

**THE LAW REFORM COMMISSION OF HONG KONG**

**REPORT**

**PRIVACY AND MEDIA INTRUSION**

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**December 2004**

The Law Reform Commission was established by the Executive Council in January 1980. The Commission considers such reforms of the laws of Hong Kong as may be referred to it by the Secretary for Justice or the Chief Justice.

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## REPORT

### PRIVACY AND MEDIA INTRUSION

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# Preface

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1. On 11 October 1989, under powers granted by the Governor-in-Council on 15 January 1980, the Attorney General and the Chief Justice referred to the Law Reform Commission for consideration the subject of “privacy”.<sup>1</sup> The Commission appointed a sub-committee to examine the current state of the law and to make recommendations. The members of the sub-committee are as follows:

**Dr John Bacon-Shone (Chairman)**

Director, Social Sciences Research Centre, The University of Hong Kong

**Mr Don Brech**

Principal Consultant, Records Management International Limited  
(Former Director, Government Records Service)

**Professor Johannes M M Chan** (from November 2001)

Honorary Senior Counsel,  
Dean, Faculty of Law, The University of Hong Kong

**Mrs Patricia Chu, BBS, JP** (till April 2001)

Former Deputy Director of Social Welfare (Services), Social Welfare Department

**Mr A F M Conway**

Chairman, Great River Corporation Limited

**Mr Edwin Lau**

Chairman, Hooray Holdings Limited  
(Former Assistant General Manager & Head of Strategic Implementation Asia Pacific, HSBC)

**Mr Robin McLeish** (from February 2000)

Barrister-at-law  
(Former Deputy Privacy Commissioner for Personal Data)

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<sup>1</sup> The Commission’s terms of reference are: “To examine existing Hong Kong laws affecting privacy and to report on whether legislative or other measures are required to provide protection against, and to provide remedies in respect of, undue interference with the privacy of the individual with particular reference to the following matters: (a) the acquisition, collection, recording and storage of information and opinions pertaining to individuals by any persons or bodies, including Government departments, public bodies, persons or corporations; (b) the disclosure or communication of the information or opinions referred to in paragraph (a) to any person or body including any Government department, public body, person or corporation in or out of Hong Kong; (c) intrusion (by electronic or other means) into private premises; and (d) the interception of communications, whether oral or recorded; but excluding inquiries on matters falling within the Terms of Reference of the Law Reform Commission on either Arrest or Breach of Confidence.”

**Mr Barry Mortimer, GBS**

Non-Permanent Judge, Court of Final Appeal  
(Former Vice-President, Court of Appeal)  
(Chairman of sub-committee from 1990 till August 1999)

**Mr James O'Neil**

Deputy Solicitor General (Constitutional), Department of Justice

**Mrs Kathy NG Ma Kam-han** (from April 2001 to April 2003)

Assistant Director (Elderly), Social Welfare Department

**Mr Peter So Lai-yin** (till November 2001)

Former General Manager, Hong Kong Note Printing Limited

**Professor Raymond Wacks**

Emeritus Professor of Law and Legal Theory, The University of Hong Kong  
(Chairman of sub-committee from August 1999 to December 2001)

**Mr Wong Kwok-wah**

Editor, Asia Times-On-Line (Chinese version)

2. The secretary of the Sub-committee is Mr Godfrey K F Kan, Senior Government Counsel.

3. The first task of the Privacy Sub-committee was to study the collection, recording, storage and disclosure of personal data. This resulted in the Commission report on *Reform of the Law Relating to the Protection of Personal Data* published in August 1994. Thereafter, the Sub-committee issued a consultation paper on the regulation of surveillance and the interception of communications. This was followed by the Commission report on *Privacy: Regulating the Interception of Communications* published in December 1996. In relation to the regulation of surveillance, the Sub-committee decided that the civil aspects of invasion of privacy should be looked into first before it finalises its recommendations on surveillance. The Sub-committee therefore published a consultation paper on *Civil Liability for Invasion of Privacy* in August 1999. That consultation paper covered the civil aspects of surveillance as well as other forms of invasion of privacy, and was published together with the consultation paper on *Media Intrusion*. The Sub-committee reviewed its preliminary recommendations in the *Civil Liability Paper* and *Media Intrusion Paper* after the LRC *Stalking Report* was published in October 2000. The final reports on *Civil Liability* and *Media Intrusion* are being published at the same time so that the public can fully appreciate the implications of the recommendations in these two reports. The Sub-committee held 15 meetings to finalise its consultation paper on media intrusion and 20 meetings to complete its report to the Commission. The Commission considered the Sub-committee report in mid-2003 and concluded their deliberations in the autumn of 2003. We record our appreciation to the Sub-committee for the immense amount of hard work they have undertaken on the media intrusion project.

## **Outline of the report**

4. Chapter 1 gives an overview of the public responses to the Sub-committee's Consultation Paper on Media Intrusion. The results of various opinion polls conducted after the publication of the Consultation Paper are summarised in Chapter 2. Since press freedom and the right to privacy are implicated in the regulation of unwarranted media intrusion, Chapter 3 explains how press freedom can be reconciled with the right to privacy under the Basic Law, the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

5. Chapter 4 studies the nature and incidence of media intrusion in Hong Kong. In order to enable the public to understand how serious media intrusion can be, the impact of media intrusion on the victims is explained in Chapter 5. These two chapters provide support for the view that there is a pressing social need to protect individuals from unwarranted media intrusion in Hong Kong. Since the broadcasting industry is regulated under the Broadcasting Authority Ordinance, we deal with intrusion by broadcasters first in Chapter 6.

6. As regards intrusion by the print media, the effectiveness of the self-regulatory measures adopted by the professional bodies will first be examined in Chapter 7. Then follows a review of the attempts made by the HK Press Council at industry self-regulation in Chapter 8. The proposal of the HK Press Council to transform itself into a statutory body enjoying qualified privilege under libel law is also discussed in that chapter. Since the self-regulatory measures adopted by the journalistic profession and the press industry have not been effective, we examine in Chapter 9 whether the problem can be resolved by issuing a code of practice under the Personal Data (Privacy) Ordinance or by amending the Ordinance.

7. Given that the Personal Data (Privacy) Ordinance has limitations and we do not consider it desirable to amend it to provide for a comprehensive system of privacy protection with respect to media intrusion, we examine in Chapter 10 whether other options suggested by the respondents and commentators can resolve the problem. Since the option of self-regulation by a voluntary press council or a non-governmental statutory press council has been put forward as an alternative to the Sub-committee's proposal, we study the experience of the press councils and similar bodies in other jurisdictions in Chapter 11. The experience of the UK Press Complaints Commission is singled out in Chapter 12 because some sections of the local press have referred to that commission as a model for Hong Kong to follow.

8. Since there is a trend in Europe complementing media self-regulation with co-regulation, we introduce in Chapter 13 the concept of co-regulation and explain its relationship with self-regulation in the media context. We then discuss in Chapter 14 the desirability of creating a statutory but self-regulating press complaints body to achieve effective self-regulation.

We conclude that such a body would not pose a threat to press freedom if there are sufficient safeguards against abuse and outside interference. The details of the proposed self-regulating body are set out in Chapter 15. The subject of anonymity for juveniles concerned in criminal proceedings is addressed in Chapter 16.

9. The Law Reform Commission is unanimous in making the conclusions and recommendations in this report.

# Chapter 1

## Public responses to the Consultation Paper

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1.1 The Privacy Sub-committee concluded in the Consultation Paper on Media Intrusion 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 (“PCPP”) 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 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.

1.2 The Sub-committee further recommended that the Council should consist of not less than 12 nor more than 20 members. Half of them (excluding the Chairman) should be drawn from members of the public and the other half from members of the press. Any person, whether or not they are related to the press, should be entitled to make nominations for press membership in the Council. Further, a retired judge or a senior lawyer should be appointed to be the Chairman, and the Privacy Commissioner should be designated as an *ex officio* member of the Council.

1.3 As regards the powers and functions of the Council, the Sub-committee recommended that it should have the power to receive complaints (including third party complaints) of alleged breaches of a Privacy Code drawn up by the Council; to initiate its own investigations; to attempt conciliation before a complaint is investigated; and to rule on alleged breaches of the Code. The Council should be under an obligation to ensure that the complaints procedure is fair to the parties. Where the Council has decided on a complaint, it may declare that the newspaper has acted in breach of the Code; reprimand the newspaper; require it to publish an apology, correction or the findings of the Council; or impose a fine on a newspaper which is found to be in serious breach of the Code. The maximum fine should be \$500,000 for a first offence and \$1,000,000 for a second or subsequent offence. A newspaper which failed to publish an apology, correction or other matters required by the Council should also be liable to a fine. A person aggrieved by any decision of the Council or anything contained in the Code should have a right of appeal to the Court of Appeal.

1.4 During and after consultation, some commentators suggested that the Sub-committee’s proposals in their Consultation Paper were made at

the behest of the Chief Executive and the Administration, or that the latter had influenced the deliberations of the Sub-committee in order to achieve the object of controlling the media. These allegations call into question the integrity and independence of those who have given their service to the Sub-committee voluntarily for over 12 years. The Sub-committee firmly denies these allegations. The Sub-committee's work on media intrusion began in mid-1997, and the need to examine this aspect of privacy was recognised as early as 1994 when the Commission published its *Report on Reform of the Law Relating to the Protection of Personal Data*.<sup>1</sup> The Sub-committee's proposals were the product of full and frank discussion of the issues involved. Neither the Government nor any interest group dictated to the Sub-committee any aspects of its recommendations.

1.5 The Sub-committee received about 80 written submissions. The list of respondents is at Annex 1. Comments made by private individuals and NGOs have also been taken into account in reaching our conclusions. In reviewing the preliminary proposals in the Consultation Paper, we have taken careful note of the degree of public support or censure accorded to each proposal. We are grateful to all those who have contributed to the debate, particularly those who have taken the time and trouble to send in a written submission. Broadly speaking, the respondents can be divided into eight categories:

- (a) respondents who agreed in principle with the Consultation Paper's proposal to establish an independent Press Council for the Protection of Privacy by law;
- (b) respondents who did not agree with all the recommendations in the Consultation Paper but agreed that an independent press council should be established by law;
- (c) respondents who preferred a self-regulatory press council with a statutory basis provided by a Private Member's Bill;
- (d) respondents who agreed that the Government had a role to play in ensuring that a self-regulatory press council was successful;
- (e) respondents who preferred a voluntary press council without excluding the possibility of Government involvement if the voluntary body was later found to be ineffective;
- (f) respondents who preferred a voluntary press council (with or without other self-regulatory measures);
- (g) respondents who preferred self-regulatory measures other than the establishment of a voluntary press council;

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<sup>1</sup> (1994). See Chapter 18 (the media and data protection), in particular, para 18.69.

- (h) other respondents who expressed major objections to the proposals in the Consultation Paper.

1.6 We should stress that this classification is for convenience only and merely aims at giving the public a general idea of the perspectives taken by the respondents. A respondent should not be labelled solely by reference to the category into which he has been classified. The categories are not mutually exclusive and there is some overlap between them.

1.7 Before we summarise the views of the respondents, we think it would be helpful to quote the opinion of **Professor Yash Ghai** of the Faculty of Law at the University of HK. Although Professor Ghai was unhappy with the tone of the Consultation Paper, which he felt tended to undervalue the importance of the media, he agreed that the Sub-committee had an arguable case for its proposals. He preferred a scheme of self-regulation by the industry itself, but at the same time noted that the Consultation Paper had offered persuasive arguments why self-regulation was unlikely to be effective – at least until there was a major change in the attitude of the proprietors and editors of leading papers, and a willingness to accept, and police, self-imposed restrictions. Professor Ghai pointed out that the Sub-committee's proposals were narrow and specific in scope. They were concerned with press intrusion on a person's privacy, when a person's conduct or affairs were of no public concern. They did not deal with other aspects of the freedom of expression. He said:<sup>2</sup>

*"Whether restrictions on press intrusion into a person's privacy are inconsistent with its freedom depends substantially on the reasons why we value press freedom. We value press freedom because the press can expose corruption in public and private spheres, facilitate the accountability of the government, inform the public on matters of general concern, promote public debate on policy and ethical questions, and provide a forum for the expression of views of the people. Intrusion on people's privacy does not promote these objectives, except when relevant questions of the morality or competence of those in charge of public affairs are concerned. Publication of private grief or conduct serves little public interest; and provides no justification for the violation of the right to privacy of those whose life is so openly paraded in newspaper columns. It panders to readers' sense of titillation, debases the nature of public discourse, and leads to a downward spiral in the ethics and practice of journalism.*

*Any regulation of the press is undesirable. But in the face of widespread disregard of the rights and privacy of individuals and irresponsible journalism, some regulation may be unavoidable. It should also be recognised that the press is in many ways in a more favourable position than individuals or other groups with*

<sup>2</sup>

Y Ghai, "The controversy about the press council proposal", Sept 99. The Chinese translation appeared in *Apple Daily* on 14.9.99 under the heading of "評議會無權罰報章".

