

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

PRIVACY AND MEDIA INTRUSION

Executive Summary

Chapter 1 - Public responses to the Consultation Paper

1. The Privacy Sub-committee concluded in its Consultation Paper on *Media Intrusion* published in 1999 that there was a pressing social need to protect members of the public from unwarranted invasion of privacy by the print media. Since they considered that voluntary self-regulation was unlikely to succeed in the near future, the Sub-committee provisionally recommended that an independent Press Council for the Protection of Privacy should be created by law to deal with complaints from members of the public about breaches of a press code on privacy-related matters. The Sub-committee recommended that the members of that Council should be appointed by an independent Appointments Commission, the members of which (including the Chairman) should be appointed by an independent person, who should be chosen by the Chief Executive in consultation with the press industry.

2. The major criticisms of the Sub-committee's proposals were that: (a) the proposed Council would be indirectly appointed by the Government; (b) the remit of the Council might be widened in the future to cover non-privacy matters; (c) the power to impose a fine would have a chilling effect on press freedom; (d) the power to initiate its own investigations and to accept third party complaints might be abused by the Council; and (e) other alternatives had not been fully explored.

Chapter 2 - Findings of opinion polls

3. The findings of opinion polls on the Sub-committee's proposals are summarised in Chapter 2. The majority of respondents in four public opinion polls agreed that privacy intrusion by the media (or newspapers) was serious. The majority of the respondents in five opinion polls agreed with the Sub-committee's proposal to set up a press council for the protection of privacy. Although 74% of the respondents in the survey targeted at media professionals were against the establishment of a "government-appointed" press council for the protection of privacy, 56% agreed that Hong Kong should have a non-governmental statutory press-monitoring body.

Chapter 3 - Press freedom and freedom from media intrusion

4. Chapter 3 examines the functions of the right to freedom of expression and how that right interacts with the right to privacy. We point out that while the protection of privacy may impinge on freedom of expression, the exercise or abuse of freedom of expression may infringe the right to privacy. The International Covenant on Civil and Political Rights (“ICCPR”) recognises this conflict. It protects privacy only from “arbitrary or unlawful” interference, while the exercise of the right to freedom of expression carries with it “special duties and responsibilities” and may legitimately be restricted by lawful measures that are “necessary for respect of the rights or reputations of others”, including the right to privacy under the Covenant.

Chapter 4 - Media intrusion in Hong Kong

5. Chapter 4 concludes that there is a pressing social need to protect the public from unwarranted media intrusion. The following topics are discussed in that chapter: (a) intrusion upon solitude or seclusion *versus* unwanted publicity; (b) plaintiffs suing for sexual harassment; (c) plaintiffs in personal injury actions; (d) privacy interests of individuals in certain public places; (e) pictures showing the body or image of a deceased person; (f) victims of crime; and (g) patients in hospitals.

6. **We recommend that the *Victims of Crime Charter* should be revised to cover the rights of victims of crime in relation to the coverage of crime by the news media, taking the comments made by the United Nations *Handbook on Justice for Victims* into account. (Recommendation 1 – para 4.30)**

7. **We recommend that:**

(a) the Administration and the Hospital Authority should review what measures they could take to better protect the privacy of patients in hospitals and examine how bylaw 7(1)(f) of the Hospital Authority Bylaws (Cap 113) and other related provisions could be better enforced; and

(b) ambulance officers, hospital staff and police officers should be provided with training on how to protect the privacy of persons injured in a crime or accident and patients being treated in hospitals. (Recommendation 2 – para 4.39)

Chapter 5 - Impact of media intrusion on victims

8. Media coverage that is insensitive, voyeuristic and uncaring can compound the emotional and psychological suffering of victims of crime and accidents. It can cause them additional distress or psychological injury at

what is already a time of trauma and shock. Their studies, businesses, careers, family relationships, or physical or mental health can be damaged as a result.

Chapter 6 - Regulating intrusion by the broadcast media

9. Chapter 10 of the newly issued Generic Code of Practice on Television Programme Standards provides that domestic free and domestic pay television programme services must comply with certain rules on privacy. However, the privacy provisions are brief compared to those in the RTHK Guidelines and the codes in other jurisdictions. The Broadcasting Authority Code is mainly concerned with the collection of materials for inclusion in broadcast programmes. It has not laid down any standards in relation to programmes broadcast on television, other than the requirement that reports of sexual offences against children should avoid identification of the child.

10. **We recommend that Chapter 10 of the Generic Code of Practice on Television Programme Standards issued by the Broadcasting Authority should make detailed provision for the prevention of (a) unwarranted invasion of privacy in programmes broadcast in Hong Kong and (b) unwarranted invasion of privacy in connection with the obtaining of material for inclusion in these programmes, taking the codes of practice adopted by the broadcasting authorities in other jurisdictions into account.** (*Recommendation 3 – para 6.9*)

Chapter 7 - Press self-regulation in Hong Kong

11. The HK Journalists Association has an Ethics Committee but does not initiate investigations on its own motion. No representatives of the public participate in the adjudication process. Members of the Association also account for a small proportion of local journalists. Even if the Association were willing to play a greater role in self-regulation, it does not have enough members to make this a success. Nor are media organisations subject to its jurisdiction. Media organisations may refuse to respond or decline to provide information. An offending media organisation is under no obligation to publish the findings of the Association. Four journalists' associations jointly issued the Journalists' Code of Professional Ethics in 2000 but compliance is purely voluntary.

Chapter 8 - The Hong Kong Press Council

12. The HK Press Council was incorporated in 2000. It deals with complaints relating to intrusion on privacy and complaints about articles of a prurient, indecent or sensational nature. The formation of the HK Press Council is welcome, but four weaknesses have been identified as the major

obstacles to the Council's effectiveness: (a) the lack of representation of magazines and several popular newspapers on the Council; (b) the risk of the Council's being held liable for defamation if it passes judgment on the conduct of non-member publications; (c) the rejection of complaints involving the use of news-gathering methods that are privacy-invasive; and (d) the power to reject a complaint if it relates to inaccuracy or a misleading statement.

