

**Legislative Council  
Panel on Constitutional Affairs**

**Progress of following up on the Law Reform Commission's  
Proposal on Stalking**

**INTRODUCTION**

This paper updates Members of the progress of following up on the Law Reform Commission ("LRC")'s report on "Stalking".

**BACKGROUND**

**LRC's recommendations**

2. In October 2000, the LRC published the report on "Stalking". The LRC considered that stalking was a course of conduct which comprised a range of actions each of which on its own might not be objectionable but, when combined over a period of time, interfered with the privacy and family life of the victim, thereby causing him distress, alarm or even serious impairment of his physical or psychological well-being. Although existing civil law and criminal offences cover some aspects of stalking behaviour, they cannot address stalking as an independent phenomenon. A stalker can be prosecuted only if his act falls within the scope of a criminal offence but stalking can occur without breach of the peace or threats of violence. The LRC therefore proposed, inter alia, that:

- (a) stalking should be made a criminal offence, with the proposed elements as follows:
  - (i) a person who pursues a course of conduct which amounts to harassment of another, and which he knows or ought to know amounts to harassment of the other, should be guilty of a criminal offence;
  - (ii) for the purposes of this offence, the harassment should be serious enough to cause that person alarm or distress; and
  - (iii) a person ought to know that his course of conduct amounts to harassment of another if a reasonable person in possession of

the same information would think that the course of conduct amounted to harassment of the other; and

- (b) a defence for news-gathering activities should be subsumed under the defence of “the pursuit of the course of conduct was reasonable in the particular circumstances” (i.e., “reasonable pursuit” defence). Apart from the “reasonable pursuit” defence, the LRC proposed that the following defences should be provided: (i) the conduct was pursued for the purpose of preventing or detecting crime; and (ii) the conduct was pursued under lawful authority.

3. On 19 December 2011, the Administration issued the Consultation Paper on Stalking (“Consultation Paper”) which set out the above recommendations of the LRC and invited public comments on the issues involved. The consultation period ended on 31 March 2012. There was no public consensus as to whether an anti-stalking legislation should be introduced. Some stakeholders’ groups including women’s and family support groups and an artistes’ group indicated in-principle support for the legislation, on the condition that concerns in relation to press freedom could be properly addressed.

4. A key focus of the public response during the consultation period was the impact the proposed offence might have on press freedom and freedom of expression/demonstration. All the media organisations/journalist groups that sent in submissions objected to the introduction of the anti-stalking legislation as proposed in the Consultation Paper. A number of submissions expressed concern that those public figures who did not welcome reporters following them may exploit the proposed legislation by claiming that the reporters’ conduct amounts to stalking. Intervention by law enforcement authorities, even if subsequently found unsubstantiated, would have disrupted news-gathering activities. Even if such activities could resume after the intervention, its news value might have been lost due to the time lapse. None of the media organisations/journalist groups which sent in written submissions considered the “reasonable pursuit” defence proposed in the Consultation Paper sufficient in protecting press freedom.

5. The Law Society of Hong Kong suggested that the “reasonable pursuit” defence should be amended as “the pursuit of the course of conduct was reasonable in the particular circumstances including all legitimate news-gathering activities by journalists or members of the press, or conduct otherwise in the public interest”, while the Hong Kong Bar Association was opposed to any separate defence for the press and which would give them, in

effect, a free hand to follow whomsoever and by whichever mode they choose to employ.

6. We reported the views received to the Legislative Council Panel on Constitutional Affairs (“CA Panel”) in November 2012<sup>1</sup>.

## **The Consultant’s Recommendations**

7. In the light of the concerns expressed about press freedom, the Administration commissioned the Centre for Comparative and Public Law of the University of Hong Kong (“the Consultant”) to study the operation of anti-stalking legislation in the United Kingdom; Queensland and Victoria in Australia; New Zealand; Canada; California and Nevada in the United States and South Africa.

8. The Consultant observed from overseas experience that news-gathering and protest activities were less likely to get caught if the scope of the offences was more precise, if a subjective fault element was used, and if specific defences/exemptions were provided. The Consultant therefore recommended offence and exemption formulations as follows:

- (a) the new offence of stalking should be based on the criminalisation of a course of conduct, consisting of at least two of the acts in a list of four categories of prohibited acts<sup>2</sup> (either the same or different acts) which causes a person reasonably, in all circumstances, to fear for his safety or the safety of anyone known to him. There should be a mental element of intending to cause a person fear for his safety or the safety of anyone known to him, or being reckless as to whether his conduct might cause such fear for safety; and
- (b) four categories of activities should be exempt from the new stalking offence: (i) conduct done pursuant to lawful authority; (ii) activities

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<sup>1</sup> Summary of the views received is set out in the Administration's paper on Consultation on Stalking – summary of views received (LC Paper No. CB(2)196/12-13(04)).