*regard to the exercise of the freedom of expression. Unlike them, the media has large resources. It deploys enormous influence with those in authority. It shapes and mobilises public opinion. It has powerful sanctions against those who oppose it. It is now internationally accepted that the nature and scope of restrictions on the freedom of expression may depend on the reach and influence of the media, especially as regards restrictions to do with morals, ethics and privacy.”*

**(a) Respondents who agreed in principle with the Consultation Paper’s proposal to establish an independent Press Council for the Protection of Privacy by law**

1.8 **Heung Yee Kuk New Territories** agreed to the introduction of measures to deal with complaints about press intrusion and breaches of a press code. The Kuk suggested that the press council should draw its members from different sectors and walks of life so that the public could have confidence in it. **The HK Association for School Discipline and Counselling Teachers** supported the Sub-committee’s proposals. However, it considered that the PCPP should be expanded to become a Media Council, which would not only deal with privacy issues, but also issues such as undue publicity of sex and violence, false and inaccurate reports, and glorification of crime. **The HK Federation of Women** commented that intervention by law should not give rise to criticism if the press failed to regulate themselves. Freedom from press intrusion was as important as freedom of the press; nor were press freedom and legal regulation irreconcilable. **The HK Performing Artistes Guild** noted that the local media had abused press freedom in recent years. It commented that their practice in gathering and reporting news had degenerated: from being civilised to vulgar and even to flagrant intrusion upon the privacy of individuals. **The HK Women Professionals & Entrepreneurs Association** agreed with the proposals so long as public interest and press freedom were given prime considerations. Press representatives should be increased to at least 60%, as a wider representation would mean greater involvement of the profession, and hence a greater likelihood of compliance.

1.9 Several private citizens also supported the proposals. **Mr S Wong** commented that all persons working in the media had a vested interest in this area. He therefore suggested that the Appointments Commission should be appointed by a panel of judges instead of the Chief Executive. **Dr Angela W Y Ng**, a registered doctor, commented that the ambit of the proposed PCPP was very restricted. She considered that the ambit should be expanded to cover the publication of pornographic and indecent materials, false and inaccurate reports, and libellous material that did not involve privacy intrusion. She agreed with Dr Alexander Ng, Vice-Chairman of the Association of Licentiates of the Medical Council of HK, that there should be an effective mechanism to monitor the press.<sup>3</sup> **Mr Harry Macleod**, Deputy Director of Public Prosecutions, agreed with the proposals. He pointed out

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<sup>3</sup> L S Ng, “醫療事故與傳媒報導”, *HK Economic Journal*, 30.10.99.



that it was clear that there were abuses by some sections of the media. This had led not only to distress, embarrassment and humiliation to those individuals concerned, and their families, but had also in some instances threatened the administration of justice. He could not see how the proposals could in any way undermine or diminish the important role of a free press in Hong Kong.

1.10 Another respondent, who was a **medical practitioner**, believed that self-regulation by the journalistic profession would not succeed. He noted that journalists had to write their reports according to the policy laid down by the newspapers proprietors. It was rare for journalists to recognise their editorial independence and even rarer to exercise it to any significant degree. Journalists would be fired if they acted contrary to their employer's wishes. Moreover, the three most popular newspapers belonged to two belligerent camps whose animosity and mutual contempt would prevent them from co-operating towards a common cause. He therefore supported the Subcommittee's proposals.

***(b) Respondents who did not agree with all the recommendations in the Consultation Paper but agreed that an independent press council should be established by law***

1.11 The **Society for Truth and Light** proposed setting up an independent statutory news council whose members are not appointed by the Government. The following were their major recommendations:

- (a) Half of the members should be elected by bodies that were representative of the news media. The remaining half should be elected by bodies that were representative of other interested parties, such as the education sector, the social welfare sector, the legal sector, parents' groups and media concern groups. The Privacy Commissioner and a representative from the Television and Entertainment Licensing Authority might also be members.
- (b) The Chairman should be a retired judge or an experienced legal professional appointed by the Government. However, the appointment must be approved by a resolution passed by other members of the Council.
- (c) The main functions of the Council should include the following: (i) to draw up and keep under review a professional code for the news media; (ii) to receive and inquire into complaints from the public; to hear representations made by both parties; and to adjudicate on complaints; (iii) to censure in public, reports that were in breach of the professional code; offending organisations should be obliged to publish the reprimand and the length of the text should be such as was specified by the Council.

- (d) The Council should be immune from libel actions.
- (e) Its secretariat should be funded by the Government.
- (f) The ambit of the Council should not be confined to privacy. It should be extended to reports that give undue publicity to sex and violence, reports that are false and inaccurate, and those that glamorise crime.
- (g) Newspapers that were found to have breached the code could be admonished or reprimanded. No fine should be imposed for the first offence. However, for the second or subsequent offences, the maximum fine should be \$500,000. In order to give room for small newspapers to survive, the level of fine actually imposed should depend on the sales figure of the offending newspaper.
- (h) The Government should set up two funds. One would be to assist victims of press abuse whose complaints had been upheld by the Council to sue the organisation at fault for damages. The second would be to provide organisations with financial assistance to promote media education.

1.12 **The Campaign Against Information about Sex and Violence, the Society for Truth and Light, the Boys' & Girls' Clubs Association of HK, the HK Association for School Discipline and Counselling Teachers, the Cooperation Scheme of School and Social Work, the Federation of Parent-Teacher Associations in Wong Tai Sin District, and the Committee on Home-School Co-operation** made a joint submission. They considered it necessary to set up an effective non-government-appointed media council to deal with the misconduct of the media. They proposed that the ambit of that body should not be confined to privacy matters. Rather, it should be extended to include news reports which played up sex or violence, glamourised crime, or were based on facts that were deliberately fabricated. The members of that body should be elected by interest groups within and without the press industry. While half of the members could be elected by various organisations in the media industry, the body should also have representatives from various interest groups in the community (such as teachers, social workers, lawyers, parents, academics and the Privacy Commissioner). The body should have authority to: (a) formulate and keep under review a code of practice for the news media; (b) receive and conduct investigations into complaints from the public; (c) publicly censure coverage that contravened the code of practice; and (d) require the organisations concerned to publish the censure in such size as was specified by the body. The power to impose a fine should not be excessive. Further, the body should be immune from libel actions.

1.13 **Ms Joyce Yee-man Nip**, Assistant Professor of the Department of Journalism at HK Baptist University, commented that the PCPP should not have power to impose a fine and should be constituted by election on the basis of individuals.<sup>4</sup> However, out of pragmatic considerations, votes could be restricted to members of the press and certain sectors of society, such as

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<sup>4</sup> See also Joyce Y M Nip, "對法改會建議的反建議", *RTHK Media Digest*, at <[www.rthk.org.hk/mediadigest/md9912/](http://www.rthk.org.hk/mediadigest/md9912/)>.

education, culture and social work. Ms Nip agreed that the Council should have the power to require newspapers to publish an apology or correction as required, and that failure to publish the apology or correction should attract a small fixed fine. Moreover, the elected press council should be funded by way of a statutory levy on newspapers and magazines. To ensure co-operation from newspapers and magazines, Ms Nip considered it desirable that the Council should have a statutory status. She justified the regulation of media intrusion by an elected body created by law on the ground that proper and legitimate regulation could help the news profession to play the social role expected of it more effectively. **Dr Kwan Kai-man**, Assistant Professor of the Department of Religion and Philosophy at HK Baptist University, also favoured the creation of a non-governmental statutory monitoring body, the members of which should come from the press and the general public.

1.14 **Mr Lau Nai-keung** considered that the proposed PCPP was a feasible mechanism but had weaknesses.<sup>5</sup> He commented that the press council should have the following features:

- (a) It should be created by statute and have the status of a private body sponsored by the Government.
- (b) It should be vested with the authority to receive and investigate complaints; publish the results of investigation; and censure the offending organisations.
- (c) It should, when necessary, represent the public or victims in instituting legal proceedings against an offending organisation.
- (d) Its funds should be appropriated by the Legislative Council.
- (e) In relation to its membership, the Government could initially draw up a list of organisations after public consultation. The organisations on the list would then nominate representatives to the council in an open, fair and just manner prescribed in the legislation. This list should be reviewed through public consultation every five years.
- (f) Its jurisdiction should cover the print media as well as the broadcast media; and the ambit of the council should include undue coverage given to sex and violence, glorification of crime, and incorrect, unfair and inappropriate reports.

**(c) Respondents who preferred a self-regulatory press council with a statutory basis provided by a Private Member's Bill**

1.15 The **HK Bar Association**<sup>6</sup> considered that there should be some form of mechanism to address the mischief and to uphold professional standards. This should be seen as a means of reinforcing professionalism rather than a threat to press freedom. The Bar therefore supported the existence of effective media regulation. The question was what form of media regulation should be in place. Whatever be the form of media regulation, it

<sup>5</sup> See N K Lau, "成立民主傳媒評議會", *HK Economic Journal*, 14.9.99.

<sup>6</sup> The submission of the Bar Association is available at <[www.hkba.org/submissions-and-position-paper/20000105.htm](http://www.hkba.org/submissions-and-position-paper/20000105.htm)>.

should be effective; the process of regulation should be transparent; and no single media organisation should dominate the process.

1.16 The Bar did not support the establishment of a statutory press council as proposed by the Sub-committee because there was Government involvement and the council had power to impose substantial financial punishment. The Bar submitted that the Sub-committee had not come up with an effective mechanism to ensure that the chair of the Appointments Commission was a truly independent person. The Bar argued that the relevant yardstick under the proposal was that of the Chief Executive. Once the Chief Executive's decision had been taken to appoint a particular individual, it would be difficult to see whether and, if so, how that decision could be effectively challenged, even if in theory judicial review might be available. It followed that there could be a legitimate fear that political contamination would transmit across the layers or the bodies.

1.17 The Bar agreed that a press council must have teeth. However, it pointed out that these could be in the form of powers of censure or reprimand, or to compel an apology and/or a correction to be printed. The Bar noted that none of the proposals to set up a non-statutory monitoring body could in truth be effective without the participation of *all* newspapers and magazines in Hong Kong and, in particular, the dominant papers which found themselves under constant public attacks for breaching media ethics. The Bar also did not believe that market censure would work. Even if a boycott were successful, it would not provide any meaningful redress to the aggrieved individual whose interest was of paramount concern.

1.18 In the Bar's view, an effective monitoring body must have statutory backing with jurisdiction over all print media; must be truly free from Government interference; and must provide quick and accessible redress to parties aggrieved by the press. In this respect, the Bar agreed with the proposals of Professor Johannes Chan:

- (a) A Private Members' Bill should be tabled before the Legislative Council for the establishment of a statutory press council. The drafting of this Bill could be left to the media. The role of the Government would then be confined to commenting on the procedural propriety of the Bill and not its content.
- (b) The press council should comprise both members of the media and other lay members.
- (c) It should have jurisdiction over all print media in Hong Kong, which would include all magazines and newspapers.
- (d) It should receive and handle complaints from the public as well as initiate its own investigations.
- (e) Once a complaint was upheld, the council should have power to reprimand the paper or order that an apology and/or correction be published by the offending newspapers in a prominent place. However, it should not have the additional powers of imposing financial penalties, which should be a matter for the court, except when its rulings were flouted.

- (f) The press council could formulate its own code of ethics. The draftsmen of the code should be familiar with, and experienced in, the media.
- (g) The code should primarily be directed at media intrusion on privacy and inaccurate reporting, with room for future expansion to cover sleaze, violence and improper news collecting methods.
- (h) The legislation should confer protection by qualified privilege in respect of anything done by the council, its members or employees in good faith in the exercise of powers or functions conferred by legislation.