13. The HK Press Council Bill promoted by the HK Press Council represents an attempt to achieve effective self-regulation with statutory backing without any Government intervention. However, the Bill drafted by the Council is not without shortcomings. For example, under the Bill, magazines would not be eligible to be admitted as press members of the statutory council. The nomination of public members would also be under the control of press members. Further, the new Council would be able to reject a complaint on the ground that it is made by a third party or the complainant has a remedy at law. Although the Council may require an offending newspaper to publish a censure, an apology or a correction, it does not have power to enforce the requirement against a defaulting newspaper.

Chapter 9 - Personal Data (Privacy) Ordinance

14. The PD(P)O does not, and was not intended to, provide a comprehensive system of protection and redress for potential and actual victims of unwarranted privacy intrusion by journalists and media organisations. The main reason is that the provisions of the PD(P)O are concerned only with privacy in relation to personal data, not privacy rights in general. Intrusive behaviour by journalists or media organisations that does not involve the recording of information relating to identifiable individuals simply does not engage the Ordinance. The PD(P)O also has no application to data relating to deceased individuals.

15. If a journalist or media organisation collects data about an individual whose identity is unknown and there is no intention by the journalist or media organisation to identify him, the collection of the data does not engage the provisions of the PD(P)O governing the collection of personal data. In addition, some provisions are not easily applied to personal data that are published generally or broadcast. Generally published or broadcast personal data do not appear to be susceptible to the application of the provisions on the dissemination of corrections of inaccurate personal data. Nonetheless, the Privacy Commissioner may approve and issue a code of practice on the application of the data protection principles and other provisions of the PD(P)O to the news media.

16. **We recommend that the Privacy Commissioner for Personal Data should issue a code of practice for the purpose of providing practical guidance as to how the provisions of the Personal Data (Privacy) Ordinance (Cap 486), including its data protection principles, are applied to the news media. (Recommendation 4 – para 9.28)**

17. We are not in favour of amending the PD(P)O so that the Privacy Commissioner may adjudicate on complaints about privacy intrusion generally by journalists or media organisations. This is mainly because: (a) the fact that the Privacy Commissioner is directly appointed by the Chief Executive may render his involvement unacceptable to some sections of the press; and (b) the press has no say in the adjudication and appeal processes under the current structure of the Ordinance.

Chapter 10 - Other suggested options

18. We have considered the following options that have been put forward as an alternative to regulation by a statutory independent press council for the protection of privacy, but conclude that all of them, except the last one, are ineffective, impracticable or undesirable.

Actions in the public domain

- (a) rely solely on market forces;
- (b) promote education on media literacy;
- (c) boycott newspapers that fall below the ethical standards;
- (d) encourage more public complaints;
- (e) encourage the establishment of independent media monitors;

More effective self-regulation by newspaper industry and journalistic profession

- (f) exhort individual newspapers to adopt their own codes of ethics;
- (g) exhort individual newspapers to appoint news ombudsmen;
- (h) legislate for compulsory licensing of journalists;

More effective self-regulation by the HK Press Council

- (i) urge publications to accept the jurisdiction of the HKPC;
- (j) extend legal aid to media organisations sued for publishing the findings and decisions of the HKPC;
- (k) protect reports of the findings and decisions of the HKPC by statutory qualified privilege;
- (l) require all newspapers to be members of the HKPC;

Better protection of media critics

- (m) make legal aid available for defamation proceedings;
- (n) attach qualified privilege to media reports of statements made by journalists' associations on media ethics;
- (o) introduce a new defence to defamation actions;

More effective remedies for victims of press intrusion

- (p) reform the law of libel;

- (q) seek civil remedies under the proposed privacy torts;
- (r) set up a legal fund to help victims of press intrusion;
- (s) establish a statutory commission without sanctions against media intrusion;
- (t) appoint a statutory Press Ombudsman;
- (u) government regulation by setting up a Press Authority;
- (v) regulation by a Press Privacy Complaints Tribunal;
- (w) prescribe a mandatory press privacy code without creating a statutory body;
- (x) provide legislative backing to a voluntary press privacy code.

Chapters 11 and 12 - Press councils and similar bodies in other jurisdictions

19. Self-regulatory bodies that operate without any Government backing or involvement can be found in Australia, Austria, Canada (Alberta, the Atlantic Provinces, British Columbia, Manitoba and Ontario), Cyprus, Estonia, Fiji, Israel, Japan, The Netherlands, New Zealand, Norway, Peru, The Philippines, Russia, South Africa, Sweden, Switzerland, Taiwan, Tanzania, Turkey, the United Kingdom, and a small number of states in the United States.

20. Statutory press councils or similar bodies can be found in 14 jurisdictions, namely, Bangladesh, Belgium, Denmark, Egypt, Ghana, India, Indonesia, Lithuania, Luxembourg, Nepal, Nigeria, Portugal, South Korea and Sri Lanka. Press councils or similar bodies that are not created by statute but are supported by the State or underpinned by a statute can be found in six jurisdictions, namely, Finland, Germany, Italy, Kenya, Quebec and Sri Lanka.

21. Since the general public and some sections of the local press have expressed an interest in developments in the UK, we have devoted the entire Chapter 12 to the history of press self-regulation in that country. It will be seen that the relationship between the press and the State is not as simple as some have suggested in Hong Kong.