<sup>2</sup> The prohibited acts are:

- (a) watching, or loitering outside of or near the building or place where a person resides, works, carries on business, studies or happens to be;
- (b) contacting a person, either directly or indirectly, for example by telephone, mail, fax, electronic mail or through the use of any technology;
- (c) sending, delivering or causing the delivery of letters, telegrams, facsimiles, electronic mail, or packages or other objects to a person; and/or
- (d) following, pursuing or accosting a person from place to place.

of a person while gathering information for communication to the public if those activities were done pursuant to a contractual arrangement with a newspaper, periodical, press association, radio or television station, or other media organisation; (iii) activities of a person carried out in the normal course of his lawful employment; and (iv) activities of a person carried out for the sole purpose of discussing or communicating matters that concern public affairs.

9. The Consultant's proposed offence differs from that of LRC's mainly in three aspects. Firstly, it includes a definition of stalking activities in the form of an exhaustive list of acts done in relation to another person, so as to enhance legal certainty. Secondly, the "fear for safety" threshold is adopted, as compared to LRC's recommended threshold of causing the person "alarm or distress". Thirdly, the Consultant's proposed mental element (i.e., intention and recklessness) is a subjective form, while the LRC recommended an objective reasonable standard (i.e., "knowing or ought to know" that conduct amounts to harassment), so as to avoid trapping the morally innocent.

10. As regards the exemptions, the Consultant's proposal differs from that of LRC's mainly in that it provides specific exemptions for news-gathering and protest activities and activities carried out in the normal course of lawful employment, as against LRC's recommended "reasonable pursuit" defence and defence for conduct pursued for the purpose of preventing or detecting crime. The Consultant saw the need to specifically exempt news-gathering and expressive activities related to public affairs, given that case law suggests that the anti-stalking legislation of the United Kingdom has been used against the media and demonstrations, and that the reasonableness defence might be too vague and providing insufficient protection to the media or peaceful demonstrators. Moreover the strong concerns over press freedom and freedom of expression expressed during the public consultation in 2011/12 in Hong Kong need to be addressed.

11. The findings of the Study were reported to the CA Panel in December 2013<sup>3</sup>. No Member expressed support of the Consultant's recommendations. Some Members continued to express objection in-principle to enacting anti-stalking legislation because such legislation, if enacted, would impact adversely on news-gathering activities and expressive

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<sup>3</sup> Summary of the key findings is set out in the Administration's paper on Overseas Experience in Implementing Anti-stalking Legislation (LC Paper No. CB(2)471/13-14(03)).

activities. Some Members were concerned about the practical difficulties in defining “media organisations”, e.g., whether Internet news media would be included or not. Some Members considered that, instead of a piece of general anti-stalking legislation, the Administration should only deal with stalking in certain specific relations only, namely, in a domestic context, between landlord and tenant, and between money lenders and borrowers. Some Members however commented that the exemption for news-gathering activities recommended by the Consultant would tilt the balance too much in favour of the press.

12. We have since written to women’s and family support groups and an artistes’ group which gave submission during the public consultation in 2011/12 as well as the two professional legal bodies, to enlist their views on the Consultant’s recommendations. We have to-date received the reply from two women’s and family support groups and the Hong Kong Bar Association. While the two women’s and family support groups indicated support for the Consultant’s recommendations, the Hong Kong Bar Association reiterated their position as expressed during the public consultation in 2011/12 that, if anti-stalking legislation is to be enacted, there should not be an express exception for the media in the anti-stalking legislation.

## **CONSIDERATIONS**

13. There are clearly still very divergent views on the different approaches of enacting anti-stalking legislation and none of the approaches seems to be supported by a majority view. We have thus done an assessment of what the way forward should be. In so doing, we consider that the following principles that have emerged from the discussions so far are hard to reconcile -

- (a) fairness and equity: as a matter of legal principle, the law should treat persons in the same or comparable situations equally. A victim stalked by a person bearing a certain relationship with him should be afforded the same protection as a victim stalked by a person bearing other relationship with him or even no relationship at all; similarly, a stalker who stalks a person bearing a certain relationship with him should be subject to the same sanction as a stalker who stalks a person bearing other relationship with him or even no relationship at all. Victims stalked in all contexts, regardless of whether they have any relationship with the stalkers, should be afforded the same

protection. The LRC therefore suggested an across-the-board approach by subjecting stalking behaviour in all kinds of situation to the same sanctions and the same defences; and

- (b) legitimate activities such as news-gathering activities should not be interfered or restricted by the new legislation.