1.19 Before **Professor Johannes Chan** became a member of the Privacy Sub-committee, he pointed out that establishing a voluntary press council to receive and deal with complaints from the public suffered from the following drawbacks:

- (a) If news organisations that have a large share of the market chose to stay out, the authority and credibility of the council would be called into question from the very beginning.
- (b) The council would not have jurisdiction over news organisations that had not participated in the scheme. News organisations that were not members could refuse to appear at its hearings.
- (c) As regards news organisations that had agreed to participate, the council would not have any effective means to enforce its adjudications where the offending news organisation did not agree to the adjudication and refused to publish its decision.

1.20 Professor Chan argued that a Private Member's Bill could obviate the danger of Government interference, while at the same time conferring legal status and authority on the press council so that it would not be a body that could be dissolved at any time, or that might become a toothless body with no enforcement mechanism. The council needed to have statutory authority because a voluntary body would be loosely organised and would only bind organisations which had become members.<sup>7</sup>

1.21 Both the **HK Christian Service** and **Professor Leonard L Chu**, Dean of the School of Communication at HK Baptist University, supported the proposal made by Professor Johannes Chan. **Dr Anne S Y Cheung**, then Assistant Professor of the Department of Law at the University of HK, also supported Professor Chan's proposal. However, she argued that it would be more appropriate to utilise the existing regime under the Personal Data (Privacy) Ordinance to regulate media intrusion, which could be more effectively dealt with by extending and redefining the power of the Privacy Commissioner. If the Sub-committee concluded otherwise, the Press Council should have the following features:

- (a) independent from the Government, with no proactive power;

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<sup>7</sup> J Chan, "傳媒自律機制需具法律效力", *Ming Pao Daily News*, 24.9.99.

- (b) uphold the twin missions of defending press freedom and promoting accountability;
- (c) deal with complaints concerning media practice in other areas;
- (d) sanctions mainly limited to the use of publicity;
- (e) media organisations should be given a chance to resolve complaints before investigation starts; and
- (f) a waiver should be included to avoid overlapping jurisdictions.

**(d) Respondents who agreed that the Government had a role to play in ensuring that a self-regulatory press council was successful**

1.22 **Caritas-HK (Youth and Community Service)** considered that self-regulation by the media was the best mechanism. Nevertheless, they recommended that the Government should support the work of the voluntary press council, for example, by granting immunity from libel suits to the council by legislation, and financing the day-to-day operations of the council.<sup>8</sup> In a newspaper article,<sup>9</sup> **Mr To Yiu-ming**, Assistant Professor of the Department of Journalism at HK Baptist University, commented that Government intervention was necessary because of market failure, but this fact did not entitle the Government to monitor the press by allowing the Chief Executive to appoint members of the press council. The objective of the Government should be to strengthen the ability of the press to regulate itself. For instance, it could provide financial support; enact legislation granting privilege to the press council for commenting on the performance of the press; offer assistance in the establishment of a secretariat; and provide legal consultancy services. Any involvement beyond these should be kept to a minimum. Mr To further commented that the authority of the council must be founded on principles of democracy to guarantee its credibility. The members of the council should be returned by a democratic election in which editors and reporters participated so that the council could be representative of the industry.

**(e) Respondents who preferred a voluntary press council without excluding the possibility of Government involvement if the voluntary body was later found to be ineffective**

1.23 The **Privacy Commissioner for Personal Data** pointed out that invasion of an individual's privacy and unauthorised collection and use of personal data did not necessarily occur simultaneously. The number of complaints against the media received by his office was low. However, non-contravention of the PD(P)O did not preclude a finding of an invasion of privacy; unwanted publicity given to an individual's private life by a media organisation might not contravene a data protection principle.

<sup>8</sup> HK Caritas (Youth and Community Service), 青少年對新聞報導的意見和期望調查報告書 (March 2001), p 17.

<sup>9</sup> Y M To, "民主選舉建自律機制", *Ming Pao Daily News*, 21.9.99 & 7.9.99.

1.24 The Commissioner supported the creation of a voluntary self-regulatory press council rather than a statutory body as recommended. However, he qualified his support by stating that the voluntary body must be made to work effectively. He stated that to be effective, there must be “equitable representation” of three categories of rights (自律三權), namely: (a) the rights of the press (ie, freedom of expression, and freedom to investigate and report in the public interest); (b) the rights of the individual (ie, the right to privacy, the right to be informed, the right to truth and the right to dignity); and (c) the rights of the community (ie, the right to the rule of law).<sup>10</sup>

1.25 The Commissioner suggested that the press council should have the following features:

- (a) The chairperson should not be a member of the industry, but should be nominated and selected by the professional associations that represented the print media.
- (b) The other members should be equally divided between those representing the rights of the press, and those representing the combined rights of the individual and the community.
- (c) Press members must include proprietors, editors, and journalists.
- (d) The members representing the interests of individuals and the community could be drawn from the statutory bodies (eg the Privacy Commissioner’s Office, the Equal Opportunities Commission and the Consumer Council), academia, the legal profession and members of the public.
- (e) The Privacy Commissioner should be represented on the council because issues concerning privacy and the collection and use of personal data are the very substance of his work.
- (f) One of the functions of the council would be to draft a code of professional practice or ethics. Matters pertaining to press collection and use of personal data should be an integral part of the code.
- (g) The rulings of the council should be binding on members.

1.26 The Commissioner continued that after a reasonable period of time had elapsed, the work of the council should be subject to an independent review of its effectiveness. The review panel should consist of three members: (a) a representative of the public nominated by the Legislative Council; (b) a representative of the press nominated by the council; and (c) a retired High Court judge nominated by the Chief Justice. The review panel’s report should be presented to the Government. The Commissioner listed the “critical success factors” for determining whether the council was effective:

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<sup>10</sup> More specifically, those laws that have a bearing upon the activities of the media, eg the PD(P)O, the Sex Discrimination Ordinance, the Control of Obscene and Indecent Articles Ordinance, the Crimes Ordinance (in relation to the anonymity of complainants in sexual offence cases), the laws of defamation, malicious falsehood, breach of confidence, etc.

- (a) support for the council from mainstream press players;
- (b) the ability to resolve resourcing and funding considerations;
- (c) the ability of members to strike a reasonable balance between the interests of the three rights;
- (d) the speedy drafting of a workable press code;
- (e) development of an effective complaint and redress mechanism;
- (f) members' compliance with Council rulings; and
- (g) the exercise of influence in gaining acceptance of rulings by all parties.

1.27 The Commissioner concluded that if the council did not live up to public expectations, this might make it more likely that a statutory body would be established to address media intrusion.

1.28 **The HK Council of Social Service** thought that the Consultation Paper should be concerned not only with privacy matters, but should also monitor sensational treatment of sex and violence in news coverage, as well false or inaccurate news reports, and those which glorified crime. It noted that some media reports had exposed in detail the family background and personal particulars of the victims involved, causing further harm to the victim and his family. It proposed that a non-governmental media council be set up by the media to undertake various monitoring functions and to let the public express their views on news coverage. The Council of Social Service suggested that more than half of the members should be elected by media associations, and representatives of various organisations in society, including the Privacy Commissioner, should be invited to become members. However, if the media did not form a media council or the council was not made to run effectively, other means of setting up a credible monitoring agency should be considered, and the possibility of government involvement in the monitoring work should not be ruled out.

1.29 In the view of **Dr Kenneth W Y Leung**, Associate Professor of the School of Journalism and Communication at the Chinese University of HK, media organisations that were unwilling to regulate themselves should be subject to regulation by a third party insofar as they had abused their freedom of speech in order to obtain commercial gains for their own advantage.<sup>11</sup> He said that the problem of ensuring that all media organisations participated in the self-regulatory system, and that of effective enforcement of adjudications, could be resolved if a statutory body were established. However, he considered that the media should be allowed to keep its house in order by way of a voluntary press council. It was only if the situation had not improved in two years' time that the proposal to establish a statutory body should be revisited. Dr Leung thought that Professor Chan's proposal was worth trying.

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<sup>11</sup> Kenneth W Y Leung, " '保障私隱報業評議會' 對新聞自由的影響", *RTHK Media Digest*, Sept 1999, at <[www.rthk.org.hk/mediadigest/md9909/01.html](http://www.rthk.org.hk/mediadigest/md9909/01.html)>.



**(f) Respondents who preferred a voluntary press council (with or without other self-regulatory measures)**

1.30        **The Newspaper Society of HK** agreed that there was a problem of privacy intrusion in some news reports. However, it did not accept the view that the press could not regulate itself. The Society believed that the problem could be resolved by self-regulation. It was therefore in favour of creating an independent press council, which comprised representatives of newspapers and members of the public, and did not have power to impose punishment. Membership of the Council would be voluntary. The Society respected the stance of those newspapers that were sceptical about the idea of a press council. It believed that the operations of the council would not be seriously affected by their absence. If the council could operate smoothly in the future, then newspapers which were sceptical would be moved to join. The **HK Chinese Press Association** did not deny that certain individual news organisations had committed some glaring transgressions, but was of the view that existing measures were sufficient to deal with the problems. It did not perceive a need to create a media council. **The Society of Publishers in Asia** believed that the creation of the proposed PCPP might inhibit free speech or have a chilling effect on the exercise of free speech. The council might also undermine the values and functions of freedom of expression. The Society preferred a self-regulatory approach, such as the establishment of a non-statutory, independent press council, which could address privacy concerns without adverse implications for press freedom. The **HK News Executives' Association** commented that the proposed PCPP could not be truly independent of the Government if the very first step in its establishment involved an appointment by the Chief Executive. The Association thought that a non-governmental organisation, exempt from legal liability, would be the most appropriate self-regulatory mechanism to monitor the news media and to adjudicate on complaints received from the public.

1.31        The **HK Federation of Journalists** preferred an independent press council constituted by industry representatives and members of the public to handle complaints from the public about press intrusion. **The School of Journalism and Communication at Chinese University of HK and the School of Communication at HK Baptist University** submitted that the proposal should be shelved because it contradicted the spirit of upholding the freedom, independence and autonomy of the press. They urged the news media to set up an independent, representative and effective self-regulatory body, and the public to translate their dissatisfaction against the media into action by boycotting the inferior media.

1.32        The **South China Morning Post** believed that the establishment of a "government-authorized and supervised committee" with the power to punish publications which printed material disliked by a committee majority could pose a serious threat to political freedoms as well as freedom of the press. It advocated the founding of a press council modelled after the Press Complaints Commission in the UK. **Television Broadcasts Ltd** supported the establishment of a PCPP in principle, but was of the view that the Council should be formed by the industry itself and its members should not be

appointed by the Government. **Metro Broadcast Corporation Ltd** agreed that an independent media council should be established to protect members of the public from unwarranted media intrusion, except that it should be established by the industry itself. It commented that the decisions of the council should be binding on the whole industry.

1.33 The **Citizens Party** opposed the establishment of a statutory press council. It said that the decision to publish or not was often subjective and could vary among practitioners. What was proper journalistic conduct in a particular set of circumstances would depend on a journalist's professional judgment. The **Democratic Alliance for Betterment of HK** did not think that the proposal could deal with complaints against the press without impinging on press freedom at the same time. No matter how little Government involvement there might be, the proposed PCPP would be regarded as a tool for the Government to interfere with press freedom. The **HK Democratic Foundation** saw no place for any Government-appointed regulatory body, no matter how indirect a role the Government might play in its appointment. Irrespective of the Government's intentions, such a body would be perceived as a constraint and possible threat to press freedom. It recommended the establishment by the media of its own press council, and that journalists should be provided with contractual protection from forced contravention of these standards and ethics by their editors and proprietors. It further recommended that the terms of reference of the Privacy Commissioner be expanded to encompass the issue of privacy as a whole and that the scope of the PD(P)O be expanded to cover issues of privacy protection in general.