Chapter 13 - Alternatives to self-regulation

22. There is no clear dichotomy between self-regulation and Government regulation, but rather a spectrum containing different degrees of external accountability and Government involvement (or outside participation) in relation to rule making, monitoring, enforcement, adjudication and evaluation. There is therefore a range of options between the extremes of pure self-regulation and Government-imposed regulation. In choosing the best model for the protection of individuals from unwarranted press intrusion, we note that there is a trend towards “co-regulation” as an alternative to pure self-regulation in achieving certain social objectives. Co-regulation may be defined as industry self-regulation with some oversight or ratification by

Government. It usually refers to the situation where the regulator and industry stakeholders work together, with the regulator setting the framework to work within. The industry stakeholders may be left to draft detailed rules within this framework and to take responsibility for implementation and enforcement. It also covers the situation where industry develops and administers a code and the Government provides the ability to enforce the code by giving it legislative backing in some way.

Chapter 14 - Press self-regulation within a legislative framework to protect individuals from unwarranted press intrusion

23. Under Article 17 of the ICCPR, individuals have a right to the protection of the law against arbitrary as well as unlawful interference with their privacy. Press intrusion is unwarranted if it constitutes an unlawful or arbitrary interference with the right of privacy or an abuse of press freedom. We therefore consider that protecting individuals from unwarranted press intrusion does not impinge on press freedom. On the contrary, it is a permissible objective of government and a legitimate aim under the International Covenant and the Basic Law.

24. Self-regulation can take place voluntarily without the instigation of the Government, or can be achieved through legislation when voluntary self-regulation is ineffective. Legislation is the proper instrument if the voluntary measures fail to meet public expectations and the problems cannot be resolved without legislative support. Bearing in mind that the journalists' associations and the HK Press Council have not been effective in providing relief to victims of press intrusion, we consider that there is a need to establish a legislative framework so that a self-regulating body with jurisdiction over all newspapers and magazines can deal with complaints about unwarranted invasion of privacy by newspapers and magazines.

25. We see our task as designing a co-regulatory mechanism that can take advantage of the strengths of voluntary self-regulation, while compensating for the weaknesses of self-regulation in its pure form. This implies an underpinning of legislation sufficient to ensure that the self-regulatory regime covers the entire industry, is effective in protecting individuals from press intrusion, and has credibility in the eyes of the public and the press, while ensuring that press freedom would not be undermined. The aim is therefore to provide a legislative framework to achieve effective self-regulation without undermining press freedom. This necessitates the creation of a statutory but independent press complaints body for the protection of privacy, which is self-regulatory in nature and modelled on the existing HKPC, but has jurisdiction over all local newspapers and magazines.

26. To keep the risk of abuse or interference to the minimum, the statute must contain institutional and procedural safeguards to ensure that the statutory body is independent and not subject to any undue influence from the

Government. The appointment process and the self-regulatory framework should also be transparent so that any perception of Government interference could be avoided and both the press and the public could be confident that the Government would not interfere with the process.

27. Some commentators have pointed out that the Legislative Council was not yet returned by universal suffrage and Hong Kong was not yet a fully democratic society. However, accepting these arguments would deprive victims of unwarranted press intrusion of their right to legal protection under Article 17 of the ICCPR, and would enable the Government to derogate from its obligation under that Article, to the extent that the unlawful or arbitrary interference originates from the press – until such time as all members of the Legislative Council are elected by universal suffrage. In our view, the right of Hong Kong people to legal protection from arbitrary or unlawful interference with their privacy (whether by the print media or not) under Article 17 is *not* contingent on full realisation of Article 25(b) of the Covenant, which guarantees the right to vote and be elected at genuine periodic elections by universal and equal suffrage. There are no provisions in the Covenant entitling the Government to derogate from its obligations in relation to the right to privacy under Article 17 on the ground that Article 25(b) has not yet been fully implemented.

28. We do not think that legislation targeted specifically at privacy concerns would be susceptible to arbitrary expansion to cover issues such as indecency or taste, nor should it be. In this regard, we think it vital to stress the following three points:

- (a) Firstly, our terms of reference relate to the issue of privacy, and it is in that context alone that we have made our proposals. In particular, the proposal to establish a statutory body is made in response to concerns at invasion of privacy by the press, and the scope of the statutory body's intended remit is specifically related to privacy issues.
- (b) Secondly, the examples of media conduct to which we refer, the issues we consider in this report, and the arguments which satisfied us of the need for a statutory body are all privacy-related. They do not provide justification for the creation of a statutory body with a wider remit, and are not intended to do so.
- (c) Lastly, we are acutely aware of the importance of freedom of speech and of the press, and have recommended the creation of a statutory body only after satisfying ourselves that it would not compromise those freedoms. Any proposal to extend the statutory body's powers beyond the realm of privacy would require specific justification for such a limitation on the freedom of speech and of the press. In particular, it would require a study as rigorous as that undertaken by us, including: evidence of a significant problem; a study to find out whether the restrictions can be justified on one of the grounds specified in the ICCPR; an examination of the

approach followed in other jurisdictions; and an analysis of alternative solutions.

29. **We recommend that an independent and self-regulating commission should be established by statute to deal with complaints of unjustifiable infringements of privacy perpetrated by the print media (hereinafter “the Commission”).** (*Recommendation 5 – para 14.29*)

Chapter 15 - A statutory but self-regulating body to protect the public from unwarranted press intrusion

Scope of coverage

30. **We recommend that the Commission should have jurisdiction over all newspapers and magazines registered under the Registration of Local Newspapers Ordinance (Cap 268). For the purposes of our recommendations, a “newspaper” is defined as a publication that usually publishes at least five times a week, while a “magazine” is defined as a publication that publishes less than five times a week.** (*Recommendation 6 – para 15.3*)

Membership

31. **We recommend that the legislation should provide that the Commission must consist of:**

(a) **members representing the press industry and the journalistic profession (“Press Members”), including: (i) members representing newspaper publishers (“newspaper members”); (ii) at least one member representing magazine publishers (“magazine member”); (iii) members representing the journalists’ associations (“journalist members”); and (iv) at least one member representing journalism academics at the tertiary institutions (“academic member”); and**

(b) **members representing the public and victims of press intrusion, who have not engaged in, or been connected with, the journalistic profession or the press industry in the three years prior to their being nominated to the Commission, including at least one retired judge (“Public Members”).** (*Recommendation 7 – para 15.12*)