### **LRC's recommendations**

14. The views received during the public consultation in 2011/12 on the LRC's recommendations indicate that while there was support to introducing an anti-stalking legislation to afford better protection to stalking victims, there were also serious concerns expressed over the possible implication LRC's formulation may have on press freedom (as set out in paragraph 4 above). The same views were expressed by Members when we reported the matter to the CA Panel in November 2012. Concerns were also raised on whether other legitimate and lawful activities, such as proactive and aggressive marketing activities, would be adversely affected.

### **The Consultant's recommendations**

15. The Consultant's formulation provides, *inter alia*, a specific exemption in respect of activities of a person while gathering information for communication to the public if those activities are done pursuant to a contractual arrangement with a newspaper, periodical, press association, radio or television station, or other media organisation. However, from the discussion with stakeholders, on the one hand there are concerns that such blanket exemption for news-gathering activities will significantly weaken the protection to victims; on the other hand, there are concerns that even with express exemption, news-gathering activities will still be adversely affected. The Hong Kong Journalist Association, for example, is of the view that reporters and press organisations alleged to have committed the stalking offence will still have to go to the court to defend and will face undue pressure. The Association also questions how Internet news media will be defined, and is concerned that they will not be covered by the proposed exemption. Views by Members are also divided: some Members consider that the safeguard for news-gathering activities is still inadequate, while other Members are worried that the proposed exemption will be tilting the balance too much in favour of the press (as per paragraph 11 above).

## **"Specified relations" approach**

16. Pursuant to some Members' proposal (as per paragraph 11 above) another approach that we have looked into is to criminalise stalking in certain specific relations only, namely, in the domestic context, between landlord and tenant, and between money lenders and borrowers.

17. As set out in paragraph 13 above, as a matter of legal principle, it is inappropriate to criminalise stalking behaviour only in specified relationships. The law should treat persons in the same or comparable situations equally. Article 14(2) of the HKBOR provides that everyone has the right to the protection of the law against arbitrary or unlawful interference with his privacy, family, home or correspondence. If it is decided that stalking behaviour should be penalised as a crime, all stalking behaviour, whether or not in the context of the specified relationships, should be subject to the same treatment and liable to the same level of sanction under the law. In the same vein, victims stalked in other contexts are in comparable situations as those stalked in the specified relationships and should not be left unprotected merely because they are not related to the perpetrator in a way recognised by the legislation or at all. Introducing legislative measures that offer protection for only selected victims would treat other victims less favourably even though they are in comparable situations. These victims would challenge the measures as unfair and do not provide adequate legal protection to their right to privacy.

18. It is also pertinent to note that stalkers may come from all walks of life and different socio-economic backgrounds. A stalker may be the ex-spouse, ex-cohabitant, ex-boyfriend/girlfriend, money lender, landlord of the victim or indeed bears no relationship with the victim at all. Prohibiting stalking behaviour in selected relationships cannot be justified merely on the basis that those relationships are currently regulated in one way or another by the existing ordinances. Indeed, overseas surveys suggest that a not insignificant percentage of stalkers are not related to the victim. For example, the statistics on stalking offences recorded by the Victoria Police in Australia indicated that around 18% of the stalking offences recorded in 2011/12 involved stalkers who were not related to the victims; the report "Stalking Victims in the United States - Revised" published by the United States Department of Justice in 2012 suggested that around 24% of victims were stalked by strangers or persons unknown to them (and another 15% from friends/roommates/neighbour, 9% from persons known from work or school and 8% from acquaintance); survey data from the Uniform Crime Reporting Survey and the Adult Criminal Court Survey compiled for the year

of 2009 in Canada showed that 11% of female victims and 12% of male victims were harassed by strangers (and another 21% of female victims and 37% of male victims by casual acquaintance). It will be hard to defend why, if stalking is to be criminalised, the solution should offer protection to only persons bearing certain specified relationship with the stalker.

19. We also note that the relevant legislation of all the jurisdictions which the Consultant studied (i.e., the United Kingdom, Australia, New Zealand, Canada, the United States and South Africa) does not make a distinction as regards the relationship between the stalker and the victim.

## **CONCLUSION**

20. It is clear that neither the LRC recommended formulation, nor the alternative formulations the Administration has explored (i.e., the Consultants' recommendations after a comprehensive study of overseas jurisdictions, and the "specified relations" approach as proposed by some Members) is supported by Members, the major stakeholders or the public, as being able to achieve the objective of providing protection to all people alike against stalking while at the same time avoid inflicting interference to the freedoms of the press and expression.

21. The above being the case, the Administration is of the view that there are no favourable conditions for us to pursue the matter further. We will take into account Members' views at the Panel meeting and make a final decision on the way forward.

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