1.34 The **Democratic Party** objected to the establishment of a Government-appointed press council. It held the view that the proposal to set up an Appointments Commission to appoint members of the press council was a disguised form of appointment by the Chief Executive of a Government press council. It believed that a voluntary self-regulatory body could serve the purposes of monitoring and education at the same time. **The Frontier** commented that there was no way to ensure that the proposed PCPP, once created, would not be controlled by the Government. It considered that the disadvantages of a press council far outweighed any advantage that it might bring. The **Liberal Party** did not support the creation of a Government-appointed council because, no matter how well-intentioned it might be, the council would suffer from the fundamental defect that it would be Government-appointed or directly or indirectly appointed by the Chief Executive, thus engendering the community's prejudice against it. The Party was also critical of the proposed council having the power to impose punishment.

1.35 **The Boys' & Girls' Clubs Association of HK** considered that the problem of media intrusion into the private lives of children in Hong Kong was very serious. It noted that children, whether or not they were parties to a news story, were likely to become the subject of media attention in local media coverage. Although the private lives of children were not matters of public concern, where an adult had become a public figure through a newsworthy event, particulars of the child's private life were sometimes revealed and his

privacy intruded upon merely to make the report more interesting to read. The Association therefore considered it necessary to set up a media-monitoring body, but to avoid undermining press freedom, believed a non-governmental body was more desirable.

1.36 The **Cooperation Scheme of School and Social Work** (which comprised the Learner-Teachers' Association; the HK Federation of Youth Groups, the HK Young Women's Christian Association; the HK Professional Teachers' Union; the HK Social Workers' General Union; and Caritas-HK (Social Work Services)) thought that the proposal set a bad precedent for the Government interfering with press freedom. The Scheme proposed that media conduct be monitored by a media council, the members of which should include organisations having an interest in the performance of the media, such as teachers, social workers, parents, the legal profession, academia and the Privacy Commissioner, as well as representatives of media associations. The council should have jurisdiction over all kinds of media, and the media-transmitted contents to be monitored by the council should include reports that contained an extravagant depiction of sex or violence, and stories that were fabricated or inaccurate, or which glamourised crime. It should also issue a public reprimand against media organisations that had breached its code of conduct, and the latter must publish a notice in the specified format. The council should be immune from liability for libel.

1.37 The **HK Psychological Society** acknowledged that the media was expected to play a watchdog role in monitoring the activities of the Government and other public bodies. However, the media might reflect "sicknesses" which exist in society, and could reinforce such "sicknesses" through sensationalism. The Society did not believe that self-regulation could work, given the fierce commercial competition for market share and the media's past record. It supported the establishment of an independent press council which was free from Government intervention at all levels to handle complaints of alleged breaches of a privacy code. **Ms Mary M W Lee**, a professional psychologist, commented that it was insufficient to rely solely on the media's self-discipline. She recommended the establishment of an independent publicly funded mass media body. She hoped that this body could reflect minority interests, express different voices, and be driven by human values instead of market needs. An independent complaint channel should also be created to investigate complaints and recommend ways for rectification. Ms Lee firmly believed that ethical practices and autonomy of the press could co-exist. She added that the powers of the council should be adequate (but not excessive) so that it could make constructive and healthy change to the "sick culture" of the mass media. **Mr Grenville Cross, SC**, Director of Public Prosecutions, felt that the media should be given a chance to prove that self-regulation works, given that the Legislative Council was in favour of self-regulation. If the original proposal was to be pursued, then a wholly independent mechanism for making appointments was called for. For example, the members could be elected through representative voting by the media, legal practitioners, social workers, etc. He did not favour a power to fine and the possible involvement thereafter of the Court of Appeal, though the powers to issue a reprimand and to order that the newspaper at fault should

publish an apology should be put in place. If they did not prove to be salutary, then the fine could be considered at some later stage.

**(g) Respondents who preferred self-regulatory measures other than the establishment of a voluntary press council**

1.38 The **HK Journalists Association** was of the view that there should be no Government involvement in the regulation of media content and ethics, particularly when democracy (and therefore the checks and balances on the Executive) was fragile and incomplete. It was therefore in favour of a non-statutory approach. It proposed that media groups and newspapers should draft and adopt a common code of ethics, and once there was sufficient agreement on the code, representative organisations should endeavour to incorporate its terms into journalists' employment contracts. Newspapers should also be encouraged to appoint their own independent ombudsmen, and to accept and investigate complaints from the public. The Association further proposed that media organisations should "in the longer term" consider setting up an industry-wide ethics committee (without public representation) to take public complaints based on alleged breaches of the common code of ethics. A timetable for considering whether to set up a non-statutory press council with public representation should also be set by the profession.

1.39 The **HK Press Photographers Association** acknowledged the importance of privacy and admitted that incidents of media intrusion were far from rare and therefore unacceptable. However, it believed that neither a PCPP appointed directly or indirectly by the Government nor a press council formed by citizens was desirable. The Association commented that any intervention by the Government would lead to doubts about the independence and autonomy of the press. It would also deal a severe blow to the credibility of the press and severely undermine the healthy development of the press. **The Foreign Correspondents' Club of Hong Kong** objected in principle to the creation of any form of statutory oversight body, believing that those news organisations which failed to meet the public's expectations and offended community sensibilities would ultimately fail in the marketplace of ideas. The Club submitted that the Sub-committee had failed to make the case that existing laws, properly applied and enforced, were insufficient to the task, or that careful amendment of those laws could not make them better. **Apple Daily** submitted that the proposal to set up a Government-appointed press council with wide-ranging power would inevitably curtail press freedom and undermine the public's right to know.

1.40 **The Law Society of HK** commented that the proposed sanctions, apart from the fines for serious breaches, were ineffectual. It held the view that the media was unlikely to improve its standards if an offending newspaper had to face only a mere "reprimand" or an order that it should publish an apology to the complainant. However, the Law Society concluded that it was more appropriate for the media to exercise self-regulation and to put its own house in order. If the media failed to do so, then it would be

appropriate for the matter to be revisited. The **Justice & Peace Commission of the HK Catholic Diocese** thought that any press council created by law, or appointed by the Government, or created with the involvement of the Government, could never be free from speculation about Government intervention. It considered that a better way would be to let public opinion monitor the press and exert pressure on them. **Breakthrough** had “strong reservations” about the establishment of a press council or any statutory body to monitor the media.

*(h) Other respondents who expressed major objections to the proposals in the Consultation Paper*

1.41 The **HK section of the International Commission of Jurists (JUSTICE)** believed that the Sub-committee had failed to present in a balanced way all the possible options dealing with the problem of media intrusion, including amendments to the PD(P)O, self-regulation through a press council or press ombudsman (whether with statutory powers and immunities or not), and legislation creating torts of infringement of privacy. The HK section of JUSTICE thought that the Consultation Paper discounted the utility of these options and degenerated into a piece of advocacy for a favoured option, namely the establishment of the PCPP. It therefore argued that the public had been deprived of the opportunity of properly examining and commenting on each of these options in detail, and of choosing any of them (whether to be implemented conjunctively or incrementally). **The Lawyers’ Group of Amnesty International HK** commented that the proposal was not an appropriate mechanism to protect individuals from press intrusion. It urged the Government to work with the press to seek alternative solutions to address public concerns about media intrusion and journalistic ethics, rather than establishing an unpopular statutory body. **The Association for the Advancement of Feminism** commented that the media should be subjected to the scrutiny of the general public, and should not be regulated by a commission created by the Government or by statute.

1.42 The **RTHK Programme Staff Union** “strongly oppose[d]” the creation of a statutory PCPP as proposed by the Sub-committee. It believed that the media should be left to put its own house in order. **Next Magazine Publishing Ltd** submitted that the solution was to ask the Privacy Commissioner to discharge his duties properly, and not to allow the Executive to regulate the media through the backdoor by creating a press council (indirectly) appointed by the Chief Executive as proposed by the Sub-committee. **HK Commercial Broadcasting Co Ltd** objected to the creation of a PCPP. It firmly believed that self-regulation provided the best means to guarantee press freedom and to ensure the commitment of the press to their social responsibilities. **Professor Joseph Man Chan** of the School of Journalism and Communication at the Chinese University of HK commented that the media should be given a chance to demonstrate their capability for self-regulation. **Mr Kevin Sinclair**, a journalist, commented that the proposals did not make sense and were dangerous. **Mr Tim Hamlett**, Associate Professor of the Department of Journalism at HK Baptist University,

commented that in not one of the sub-committee's examples of media intrusion was there the slightest suggestion that the alleged victim had been harmed, still less that he or she had complained. He submitted that the PCPP should be described as a tribunal; the Sub-committee could have designed a council which was informal and relatively powerless, or it could have chosen a tribunal with all the formality and safeguards which that implies.

1.43        **The US Freedom Forum Asian Center** argued that the Consultation Paper presented no substantial evidence of media intrusion to the degree justifying a monitoring apparatus. It submitted that the community, readers and advertisers supported *Apple Daily* and *Oriental Daily News*. The **Society of Professional Journalists in the US** opposed any governmental entity that could lead to the stifling of a free press in Hong Kong. It also opposed any other action by the HK Government that could weaken the rights of the people of Hong Kong to enjoy freedom of speech and of the press. **Mr Floyd Abrams**, an American attorney-at-law, commented that the Sub-committee was "playing with fire" when it proposed to establish a council with sweeping authority over what the press chose to print. He said that journalistic judgment in the area of personal privacy often involved a weighing of a variety of factors as to which responsible journalists might differ and the ultimate judgment on those matters was largely one of taste. Such judgments should, in his view, be made by journalistic organisations themselves.

*(i) Other comments made by the respondents*

1.44        The **Legal Aid Department** commented that when freedom of expression conflicted with the right of privacy, appropriate sanction was desirable which should only be exercised carefully and legally in order to avoid unnecessary encroachment on, and jeopardising of, press freedom. The **Hospital Authority** had no comments on the proposed PCPP but welcomed the assistance offered by the proposals, since media intrusion might affect or impair its responsibility to provide health care. The **HK Policy Research Institute** advised that the experience of the Supreme Council on Audio and Visual Programmes in France provided a useful model. Members of the Council were appointed by persons representing the public, such as the President of France, the leader of the National Assembly, and the Speaker of the Senate. Although the Council monitored the media, its authority commanded high respect in France. The Institute therefore argued that establishing a high level body that monitored the media did not mean that democracy and liberty would be controlled or stifled as a result. On the contrary, it could be an effective mechanism to safeguard press freedom and plurality of opinion.<sup>12</sup> **Against Child Abuse** commented that the existing self-regulatory monitoring mechanisms were ineffective in protecting the safety and privacy of victims. It suggested that an independent mandated monitoring body be set up which was adequately funded and consisted of experts from both inside and outside the field, and reputable persons from the

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<sup>12</sup> See Jane C Y Lee, "Insights from a tour of *Conseil Supérieur de l'Audiovisuel*", RTHK Media Digest, Sept 1999, pp 10-11 (in Chinese) at <[www.rthk.org.hk/mediadigest/md9909/04.html](http://www.rthk.org.hk/mediadigest/md9909/04.html)>.

community. It further suggested that clear principles and guidelines outlining areas of concern should be laid down and reviewed on a regular basis.

1.45 Representatives of the Sub-committee discussed their proposals with the members of the Central and Western Provisional District Board, the Sha Tin Provisional District Board, the Kwun Tong Provisional District Board and the LegCo Panel on Home Affairs on 23 September, 24 September, 4 October and 8 November 1999 respectively. On 17 November 1999, 39 members of the **Legislative Council** voted in favour of the motion: "That this Council urges the authorities to promote education on media literacy across the board, opposes the establishment of a government-appointed press council and hopes that the media will expeditiously set up an effective self-regulatory mechanism which safeguards freedom of speech and of the press, protects personal privacy and preserves public morality." Three members abstained and no member voted against the motion. In response, the **Home Affairs Bureau** told the Legislative Council that the best way to improve media conduct would be to have an effective self-regulatory mechanism formed by the press.

1.46 To conclude, the major criticisms of the Sub-committee's proposals may be summarised as follows:

- (a) the proposed Council is 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 have not been fully explored, such as amending the PD(P)O to give the Privacy Commissioner powers to deal with media intrusion in addition to matters relating to personal data privacy.

1.47 The submissions made by various parties were considered by the Sub-committee with considerable care and enabled the Sub-committee to understand the issues more thoroughly. In addition to written submissions and commentaries in the press, members of the public have also expressed their views through opinion polls. The findings of these opinion polls are summarised in the next chapter.

