission of Hong Kong (Privacy Subcommittee)

5. Members noted that the Research and Library Services Division of the Legislative Council (LegCo) Secretariat had prepared a research report entitled "The Regulation of Media Intrusion of Privacy : the Experiences in Taiwan, the United Kingdom and the United States" [RL01/99-00].

Meeting with deputations

6. The Chairman welcomed representatives of the deputations and invited them to present their views on the two consultation papers published by the Privacy Subcommittee of the Law Reform Commission (LRC). She said that the Panel would discuss with the LRC Privacy Subcommittee and the deputations on the issues raised.

Hong Kong Journalists Association (HKJA)

7. The Chairman of HKJA said that while HKJA agreed that the right of privacy should be protected, it would not accept the proposal of setting up a statutory Press Council for the Protection of Privacy (the Press Council), initiated either by the Government or by the industry itself, as such a mechanism would undermine press freedom. She explained that according to the International Covenant on Civil and Political Rights (ICCPR), the exercise of the rights provided for should not be subject to any restrictions unless such restrictions were proved to be necessary. HKJA also rejected the Privacy Subcommittee's claim that the gravity of media intrusion justified such restrictions because -

- (a) some cases of media intrusion cited in Chapter 2 of the Consultation Paper on *the Intrusion by the Media* were not privacy infringement and could be dealt with by other legislation;
- (b) since the commencement of the Personal Data (Privacy) Ordinance (Cap. 486) in December 1996 and up to September 1999, only 37 complaint cases (4% of the total cases) involving the media had been received by the Office of the Privacy Commissioner for Personal Data (the Privacy Commissioner);

and

- (c) the 37 cases received by the Privacy Commissioner included complaints against media agencies for not responding to requests for information within the statutory period.

8. The Chairman of HKJA pointed out that the Privacy Subcommittee's recommendation of a Press Council ran counter to the practice of developed countries which relied on civil law and self-regulation by the media to protect privacy. These overseas media regulatory bodies were non-statutory and could not impose sanctions on media. The Chairman of HKJA added that the Press Council should be responsible for the criticisms it made and it would be unfair to exempt it from regulation of the defamation law.

9. The Chairman of HKJA disagreed with paragraphs 7.23 - 7.31 of the Consultation Paper that a legislature elected by universal suffrage would not modify the Press Council in such a way that would knowingly infringe fundamental human rights. She pointed out that at present only one-third of the Members of the LegCo were returned by election and a review would only be conducted in 2007 as to whether all LegCo Members were to be returned by universal suffrage.

10. The Chairman of HKJA did not agree that the media had made no signs of improvement in self-regulation. She said that public concern about media intrusion only surfaced in recent years, and the media should be allowed some time to devise a self-regulatory mechanism. HKJA hoped that media agencies and news practitioners' associations would adopt a common code of ethics and set up a complaints or ombudsman system. She was of the view that setting up a Press Council should only be the last resort when all such efforts failed.

Hong Kong Press Photographers' Association (HKPPA)

11. The Vice-Chairman of HKPPA said that although there were merits in having a Press Council, HKPPA did not accept the Privacy Subcommittee's recommendation that a statutory Press Council should be set up because the latter could become a tool to control the media. Moreover, members representing the media in the Press Council would have conflict of interest. HKPPA also did not support the establishment of a non-statutory Press Council at the present stage as it would have adverse impact on press freedom. HKPPA considered that the media should establish a self-regulation mechanism, and that legal aid should be granted to those persons who had their privacy infringed to seek legal remedies. HKPPA took the view that the establishment of a non-statutory Press Council should only be considered if these efforts failed.

Hong Kong Chinese Press Association (HKCPA)

[Paper No. CB(2)296/99-00(01)]

12. The Chairman of HKCPA briefed members on the HKCPA's written submission. He said that HKCPA was opposed to media intrusion and abuse of press freedom. However, HKCPA was of the view that there were already adequate legislation and mechanism to regulate the media. HKCPA supported self-regulation instead of setting up a Press Council because government involvement in a Press Council would hamper press freedom.

Citizens Party

[Paper No. CB(2)320/99-00(01)]

13. The Executive Committee member of the Citizens Party briefed members on the written submission which set out the problems of having a statutory Press Council. The Citizens Party opposed in principle the establishment of a statutory Press Council which would be vested with power to impose penalties. He stressed that a voluntary mechanism without disciplinary powers would help uphold press freedom and promote responsible journalism.