32. **We recommend that the legislation should provide that the number of Press Members must not exceed the number of Public Members.** (*Recommendation 8 – para 15.12*)

Nomination of Commission members

33. We recommend that the legislation should ensure that:
- (a) the procedure for the nomination of Commission members is fair and transparent without any Government involvement;
 - (b) the Press Members are nominated by representatives of the newspaper industry, the magazine industry, the journalistic profession and the journalism teaching profession; and
 - (c) the Public Members (other than the retired judge or judges, who should be nominated by the judiciary) are nominated by professional bodies and non-governmental organisations which are independent of the journalistic profession and the press industry, but have a professional, academic or real interest in press standards or have some experience in dispute resolution. (*Recommendation 9 – para 15.17*)

Nomination of newspaper members

34. We recommend that:
- (a) for the purposes of the nomination of newspaper members, the legislation should classify all newspapers into Category I, II or III according to their readership: (i) Category I newspapers are printed newspapers having the highest readership in Hong Kong; (ii) Category II newspapers are other printed newspapers having a significant readership in Hong Kong; (iii) Category III newspapers are newspapers other than those in Categories I and II;
 - (b) the legislation should provide that the newspaper members of the Commission consist of: (i) members representing Category I newspapers; (ii) members representing Category II newspapers; and (iii) at least one member representing Category III newspapers;
 - (c) the legislation should ensure that each Category I newspaper is entitled to nominate one member, while Category II newspapers will have a greater say than Category III newspapers in determining who should be nominated as a newspaper member;
 - (d) for the purposes of nominating the newspaper members of the first Commission, the legislation should specify that the latest ACNielsen HK Media Index Year-End Report must be used as a basis for determining which newspapers should be classified

as Category I newspapers, whereas other newspapers regarded by the industry as in the mainstream will be classified as Category II newspapers;

- (e) for the purposes of nominating the newspaper members of the second or any subsequent Commission, the legislation should provide that the Commission must commission a reputable market research organisation to conduct a 12-month survey on the readership of all printed newspapers in Hong Kong and use the rankings of the newspapers in that survey to classify the newspapers into one of the three categories; and
- (f) the legislation should provide that where a Category I newspaper fails to nominate a newspaper member, the Press Members on the Commission will be entitled to nominate any newspaper proprietor or editor to fill the vacancy. Where a Category II or III newspaper is entitled to appoint a representative to a nomination committee but fails to do so, the remaining members of the committee will be entitled to make a nomination in the absence of that representative. Where the committee fails to make a nomination, the Press Members on the Commission will be entitled to nominate any newspaper proprietor or editor to fill the vacancy.
(*Recommendation 10 – para 15.24*)

35. We set out below by way of example one of the means by which our recommendation may be implemented. On the assumption that the Commission has seven newspaper members, the members may be nominated in the following manner:

- (a) in the case of the first Commission,
 - (i) two members will be nominated by *Oriental Daily News* and *Apple Daily* respectively;
 - (ii) four members will be nominated by a committee which comprises representatives of the following 14 newspapers: *China Daily HK*; *HK Commercial Daily*; *HK Daily News*; *HK Economic Journal*; *HK Economic Times*; *Metro*; *Ming Pao Daily News*; *Sing Pao Daily News*; *Sing Tao Daily*; *South China Morning Post*; *Ta Kung Pao*; *The Standard*; *The Sun* and *Wen Wei Po*; and
 - (iii) one member will be nominated by a committee which comprises representatives of newspapers other than those mentioned in (i) and (ii) above;
- (b) in the case of the second or any subsequent Commission,
 - (i) two members will be nominated by the newspapers ranking first and second in the readership survey commissioned by the Commission (Category I newspapers);

- (ii) four members will be nominated by a committee which comprises representatives of the 14 newspapers ranking third to sixteenth in the readership survey, or representatives of the newspapers having such other rankings in the readership survey as is prescribed in the legislation (Category II newspapers); and
- (iii) one member will be nominated by a committee which comprises representatives of newspapers other than those in (i) and (ii) above (Category III newspapers).

Nomination of magazine members

36. **We recommend that:**

- (a) the legislation should provide that any magazine member of the Commission will be nominated by a committee comprising representatives of those magazines having such rankings in a readership survey as is prescribed in the legislation;**
- (b) the legislation should specify that the readership figures in the latest ACNielsen HK Media Index Year-End Report will be used as the basis for determining which magazines should be represented on the committee for the nomination of the magazine member or members of the first Commission;**
- (c) the legislation should further provide that the findings of a 12-month survey on the readership of all magazines in Hong Kong commissioned by the Commission and conducted by a reputable market research organisation will be used as the basis for determining which magazines should be represented on the committee for the nomination of the magazine member or members of the second or any subsequent Commission; and**
- (d) the legislation should provide that where a magazine is entitled to appoint a representative to the nomination committee but fails to do so, the remaining members of the committee will be entitled to make a nomination in the absence of that representative. Where the committee fails to make a nomination, the Press Members on the Commission will be entitled to nominate any magazine proprietor or editor to fill the vacancy. (*Recommendation 11 – para 15.26*)**

37. By way of example, the magazine member or members may be nominated by a committee which comprises representatives of: (a) in the case of the first Commission, the ten (or twenty) most widely read magazines identified in the latest ACNielsen HK Media Index Year-End Report; and (b) in the case of the second or any subsequent Commission, the ten (or twenty)

most widely read magazines identified in the latest readership survey commissioned by the Commission.