## Chapter 2

### Findings of opinion polls

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2.1 A number of opinion polls have been conducted on the proposals of the Privacy Sub-committee and media ethics in general. The findings of these opinion polls should be kept in mind when examining whether there is a pressing social need to protect individuals from unwarranted media intrusion and, if so, what is the most suitable mechanism to address this problem.

2.2 **The HK Policy Research Institute** - The Institute conducted four opinion surveys in August, September, October and November 1999 to track public opinion on the Sub-committee's proposal. The results of these surveys consistently indicated that more than half of the respondents supported the Sub-committee's proposals. The following were the major findings:<sup>1</sup>

- (a) The November survey shows that 52% of the respondents agreed that the incidence of media intrusion was "serious", representing a 10% increase compared with the finding of the September survey. Those who disagreed consistently remained below 10%, and those who were unsure amounted to about 40%.
- (b) Sixty one per cent of the respondents to the November survey agreed with the Sub-committee's proposal to set up a press council to handle complaints about invasion of privacy. Those who disagreed amounted to only 21%. Since the poll was first conducted in August, the percentage of those who agreed with the proposal slightly increased, whereas those who disagreed slightly decreased.
- (c) In the November survey, 56% of the respondents did not believe that the media professionals could deal with the problem by way of a code of conduct, while 44% believed they could. Although the percentage of respondents who believed that the media professionals could address media intrusion by way of a code had increased since August, those who were unconvinced that they could address the problem held steady at over 50%.
- (d) According to the findings of the four surveys, about 40% were of the opinion that the proposal would have an effect on press

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<sup>1</sup> HK Policy Research Institute, "Changing Public Opinion on the Proposed Press Council – Press Release", 17.11.99.



freedom, while about 33% did not consider that it would have such an effect.

- (e) When asked whether they agreed with the media professionals' comment that the Government would interfere with press freedom through the appointment of members into the Council, 34% of the respondents in the November survey replied yes, while 12% replied no and 50% were unsure. This finding is similar to those in the September and October surveys.

2.3 The Institute concludes that the trend of the public opinion indicates that the public desires a press council which is of a high standard, trustworthy, authoritative and independent, and which can effectively monitor press intrusion on the one hand and maintain press freedom on the other.

2.4 ***Apple Daily*** in collaboration with the HK Institute of Asia-Pacific Studies, Chinese University of HK – *Apple Daily* commissioned the Institute to conduct a poll on the performance of the SAR Government and the Chief Executive in August 1999. The relevant findings were as follows:<sup>2</sup>

- (a) Forty four per cent of the respondents generally did not believe what the local newspapers reported. Only 18% generally believed what they reported. Thirty six per cent were unsure.
- (b) Sixty per cent said that abuse of press freedom and infringement of privacy were serious. Only 14% said not serious; 23% were unsure.
- (c) Seventy four per cent said that abuse of press freedom and infringement of privacy occurred mainly in the entertainment pages.
- (d) Sixty per cent agreed with the Sub-committee's proposal that a PCPP be established to investigate privacy complaints and impose sanctions. Only 24% disagreed with the proposal.
- (e) Thirty nine per cent agreed that the PCPP, which would comprise Press Members and Public Members in equal share, be formed by an Appointments Commission appointed by the Chief Executive (sic), while 38% disagreed.
- (f) When asked whether they agreed that an offending newspaper should be subject to a maximum fine of \$500,000 for the first offence and \$1,000,000 for the second and subsequent offence, 48% responded that the level of fines was appropriate and another 7% said it was too low. Those who thought the level of fine too heavy amounted to 35%.

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<sup>2</sup> HK Institute of Asia-Pacific Studies of the Chinese University of HK, "Comments of Citizens on the Performance of the HKSAR Government and the Chief Executive", TEL/24/08/99/Ref.204, 24th to 25th Aug 1999 (Researchers: Wong Kar-ying & Shum Kwok-cheung).

- (g) When asked whether they were worried that press freedom would be undermined if the PCPP was formed, 47% responded no while 35% said yes. Twelve per cent were unsure.
- (h) When asked whether they agreed that it was more desirable to have a council similar to a professional body and formed by the press industry than a council whose authority derived from the Chief Executive, 59% said yes and 28% said no.

**2.5 The HKU Journalism & Media Studies Centre in collaboration with the HKU Social Sciences Research Centre** – The Research Centre conducted an opinion poll in collaboration with the Media Studies Centre in September 1999. The following were the major findings:<sup>3</sup>

- (a) Thirty nine per cent of the respondents replied that the news media in Hong Kong were “quite irresponsible” or “very irresponsible” in their reporting, while those who considered that they were “very responsible” or “quite responsible” amounted to only 18%. Thirty four per cent were unsure.
- (b) Sixty five per cent of the respondents said they “could do nothing or did nothing” about it when dissatisfied with the performance of the newspaper usually read by them, while 17% said they did not buy the newspaper again or bought another newspaper. Only 5% said they would complain to the newspaper, the Government or other organisations.
- (c) Fifty three per cent “strongly agree” or “quite agree” with the suggestion of the Sub-committee to set up a Press Council that would have the authority to hand down a judgement and impose a fine. Those who chose “not quite agree” or “strongly disagree” amounted to 21% and 4% respectively.
- (d) When asked to what extent did the setting up of the Press Council affect press freedom, 40% answered it had a “great effect” or a “considerable effect”; 16% answered it had a “general effect”; while 24% answered “not much effect” or “definitely no effect”.
- (e) Forty three per cent thought the press could not fix itself. Those who thought otherwise amounted to 33%.

**2.6 The Society for Truth and Light** – In October 1999, the Society interviewed 646 persons by asking them questions on the streets.<sup>4</sup> Eighty five per cent of the respondents considered that privacy intrusion by newspapers was serious, especially for artistes and public figures. About 75% did not believe that the news media could regulate itself, mainly because there was

<sup>3</sup> “Poll on Public Opinion on HK’s News Media”, 7th & 8th Sept 1999.

<sup>4</sup> Society for Truth and Light, “Findings of a Questionnaire Survey on the Press Council for the Protection of Privacy”, Nov 1999.

keen competition within the industry which had prompted media organisations to strive to boost sales without regard for professional ethics. Seventy three per cent supported the proposal to set up a PCPP. Eighty per cent considered that the press council should also deal with issues concerning inaccurate reports in addition to privacy.

2.7 On the composition of the council, over 60% of the respondents considered that it was acceptable for the Government to appoint some of the members. Seventy per cent of those who held this view considered that the number of members appointed by the Government should be less than 50%. In relation to members not appointed by the Government, about half of the respondents considered that they should be elected by industry associations and private bodies outside the industry. Less than 20% of the respondents supported the LRC's proposal that the press council should be indirectly appointed by the Chief Executive. About 20% of the respondents categorically rejected any Government appointment of council members. However, nearly 70% supported the Sub-committee's recommendation that any organisation found to be in breach of professional ethics should be liable to a maximum fine of \$500,000 for a first offence and \$1,000,000 for a second or subsequent offence.

2.8 **The Cooperation Scheme of School and Social Work** – The Cooperation Scheme conducted a questionnaire survey in November 1999 to evaluate the performance of the media at various social service centres and secondary schools.<sup>5</sup> The main targets of this survey were teachers, social workers, parents and students. All four respondent groups were most dissatisfied with the media in the following areas: extravagant depiction of sex, propagating violence; inaccuracy in news coverage; glamorising immoral or improper conduct; and hyping up scandals. Media intrusion, the focus of the LRC, was ranked sixth and only 19% of the respondents were dissatisfied with such media practice. However, 80% of the respondents thought that the media should be monitored. Most respondents preferred the industry forming a voluntary trade organisation to monitor the media and vest this organisation with the statutory authority to punish or reprimand offenders who have breached a code of conduct. The option: "Government to set up a trade organization with statutory authority to punish offenders who breach the code of conduct", did not find much favour amongst the respondents.

2.9 **The Hon Bernard Chan** – Bernard Chan, the legislative councillor representing the insurance sector, conducted a survey in October 1999 to collect opinion about the Press Council proposal from the chief executives, presidents, managers and executives of big insurance companies in Hong Kong. The following were the findings:<sup>6</sup>

- (a) Fifty seven per cent of the respondents supported the creation of the Press Council while 43% objected.

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<sup>5</sup> Submission to the Privacy Sub-committee on the *Media Intrusion Paper* dated 30.11.99.

<sup>6</sup> B Chan, "A survey on proposals of the setting up of a Press Council", Nov 99.

- (b) “Many” believed the council should include members appointed by the Government (directly or indirectly) and representatives elected from the media. “Some” also wanted to include academics and legal professionals to ensure that the council can run fairly.
- (c) Forty five per cent disagreed that a body formed by media representatives should be a better way to curb media’s intrusion into privacy, while 43% agreed.
- (d) Seventy five per cent said press freedom was being abused in Hong Kong. Out of these respondents, 55% said the abuse was “serious” or “very serious”.
- (e) Fifty five per cent said they worried that freedom of speech would be harmed if a Press Council as proposed by the Government (sic) was set up. The same number of respondents feared Hong Kong’s well-established image as a free city would be damaged by the establishment of a media watchdog. Forty two per cent worried that it would affect foreign investors’ confidence.

**2.10 The Democratic Party** – The Party conducted a telephone opinion survey in October 1999 in order to find out the views of the public on the issue.<sup>7</sup> The findings showed that almost 60% of the 519 interviewees responded that the extent of privacy intrusion by newspaper had reached a serious level, which reflected that the public was expecting improvement in this area. Furthermore, more than 50% of the interviewees thought that a press council appointed by the Government to monitor the press would undermine press freedom. With respect to what kind of mechanism should be adopted at the present stage to monitor the media, the survey showed that 40-odd percent of the interviewees opined that the public and the industry should bear the responsibility at this stage. Almost 30% believed that there was no need to set up other ways of monitoring. Only 15% considered that it was more appropriate to have a governmental mechanism to monitor the media.

**2.11 The HKNEA, HKJA, HKFJ and HKPPA in collaboration with Lingnan University** – The survey, commissioned by the four journalists’ associations, was conducted by Lingnan University in October 1999 to collect the views of members of the media industry on the PCPP proposal, and their views on media ethics and self-regulation. A total of 1026 reporters and other media professionals responded. The following were the major findings:<sup>8</sup>

- (a) Over 50% of the respondents were “not satisfied” or “very dissatisfied” with the professional ethics of the local media. Only less than 5% of the respondents were “satisfied” or “very satisfied”.

<sup>7</sup> Democratic Party Research Centre, “Opinion poll on press council”, October 1999.

<sup>8</sup> Lingnan University, “Survey on Media Ethics and Self-Regulatory Mechanism”, Oct 1999.

- (b) Forty four per cent of the respondents agreed that “not paying enough respect to individual privacy” was a major problem, while 30% considered “using unfair means to obtain news materials or photographs” a major problem. As for “untrue or exaggerated reports”, 59% considered it a major problem.
- (c) Seventy two per cent “disagreed” or “strongly disagreed” that the “government-appointed Privacy Commissioner” should be responsible for approving or formulating a code of practice on privacy matters for the news media to follow.
- (d) Seventy four per cent “disagreed” or “strongly disagreed” with the proposal to set up a “government-appointed” Press Council for the Protection of Privacy which would have power to receive complaints, initiate investigations, and to take punitive measures against the media.
- (e) Eighty five per cent “disagreed” or “strongly disagreed” that members of the council should be indirectly appointed by the Chief Executive as proposed by the Sub-committee.
- (f) When asked which mechanism is the most desirable way to strengthen professional standards, 52% replied “setting up an internal regulatory mechanism within the industry”, while 35% chose “setting up a non-governmental statutory monitoring body”. Those who preferred a press council formed by the Government amounted to 4%. This shows that 39% considered that setting up a statutory monitoring body is the most desirable way to strengthen professional standards.
- (g) In a separate question specifically on the desirability of setting up a non-governmental statutory monitoring body in Hong Kong, 56% of the respondents “agreed” or “strongly agreed” that Hong Kong should have such a body. Another 15% were unsure. Respondents who “disagreed” or “strongly disagreed” amounted to only 24%.
- (h) Sixty per cent of those who neither “disagreed” nor “strongly disagreed” that a non-governmental statutory monitoring body be created considered that the ambit of the statutory body should cover “untrue or exaggerated media reports”. Other functions, ranked by the number of respondents choosing them, included: “too much sex and violence” (46%), “inappropriate newsgathering methods” (38%), “media intrusion upon privacy” (36%), and “the media contravening social morals” (27%).
- (i) Fifty seven per cent of those who were in favour of a statutory body agreed that it should have the power to initiate investigation. Those who disagreed amounted to only 17%. In addition, 54% agreed that it should have power to openly censure individual

media organisations and media practitioners; 34% agreed that it should have power to “require” an offending media organisation to publish its verdict and to exempt a media organisation from liability for defamation for publishing or reporting the verdict; and 25% agreed that the statutory body could impose a fine.

