

HKJA SAYS NO TO LAW REFORM COMMISSION PRIVACY PACKAGE

The Hong Kong Journalists Association (HKJA) expresses deep disappointment and concern over the Law Reform Commission's (LRC) recently published reports on privacy, in particular over its call for the establishment of a statutory press council and a new civil tort on invasion of privacy. While the HKJA agrees that the press is not blameless on privacy issues, it feels strongly that taking a legislative approach is fundamentally wrong - as it runs counter to the principle of voluntary self-regulation and will inevitably weaken freedom of expression.

The HKJA accepts that the Law Reform Commission has toned down the powers of the proposed press council. However, the concessions are illusory, given the effect that the new civil tort could have on the finances of media organisations. Though the new-style commission will not have the power to fine newspapers, it remains possible that a claimant may use its judgement to substantiate his or her claim and receive hefty compensation under the civil tort. The chilling effect of this scenario cannot be underestimated. That is the reason that overseas press councils of a voluntary nature refuse to handle complaints that are also being handled in the courts.

However, what worries us most is the way the Law Reform Commission has deviated from the spirit of international human rights law and jurisprudence. The International Covenant on Civil and Political Rights recognises that freedom of expression can be limited by law if there is a pressing social need. However, the HKJA believes this is not the case in Hong Kong's case. Complaints are rare, and many cases can be handled through existing laws and torts, as the LRC itself has indicated in its reports.

The LRC's legislative approach is also at variance with the trend in a number of common law jurisdictions to improve privacy protection through judicial development of the common law. Britain, for example, rejected calls for the introduction of privacy protection laws as recently as 2003.

Given the vagueness of the concept and the potential for abuse, the threat to freedom of expression will be very real. We therefore urge the government to reject the LRC's

proposals.

No Need For A Statutory Press Commission

The LRC has repackaged the privacy sub-committee's proposal for a statutory press commission. In an attempt to meet the worries of freedom of expression practitioners and civil rights groups, it has offered several concessions. For example, the chief executive would no longer have a direct role to play in the council's formation, and the body would no longer have the power to fine newspapers. Further, journalists would not be forced to disclose sources of information and there would be judicial appeal channels.

However, these concessions should not obscure the basic fact that the press commission would be set up by statute, and such a law - however liberal - could be amended at some later date - especially by a legislature that is not elected by equal and universal suffrage. Moreover, the possibility that government's influence may channel in the selection of organizations for the formation of the proposed commission cannot be taken lightly. Indeed, recent developments suggest that Hong Kong is a long way from the Basic Law goal of a fully directly elected legislature, with some government officials even suggesting that universal suffrage can best be achieved through the retention of functional constituencies.

Indeed, the LRC proposes in its recent report that media regulation should be achieved through a vague concept called co-regulation - a system whereby the state would play a role in setting the basic rules, while leaving implementation to the journalistic industry.

However, the report points out clearly in paragraph 12.25 why Britain has shied away from any government involvement:

"In its White Paper on Privacy and Media Intrusion published in 1995, the UK government rejected the idea of setting up a statutory complaints tribunal or a statutory Press Ombudsman on the grounds that the imposition of statutory controls might open the way for regulating content, thereby laying the Government open to charges of press censorship."

Further, the current chairman of the Australian Press Council, Professor Ken McKinnon, says: "A government established Press Council would amount to licensing and control of the press, since it would have powers to determine what could be

published and membership would be determined by government. It would be the end of a free and responsible press."

The HKJA fully agrees with these sentiments, and urges the SAR government to adopt the same approach by rejecting any proposal to set up a press commission by statute. While in theory such a move might improve press ethics, there is never an absolute guarantee that it could not be exploited for political purposes - to rein in opposition voices in the media. The disadvantages thus far outweigh the advantages.

It would also be absurd for the government to act on the proposal when it has ignored so many other recommendations put forward by the Law Reform Commission, including those seeking restraints on phone-tapping. It would be equally absurd for the government to act when it has consistently turned down calls for press freedom to be better protected, through for example the enactment of an access to information ordinance and a tighter law against the search and seizure of journalistic material.

