



HONG KONG JOURNALISTS ASSOCIATION  
香港記者協會

**HKJA SUBMISSION TO CMAB ON GOVERNMENT CONSULTATION  
PAPER ON STALKING**

2<sup>nd</sup> March 2012

1. The Hong Kong Journalists Association (HKJA) notes with concern the government's consultation paper on stalking released in December 2011. While the association holds that innocent people should be protected from harassment in the form of stalking, it is worried about the implications for legitimate journalistic activities and the way any new law could be abused to block genuine investigative activities by journalists.

2. It is obvious to us that press freedom will be severely restricted by the proposed new legislation on stalking. While performing their duties, journalists will repeatedly press for answers from interviewees if questions remain unanswered, wait around premises of interviewees who refuse to clarify points, and even follow individuals who may wish to hide from the public because they have engaged in malpractice. These legitimate journalistic activities, which are not always welcomed by interviewees who do not want to be held responsible to the public, can easily become criminal activities as defined by the Constitutional and Mainland Affairs Bureau (CMAB) in its consultation paper. In a recent case, an official with the North Korean consulate in Hong Kong called the police to "persuade" the press to leave the premises after they sought comments from the consul on the death of Kim Jong Il - a clear case of a news story which is in the public interest. Abusive use of anti-stalking legislation is therefore highly likely.

**Useless Defence**

3. The so-called defence of the pursuit of a course of conduct being "reasonable in the particular circumstances", as stated in paragraph 3.38 (c), is in our view highly flawed. In our experience, targeted interviewees simply want to stop the media from reporting. They may not even take the case to court, which prevents a potential defendant from even using the defence.

4. Experience of the United Kingdom law - the UK Protection from Harassment Act 1997 (PHA) - also leads us to believe that any anti-stalking law in Hong Kong could easily be exploited. The government consultation document cites this law extensively, including its provision that conduct which is "reasonable in the particular circumstances" is a significant defence. We beg to differ. The reality is that the PHA's use has widened to include newspapers and other publications.

5. Adrian Arbib, a photographer in the UK, was served with an injunction in 2007 under the PHA, barring him from taking photographs or videos of individuals and their vehicles involved in bulldozing 30 acres of land, filling in two lakes and dumping power station waste ash.<sup>i</sup> The action was related to a protest against the plan - and the story was clearly in the public interest. Yet a judge allowed the serving of an injunction against the photographer, thereby limiting his ability to carry out his job.

6. The case was cited in an article written by a lawyer in *The Guardian*<sup>ii</sup>. The London-based freedom of expression advocacy organization, Article 19, also made reference to this case in a report submitted to the 91st session of the United Nation Human Rights Committee. It noted that "the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors."<sup>iii</sup> Article 19 further suggested that Britain should consider amending the law to prevent its application to genuine protests.

7. *The Guardian* article also notes that the PHA has been used as a replacement for libel claims, particularly where claimants are not interested in substantial damages, but want to stop defendants expressing themselves.

8. The article also pointed to one case in which a black woman, Esther Thomas, successfully brought a claim under the PHA against *The Sun* for publishing articles about her, which reported that three police officers had been demoted as a result of a complaint which she had made about their alleged racist remarks<sup>iv</sup>. In another case, Bob Crow, chief of Rail, Maritime and Transport Workers Union, had used the law to limit personal attacks on him by the *London Evening Standard*.

## **PHA Covers Wide Range of Activities**

9. Another article<sup>v</sup> discussed a Court of Appeal judgement dated February 15th 2011 in the case Iqbal versus Dean Manson Solicitors. The article noted that "(t)his (PHA) was a landmark piece of legislation which has a broad ambit and can encompass conduct quite different to stalking and physical harassment. In particular it can cover harassment by the media..."

10. These arguments point to the fact that anti-stalking legislation can - and most likely will - lead to abuse. It opens the door for individuals to use the law to prevent reporters from carrying out legitimate journalistic activities. Mention of harassment which causes alarm or distress is clearly not enough to prevent abuse.

11. It is regrettable that the CMAB ignored the detrimental effect of the PHA on press freedom. It even went on to suggest the adoption of an even more controversial proposal - the criminalisation of the pursuit of a course of conduct involving the harassment of two or more persons on separate occasions, with the intention of persuading any person not to do something he is entitled to do, or to do something which he is not obliged to do. (See paragraph 3.17.) The report links this with animal rights protests in Britain.