- (j) Thirty five per cent of all respondents considered that the statutory monitoring body would bring a “positive impact” or a “very positive impact” on press freedom. Only 26% considered that it would bring a “negative impact” or a “very negative impact”. Forty per cent were neutral or chose “don’t know or no comment”.

**2.12 Preliminary observations on polls conducted shortly after the Consultation Paper** – The following are our preliminary observations on the findings of the surveys conducted shortly after the publication of the Consultation Paper:

- (a) The majority of the respondents in the public opinion polls conducted by the following bodies agreed that privacy intrusion by the media (or newspapers) was serious: the HK Policy Research Institute (52%); the HK Institute of Asia-Pacific Studies (60%); the Society for Truth and Light (85%); and the Democratic Party (60%).
- (b) The majority of the respondents in the opinion polls conducted by the following bodies agreed with the Sub-committee’s proposal to set up a press council for the protection of privacy: the HK Policy Research Institute (61%); the HK Institute of Asia-Pacific Studies (60%); the HKU Social Sciences Research Centre (53%); the Society for Truth and Light (73%); and the Office of Hon Bernard Chan (57%).
- (c) 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.

**2.13 The HK Press Council in collaboration with the HK Institute of Asia-Pacific Studies, Chinese University of HK** – The HKPC commissioned the Institute to conduct a poll in January 2002 on the mechanism for the handling of public complaints against newspapers. The following were the major findings:

- (a) As many as 58% of the respondents considered that invasion of privacy by newspapers was serious. Only 11% considered the problem of newspaper intrusion not serious. As for inaccuracy in reporting, 52% considered it serious, while 12% replied not serious.

- (b) Seventy per cent did not know where to lodge a complaint against a newspaper. Those who said they would lodge a complaint with the newspaper concerned or another media organisation amounted to 9% and 11% respectively, while those who preferred lodging a complaint with a journalists' association or the HK Press Council amounted to only 4.8% and 4.7% respectively.
- (c) Eighty five per cent agreed that Hong Kong needed an independent body to monitor the newspapers and accept complaints. The majority considered that the following persons should be represented on that body: academics (83%), newsmen (83%), public members (81%), professionals (75%), legislators (67%), government officials (57%) and judges (54%).
- (d) Seventy two per cent considered that the most desirable method of establishing the monitoring body would be for both the press and the public to join hands in setting it up. Those who preferred the Government making the appointments or the press establishing the body itself amounted to only 8% and 4% respectively.
- (e) Out of those who were aware of the existence of the HK Press Council, 56% considered that it had little effect on improving the ethics of newspapers. Those who believed that it had a huge effect amounted to only 6%.
- (f) The majority believed that a press council should have the following powers: openly condemn a newspaper that is guilty of unethical conduct (90%); impose a fine on an offending newspaper (73%); immune from libel actions for exercising its adjudication function (64%). Forty nine per cent also believed that media reports about the adjudications made by the Council should be privileged.
- (g) When asked whether introducing legislation to protect the Council from libel actions and grant privilege to media reports about the adjudications would have an impact on press freedom, 49% said it would not have an impact. Twenty six per cent even believed that it would have a positive impact. Those who believed it would have a negative impact amounted to only 25%.

2.14 It is worth noting that the survey commissioned by the HK Press Council was conducted 18 months after the establishment of the Council, or two and a half years after the publication of the Consultation Paper. Nonetheless, as many as 58% of the respondents in the 2002 survey considered that invasion of privacy by newspapers was serious. When compared with the findings of the surveys conducted by the HK Policy Research Institute, the HK Institute of Asia-Pacific Studies, the Society for Truth and Light, and the Democratic Party conducted in late 1999, it appears to suggest that the establishment of the HK Press Council in 2000 has done

little to improve the situation, and press intrusion is still a public concern which has not yet been adequately addressed.

2.15 Although the findings of the public opinion polls suggest that a majority of those polled support the Sub-committee's proposal to establish a statutory but independent press council for the protection of privacy, a significant proportion of those polled had misgivings about the proposal's impact on press freedom. They were concerned in particular at the mechanism for appointing the members of the council. We will therefore review the various aspects of the original proposal in the light of the latest developments and examine whether it is really necessary to establish such a statutory body despite the objections of the press. Before we explore whether media intrusion is serious in Hong Kong and whether the self-regulatory initiatives are effective in addressing the public concerns, we explain in the next chapter how press freedom can be reconciled with privacy in the media context.



## Chapter 3

### Press freedom and freedom from media intrusion

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3.1 Any proposal to protect individuals from media intrusion must not create undue restrictions on press freedom. The public interest is best served by an ample flow of information to the public concerning matters of public interest to the community. The press play an essential role in imparting matters of public interest to the community. It is important that their ability to do so is not stifled. Our object is therefore to protect the private lives of citizens from media intrusion without undermining press freedom.

3.2 We examine in this chapter the functions of the right to freedom of expression and how that right interacts with the right to privacy.<sup>1</sup> It will be seen 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 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 be subject to legal restrictions permissible under the Covenant.

#### Freedom of the press

3.3 Article 27 of the Basic Law protects freedom of the press in addition to freedom of speech and of publication. A study into the background to the drafting of Article 27 reveals that there were conflicting views within the Consultative Committee as to whether all aspects of press freedom are covered by “freedom of speech and of publication”. The local press therefore felt that freedom of the press should be expressly stipulated in the Basic Law so that press freedom could be guaranteed.<sup>2</sup>

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<sup>1</sup> See generally, *Conference on freedom of expression and the right to privacy - Conference Reports* (Strasbourg: Directorate General of Human Rights, Media Division, 2000) (conference date: 23.9.99), at <[www.humanrights.coe.int/media/](http://www.humanrights.coe.int/media/)>.

<sup>2</sup> Press freedom was thought to include: (i) the freedom to run a media organisation; (ii) the freedom to collect information; (iii) the freedom to impart information; (iv) the freedom to express an opinion; and (v) the freedom to receive information and opinion. See *Final Report on Freedom of the Press* (1987), prepared by the Special Group on Culture, Technology, Education & Religion and the Special Group on the Rights, Freedom, Welfare & Duties of Hong Kong residents and Other Persons under the Basic Law Consultative Committee, and passed by the Executive Committee on 14.3.87 (CCBL-SG/CES/RDI-01-PR01-870311(E)), para 8.1.1.

3.4 Press freedom is important because the press is a medium for publishing information and ideas, and journalism is the primary and principal manifestation of freedom of expression. The HK Court of Final Appeal has this to say about freedom of expression:

*“Freedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong’s system and way of life. The courts must give a generous interpretation to its constitutional guarantee. This freedom includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticise governmental institutions and the conduct of public officials.”*<sup>3</sup>

3.5 The House of Lords in the UK recognised that freedom of expression serves a number of objectives:

*“First, it promotes the self fulfilment of individuals in society. Secondly, in the famous words of Mr Justice Holmes (echoing John Stuart Mill), ‘the best test of truth is the power of the thought to get itself accepted in the competition of the market.’ Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.”*<sup>4</sup>

3.6 English common law is inapplicable to questions concerning freedom of the press in the US. The First Amendment to the US Constitution contains express prohibitions against the enactment of laws which would abridge freedom of speech or of the press. Any government action that chills constitutionally protected speech contravenes the First Amendment. Thus, although there is authority that a statute may constitutionally prohibit the publication of the name or identity of the victim of a sexual crime, a state may not impose sanctions on the accurate publication of the name of a rape victim obtained from public records.<sup>5</sup> Statutes violating the First Amendment include those which make it a crime for a newspaper to publish, without the written approval of a juvenile court, lawfully obtained, truthful information identifying by name a youth charged as a juvenile offender; or prohibit the publication in a newspaper of the name or picture of any child under the jurisdiction of the family court, except as authorised by the court.<sup>6</sup> The First Amendment also provides some protection for news agencies’ efforts to gather news and protects their right to receive protected speech. However, the First

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<sup>3</sup> *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 920, per Li CJ.

<sup>4</sup> *R v Secretary of State for the Home Department, ex parte Simms* [1999] 3 WLR 328, 337 (per Lord Steyn); citations omitted.

<sup>5</sup> *Cox Broadcasting Corp v Cohn*, 420 US 469.

<sup>6</sup> 58 Am Jur 2d § 26.

Amendment right to gather news does not guarantee to the press a constitutional right of special access to information or places not available to the general public.<sup>7</sup> Newspapers in the US are not immune from the application of general laws. A newspaper publisher has no special privilege to invade the rights and freedoms of others.

3.7 The press is singled out for protection in many constitutions because it is particularly vulnerable to Government control. Unless checked by the constitution, the Government can impose restrictions on the press directly or indirectly, such as through the imposition of heavy taxation on publishing companies, requirements for large bonds to start a newspaper, and injunctions against future issues.<sup>8</sup>

3.8 The press can play the role of professional critics by acquiring enough information to pass judgment on the actions of the Government, and disseminating such information and judgments to the general public.<sup>9</sup> As observed by the European Court of Human Rights:

*“Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.”*<sup>10</sup>

3.9 By and large, the local press has been free to play the role of professional critic. Over the years, local newspapers have been used as a medium to criticise the Qing dynasty, warlords, the Chiang administration, Japanese militarism, colonialism and Communism. Since the Government decided to introduce democracy in the late 1980s, many councillors, political groups and columnists have also criticised the Government through the press.<sup>11</sup> Indeed, a recent study found that 58% of local journalists consider that the most important function of newspapers is to monitor the Government.<sup>12</sup>

3.10 Some may therefore argue that Article 27 of the Basic Law should be construed as creating a fourth institution outside the Government as an additional check on the executive, legislature and judiciary. Under the Basic Law, the Government is accountable to the legislature, and all legislators will ultimately be elected by universal suffrage. In an age of

<sup>7</sup> 16A Am Jur 2d §476 and §477. The First Amendment does not permit the press to break and enter an office or dwelling to gather news with impunity.

<sup>8</sup> Z Chafee Jr, *Government and Mass Communications* (1947) at 34-35; cited in David Lange, “The Speech and Press Clauses” (1975) 23 UCLA Law Rev 77, fn 4.

<sup>9</sup> V Blasi, “The Checking Value in First Amendment Theory”, *American Bar Foundation Research Journal* (1977), No 3, p 521.

<sup>10</sup> *Castells v Spain* (1992) 14 EHRR 445 at 476.

<sup>11</sup> 李谷城, “香港報業百年滄桑”, (HK: Ming Pao, 2000), ch 8.

<sup>12</sup> Justice & Peace Commission and Amnesty International (HK Branch), 新聞工作者人權意識研究 (A Study on the Human Rights Consciousness of Journalists), Oct 2002, para 5.1.3.

transparency and accountability, the public's right to know extends to matters concerning the workings of the Government and what is being done in their name by their representatives in the legislature. If democracy is to function effectively, it is essential that the public is adequately informed as to the actions of Government officials and members of the legislature.<sup>13</sup>

3.11 Apart from the important role played by the press in scrutinising the activities of the Government, press freedom also serves to protect the public from the improper or wrongful conduct of private individuals who are involved in public affairs, particularly those who are powerful and influential in society. Matters relating to the public life of the community and those who take part in it are plainly matters of public interest. The expression "public life" includes not only activities such as the conduct of Government and political life, elections and public administration, but also matters such as the governance of public bodies, institutions and companies which give rise to a public interest in disclosure.<sup>14</sup> Those who engage in public life must expect that their public conduct will be the subject of scrutiny and criticism. The freedom of the press in exposing unlawful or improper conduct should not be undermined.