Nomination of journalist members

38. We recommend that the legislation should provide that the journalist members of the Commission must be nominated in the following manner:

- (a) in the case of the first Commission, by a committee comprising representatives of the HK News Executives' Association, the HK Journalists Association, the HK Federation of Journalists, and the HK Press Photographers Association;
- (b) in the case of the second Commission, by a committee comprising representatives of such journalists' associations as shall be determined by the HKNEA, HKJA, HKFJ and HKPPA as having the promotion or upholding of the professional and ethical standards of the journalistic profession as one of its objects;
- (c) in the case of any subsequent Commission, by a committee comprising representatives of such journalists' associations as shall be determined by the committee for the nomination of journalist members for the previous Commission as having the promotion or upholding of the professional and ethical standards of the journalistic profession as one of its objects.

The legislation should further provide that where a journalists' association is entitled to appoint a representative to a nomination committee but fails to do so, the remaining members of the committee will be entitled to make a nomination in the absence of that representative. Where the committee fails to make a nomination, the Press Members on the Commission will be entitled to nominate any journalist to fill the vacancy. Where a committee for the nomination of journalist members for the previous Commission fails to decide which journalists' associations should be represented on the committee for the nomination of journalist members for the next Commission, the Press Members on the Commission will be entitled to decide which journalists' associations should be represented on that committee. (*Recommendation 12 – para 15.28*)

Nomination of academic members

39. We recommend that:

- (a) the legislation should provide that any academic member of the Commission must be nominated by the academic community in the discipline of journalism;**
- (b) the legislation may either specify that an academic member must be nominated by a committee which comprises all the heads of journalism at the tertiary institutions in Hong Kong, or specify that such a member must be nominated by all the journalism academics at these institutions;**
- (c) where the legislation provides that an academic member must be nominated by the heads of journalism, there should be no restrictions on a head of journalism nominating himself to the Commission; and**
- (d) the legislation should provide that where a head of journalism (or a journalism academic, as the case may be) fails to participate in the nomination proceedings, the other heads of journalism (or journalism academics) will be entitled to make a nomination in his absence; where the heads of journalism or academic staff fail to make a nomination, the Press Members on the Commission will be entitled to nominate any journalism academic to fill the vacancy. (*Recommendation 13 – para 15.29*)**

Nomination of public members

40. We consider that the legislation should specify the professional bodies and NGOs that would have the responsibility of nominating the Public Members. This would ensure that the Administration would have no discretion in this matter and the legislation would not be seen as providing an opportunity for the Administration to influence the process by inviting pro-Government or anti-press bodies to make the nominations.

41. **We recommend that:**

- (a) the legislation should provide that the nomination of any retired judge as a Public Member must be made by the Chief Justice;**
- (b) the professional bodies and non-governmental organisations having responsibility for the nomination of the other Public Members should be specified in the legislation and should include those representing the legal profession, the social services sector, the education sector, the mental health profession, the performing arts sector, the religious sector and the business sector; and**

(c) the legislation should further provide that where an organisation or association is entitled to appoint a representative to a nomination committee but fails to do so, the remaining members of the committee will be entitled to make a nomination in the absence of that representative; where an organisation, a nomination committee or any other person is entitled to nominate a Public Member but fails to do so, the Public Members on the Commission will be entitled to nominate any person who has not engaged in, or been connected with, the journalistic profession and the press industry in the three years prior to his being nominated to the Commission to fill the vacancy. (Recommendation 14 – para 15.30)

42. By way of example, the Public Members on the Commission could include one or more persons from each of the following categories:

- (a) a retired judge nominated by the Chief Justice;
- (b) a legal practitioner or law professor nominated by the Law Society of HK;
- (c) a legal practitioner or law professor nominated by the HK Bar Association;
- (d) a social worker nominated by the HK Council of Social Services or the eight registered social workers referred to in section 4(3)(a) of the Social Workers Registration Ordinance (Cap 505), ie, the eight registered social workers who have been elected to the Social Workers Registration Board by the registered social workers in accordance with the rules made under section 9(1)(b) of that Ordinance;
- (e) an academic, a teacher, a principal or a senior staff member of an educational institution of Hong Kong nominated by a committee which comprises the representatives of professional associations in the education sector, such as the HK Professional Teachers' Union, the HK Federation of Education Workers, the HK Association for School Discipline and Counselling Teachers, the HK Association of Heads of Secondary Schools, and the Federation of HK Higher Education Staff Associations;
- (f) a mental health professional nominated by the HK Psychological Society, or by a committee which comprises the representatives of associations having a special interest in mental health;
- (g) a person nominated by the HK Performing Artistes Guild;
- (h) a person nominated by a committee which comprises the representatives of (i) the Catholic Diocese of HK; (ii) the Chinese

Muslim Cultural and Fraternal Association; (iii) the HK Christian Council; (iv) the HK Taoist Association; (v) the Confucian Academy; and (vi) the HK Buddhist Association; and

- (i) a person nominated by a committee which comprises the representatives of associations that represent the commercial interests of Hong Kong, such as the HK General Chamber of Commerce, the Chinese General Chamber of Commerce, the Business & Professionals Federation of HK, and the HK Women Professionals & Entrepreneurs Association.

Privacy Commissioner for Personal Data

43. We recommend that the legislation should confer a power on the Commission to invite the Privacy Commissioner for Personal Data or his representative to attend its meetings. (*Recommendation 15 – para 15.33*)

Disqualification from membership

44. We recommend that the legislation should make provision for disqualifying a person from being nominated as a candidate for appointment to the Commission, as well as for disqualifying a person from membership of the Commission. Persons to be disqualified should include:

- (a) the Chief Executive;
- (b) members of the Executive Council, the Legislative Council and the District Councils;
- (c) judges, civil servants and other public officers;
- (d) members of any national, regional or municipal legislature of any place outside Hong Kong;
- (e) persons who have been convicted of a serious criminal offence; and
- (f) any person who engages in, or has a connection with, the journalistic profession or the press industry after his nomination or appointment as a Public Member of the Commission. (*Recommendation 16 – para 15.36*)

Nominal appointment by the Chief Executive

45. We recommend that the legislation should provide that the Chief Executive must appoint those nominated to be members of the Commission unless there is any procedural impropriety in the nomination process. (*Recommendation 17 – para 15.37*)