The Society for Truth & Light Ltd (the Society)

[Paper No. CB(2)332/99-00(01)]

14. The General Secretary of the Society briefed members on the written submission which was tabled at the meeting and issued to absent members vide Paper No. CB(2)332/99-00(01). The Society proposed to set up a statutory, independent Press Council to receive and adjudicate complaints against the media for invasion of privacy, inaccurate reporting, and publication of violent or pornographic materials. The Society emphasized that members of the Press Council should not be appointed by the Government, and they should be elected from the media and concern groups. The Society also made recommendations on the functions and powers of the proposed Press Council as detailed in its written submission.

(The Deputy Chairman took the chair during the temporary absence of the Chairman.)

Mr Tim HAMLETT

[Paper No. CB(2)313/99-00]

15. Mr Tim HAMLETT briefed members on his written submission. He pointed out several shortcomings of the Consultation Paper. He said that the Privacy Subcommittee had overlooked the fundamental principle that there were limits in privacy rights, and that the Consultation Paper had taken an unduly restrictive view of the human need for information, communication and exchange. He opined that the Privacy Subcommittee had not given evidence to justify its recommendation for a statutory Press Council to regulate media intrusion, as the cases cited in the Consultation Paper were more related to matters of public record, legitimate reporting and public interest instead of media intrusion. In the absence of information on the sample size and survey

methodology, he found it difficult to accept the recommendation.

16. Mr Tim HAMLETT pointed out that while the Privacy Subcommittee had elaborated its justifications for not recommending the creation of a general tort of invasion of privacy, it had not recommended any safeguards against possible abuses by the Press Council. For example, it did not provide the accused with the right to make legal representation. Mr HAMLETT added that a Press Council would naturally seek to expand its jurisdiction beyond protection of privacy, irrespective of whether it was established with Government's initiative. He said that the same happened to the Equal Opportunities Commission and the Obscene Articles Tribunal which had sought to expand their jurisdictions.

17. Mr HAMLETT said that at the Panel meeting on 26 April 1999, there appeared to be a consensus that legislative control over the media was inappropriate. He hoped that the consensus would sustain.

Meeting with the Privacy Subcommittee of Law Reform Commission (LRC)

Response to views expressed by deputations

18. The Deputy Chairman invited the Privacy Subcommittee of LRC to respond to the views expressed by deputations. Prof Raymond WACKS, Chairman of the Privacy Subcommittee, responded by emphasizing that there was no argument about the importance of freedom of speech which was protected by the Basic Law, the Hong Kong Bill of Rights Ordinance (Cap. 383), and ICCPR. However, as all rights were limited, it was necessary to strike a balance among different rights and interests. He said that the Privacy Subcommittee would not make any recommendation which would compromise press freedom in Hong Kong unless there was a legitimate need for some restrictions over media practices. He pointed out that the right of privacy, which was an American invention, had not existed in the English laws and was therefore not adopted in the laws of Hong Kong. During the study, the Privacy Subcommittee found that the common law did not provide adequate protection against infringement of privacy by the media.

19. Prof Raymond WACKS noted that deputations were concerned that Government might use the Press Council to suppress the media. He clarified that it was highly unlikely that the Press Council could be used to regulate the media other than its intrusion into privacy, if the legislation was properly drafted and if the Press Council strictly adhered to its terms of reference.

20. Responding to the views expressed by Mr. Tim HAMLETT, Prof Raymond WACKS said that he did not see any problem in making reference to the psychological aspects of privacy. He pointed out that many remedies in law aimed at protecting individuals from damages to their psychological well-being. As regards the right to make legal representation, he clarified that the proposed Press Council was intended to be an informal mechanism to

adjudicate complaints on media intrusion of privacy. To save time and money, legal representation was not recommended for an informal system. Concerning the possibility of the Press Council expanding its jurisdiction beyond privacy issues, Prof WACKS said that a screening mechanism could be introduced to exclude those complaints which did not meet the criteria. He said that such a system had proved to be successful in the Office of the Privacy Commissioner for Personal Data which had been operating effectively within its jurisdiction.

21. Referring to HKJA's argument that only a few cases received by the Privacy Commissioner were directly related to media intrusion, Prof Raymond WACKS said that individuals normally would not make complaints of media intrusion to the Privacy Commissioner because the present legislation was not designed for that purpose. However, he cited a recent case in which a magazine sought judicial review of the Privacy Commissioner's ruling that the publication of a photograph of a woman without her consent was in breach of the Personal Data (Privacy) Ordinance. Prof WACKS considered that cases of this kind would require balancing the right of privacy and press freedom, and that a Press Council would be the appropriate body to adjudicate such complaints. With regard to the reference to overseas experience in the Consultation Paper, Prof WACKS said that this would help people to compare and decide on the best model for Hong Kong.