3.12 However, the constitutional right of free speech in Article 27 is not absolute.<sup>15</sup> Although freedom of the press is important for democracy and the public, it does not give a special right to media organisations to unjustifiably exploit other people's private lives for commercial gain. It is essential to distinguish between the public's interest in information and the interest of a democratic system in having a free press on the one hand, and the commercial interests of media organisations on the other. When weighing the commercial interests of media organisations against the interest of an individual to enjoy a protected private life, one has to look at what is being put onto the scales of press freedom: forced commercialisation of others or important information for the public.<sup>16</sup>

3.13 We must, however, stress that any interference with the press has to be justified. Such interference inevitably has some effect on the ability of the press to perform its role in society. This is the position irrespective of whether a particular publication is desirable in the public interest. The existence of a free press is in itself desirable and so any interference with it must be justified.<sup>17</sup> Lord Nicholls said:

*"To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration and the means employed must be proportionate*

<sup>13</sup> Such an interpretation of Article 27 is consistent with that adopted by the Basic Law Consultative Committee: *Final Report on Freedom of the Press* (1987), above, para 3.

<sup>14</sup> *Reynolds v Times Newspapers Ltd* [1998] 3 WLR 862, 909 (CA). "Public life" does not include matters that are personal and private, in which there is no public interest in disclosure.

<sup>15</sup> *Wong Yeung Ng v SJ* [1999] 3 HKC 143, 147B (decision of Appeal Committee of the CFA).

<sup>16</sup> M Prinz, "Remedies against an infringement of privacy", in *Conference on freedom of expression and the right to privacy - Conference Reports* (Strasbourg: Directorate General of Human Rights, Media Division, 2000), at <[www.humanrights.coe.int/media/](http://www.humanrights.coe.int/media/)>, 67 at 69-70.

<sup>17</sup> *A v B & C* [2002] EWCA Civ 337, para 11(iv).

*to the end sought to be achieved. ... It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment.*<sup>18</sup>

3.14 The need to justify any interference with press freedom has also been stressed by the Supreme Court of South Africa:

*“The press played a critical role in the free exchange of ideas, an essential part of freedom of speech. It was the role of the press to ferret out and expose corruption and maladministration, to contribute to the exchange of ideas and to act as watchdog of the governed. ... In order for a law to qualify as a reasonable and justifiable limit on a right or freedom it had to be shown that the law pursued a sufficiently important objective, was rationally connected to that objective, impaired the right no more than was necessary to accomplish such objective and did not have a disproportionately severe effect on the person to whom it applied.”*<sup>19</sup>

3.15 Our *Report on Reform of the Law Relating to the Protection of Personal Data* published in 1994 approached the relationship between personal data protection and media freedom “starting from a position that free speech is pre-eminent, but that certain exceptions protecting the individual may prove to be necessary.”<sup>20</sup> In its submission, the HK section of JUSTICE queried whether the proposals in the Consultation Paper had deviated from this stance. We maintain the view that the correct starting position is that free speech is pre-eminent, particularly when freedom of speech and of the press is now guaranteed by the Basic Law of the HKSAR. Nonetheless, certain privacy interests are also protected by the Basic Law, including privacy of the person (Article 28), territorial privacy (Article 29) and communications privacy (Article 30). There are no provisions in the Basic Law suggesting that the rights and freedoms in Articles 27, 28, 29 and 30 are in any hierarchical order.

3.16 In addition to the protection of press freedom under Article 27 and the protection of privacy under Articles 28 to 30, the Basic Law also affords protection to these two human rights through Article 19 (freedom of expression) and Article 17 (privacy) of the International Covenant on Civil and Political Rights (“ICCPR”). Article 39 of the Basic Law provides that the provisions of the ICCPR shall be implemented through the laws of Hong Kong, and any restrictions on the rights and freedoms enjoyed by Hong Kong

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<sup>18</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 200 (HL).

<sup>19</sup> *Government of the Republic of South Africa v The Sunday Times Newspaper* [1995] 1 Law Reports of the Commonwealth 168. See also the decision of the Supreme Court of India in *Indian Express Newspapers (Bombay) Private Ltd v Union of India* (1985) SCR (2) 287, 342.

<sup>20</sup> (1994), para 18.17.

residents must not contravene these provisions. Hence, although restrictions may be imposed on the right to privacy or the right to free speech, they must be provided by law and be compatible with the ICCPR.<sup>21</sup> We examine below how free speech and privacy are reconciled under the Covenant.

## International Covenant on Civil and Political Rights

3.17 In addition to the Basic Law, freedom of speech and of the press is protected under the HK Bill of Rights Ordinance (Cap 383) and the ICCPR.<sup>22</sup> Article 19 of the ICCPR provides, *inter alia*:

*“2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

*3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals.”*

3.18 The exercise of freedom of expression may violate the rights of others, including privacy. Contrary to the position in the US where press responsibility is not mandated by the First Amendment to its Constitution,<sup>23</sup> Article 19 of the ICCPR expressly requires that the exercise of the right to freedom of expression carries with it “special duties and responsibilities”. The reference to “special duties and responsibilities” was adopted in order to offer States Parties an express tool to counter abuse of power by the modern mass media. States which supported these proposals were of the opinion that freedom of expression was a “dangerous instrument” as well as a precious heritage. They maintained that, in view of the powerful influence the modern media exerted upon the minds of man and upon national and international affairs, the “duties and responsibilities” in the exercise of the right to freedom of expression should be especially emphasised.<sup>24</sup>

3.19 The idea that the exercise of the right to freedom of expression involves “duties and responsibilities” has also been adopted in Article 10(2) of the European Convention on Human Rights. According to Françoise Tulkens, Judge at the European Court of Human Rights,

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<sup>21</sup> Basic Law, Article 39. *SJ v Oriental Press Group*, HCMP 407/1998, at 59.

<sup>22</sup> See generally, K Boyle, “Freedom of Opinion and Freedom of Expression” in J Chan & Y Ghai (ed), *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths, 1993), ch 13.

<sup>23</sup> *Miami Herald Publishing Co v Tornillo*, 418 US 241, 256.

<sup>24</sup> M J Bossuyt, *Guide to the “Travaux Préparatoires” of the ICCPR* (Martinus Nijhoff Publishers, 1987), p 386.

*“The idea is not to establish a sort of parallelism between ‘rights’ and ‘duties’. Nor is it to subordinate one concept to the other or maintain that freedom of expression ‘has to be deserved’. More subtly and fundamentally, the wording of the Convention calls on each person concerned, according to his individual or social position in the freedom of expression that is guaranteed, to think in terms both of freedom and of responsibility and to act accordingly. Whoever exercises freedom of expression also undertakes (and I use the word ‘undertake’ advisedly, as it means to take upon oneself voluntarily and is quite different from ‘ascribe’) the duties and responsibilities which these freedoms entail.”<sup>25</sup>*

3.20 The UN Human Rights Committee has not commented on the nature of these duties and responsibilities except that it is “the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual’s right.”<sup>26</sup> But the expression is generally presumed to include the duty to present information and news truthfully, accurately and impartially.<sup>27</sup> It has also been suggested that it obliges speakers not to abuse their power at the expense of others.<sup>28</sup> In determining the nature of the “duties and responsibilities”, it is necessary to ascertain the status of the person in question, the content of the information expressed, and the medium chosen for such expression. It is arguable that a person who chooses to publish in a newspaper private information about children, victims of crime, or other vulnerable persons, is under a special responsibility not to harm the individual concerned.

3.21 Whereas the First Amendment to the US Constitution expressly proscribes any laws abridging freedom of speech or of the press, thereby giving pre-eminence to freedom of expression in reconciling free expression with privacy, Article 19(3) of the ICCPR expressly provides that the exercise of freedom of expression 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 Article 17, which provides:

*“1. No one shall be subjected to arbitrary or unlawful interference with the privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.”*

<sup>25</sup> F Tulkens, “Freedom of expression and information in a democratic society and the right to privacy under the European Convention on Human Rights”, in *Conference on freedom of expression and the right to privacy - Conference Reports*, above, 17 at 19.

<sup>26</sup> General Comment 10/19 of 27 July 1983, para 2.

<sup>27</sup> K J Partsch, “Freedom of Conscience and Expression, and Political Freedoms”, in L Henkin (ed), *The International Bill of Rights - The ICCPR* (1981), p 210.

<sup>28</sup> M Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary* (Strasbourg: N P Engel, 1993), at 349.

As regards the protection of “public morals” under Article 19(3), it may imply safeguarding the moral ethos or moral standards of a society as a whole, but may also cover protection of the moral interests and welfare of certain individuals or classes of individuals who are in need of special protection because of lack of maturity, mental disability or state of dependence.<sup>29</sup> As far as the protection of individuals is concerned, the expression protects the psychological as well as the physical well-being of individuals.<sup>30</sup>

3.22 Having regard to the fundamental role of journalistic freedom of expression, we consider that any interference with the practice of journalism must: (a) be foreseen in the complete and exhaustive list of restrictions set out in Article 19(3) of the ICCPR; (b) be necessary in a democratic society and respond to a pressing social need;<sup>31</sup> (c) be laid down by law and formulated in clear and precise terms; (d) be narrowly interpreted; and (e) be proportional to the aim pursued.<sup>32</sup>

3.23 We acknowledge that the purpose of protecting the right to privacy is not, of itself, a sufficient reason to restrict expression. Any restriction on freedom of expression imposed by any privacy legislation must be necessary to protect the right to privacy. Since the requirement of necessity implies an element of proportionality, the scope of the restriction must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect that value.<sup>33</sup>

3.24 Also relevant is Article 5(1) of the ICCPR, which aims at preventing the abuse of any one of the rights and freedoms declared in the Covenant for the purpose of prejudicing one or more of the others. The rights capable of being abused include the freedom of expression. For present purposes, there are two aspects to Article 5(1). First, any limitation on exercise of the right to free expression or the right to privacy must not be greater than is provided for in the Covenant. Secondly, the exercise of the right to free expression cannot aim at the destruction of the right of privacy under Article 17. Conversely, the protection of the right to privacy cannot aim at the destruction of the right to free expression under Article 19.

3.25 Article 19 of the ICCPR provides that freedom of expression includes “freedom to seek, receive and impart information and ideas of all kinds”. A motion to replace the word “seek” with “gather”, thus excluding the right of active inquiry, was defeated in the UN General Assembly. The States voting against the motion stated that active steps to procure and study

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<sup>29</sup> *Dudgeon v UK* (1981) 4 EHRR 149, para 47.

<sup>30</sup> *X v Sweden*, CD, vol 7, p 18.

<sup>31</sup> Note, however, that the Privy Council in *Ming Pao Newspaper v AG of HK* [1996] 3 WLR 272 held at 279 that “necessary” in Article 16 of the HK Bill of Rights (which corresponds to Article 19 of the ICCPR) should be used in its “normal meaning” and needed not be replaced with a phrase such as “pressing social need”.

<sup>32</sup> 4th European Ministerial Conference on Mass Media Policy (Journalistic Freedoms and Human Rights) (1994), DH-MM (98) 4, Resolution No 2, Principle 6; *Ming Pao Newspapers Ltd v AG of HK* [1996] 3 WLR 272, 277.

<sup>33</sup> *Faurisson v France* (1997) 2 BHRC 1 at 17 (individual opinion of E Evatt & D Kretzmer, co-signed by E Klein (concurring)).



information should be protected and that any abuse on the part of journalists could be sufficiently prevented under the limitations clause in paragraph 3.<sup>34</sup>

3.26 The right of the press to acquire information is justified on the grounds that it is desirable to have an informed public which is able to assess the wisdom of governmental decisions.<sup>35</sup> No citizen can obtain for himself all the information needed for the intelligent discharge of his political and social responsibilities. Much of the fact-finding has to be conducted vicariously by the press. The dissemination of information by the press is often the means by which the public first discovers that an issue is a matter of public importance.

3.27 However, the argument that it is a function of the press to keep the public informed on social issues can only justify a right to impart or receive information without undue interference. It does not give the press a privilege to compel others to disclose information which they are unwilling to impart, nor does it entitle the press to use intrusive means to acquire personal information which others wish to keep private. The freedom to seek and receive information under Article 19 does not provide a person with a right to extract information from an unwilling speaker.<sup>36</sup>

## American Convention on Human Rights

3.28 The American Convention on Human Rights is open for ratification by the member States of the Organisation of American States. About 25 States are parties to the Convention. Canada and the US are members of the Organisation but neither have ratified the Convention. The right to privacy in Article 11 of the ACHR is similar to that in Article 17 of the ICCPR, but the right to freedom of expression in Article 13 of the Convention is more elaborate than that in Article 19 of the Covenant.

