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Panel on Constitutional Affairs

Updated background brief prepared by the Legislative Council Secretariat for the meeting on 16 June 2014

Consultation on Stalking

Purpose

This paper provides background information on issues relating to stalking. It also summarizes the relevant discussions held by the Panel on Home Affairs ("the HA Panel") and the Panel on Constitutional Affairs ("the CA Panel").

Background

Consultation Paper on Stalking in 1998

2. The Law Reform Commission ("LRC") was established by the Executive Council in 1980. LRC considers for reform those aspects of the law which are referred to it by the Secretary for Justice or the Chief Justice. On 11 October 1989, the then Attorney General and the Chief Justice referred to LRC for consideration the subject of privacy. Between 1994 and 2006, LRC published six reports related to privacy¹.

3. LRC issued a Consultation Paper on Stalking² in May 1998. Following public consultation, LRC published the Report on Stalking in October 2000. The Administration advised that, given the complexity and sensitivity of the issues involved, the Administration would handle the relevant reports on privacy (including the Report on Stalking) in stages and map out the way forward in consultation with relevant parties.

¹ These reports are "Reform of the Law Relating to the Protection of Personal Data" published in August 1994, "Privacy: Regulating the Interception of Communications" published in December 1996, "Stalking" published in October 2000, "Civil Liability for Invasion of Privacy" published in December 2004, "Privacy and Media Intrusion" published in December 2004 and "Privacy: The Regulation of Covert Surveillance" published in March 2006.

² The Privacy Sub-committee of LRC recommended that a new offence of harassment be created. Any person who pursues a course of conduct which amounts to harassment of another would be guilty of the offence.

4. After discussion of the Consultation Paper on Stalking (1998) at its meeting on 27 July 1998, the HA Panel discussed the Report on Stalking with representatives of LRC and the Administration, journalists' associations, press organizations, women groups and other concern organizations at its meeting on 12 January 2001. The subject was raised again at the meetings of the HA Panel held on 9 February and 15 October 2007.

Public consultation in 2011 and consultancy study on overseas experience

5. In December 2011, the Administration indicated that it would first deal with the Report on Stalking and would conduct a public consultation exercise to gauge views on the report's recommendations. The Constitutional and Mainland Affairs Bureau ("CMAB") published a consultation paper on 19 December 2011 and launched public consultation which ended on 31 March 2012. A summary of views received is included in the Administration's paper (LC Paper No. CB(2)196/12-13(04)).

6. The CA Panel³ discussed the Consultation Paper on Stalking at its meeting on 19 December 2011, and received views from deputations on 20 February 2012. At the meeting on 19 November 2012, the Administration briefed members on the public views received. The CA Panel noted that of the 506 written submissions received, about 46% supported the introduction of an anti-stalking legislation and about 35% opposed, while the remaining did not indicate any general support/objection. The Administration advised that it would study relevant overseas experience. The Administration commissioned the Centre for Comparative and Public Law of the University of Hong Kong ("the Consultant") to conduct a study on the experience of overseas jurisdictions⁴ in implementing anti-stalking legislation. At the CA Panel meeting on 16 December 2013, the Administration briefed members on the key findings of the study.

Issues of concern raised at meetings of the HA Panel and CA Panel

7. The major issues of concern raised at the above meetings are summarized in the following paragraphs.

Need for anti-stalking legislation

8. During the discussion of the HA Panel on stalking, some members questioned the need to introduce anti-stalking legislation to criminalize stalking.

³ With effect from the 2008-2009 legislative session, the policy area of human rights has been placed under the purview of the CA Panel.

⁴ The six selected overseas jurisdictions were: the United Kingdom; Queensland and Victoria in Australia; New Zealand; Canada; California and Nevada in the United States and South Africa.

They asked how anti-stalking legislation could ensure simple and effective procedures for victims of stalking behaviours to obtain remedies. These members were concerned that the proposed legislation might cast the net too wide by criminalizing problematic behaviours which could be resolved by other means such as counselling.

9. Representatives of LRC advised that criminalizing stalking behaviour would enable the Police to take prompt action to protect the victim from further harassment. The stalker could be arrested and brought to court if the behaviour was repeated and caused alarm or distress to the victim. A court sentencing a stalker who was convicted of harassment could issue a restraining order to protect the victims from further harassment by the stalker. LRC was of the view that stalking could have a serious impact on the private life and safety of individuals. Although legislation could not prevent stalking from the beginning, it would help prevent further or continuous harassment by the stalker. There was also no evidence that other jurisdictions had difficulties in enforcing anti-stalking legislation.

10. LRC reviewed in the Report on Stalking the limitations of the Domestic Violence Ordinance (Cap. 189) ("DVO") in the context of stalking, and recommended that the Administration should give consideration to reforming the law relating to domestic violence. LRC also made certain proposals in the Report to deal with stalking arising from activities relating to debt collection. Some members suggested that, instead of having a single piece of anti-stalking legislation, the Administration should consider introducing separate legislative measures to deal with specific problems, such as amending DVO to deal with harassment by ex-spouses and introducing legislation against abusive debt collectors. It was further suggested that the Administration should act on the recommendations of the Report on Stalking in relation to the enhancement of protection for women against domestic violence before considering how to take forward the remaining recommendations regarding the work of the media. The Administration had been requested to look into the issue in the context of the Domestic Violence (Amendment) Bill 2007.