22. Mr A F M CONWAY, member of Privacy Subcommittee, said that the Privacy Subcommittee had been working on the subject of privacy for ten years and there was impeccable evidence that ordinary citizens had been subject to unwarranted media intrusion. Public poll and research had shown that the public did not believe that the media agencies would respond voluntarily or positively to the legitimate concern of privacy. He said that many people supported most of the recommendations in the Consultation Paper for the regulation of media intrusion, particularly the proposal of setting up a Press Council. He stressed that the proposed Press Council was only one option for the public to protect the right of privacy. If the media industry could organise its own monitoring and disciplinary body similar to the Press Council, it would also be acceptable to the public.

23. Mr James O'NEIL, member of Privacy Subcommittee, said that the Privacy Committee concurred with the deputations that there should not be a government-controlled body to regulate media intrusion. He clarified that the proposal of a statutory Press Council was only to confer legal status to the monitoring body and that it would not be a government organization.

24. Mr Edwin LAU, member of Privacy Subcommittee, said that the discussion had been focused on whether the media should be exempt from the regulation of the Personal Data (Privacy) Ordinance. He stressed that the proposed Press Council was only to deal with protection of privacy but not to regulate the media in general.

Discussion

25. Miss Emily LAU said that the Chief Executive indicated his support for the Privacy Subcommittee's recommendation to set up a statutory Press Council when the Consultation Paper was published. As the LRC was appointed by the Government, many people were of the view that its recommendation was pro-government. She therefore asked whether Privacy Subcommittee's recommendation was made independently or with Government's blessing.

26. Prof Raymond WACKS responded that the proposal of a Press Council was to address the specific concern about inadequate protection in law against media intrusion of privacy. He said that LRC was not a political body; it was tasked to examine the current state of law and to make recommendations on law reforms. The Privacy Subcommittee had also published another Consultation Paper on *Civil Liability for Invasion of Privacy* at the same time on a related subject of law reform. The Consultation Paper on *Civil Liability for Invasion of Privacy* sought to provide a remedy for individuals against intrusion of privacy by any person and not just by the media. While the Privacy Subcommittee considered that the media should operate within an ethical framework, it had noted that the media had not made adequate efforts to set up such a framework over the years.

27. Miss Emily LAU asked whether Mr Raymond WACKS was in support of the recommendation of setting up a Press Council. Prof WACKS responded that although most recommendations in the Consultation Paper had been discussed before he took over the chair of the Privacy Subcommittee, the proposal of setting up a Press Council was the collective recommendation of the Privacy Subcommittee. Prof WACKS was of the view that although existing legislation had provided remedy for individuals whose privacy had been infringed by the media, the legislation was not designed specifically for the purpose of protecting individuals from media intrusion. His personal opinion was that it would provide a better solution if the existing legislation could be amended to enable the Privacy Commissioner to adjudicate complaints against media intrusion.

28. Miss Emily LAU referred to paragraph 37.8 of the LegCo Secretariat research report which stated that the Press Council as proposed in the Consultation Paper would have statutory power to launch investigations and take punitive actions and that would inevitably touch upon Article 27 of the Basic Law. She therefore asked whether the proposed Press Council would contravene Article 27 of the Basic Law.

29. Prof Raymond WACKS said that the right of privacy and freedom of speech and of the press were human rights subject to limitations necessary for the protection of the rights of others. He pointed out that the European Convention on Human Rights, the United Nations Declaration on Human Rights and the Basic Law had all acknowledged that the rights to freedom of

speech and of press were restricted.

30. Mr WONG Kwok-wah, member of Privacy Subcommittee, disagreed that the proposed Press Council would contravene Article 27 of the Basic Law. He said that Chapter One of the Consultation Paper had discussed in detail the right to privacy and freedom of expression.

(The Chairman resumed the chair at this juncture)

31. Mr Andrew CHENG expressed reservation about the need for a Press Council since the court could now adjudicate cases of media intrusion in the light of the Basic Law and Personal Data (Privacy) Ordinance. He was concerned that a Government-appointed Press Council vested with a wide range of powers would have adverse impact on press freedom. Mr CHENG also asked the Privacy Subcommittee the reasons for not recommending the model of the Press Complaints Commission of the United Kingdom, which was an independent body without any sanction powers.