Chairman

46. **We recommend that the legislation should provide that the Chairman of the Commission must be a Public Member elected by all members of the Commission.** (*Recommendation 18 – para 15.38*)

Summary of the proposals on Commission membership

Press Members	Members representing newspaper publishers	Each of the Category I newspapers should be entitled to nominate one newspaper member (Category I newspapers are newspapers that have the highest readership in HK as determined by a readership survey).
		A specified number of newspaper members should be nominated by Category II newspapers, ie, newspapers that have a significant readership in HK as determined by a readership survey, excluding Category I newspapers.
		At least one newspaper member should be nominated by Category III newspapers, ie, newspapers other than Categories I and II newspapers.
	At least one member representing magazine publishers	At least one Press Member should be nominated by magazines having such rankings in a readership survey as shall be prescribed in the legislation, eg, the ten or twenty most widely read magazines in HK.
	Members representing journalists	In the case of the first Commission, the journalist members should be nominated by the HKNEA, HKJA, HKFJ and HKPPA. In the case of the second Commission, they should be nominated by such journalists' associations as shall be determined by these four associations.
	At least one journalism academic	At least one Press Member should be nominated by all heads of journalism (or journalism academics) at the local tertiary institutions.
Public Members	At least one Public Member should be a retired judge nominated by the Chief Justice; while the other Public Members should be nominated by professional bodies and NGOs in the legal profession, the social services sector, the education sector, the mental health profession, the performing arts sector, the religious sector and the business sector.	

Chairman	The Chairman should be a Public Member elected by all members of the Commission.
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Note: The number of Press Members must not exceed that of Public Members.

Press code on privacy-related matters

47. **We recommend that:**

- (a) the legislation should provide that the Commission must draw up and keep under review a code of conduct on privacy-related matters (“the Press Privacy Code”) which gives guidance to the print media as to the principles to be observed, and the practices to be followed, in reconciling the right to freedom of expression and the right to privacy under the International Covenant on Civil and Political Rights;**
- (b) the Code must make allowances for investigative journalism and publications that can be justified in the public interest;**
- (c) the Code must be ratified by the Commission, but may be drafted and reviewed by the Press Members or by a Code Committee appointed by the Commission. The Code Committee may include experienced journalists or journalism academics who are not members of the Commission but could give expert advice on media ethics; and**
- (d) the press and the public should be consulted during the drafting and review processes. (Recommendation 19 – para 15.43)**

48. **We recommend that the Press Privacy Code should not form part of the legislation and need not require the endorsement or approval of the legislature. The Commission should bear full and final responsibility for the contents of the Code. (Recommendation 20 – para 15.43)**

49. **We recommend that the legislation should provide that, in addition to stating the general principles, the Press Privacy Code must also provide guidelines as to how freedom of the press should be reconciled with the privacy interests of persons who are particularly vulnerable to press intrusion. (Recommendation 21 – para 15.44)**

Factual errors about an individual

50. Accuracy of facts about an individual is not only related to privacy but is a core principle in the protection of privacy. Wrongly reporting that a named person is a lottery winner, a homosexual, a prostitute, mentally ill, infertile, licentious, insolvent or receiving social security assistance is no less an interference with that person's privacy than would be the case if the report is true. To the extent that the news media is exempt from the provisions on access to personal data prior to publication, and the provisions on accuracy and correction of personal data do not seem to have created a right to the dissemination of a correction in the newspaper concerned after publication, the Commission should provide a mechanism through which inaccuracies (including fabrications) and distortions about an individual that have been published in a newspaper can be corrected in a subsequent issue. Not all publication of inaccurate (including fabricated) or misleading personal information would give rise to an action for libel. Even if such publication amounts to libel, few would wish to take the time and trouble to bring an action against the newspaper concerned.

51. **We recommend that the legislation should provide that the Press Privacy Code must require newspapers and magazines:**

(a) to take care not to publish inaccurate (including fabricated) or misleading information about an individual; and

(b) where a significant inaccuracy (including fabrication) or misleading statement about an individual has been published (whether deliberately or inadvertently), to publish a correction promptly when requested to do so and, as far as possible, with a prominence equal to that given to the original publication.
(Recommendation 22 – para 15.66)

Power to deal with complaints about alleged breaches of the Code

52. **We recommend that the legislation should confer on the Commission the power to:**

(a) receive complaints about alleged breaches of the Press Privacy Code committed by a newspaper or magazine;

(b) encourage the parties to effect a settlement by conciliation before making a ruling on a complaint; and

(c) rule on alleged breaches of the Press Privacy Code.
(Recommendation 23 – para 15.67)

Complaints against publishers, not journalists

53. **We recommend that the legislation should provide that all complaints alleging breaches of the Press Privacy Code will be treated as directed against the publishers in question.** (*Recommendation 24 – para 15.71*)

Power to initiate own investigations and accept third party complaints

54. **We recommend that the legislation should confer on the Commission a power to initiate an investigation without complaint or investigate a complaint made by a third party if the investigation can be justified on the grounds of public interest. The legislation should list the factors that the Commission must take into account in determining whether such an investigation can be justified.** (*Recommendation 25 – para 15.83*)

55. These factors should include:

- (a) whether there are reasonable grounds to believe that an act or publication might constitute a breach of the Press Privacy Code;
- (b) the seriousness of the alleged privacy intrusion, having regard to matters such as the means by which private facts were obtained, the nature of the private facts involved, and the extent to which the private facts were disclosed;
- (c) the status of the victim;
- (d) the likelihood of the intrusion being repeated in the future;
- (e) whether the investigation would help prevent future intrusions;
- (f) the physical and mental conditions of the victim;
- (g) whether the victim has notice of the intrusion;
- (h) whether the victim can reasonably be expected to come forward and lodge a complaint with the Commission himself ;
- (i) the number of victims involved;
- (j) the number of publications involved;
- (k) whether the victim objects to the Commission investigating the intrusion; and
- (l) where the Commission could not ascertain from the victim as to whether he would object to the Commission investigating the intrusion, whether the victim can reasonably be expected not to raise any objection to the Commission investigating the intrusion.