11. During the deliberations on Domestic Violence (Amendment) Bill 2007, the Administration advised that the issue of stalking in the domestic context had already been covered by the concept of "molest" under DVO and victims stalked by their spouses/cohabitants might seek injunctive protection through the civil route. To make stalking a criminal offence only in domestic context might give rise to significant enforcement problems as the frontline Police officers would have to ascertain the relationship between the complainant and the alleged offender before they could take any further action. The Administration considered it neither appropriate as a matter of principle nor practical from the enforcement perspective

to single out domestic stalking and legislate against such activity individually. If it was decided that stalking behaviours should be penalized as a crime, all stalking behaviours, whether in domestic or non-domestic context, should be subject to the same treatment and liable to the same level of criminal sanction under the law.

12. At several meetings of the CA Panel, some members reiterated that, instead of having a single piece of anti-stalking legislation, the Administration should consider introducing separate legislative measures to deal with specific problems, such as stalking behaviors relating to domestic violence, debt collection and intrusion into the private life of artistes. Some members suggested that the Administration should explore other alternatives to address specific types of stalking behaviour under the existing criminal provisions, such as by imposing a higher penalty for the offence of offensive phone calls. Some members were of the view that the Administration should accord priority to enacting legislation to enhance protection for women against domestic violence to address concerns of women's groups. Some members considered it inappropriate to compare Hong Kong with the selected jurisdictions as Hong Kong had no legislation to protect freedom of information like those jurisdictions.

13. The Administration advised that in the absence of an anti-stalking legislation, a stalker could only be prosecuted if his act constituted a criminal offence but stalking could occur without a breach of the peace or threats of violence; and mere watching, besetting or persistently following would not render the stalker criminally liable. On the suggestion of imposing a higher penalty on the offence of offensive calls, the Administration advised that the level of penalty had to be proportionate to the offence. The Administration reiterated that to legislate against stalking in a specific context would not resolve entirely the problem because many stalkers (e.g. those having psychological problem) bore no relation to the victims.

Proposed offence of harassment and defences

14. LRC recommended that under the proposed anti-stalking legislation, a person who pursued a course of conduct which amounted to harassment of another, and which he knew or ought to have known⁵ amounted to harassment of the other, should be guilty of a criminal offence; and for the purposes of this offence, the harassment should be serious enough to cause that person alarm or distress. Some members expressed concern that the proposed threshold for the offence was set too high as there must be proof that the victim had felt "alarmed" or "distressed" by a course of conduct. The Administration explained that the evidential threshold should not be set too low for a newly created criminal offence,

⁵ A person ought to know that his course of conduct amounted to harassment if a reasonable person in possession of the same information would realize that the course of conduct amounted to harassment.

and the public might not agree to penalize an annoying act which did not cause another person alarm or distress. Some members opined that whether a person felt "alarmed" or "distressed" by a course of conduct was very subjective. The Administration advised that the evidential threshold needed to be met in order to instigate any prosecution.

15. Some members specifically asked whether the following activities would be regarded as reasonable pursuit of a course of conduct under the defence in the proposed legislation: protests of the victims of the Lehman Brothers mini-bond crisis outside the banks over a period of time and picketing activities of trade unions, and the media hiring cranes to peer at the residence of a Chief Executive candidate following revelations of illegal structures there. The Administration advised that industrial actions and public demonstrations which proved to be a reasonable course of conduct in the circumstances would be covered by the proposed defence.

16. At the CA Panel meeting on 16 December 2013, members noted that the Consultant proposed that the new offence of stalking should be based on the criminalization of a course of conduct, consisting of at least two of the acts in a list of prohibited acts (either the same or different acts) which caused a person reasonably, in all circumstances, to fear for his safety or the safety of anyone known to him. Some members opined that some of the proposed prohibited acts seemed not serious enough to constitute stalking. They also questioned whether the duration of those acts would also need to be specified.

17. The Administration and the Consultant explained that there must be at least two occasions of prohibited conduct to constitute a "course of conduct". This approach was adopted in Canada, New Zealand and California and also followed the LRC's position in that the element of persistence be included in the *actus reus*. The new offence also required the mental element of "intending" to cause a person fear for safety or "being reckless" as to whether his conduct might cause such fear. Although a timeframe was not specified for the prohibited acts, the offence would require such acts be persistently done to the extent of causing a person to "fear for his safety".

Impact on press freedom

18. Some members expressed the view that the proposal of legislating against stalking would have the effect of hampering legitimate journalist activities. They were also concerned that the proposal might result in unwarranted curbs on press freedom and the freedom of expression.