Further, the HKJA fails to understand why the Law Reform Commission wishes to rush to implement what many countries have shied away from. This is particularly true as it appears that little has been done to make the Hong Kong Press Council more representative, through the inclusion of at least one of the major newspaper publishers. Little has also been done by individual publishers, including members of the Hong Kong Press Council, to become more accountable, through the publication of complaint letters or the appointment of media ombudsmen. Much more effort could be put into such initiatives by individual newspapers before rushing down the statutory road.

Why The Law Reform Commission Has Got It Wrong

The Law Reform Commission's report has many weaknesses. The most glaring is its suggestion that the statutory route is not uncommon. It surveys 47 countries and territories, yet finds that only 14 have statutory councils. Indeed, one of them - Sri Lanka - is about to adopt a self-regulatory model - albeit with some government input.

However, what the survey masks is that the vast majority of countries on which Hong Kong models itself have voluntary non-statutory councils. These democratic, common law countries include Australia, New Zealand, Canada, the UK and the US - although in the latter case there are councils in only a limited number of states. A National News Council was abandoned. In short, Hong Kong's role models stay well clear of

statutory regulation - even if there is pressure from political quarters for them to adopt such an approach - as in the case of Britain with the Calcutt report on media intrusion.

The HKJA also has strong doubts about whether the Law Reform Commission has made a proper case that there is a pressing social need for taking the statutory route in dealing with the problem of media intrusion. We acknowledge that there have been very serious infringements in the past, but there has undoubtedly been some improvement since then. Indeed, at least one member of the LRC's privacy sub-committee, Wong Kwok-wah, has admitted that this is the case. We are confident in saying that the worst has now passed - and if Hong Kong can survive the worst, then there is no compelling reason to introduce a mechanism that may adversely affect press freedom.

Indeed, the surveys that the Law Reform Commission relies on in its report on media intrusion are not recent. All but one dated back to 1999. The most recent was carried out in 2002 by the Hong Kong Press Council, which was in the process of seeking endorsement for a bill granting it statutory protection. We note that the Law Reform Commission made no attempt in its report to find out current thinking on this issue and whether people would support the kind of press council it was proposing.

The same may be said about the survey of media reports concerning intrusion, which was carried out in 2000 and 2001 (para 4.7). There is no attempt in the report to bring the study up to date, or to consider whether serious incidents have continued to happen in sufficient numbers to justify drastic action.

New Privacy Tort Is Overkill For HK

The HKJA respects the right of individuals to privacy, which allows people to live their lives with only minimal interference. However, the LRC sets off on the wrong foot in proposing a new civil tort.

The LRC states that privacy enables individuals to deliberate and establish opinions without fear of any unpleasant or hostile reaction from others. It also says that it reduces the cost of running for public office and helps society attract talented individuals to serve the community. The HKJA is puzzled by the underlining philosophy of equating privacy with anonymity. This may nurture secrecy and irresponsibility, which runs counter to the SAR government's aspiration for an open and responsible government.

The Law Reform Commission's weak position also reflects in the conflicting point of view towards the importance of freedom of expression. In paragraph 3.15, the LRC quoted what they wrote in *'Report on Reform of the Law Relating to the Protection of Personal Data'* published in 1994 and maintained that 'the correct starting position is that free speech is pre-eminent, particularly when freedom of speech and of the press is now guaranteed by the Basic Law of the HKSAR.' However, it later took the view that there is no priority between speech and privacy, relying on various statements by courts, writers and other bodies (see paras. 3.35-3.48). To some extent this contradicted its own view that freedom of speech is pre-eminent!

Recognised that the US goes too far, as rightly judged by the LRC, in subordinating privacy to the freedom of expression, there seems to be little doubt that the freedom of expression is a more ancient and now universally more highly rated value than privacy.

Weak Arguments On Constitutional Ground

Besides, the arguments made by the LRC on constitutional guarantee are not as sound as it proposed. According to Prof. Yash Ghai, a legal expert on Basic Law, the arguments based on Articles 28-30 seem to be weak. He explains:

1. The Report claims too much for Articles 28-30 seeming to suggest that are a sort of constitutional code of privacy protection. The word privacy appears only in Article 30.
2. Article 28 is more concerned with the physical integrity of the person. It clearly has its origin in the need to protect the individual from the excesses of state bodies especially the police. Obviously there is a privacy element to this, but it would not be possible to erect on the basis of Article 28 any general claim to privacy where there was no actual interference with the person – no touching, interference with freedom of movement etc. So it would be of no relevance in the case of taking photos as a form of infringement of privacy, for example.
3. Similarly with Article 29: as much as anything this is a protection of property. Note that it is about 'premises' – not about vehicles or handbags or any other property that might contain a person's private details.
4. And Article 30 would not protect a person's papers that were not communications – one's personal diary for example. It is as much as anything

about protecting business, one suspects.