No requirement to waive legal rights

56. We are not in favour of the Commission asking a complainant to waive the right to bring legal proceedings in respect of any matter alleged in the complaint. There is no risk of double jeopardy because the Commission

would have neither the power to award compensation against a newspaper, nor a power to impose a fine.

57. **We recommend that a complainant should not be required to waive his right to take any civil proceedings in respect of the subject matter giving rise to the complaint before his complaint can be investigated by the Commission. However, the legislation should provide that the Commission will have a discretion either to reject a complaint if legal proceedings are pending or to postpone adjudication pending the outcome of the proceedings. (Recommendation 26 – para 15.97)**

Complaints Committee

58. **We recommend that the legislation should confer on the Commission a power to set up a Complaints Committee and to delegate such authority to the Committee as the Commission thinks fit. (Recommendation 27 – para 15.100)**

Duty to declare interests

59. **We recommend that the legislation should require Commission members to declare their interests in specified circumstances. (Recommendation 28 – para 15.102)**

Right to regulate its own procedure

60. **We recommend that subject to other recommendations in this report, the legislation should provide that the Commission will be allowed to regulate its procedure, which must be consistent with the principles of natural justice. (Recommendation 29 – para 15.103)**

61. **We recommend that the legislation should provide that:**

(a) the person presiding at a meeting of the Commission or its Complaints Committee must always be a Public Member; and

(b) neither the provisions of the Evidence Ordinance nor any other rules of law relating to the admissibility of evidence will apply to the proceedings before the Commission or its Complaints Committee. (Recommendation 30 – para 15.103)

62. **We recommend that the legislation should provide that all members of the Commission should vote as individuals and not as representatives of the organisations or associations that nominated them. (Recommendation 31 – para 15.104)**

No power to compel journalists to disclose sources

63. We consider that the Commission should not have a power to compel a journalist to give evidence and to disclose his source of information.

Duty to give reasons in writing

64. We recommend that the legislation should impose an obligation on the Commission or its committee to give reasons in writing to the parties concerned when it decides not to undertake or continue an investigation, or when it adjudicates a complaint. *(Recommendation 32 – para 15.110)*

No power to award compensation

65. We recommend that the Commission should not have the power to award compensation against a newspaper or magazine publisher who is found to have breached the Press Privacy Code. *(Recommendation 33 – para 15.111)*

66. Only if a newspaper is found by a court of law to have committed a civil wrong should it be required to pay compensation to the victim. If the complainant wants to seek recompense from an offending newspaper, he should ground his claim either in libel or on one of the two proposed torts of invasion of privacy and pursue his claim in a court of law.

No power to impose a fine

67. We recommend that the Commission should not have the power to impose a fine on a newspaper or magazine publisher who is found to have breached the Press Privacy Code. *(Recommendation 34 – para 15.115)*

68. The publication of a critical adjudication or a prompt correction would generally provide sufficient redress. Enabling the Commission to impose a fine may potentially deter the media from publishing information of public interest, and create a penumbra around the prohibited zone, which journalists and editors steer clear of to avoid the possibility of financial penalties. Further, where there is the possibility of a financial penalty, the process would have to carry with it the safeguards, formalities and delays that are inherent in the court procedure. This would impose a major obstacle to the speedy and informal resolution of complaints, and would result in higher running costs for the Commission and a more expensive process for the parties.

Power to advise, warn, reprimand and order the publication of findings and decisions

69. We recommend that the legislation should confer the following powers on the Commission dealing with a newspaper or magazine that is found to have breached the Press Privacy Code:

- (a) to advise, warn or reprimand the publisher of the newspaper or magazine;
- (b) to require the newspaper or magazine publisher to publish a correction, and to approve or decide on its content;
- (c) to require the newspaper or magazine publisher to publish the Commission's findings and decision, or a summary thereof as approved by the Commission; and
- (d) to give such directions as to the time, manner, form and place of any publication under (b) or (c) above as are appropriate under the circumstances. (*Recommendation 35 – para 15.120*)

No power to order an apology

70. We recommend that the Commission should not have the power to order a newspaper or magazine publisher who is found to have breached the Press Privacy Code to make an apology. However, the Commission should be able to include in its decision a recommendation that the publisher should publish an apology or tender a private apology to the complainant. (*Recommendation 36 – para 15.125*)

Enforcement of adjudications

71. We recommend that the legislation should provide that, where a newspaper or magazine publisher fails to publish a correction or the Commission's findings and decision as required, the Commission will have the power to apply to the Court for an order requiring the publisher to take any specified action and to bear the costs of the application incurred by the Commission. (*Recommendation 37 – para 15.131*)

Right of publisher to appeal against adjudication

72. We consider that the Commission's decisions should be subject to the supervision of the Court of Appeal. However, to ensure that the appeal mechanism would not impose an undue burden on the press and complainants, only newspaper and magazine publishers should be able to appeal against a decision of the Commission, and the respondents in these appeals should be the Commission instead of the complainants.