32. Prof Raymond WACKS responded that the Privacy Subcommittee was obliged to propose a remedy in law which was acceptable to the community and adequate to address the problem of media intrusion. A Press Council without punitive power would be tantamount to "a tiger without teeth". He said that the community in Hong Kong generally had little faith in self-regulation by the media because the three most popular newspapers had shown little inclination to be involved in the self-regulation process. Mr Andrew CHENG reiterated that he had serious concern about the proposal of a Press Council as governments in overseas countries had not initiated the establishment of similar press monitoring bodies.

Discussion with deputations

33. Referring to Prof Raymond WACKS's remarks that a Press Council without adequate powers would become "a tiger without teeth", The Chairman of HKJA said that, to her knowledge, no media regulatory bodies in overseas countries had punitive power, as this would require a statutory and strict standard in law which would restrict press freedom.

34. Mr Andrew CHENG said that the public had justified concern about the viability of self-regulation because there was little evidence that the media in Hong Kong was committed to self-regulation. He asked whether a press council modelled on the Press Complaints Commission in the United Kingdom was acceptable to HKJA. The Chairman of HKJA responded that HKJA did not support the establishment of a collective monitoring body, statutory or non-statutory, to improve media ethics, for the following reasons -

- (a) according to a survey conducted by HKJA in 1992-93, the self-regulatory bodies of the press in overseas countries were not effective;

- (b) the 1994 survey of the Australian Press Council revealed that over half of the respondents were not satisfied with the settlement of the complaints; and
- (c) HKJA was concerned that a press council would be subject to pressure to expand its powers and jurisdiction, which might eventually restrict press freedom.

35. The Chairman of HKJA was of the view that the public did not have adequate understanding about the notion of privacy. She pointed out that according to a recent survey conducted by the Society for the Truth and Light Ltd, most respondents had referred to the infringement of privacy of public figures, celebrities and government officials. Nevertheless, she considered that it was commonly accepted that public figures enjoyed comparatively less privacy right when compared with ordinary citizens. She was therefore of the view that the problem of media intrusion was not so serious that warranted regulation.

36. Mr Andrew CHENG stressed that to counteract the proposal of setting up a Press Council, the media must demonstrate to the public that efforts had been made to improve media ethics. The Chairman of HKJA responded that HKJA had pledged to take the lead in establishing a media monitoring forum but progress was slow due to ideological differences among media agencies and resource constraints of the HKJA. She informed members that a draft code of ethics for news practitioners was being compiled by the Hong Kong News Executives' Association (HKNEA) in consultation with news executives of the media, media proprietors and concerned parties. She reiterated that the media would need more time to put in place a self-regulatory mechanism.

37. The Chairman of HKCPA added that a statutory media monitoring forum was unnecessary because voluntary joint action by the industry would achieve the same effect. He said that the media bodies had been actively working on the self-regulatory mechanism although the progress was slow.

38. The General Secretary of the Society expressed reservation about HKJA's capability to establish a self-regulatory mechanism in view of its resource limitations. The Chairman of HKJA clarified that media agencies and news practitioners' associations made joint efforts in establishing the media monitoring forum. She added that HKJA already had an ethics committee which was a disciplinary mechanism to receive and adjudicate complaints on media ethics. The HKJA's constitution had been amended recently so that its adjudication on these cases could be released to the public, instead of publication in the bulletin.

39. Miss Cyd HO sought clarification from HKJA and HKPPA about their position on the establishment of a non-statutory Press Council. The Chairman of HKJA responded that if a non-statutory press council was to be established,

it should be organised by the community and should enjoy a high degree of freedom of speech. The Vice Chairman of HKPAA reiterated that although there were merits in having a non-statutory Press Council, HKPAA was concerned about its negative impact on press freedom. HKPAA was therefore of the view that it was not the best solution to the problem of media intrusion.

40. In response to Miss Cyd HO, the Chairman of HKJA said that the media must be aware of its social responsibility, and if the industry could not show any sign of progress in self-regulation, the media would have difficulties to justify its opposition to statutory control especially when the public had generally accepted the idea.

(*Post-meeting note* : A letter dated 8 November 1999 from HKJA clarifying its position on the regulation of media intrusion was issued to members vide Paper No. CB(2)332/99-00(02).)