5. For another reason the Report claims too much for Article 28-30: the extent to which these articles operate 'horizontally' – that is as between residents/organizations—is unclear. In general bills of rights afford protection only against state agencies, unless expressly provided otherwise. Of these articles, only article 30 refers to 'individual', and even there it is possible that the reference is to an individual in a position of authority.

Although the LRC are on stronger ground when it comes to Article 39 that incorporates the International Covenant on Civil and Political Rights since the covenant protects freedom of expression and privacy. However, the LRC fails to meet the requirement of necessity to limit freedom of expression.

Fails The Necessity Test

Though not comprehensively protected, the LRC concedes that some aspects of the right to privacy are covered by the Personal Data (Privacy) Ordinance (paras 2.28 to 2.58). Also, in some situations, people can claim compensation through existing torts such as breach of confidence. In short, the LRC concludes that collection of information is not covered by existing channels. Neither are deceased people and unnamed individuals. The HKJA doubts whether there is an urgent need to enact a new tort to cover these areas.

As suggested by The Justice (Hong Kong Branch), the protection of privacy can be achieved through judicial development. The British government also takes this position. In rejecting a parliamentary call for new legislative proposals to clarify the protection that individuals could expect from unwarranted intrusion into their private lives, the government stated in 2003 that specific privacy legislation was "not only unnecessary but undesirable". It further stated that the focus should be on ensuring that the press fulfils its responsibilities under the Press Complaints Commission's code of practice.

What puzzles the HKJA most, however, is the LRC's desire to move rapidly towards what for many democratic, common law countries would be untried and potentially dangerous territory. It complains that judicial development would be too slow in bringing about better protection for individual privacy, without explaining why Hong Kong should rush into a legislative approach. The reality - given the effect that such laws may have on freedom of expression - is that the government and the legislature

should be extremely cautious in considering whether to adopt the LRC's proposals.

The LRC also cites a number of countries where privacy is protected by law. Yet, a closer look will find that they are either outside the common law framework or democratic countries with constitutional protection for freedom of expression. Hong Kong is a common law jurisdiction - yet without full democracy. The conditions are therefore not right for the kind of privacy legislation envisaged by the Law Reform Commission.

The Catch-All New Tort

The LRC recognises that the concept of privacy is vague. Without a clearly defined law which is proportionate to its legitimate purpose, it may not satisfy the requirements set down in the International Covenant on Civil and Political Rights (ICCPR).

According to the LRC proposal, the tort would involve any unwarranted publicity of another's private life that is seriously offensive to a reasonable person of ordinary sensibilities. There is a Chinese saying that one person's candy may be another's poison. To base a law on the subjective feelings of an individual is so vague that it will surely fail the requirement test. It will also prompt people to be wary of talking about others, and reporters may stop reporting such opinions and facts. It may also deter reporters from cross-checking facts from independent sources of information. The LRC's proposal could therefore turn reporters into recorders.

The proposal ignores the fact that news is always evolving. A light story about a celebrity may turn into a disclosure of malpractice or misbehavior. Such was the case of the story about the daughter of the former chairperson of the Equal Opportunities Commission, Mr Justice Michael Wong, which first touched on details of a romance and gift-giving, and later evolved into allegations of judicial impropriety.

The enactment of new privacy laws could block such reporting, thereby weakening people's right to know. This is a risk that Hong Kong should not take if it wishes to preserve media freedoms.

The vagueness of the new tort even prompted the then Privacy Commissioner to express concern. He commented that the potential liability arising from it may pose a "constant threat" to the media because its boundary was far from clear (para 7.47).

The desire of the LRC to proceed with its proposal was such that it called such a concern "overstated". It also highlighted safeguards for press freedom. However, the HKJA cannot agree that the safeguards are sufficient to protect press freedom.

Insufficient Safeguards For Freedom Of Expression

The LRC proposed several defences for the civil tort. They include consent, lawful authority, public interest and the same privilege as applies in defamation cases. Nevertheless, they are not without flaws.