19. In response to concern about the impact on press freedom, representatives of LRC explained that it was an extremely difficult task to balance press freedom

and the interests of individuals who suffered genuine physical and emotional stress as a result of stalking behaviours. The LRC representatives advised that the offence of stalking would require that an individual engaged in a "course of conduct", the mental element that he "knew or ought to have known" his conduct amounted to harassment of the other, and the seriousness of the harm caused. Sufficient protection had been provided for in the proposed legislation, such as the defence of showing that the pursuit of the course of conduct was reasonable in the particular circumstances.

20. At the CA Panel meeting on 19 December 2011, a member proposed that a specific defence for news-gathering activities should be provided for in the legislation so that legitimate news-gathering activities of political activities which were not conducted publicly would not be affected. Another member, however, agreed to LRC's view that "legitimate news-gathering activities" were already subsumed under the proposed defence of "reasonable pursuit". The Administration advised that it was understandable that front-line journalists would sometimes pursue a course of conduct persistently in trying to solicit responses from a target. It was open-minded as to whether "legitimate news-gathering activities" should be subsumed under the "reasonable pursuit" defence as recommended by LRC, or be made a separate defence and how such a defence should be framed.

21. At the meeting on 16 December 2013, some members reiterated that anti-stalking legislation, if enacted, would have the effect of hampering journalist activities and protest activities. Noting the Consultant's view that the legal interpretation of "exemption" was the same as defence in criminal law, some members considered that reporters and press organizations concerned alleged to have committed the stalking offence would still have to go to the court to defend and would face undue pressure even specific exemptions were proposed for news-gathering activities. The Consultant advised that it had recommended using the term "exemption" because it served to exempt a category of conduct that was defined clearly and broadly. The Consultant had recommended that this should be a defence that imposed only an evidential burden, not a legal burden of proof on the defendant. Under its proposal, whether a charge should be brought against a reporter would depend on the test of whether there was reasonable ground to suspect that the elements of the offence including the exemptions were engaged. If there were reasonable grounds to suspect that any of the exemptions were engaged, then the Police could not lawfully arrest the person.

22. Some other members expressed concern as to whether a reporter working for an established media organization would be given blanket exemption from the stalking offence, even though the reporter did engage in stalking activities in the course of gathering news which actually did not carry much public interest. The Consultant considered that unless reporters had breached existing laws, e.g.

having committed the use of violence, the threat of violence, or resorted to intimidation or other unlawful means, they should be exempted. The Administration advised that details of the legislative provisions would need to be further worked out if the Government decided to introduce anti-stalking legislation.

Recent development

23. The Administration has proposed to brief the CA Panel on the progress of following up on LRC's proposal on stalking at the next meeting on 16 June 2014.

Relevant papers

24. A list of the relevant papers available on the LegCo website (<http://www.legco.gov.hk>) is in **Appendix**.

Council Business Division 2
Legislative Council Secretariat
10 June 2014

Relevant documents on Consultation on Stalking

Committee	Date of meeting	Paper
Panel on Home Affairs ("HA Panel")	27.7.1998 (Item II)	Agenda Minutes
	12.1.2001 (Item I)	Agenda Minutes
Legislative Council	9.4.2003	Official Record of Proceedings Pages 16 - 18 (Oral question raised by Dr Hon LAW Chi-kwong)
Panel on Administration of Justice and Legal Services	22.11.2004 (Item III)	Minutes
HA Panel	9.2.2007 (Item IV)	Agenda Minutes
	15.10.2007 (Item I)	Minutes
House Committee	30.5.2008	Report of the Bills Committee on Domestic Violence (Amendment) Bill 2007
Legislative Council	19.6.2008	Progress Report on "Legislating to regulate debt collection practices"
	26.11.2008	Official Record of Proceedings Pages 74 - 76 (Written question raised by Hon CHEUNG Hok-ming)
	6.5.2009	Official Record of Proceedings Pages 34 - 43 (Oral question raised by Hon Alan LEONG Kah-kit)

Committee	Date of meeting	Paper
	3.2.2010	Official Record of Proceedings Pages 109- 111 (Written question raised by Hon Mrs Regina IP LAU Suk-ye)
	10.11.2010	Official Record of Proceedings Pages 92 - 94 (Written question raised by Hon Audrey EU Yuet-mee)
	26.1.2011	Official Record of Proceedings Pages 81 - 91 (Written question raised by Hon Paul TSE Wai-chun)
	22.6.2011	Official Record of Proceedings Pages 141 - 144 (Written question raised by Hon Albert CHAN Wai-yip)
Panel on Constitutional Affairs ("CA Panel")	19.12.2011 (Item IV)	Agenda Minutes
	20.2.2012 (Item IV)	Agenda Minutes
Legislative Council	4.7.2012	Official Record of Proceedings Pages 101 – 104 (Written question raised by Hon Albert CHAN Wai-yip)
CA Panel	19.11.2012 (Item V)	Agenda Minutes
	16.12.2013 (Item III)	Agenda Minutes