41. Referring to the survey conducted by the Society, Miss Emily LAU and Miss Cyd HO inquired about the sample size and methodology. The General Secretary of the Society informed members that it was a small-scale questionnaire survey conducted randomly at various locations in the territory. He said that the Society's recommendations were put forward after thorough discussion by its Board and the survey result was attached for reference only. Miss LAU expressed concern about the accuracy of the survey findings. She was of the view that the Society should explain clearly in its paper the survey method when releasing the findings and that the media had the responsibility to present the full picture to the public. The General Secretary of the Society responded that the Society had no intention to mislead the public because it had explained the methodology and sample size in its paper. It would be up to the media to decide how to present the data.

42. In response to Miss Cyd HO, the General Secretary of the Society said that he did not agree that public figures or their relatives should not enjoy the same degree of privacy as ordinary people.

43. On the Society's recommendation that the Press Council should also adjudicate complaints on reports of sex and violence, Miss Cyd HO remarked that the public apparently was not concerned about the prevalence of violent and pornographic materials in newspapers since the two most criticised newspapers had the highest circulation figures. She commented that the Society had failed to point out in the survey that readers also had the responsibility to uphold media ethics through market force. The General Secretary of the Society responded that newspapers with high circulation figures were not free from unethical reporting. The Society would continue its effort to educate the public on how to select newspapers. He added that readers' responsibility was not included in the questionnaire because this was not the objective of the survey.

44. Mr Andrew CHENG reiterated his concern that the Society proposed to

set up a Press Council with extensive powers and wide jurisdiction beyond intrusion of privacy. While agreeing that existing legislation did not adequately address the problem of media intrusion of privacy, Mr CHENG opined that the problem should be dealt with by the existing legislative framework rather than by setting up a new mechanism such as a statutory Press Council. The General Secretary of the Society responded that parents, teachers and social workers were more concerned about excessive reporting on sex and violence instead of intrusion of privacy. They were also concerned about other improper practices of the media such as "beautifying" unlawful acts of triad members and inaccurate reporting on sex offences.

45. The Executive Committee member of Citizens Party expressed concern that most cases of unethical reporting quoted by the Society involved subjective and moral judgement but the Press Council proposed by the Society would not have the legal power to adjudicate such complaints.

46. The General Secretary of the Society said that members of the Press Council should be elected by the media and concerned groups, and that it should abide by a unified code of practice. Miss HO expressed doubts that the Press Council could make independent and impartial judgement when most of all its members were to be returned by functional constituencies, i.e. the media, social workers, lawyers and teachers. The General Secretary of the Society disagreed that elections of functional constituencies were not representative. He considered it essential to include participation of the industry in a regulatory mechanism.

47. The Deputy Chairman said that the Consultation Paper had triggered off heated debate in the community. It was regrettable that the progress of putting in place a self-regulatory mechanism by the industry itself was far from satisfactory. He stressed that freedom of speech and of the press were effective and important tools to monitor the executive-led Administration particularly when the legislature was not returned by universal suffrage. Nevertheless, protection of privacy was also important. He said that the Democratic Party was of the view that the existing legislation should be amended to provide adequate remedies to victims of privacy intrusion while legal aid should be granted to enable such victims to seek remedies. The Deputy Chairman also pointed out that the Court of Final Appeal had recently ruled in favour of a television presenter who had made adverse comment on a newspaper with high circulation figure. In this case, the Court of Final Appeal had taken a broader view on the scope of fair comment on a matter of public interest as a defence to an action of defamation.

48. To address the problem of media intrusion, the Deputy Chairman suggested the media establish a self-regulatory mechanism which could reprimand a media agency for breaching the unified code of ethics. In this connection, the Chairman of HKJA informed members that the HKJA, HKPPA, HKNEA, Hong Kong Federation of Journalists had set up a "Joint Working Group on Press Ethics" to study various proposals and to make

recommendations to improve media ethics to meet public expectations. She was of the view that social sanction would work, as one of the most criticised newspapers with high circulation figure had recently set up a working group to put in place a complaint mechanism. She had also discussed with the Newspaper Society of Hong Kong on the common grounds for joint actions. However, the Newspaper Society of Hong Kong was in favour of having a statutory self-regulatory Press Council. The Vice Chairman of HKPPA remarked that a voluntary media monitoring system might not be effective in restraining intrusive reporting.

49. On the question of including lay members in the media monitoring forum to enhance credibility, the Chairman of HKJA stressed that HKJA did not reject public participation in monitoring the media. The Chairman of HKCPA considered, however, that inclusion of lay members would cause operational difficulties and would further delay the establishment of such a forum. In this regard, Miss Emily LAU held a strong view that a media monitoring forum which excluded public participation would not have any credibility.

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