12. The HKJA strongly object to this proposal, which clearly has a political element to it, and has nothing to do with the traditional concept of stalking. In Hong Kong's context, it would be wrong to introduce such a concept into the statute book, given the rights that are enshrined in the Basic Law and the Hong Kong Bill of Rights Ordinance. Indeed, the report recognises that the problem the UK law is seeking to solve is not a matter of major concern in Hong Kong, and there are no similar provisions in anti-stalking legislation in other jurisdictions. Such an offence should not therefore be introduced in Hong Kong.

13. Moreover, most countries in the European Union have not adopted anti-stalking laws. According to an EU report<sup>vi</sup> released in 2010, only twelve out of 27 member states had enacted such legislation. Another EU-commissioned report<sup>vii</sup> suggested that member states should take a cautious approach to examine the effectiveness of the law and devote more efforts to education on the issue.

## The Way Forward

14. The HKJA objects to the new legislation proposed by the CMAB, which it believes to be excessively wide in scope and too vague in its definition of what constitutes stalking. Moreover, it is doubtful whether the law could meet the common law requirements that there must be a pressing social need. According to European Court of Human Rights, the test relies on whether government's interference is proportionate to the legitimate aim pursued and the reasons given by the authorities to justify it are relevant and sufficient. The CMAB cited the comments of the Law Reform Commission (LRC) made eleven years ago as the basis for its case - that "the protection offered by the civil and criminal law is spotty, uncertain and ineffective" and thus the problem of stalking needs to be addressed. However, the situation has improved since then.

15. As stated by the LRC twelve years ago, "some of the offensive behavior associated with stalking can be dealt with under existing laws". Through strengthened enforcement, the number of cases has dropped. The Secretary for Security, Ambrose Lee, said on several occasions in the Legislative Council that the situation regarding non-criminal debt collection-related harassment cases had improved. According to the figures he reported in June 2011, the number of cases reported to the police from 2006 to 2010 was down, and the figure for the first five months of 2011 had dropped 20 percent compared with the same period in 2010.

16. Regarding stalking involving personal relationships, the Domestic Violence Ordinance has been amended to include cohabitation relationships, which means that more people can be protected under this ordinance.

17. Given that the anti-stalking law may curb press freedom, women's groups<sup>viii</sup> suggested again in 2006 and 2007 to the government that anti-stalking provisions should be included in the Domestic and Cohabitation Relationship Ordinance, instead of enacting a completely new law. It was a sensible and balanced approach. Regrettably, the government has turned a deaf ear to this proposal.

18. While the HKJA would not speculate on whether political motives may lie behind the government proposal for a new law, we stand by the proposal suggested by the women's groups. We therefore urge the government to resist

the temptation to enact a new law which would cover activities that are vaguely defined. It should instead focus on incorporating narrowly defined anti-stalking clauses in existing ordinances to guard against the type of cases mentioned in paragraph 2.11. As a matter of fact, the former TV anchor mentioned in paragraph 2.11 (c) told the press that she would rather not have a new law because of its threat to press freedom.

19. We also note that the report makes reference to Law Reform Commission reports on civil liability for invasion of privacy and privacy and media intrusion. The proposals contained in these two reports are of extreme concern to the media - and if implemented could seriously harm Hong Kong's press freedom. Of particular concern is the proposal to create a statutory press council to handle privacy complaints. We would urge the government not to pursue the recommendations contained in these two reports.

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<sup>i</sup> RWE Npower v Carrol. Also see

<http://www.epuk.org/News/472/npower-injunction-on-epuk-member>

<sup>ii</sup> Duncan Lamont, *The harassment of press freedom. The Guardian*, 5 March 2007

<sup>iii</sup> P.12 of the report

<sup>iv</sup> Thomas v News Group Newspapers Ltd & Anor [2001] EWCA Civ 1233

<http://www.bailii.org/ew/cases/EWCA/Civ/2001/1233.html>

<sup>v</sup> Edward Craven : “Case Law: Iqbal v Dean Manson, harassment by letter”

<http://inform.wordpress.com/2011/02/25/case-law-iqbal-v-dean-manson-harassment-by-letter-edward-craven/>

<sup>vi</sup> *Feasibility Study to Assess the Possibilities, Opportunities and Needs to Standardize National Legislation on Violence Against Women, Violence Against Children and Sexual Orientation Violence*, P.67

<sup>vii</sup> *Protecting Women from the New Crime of Stalking: A comparison of Legislative Approaches Within the European Union*

<sup>viii</sup> Women’s groups here included Hong Kong Women's Coalition on Equal Opportunities, Hong Kong Association for the Survivors of Women Abuse.