73. **We recommend that the legislation should provide that a publisher aggrieved by an adverse decision of the Commission is entitled to appeal to the Court of Appeal, and the Court of Appeal may thereupon affirm, reverse or vary the decision appealed against, or remit the case to the Commission for an, or another, investigation or hearing. The Commission will be the respondent in such an appeal. (Recommendation 38 – para 15.134)**

No right to legal representation except with permission

74. **We recommend that the legislation should provide that legal practitioners will not have a right of audience at any hearing before the Commission or its Complaints Committee for the purposes of an investigation. However, the Commission or Committee should have a discretion to allow either or both parties to be legally represented if it thinks fit after taking into consideration the guidelines drawn up by the Commission for this purpose. (Recommendation 39 – para 15.143)**

75. The guidelines should set out the considerations that should be taken into account in determining the appropriateness of legal representation. These considerations might include:

- (a) the seriousness of the allegation made by the complainant;
- (b) the seriousness of the consequences that would entail if the Commission ruled against the publisher;
- (c) whether any points of law are likely to arise;
- (d) the complexity of the case;
- (e) the ability of the complainant to present his case;
- (f) whether a party would have difficulties questioning a witness, particularly a witness giving evidence of an expert nature;
- (g) the need for reasonable speed in making an adjudication;
- (h) whether the publisher would be represented by a legally qualified employee or officer;
- (i) the need to maintain parity between the parties;
- (j) the wishes of the parties; and
- (k) whether one party would object to the other party's being represented by a legal practitioner.

Duty to publish findings, decisions and annual reports

76. We recommend that the legislation should impose an obligation on the Commission to publish promptly its findings and decisions, and the reasons therefor. It should provide that the publication must contain, as regards every complaint that has been accepted by the Commission in the period covered,

- (a) a summary of the complaint and the action taken by the Commission on it;
- (b) where the Commission has adjudicated on the complaint, a summary of its findings, decisions and reasons therefor;
- (c) where a publisher is required to implement a decision of the Commission, a summary of any action taken by the publisher; and
- (d) any recommendations and comments the Commission thinks fit to make. (*Recommendation 40 – para 15.144*)

77. We recommend that the legislation should impose an obligation on the Commission to publish an annual report giving a detailed account of its activities in the past year, and to lay copies thereof before the Legislative Council. (*Recommendation 41 – para 15.146*)

Anonymity for alleged victims

78. We recommend that the legislation should provide that all statements issued for the information of the public by the Commission must be so framed as to prevent the identity of any alleged victim of a breach of the Press Privacy Code from being ascertained from them unless the alleged victim has no objection to the Commission revealing his identity in the statements. (*Recommendation 42 – para 15.147*)

Legal immunity for Commission members and employees but not the Commission itself

79. We consider that members of the Commission (as opposed to the Commission itself) should be protected from legal liability so that they can adjudicate complaints and publish their findings and decisions without fear of legal liability. Without legal immunity, many qualified candidates would be unwilling to agree to be nominated as members, and those who were willing to serve as Commission members would be deterred from voicing their criticisms.

80. **We recommend that the legislation should provide that no member or employee of the Commission will be personally liable for any act done or omitted to be done by him in good faith in the performance of any function or the exercise of any power imposed or conferred on the Commission. However, the protection accorded to the members and employees of the Commission in respect of any act or omission will not in any way affect the liability of the Commission for that act or omission. (Recommendation 43 – para 15.159)**

Media reports of the Commission’s findings and decisions protected by qualified privilege subject to explanation or contradiction

81. We consider that there are sound reasons for extending the defence of qualified privilege under section 14 of the Defamation Ordinance to the publication or broadcasting of a fair and accurate report of the findings and decisions of the Commission. The Commission would be a statutory body performing public functions in the interests of the public. The public’s right to know the Commission’s findings and decisions should not be fettered by a fear of libel action on the part of the press. Private interests should give way to freedom of the press as long as the media reports are made honestly without malice and the person affected is afforded an opportunity to reply.

82. **We recommend that the categories of media reports that are protected by qualified privilege subject to explanation or contradiction in Part II of the Schedule to the Defamation Ordinance (Cap 21) should be extended to a copy or a fair and accurate report of: (a) any findings or decision of the Commission; or (b) any official report, notice or other matter issued for the information of the public by the Commission. (Recommendation 44 – para 15.168)**

Education and research

83. **We recommend that the legislation should provide that the Commission will have the power to:**

- (a) promote awareness and understanding of the Press Privacy Code and the complaints procedure of the Commission;**
- (b) raise the awareness and understanding of: (i) an individual’s right to be protected from unlawful or arbitrary interference with his privacy by the press under Article 17 of the International Covenant on Civil and Political Rights; and (ii) the press’ responsibility to respect the right to privacy when exercising the right to freedom of expression under Article 19 of the Covenant;**

(c) issue guidelines or make general observations on compliance with the Press Privacy Code; and

(d) commission research into matters relating to press intrusion.
(Recommendation 45 – para 15.169)

Funding

84. **We recommend that the Commission should be provided with sufficient funds to employ such staff and to engage such professional services as may be necessary for the performance of its functions.** *(Recommendation 46 – para 15.170)*

85. **We recommend that:**

(a) the Commission should be funded partially by a levy on newspapers and magazines and partially by moneys appropriated by the Legislative Council;

(b) the running costs of the Commission, including the costs of providing ongoing legal advice to the Commission, should be borne by the industry;

(c) the costs of education and research incurred by the Commission should be funded by public revenue;

(d) the legal costs of the Commission, other than the costs of providing ongoing legal advice to the Commission, should be funded by public revenue;

(e) any damages payable by the Commission should be met by public revenue; and

(f) any levy must not be unduly onerous for existing newspapers and magazines, or act as a barrier to new entrants.
(Recommendation 47 – para 15.180)

Chapter 16 - Anonymity for juveniles concerned in criminal proceedings

86. We are of the view that the identities of juveniles under 16 who are involved in criminal proceedings (whether as an offender or a victim or witness) should be protected from publicity even though the proceedings are not taken in a juvenile court. The restrictions on the reporting of the identities of these juveniles should be mandatory instead of discretionary, though the court should always have the power to lift the restrictions if this is in the interests of justice.

87. **We recommend that the Administration should: (a) extend the protection afforded by section 20A(1) of the Juvenile Offenders Ordinance (Cap 226) to juvenile victims and witnesses under the age of 16 who are concerned in criminal proceedings other than those in a juvenile court; and (b) give consideration to extending such protection to juvenile offenders under the age of 16 who are concerned in such proceedings. (*Recommendation 48 – para 16.9*)**

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