Consent to criticism that may portray a person in a less than positive light is difficult to obtain in the first place. Consent may also be withdrawn when an individual finds that things have developed in a way which is not in his or her favour. Worse, the individual can deny ever having given consent. In case of a dispute, the journalist would find it almost impossible to prove that consent had been given during a one-on-one interview, if the other party denied the fact.

The HKJA welcomes the defence of public interest. However, it will best protect freedom of expression if it is defined in broad terms. This is not the case in the LRC's proposals.

In paragraphs 7.63 to 7.87, the LRC tries hard to define which group of people can enjoy privacy. For example, it suggested that the private life of a public figure who has no link with his or her office should be protected. However, if an officer who is responsible for local education sends a child overseas for study, then this might reflect his or her level of confidence in the local education system. This is of public interest, but may not be protected under the proposed law.

The LRC also claims that publications may argue that they were trying to expose improper conduct, or conduct that may mislead the public. A public servant may lie to his or her spouse - an act that would not involve misleading the public. But it would still be useful in determining that person's character and suitability for public office.

Further, in recommendation 14, the LRC has refused to allow prior publication as a defence, thereby further weakening the position of the media. The public may - ironically - have to learn the relevant facts from other countries, and not at home. This is a seriously anomalous situation.

Correction of False Facts About Individuals

To report correctly is the responsibility of journalists, and corrections should be made if untrue information is reported. Both are regulated by the HKJA's code of ethics. However, it will be a different case if legislation is introduced to govern this area. The LRC proposes in recommendation 22 that if the proposed privacy commission cannot force the media to make corrections, then this should be done through legislation.

However, such a legislative approach could bring about considerable abuse. It may become a tool for those who intentionally give false information to the media and then ask for a correction. They then gain fame through the initial story and the subsequent correction. The harm would be even greater if compensation is involved.

Recommendation 25 also poses grave dangers to the media. The LRC proposes that compensation can be awarded for injury to a person's feelings – a proposition which - according to the LRC - could lead to huge awards. Yet few cases exist as a basis for such awards. Should it depend on the fame and fortune one enjoys? If so, such a provision will benefit the wealthy, and not the common man in the street - which is the avowed aim of the LRC.

Even more threatening is the proposal that courts should be given additional leeway to hold hearings in camera. Open court hearings constitute one of the basic judicial principles that help to build confidence in the court system. The decision over whether to hold hearings behind closed doors should be governed by existing judicial procedures, and not by any new rules dreamed up to protect privacy. After all, any move to close courts more frequently will inevitably nurture secrecy and jeopardize public trust in the judiciary.

Room For Improvement Through Alternative Means

The HKJA recognizes that there is merit in some of the proposals put forward in the reports on privacy and media intrusion. Indeed, these could over time prompt better journalistic standards, without recourse to a statutory press council or new civil torts. The government should consider the following measures:

a) Hospital patients and victims of crime could be better protected, although relevant guidelines should be drawn up in conjunction with media representatives.

b) Broadcasting Authority codes of practice could be strengthened to better protect against media intrusion, although this should be achieved through thorough consultation with relevant stakeholders, including journalists.

c) The government should follow up on the proposal to grant anonymity to juveniles involved in criminal proceedings.

d) The HKJA supports genuine help for those seeking legal assistance through the Privacy Commissioner for redress for abusive use of personal data. It is far better to use existing channels of redress, and not legislation, to solve such problems.

In conclusion, the HKJA quotes from a University of Paris professor, Claude-Jean Bertrand, who has studied so-called media accountability systems (MAS) for almost thirty years. Speaking to the Australian Press Council, he said that press councils are not the only type of MAS:

"There are at least 30 other types, consisting in individuals or groups, texts or broadcasts, and various processes: e.g. ombudsmen, media reporters, liaison committees, critical reviews, workshops, ethical audits, etc. What should be done is set up a network of MAS. No MAS can have a strong immediate effect - but all together can have a vast long-term influence."

Let us throw away the "instant noodle" approach in handling matters that may affect Hong Kong's fragile freedom of expression. And let us all work in a more cautious but healthy way to protect the conflicting rights of freedom of expression and privacy.

The Hong Kong Journalists Association
January 14th 2005