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Panel on Constitutional Affairs

Updated background brief prepared by the Legislative Council Secretariat for the meeting on 16 December 2013

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

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.

4. In December 2011, the Administration indicated that it would first deal with the Report on Stalking and would conduct a public consultation exercise to

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.

gauge views on the report's recommendations. In this connection, 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. Chapter five of the consultation paper on "Issues on which Comments are Invited" summarizing issues relating to the proposal to legislate against stalking is in **Appendix I**.

Relevant discussions held by the HA Panel and the CA Panel

5. 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. Since then, Members have monitored the progress of the Administration in taking forward the relevant recommendations in the Report on Stalking and other reports on privacy. The issue was raised again at the meetings of the HA Panel held on 9 February and 15 October 2007.

6. The CA Panel³ received a briefing by the Administration on the Consultation Paper on Stalking issued by CMAB 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 on the Consultation Paper on Stalking, 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 the relevant overseas experience. The major issues of concern raised by members at the above meetings are summarized in the following paragraphs.

Need for anti-stalking legislation

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

8. Representatives of LRC advised that criminalizing stalking behaviour would enable the Police to take prompt action to protect the victim from further

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.

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.

9. 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.

10. The view of LRC, however, was that stalking was a social problem which could not be addressed fully by amending DVO because many stalkers bore no relation to the victims. To legislate against certain trade or profession would not resolve entirely the problem of stalking either.

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. According to the progress report submitted by the Security Bureau in August 2008 in respect of the motion debate on "Legislating to regulate debt collection practices" at the Council meeting of 18 June 2008, the need to regulate harassment in relation to debt collection activities would be considered in the context of examining the feasibility of legislating against stalking.

13. At the CA Panel meetings on 19 December 2011 and 19 November 2012, some members reiterated the view 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 behaviours 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.

14. 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

15. 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 known⁴ 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

⁴ 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.

evidential threshold should not be set too low for a newly created criminal offence, 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.

16. Some members specifically asked whether the following activities would be regarded as reasonable pursuit of a course of conduct under the defence⁵ 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.

Impact on press freedom

17. 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 curb on press freedom and the freedom of expression.

18. 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.

19. 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

⁵ Please see paragraph 4(a)(iii) of the extract in Appendix I.

responses from a target. The Administration explained that in order to constitute the offence of stalking, a person had to pursue a course of conduct which amounted to harassment to cause another person alarm or distress, and which he knew or ought to have known amounted to harassment of the other. A defence that the pursuit of the course of conduct was reasonable in the particular circumstances had also been proposed in the legislation.

20. The Administration advised that 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. The Administration undertook that the public views received on these issues would be considered in proposing the way forward.

21. At the CA Panel meeting on 19 November 2012, members noted that a number of women's groups also considered that concerns in relation to press freedom should be properly addressed.

Recent position

22. The Administration has proposed to brief the CA Panel on the overseas experience in implementing anti-stalking legislation at the Panel meeting on 16 December 2013.

Relevant papers

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

Chapter Five : Issues on which Comments are Invited

Need for Legislation

1. Comments are invited on our proposal to legislate against stalking.

Offence of Harassment

2. Comments are invited on :
 - (a) whether stalking should be made a criminal offence based on the LRC's recommendation that :
 - (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) whether collective harassment and harassment to deter lawful activities should be made offences.

Penalty

3. Comments are invited on the following issues, if the proposed offences are pursued :
 - (a) whether a single maximum penalty level for the proposed offence of harassment should be provided, irrespective of

whether the offender knew or ought to have known that the conduct amounted to harassment;

- (b) whether the maximum penalty for the proposed offence of harassment should be set at a fine at Level 6 (\$100,000) and imprisonment for two years;
- (c) whether the maximum penalty for the offences of collective harassment and harassment to deter lawful activities should be set at the same level as in (b) above; and
- (d) whether the limitation period for institution of court proceedings should be specified as two years from the time when the actions taken by the stalker constituted a course of action and the cumulative effect of these actions was such that the victim was alarmed or put in a state of distress.

Defences

4. Comments are invited on :

- (a) whether the following defences proposed by the LRC for the offence of harassment, if pursued, should be provided :
 - (i) the conduct was pursued for the purpose of preventing or detecting crime;
 - (ii) the conduct was pursued under lawful authority; and
 - (iii) the pursuit of the course of conduct was reasonable in the particular circumstances;
- (b) whether a defence for news-gathering activities should be subsumed under the “reasonable pursuit” defence in sub-paragraph (a)(iii) above as recommended by the LRC, or a separate, specific defence for news-gathering activities should be provided for the offence of harassment, if pursued;

- (c) if a specific defence for news-gathering activities should be provided, how the defence, whether qualified or not, should be framed;
- (d) whether any other defences should be provided for the offence of harassment, if pursued; and
- (e) whether, and if so what, defences should be provided for the offences of collective harassment and harassment to deter lawful activities, if pursued.

Restraining Orders in Criminal Proceedings

5. Comments are invited on :

- (a) whether or not a court sentencing a person convicted of the offence of harassment, if pursued, should be empowered to make a restraining order prohibiting him from doing anything which causes alarm or distress to the victim of the offence or any other person as the court thinks fit; and
- (b) if so :
 - (i) whether the restraining order may be made in addition to a sentence imposed on the defendant convicted of the offence of harassment, a probation order or an order discharging him absolutely or conditionally;
 - (ii) whether the duration of the order has to be specified or the order may have effect for a specified period or until further notice;
 - (iii) whether the prosecutor, the defendant or any other person mentioned in the restraining order should be allowed to apply to the court for it to be varied or discharged; and

- (iv) whether the maximum penalty for breaching a restraining order should be set at the same level as that proposed for the offence of harassment (i.e. a fine at Level 6 (\$100,000) and imprisonment for two years).

Civil Remedies for Victims

- 6. Comments are invited on whether :
 - (a) a person who pursued a course of conduct which amounted to harassment serious enough to cause alarm or distress of another should be liable in tort to the object of the pursuit; and
 - (b) the plaintiff in an action for harassment should be able to claim damages for any distress, anxiety and financial loss resulting from the pursuit and to apply for an injunction to prohibit the defendant from doing anything which causes the plaintiff alarm or distress.

Enforcement of Injunctions

- 7. Comments are invited on :
 - (a) whether the following LRC recommendations should be taken forward :
 - (i) where a civil court grants an injunction in an action for harassment, it should have the power to attach a power of arrest to the injunction;
 - (ii) a police officer should be able to arrest without warrant any person whom he reasonably suspects to be in breach of an injunction to which a power of arrest is attached;
 - (iii) the court dealing with the breach should have the power to remand the defendant in custody or release him on bail;

- (iv) where the court has not attached a power of arrest to the injunction, the plaintiff should be able to apply to the court for the issue of a warrant for the arrest of the defendant if the plaintiff considers that the defendant has done anything which he is prohibited from doing by the injunction; and
 - (v) if the defendant is arrested under such a warrant, the court dealing with the breach should have the power to remand him in custody or release him on bail; and
- (b) our view that a breach of a civil injunction should not be made a criminal offence.

Appendix II

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