3.29 After declaring that the exercise of the right to freedom of expression is not subject to prior censorship but is subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure respect for the rights or reputations of others, or the protection of national security, public order, or public health or morals, Article 13(3) of the Convention provides that:

*“the right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.”*

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<sup>34</sup> M Nowak, above, 343.

<sup>35</sup> *AG v Times Newspapers* [1974] AC 273, 315. See also *Re Compulsory Membership of Journalists' Association* (1985) 8 EHRR 165, 184 -185.

<sup>36</sup> See E Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1987), ch III.5.

3.30 In contrast to the ICCPR, the right of reply is expressly guaranteed by the American Convention:

*“1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or make a correction using the same communications outlet, under such conditions as the law may establish. 2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred. ...”*

3.31 The Inter-American Court of Human Rights hears cases submitted to it by the State Parties or the Inter-American Commission on Human Rights after the latter has examined the matter and expressed its opinion. At the request of a member State of the OAS, the Court may also provide a State with opinions regarding the compatibility of any of its domestic laws with the ACHR. In the *Licensing of Journalism* case,<sup>37</sup> the Court expressed the opinion that compulsory licensing of journalists is incompatible with Article 13 of the Convention if it denies any person access to the full use of the news media as a means of expressing opinions or imparting information. In the *Right of Reply* case,<sup>38</sup> the Court advised that Article 14(1) of the Convention recognises an internationally enforceable right to reply or to make a correction, and that when the right is not enforceable under domestic law, the State concerned has the obligation to adopt legislative or other measures to give effect to this right.

## European Convention on Human Rights

3.32 Freedom of expression in Europe is also protected by Article 10 of the European Convention on Human Rights. The European Court of Human Rights has expressed the view that freedom of expression constitutes “one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment”.<sup>39</sup> Subject to such restrictions as are permissible under Article 10(2), it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the community.<sup>40</sup>

3.33 In enunciating the principles underlining the freedom of expression, the Strasbourg authorities have put a high value on informed discussion of matters of public concern. The European Court of Human Rights has therefore ascribed a hierarchy of value, first to political expression,

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<sup>37</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Inter-Am Ct HR (Series A) No 5 (1985), para 85.

<sup>38</sup> *Enforceability of the Right to Reply or Correction*, Advisory Opinion OC-7/86, Inter-Am Ct HR (Ser A) No 7 (1986), para 35.

<sup>39</sup> *Lingens v Austria* (1986) 8 EHRR 407, 418.

<sup>40</sup> *Prager and Oberschlick v Austria* (1995) 21 EHRR 1, 21; *Fressoz v France*, No 29183/95 (21.1.99), para 45.

then to artistic expression and finally to commercial expression.<sup>41</sup> The Court is mindful of the fact that journalistic freedom also covers “possible recourse to a degree of exaggeration, or even provocation”.<sup>42</sup> Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless “to impart - in a way consistent with its duties and responsibilities - information and ideas on all matters of public interest.”<sup>43</sup> Not only does the press have the task of imparting information and ideas on matters of public interest; the public also has a right to receive them. The role of the press has therefore been described as “purveyor of information and public watchdog”.

3.34 Under the European Convention, the exercise of freedom of expression may be subject to such restrictions as are “necessary” in a democratic society for the protection of the reputation or rights of others, or for preventing the disclosure of information received in confidence. The adjective “necessary” has been construed by the European Court as implying the existence of a “pressing social need”. In addition, the interference must be “proportionate to the legitimate aim pursued” and the reasons given to justify it must be “relevant and sufficient”.<sup>44</sup> The proportionality test implies that the pursuit of the countervailing interests mentioned in Article 10 of the Convention has to be weighed against the value of open discussion of topics of public concern. When striking a fair balance between the countervailing interests and the right to freedom of expression, the court should ensure that members of the public would not be discouraged from voicing their opinions on issues of public concern for fear of criminal or other sanctions.<sup>45</sup>

3.35 Although the European Court in *Sunday Times v UK* held that it was “faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted”,<sup>46</sup> jurisdictions in Europe tend to treat the rights of privacy and free expression as fundamental human rights having equal status. Both the right to freedom of expression and the right to privacy under the European Convention are subject to limitations necessary for the protection of the rights of others.<sup>47</sup> In a resolution on the right to privacy, the Parliamentary Assembly of the Council of Europe<sup>48</sup> declared that the two rights “are neither absolute nor in any hierarchical order, since they are of equal value”.<sup>49</sup> It is therefore necessary to find a way of balancing the

<sup>41</sup> D J Harris, M O'Boyle & C Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995), at 414.

<sup>42</sup> *Prager and Oberschlick v Austria* (1995) 21 EHRR 1, at 21.

<sup>43</sup> *Bladet Tromsø v Norway* (1999) 6 BHRC 599, at 624.

<sup>44</sup> *Barthold v Germany* (1985) 7 EHRR 383, para 55.

<sup>45</sup> *Barfod v Denmark* (1989) 13 EHRR 493, at 499.

<sup>46</sup> *Sunday Times v UK* (1979) 2 EHRR 245, para 65.

<sup>47</sup> European Convention on Human Rights, Articles 8(2) and 10(2).

<sup>48</sup> The members of the Parliamentary Assembly are elected or appointed by national parliaments of the Member States of the Council of Europe from among their own members. The European Convention on Human Rights was promoted by the Council of Europe.

<sup>49</sup> Resolution 1165 (1998), para 11, followed in *A v B & C* [2002] EWCA Civ 337, para 11(xii); *Naomi Campbell v Vanessa Frisbee* [2002] EWHC 328 (Ch), para 24; and *Naomi Campbell v Mirror Group Newspapers* [2002] EWHC 499 (QB), para 48 & 98. See also J Craig & N Nolte,

exercise of two fundamental rights. Where a question arises of interference with private life through publication in the mass media, the State must find a proper balance between the two Convention rights.<sup>50</sup> We note that neither English common law nor most constitutional bills of rights treat the right to freedom of speech as a primary right which always takes precedence over other rights or interests.<sup>51</sup>

3.36 The courts in the UK seem to agree with the Council of Europe that the two rights are of equal value. In *Douglas v Hello! Ltd*, Sedley LJ held that neither the right to publish under Article 10(1) nor any of the other rights referred to in Article 10(2) is a trump card under the UK Human Rights Act 1998. He said:

*“The European Court of Human Rights has always recognised the high importance of free media of communication in a democracy, but its jurisprudence does not - and could not consistently with the Convention itself - give Article 10(1) the presumptive priority which is given, for example, to the First Amendment in the jurisprudence of the United States’ courts. Everything will ultimately depend on the proper balance between privacy and publicity in the situation facing the court.”*<sup>52</sup>

And in *Cream Holdings Ltd v Banerjee*, Simon Brown LJ said:

*“It is one thing to say ... that the media’s right to freedom of expression, particularly in the field of political discussion ‘is of a higher order’ than ‘the right of an individual to his good reputation’; it is, however, another thing to rank it higher than competing basic rights.”*<sup>53</sup>

3.37 The English courts have also endorsed the approach recommended by the Council of Europe resolution on the right to privacy. In *A v B plc*, the English Court of Appeal considered that the resolution provided “useful guidance” on the difficult issue of finding the right balance.<sup>54</sup> This approach was subsequently followed by the English courts.<sup>55</sup> However,

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“Privacy and Free Speech in Germany and Canada: Lessons for an English Privacy Tort” [1998] 2 EHRLR 162, 163-165.

<sup>50</sup> *N v Sweden* (1986) 50 DR 173 at 175.

<sup>51</sup> Sydney Kentridge, “Freedom of speech: Is it the primary right?” (1996) 45 ICLQ 253 (arguing that to take the right to freedom of speech to extremes is likely to damage rather than further the purposes for which it exists and may reduce rather than increase society’s commitment to freedom of speech).

<sup>52</sup> *Douglas v Hello! Ltd* [2001] 2 WLR 992 at para 135. Sedley LJ said at para 136 that the qualifications set out in Article 10(2) are as relevant as the right set out in Article 10(1), meaning that, for example, the reputations and rights of others are as material as the defendant’s right of free expression. See also para 150, *per* Keene LJ.

<sup>53</sup> [2003] 2 All ER 318, para 54.

<sup>54</sup> *A v B & C* [2002] EWCA Civ 337, para 11(xii). The resolution is discussed in paras 3.44 – 3.46 below. See also *Campbell v MGN Ltd* [2004] UKHL 22, para 113 (HL).

<sup>55</sup> *Campbell v Frisbee* [2002] EWHC 328 (Ch), paras 24 & 29 (holding that the right to privacy and the right to freedom of expression are of equal value and s 12(4) of the Human Rights Act 1998 does not give the right to free expression a presumptive priority over other rights); *Campbell v Mirror Group Newspapers* [2002] EWHC 499 (QB), paras 43 to 48 & 98 (holding that neither Article 10 nor Article 8 of the European Convention has pre-eminence, the one over the other);

although the right to freedom of expression is not in every case the ace of trumps, “it is a powerful card to which the courts of this country must always pay appropriate respect.”<sup>56</sup> Any impediment to freedom of expression must be on cogent grounds recognised by law.<sup>57</sup>

3.38 In the 1986 case of *Winer v UK*,<sup>58</sup> the European Commission of Human Rights declared inadmissible a complaint that English law lacked adequate remedies apart from defamation against invasion of privacy. However, the Commission in that case did not decide that there is no positive obligation on the part of a State Party to protect individuals from unwanted publicity in a case where the law of defamation cannot provide a remedy for invasion of privacy. Such a situation would arise when the published facts are true, making it impossible for the aggrieved individual to bring an action for defamation. Nor did the Commission address the situation where the invasion takes the form of an intrusion (eg by surveillance or interception of communications), in which case a restriction on freedom of expression would not be directly involved.<sup>59</sup>

3.39 In *Markt Intern v Germany*,<sup>60</sup> a case decided in 1987, the European Commission agreed that, in general, the restriction of true statements requires the application of a stricter test of necessity than the restriction of false or misleading allegations. However, it also recognised that the truth of information cannot be the only criterion for being allowed to publish it. True statements can interfere with legitimate interests which deserve a degree of protection equal to that given to freedom of expression. The European Court affirmed this view in this case, holding that:

*“even the publication of items which are true and describe real events may under certain circumstances be prohibited: the obligation to respect the privacy of others or the duty to respect the confidentiality of certain commercial information are examples.”*<sup>61</sup>

3.40 In 1998, the European Court went so far as ruling that Article 10 of the Convention “does not ... guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern”.<sup>62</sup> It pointed out that:

*“By reason of the ‘duties and responsibilities’ inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in*

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*Douglas v Hello! Ltd (No 3)* [2003] EWHC 786 (Ch), [2003] All ER (D) 209, para 186 (iii)-(v); and *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] 1 All ER 224, para 40.

<sup>56</sup> *Douglas v Hello! Ltd* [2001] 2 WLR 992, para 49.

<sup>57</sup> *Douglas v Hello! Ltd* [2001] 2 WLR 992, para 137.

<sup>58</sup> No 10871/84, 48 DR 154.

<sup>59</sup> D J Harris, M O’Boyle & C Warbrick, above, at 326.

<sup>60</sup> (1987) 11 EHRR 212 at 234 (European Commission decision).

<sup>61</sup> (1989) 12 EHRR 161 at 175 (European Court decision).

<sup>62</sup> *Bladet Tromsø v Norway* (1999) 29 EHRR 125, para 65.

*good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.*<sup>63</sup>

The requirement that the exercise of freedom of expression carries with it “duties and responsibilities” also applies to the press. People exercising freedom of expression, including journalists, undertake “duties and responsibilities” the scope of which depends on their situation and the technical means they use.<sup>64</sup> The “duties and responsibilities” are liable to assume significance when what is at issue is an attack on the reputation of private individuals and an undermining of the “rights of others”.<sup>65</sup>

3.41 Most recently, the applicant in *Peck v UK*<sup>66</sup> complained about the disclosure to the media of closed circuit television footage recorded in a public street, which resulted in his image being published and broadcast widely. The applicant also argued that there was no effective domestic remedy in relation to the violation of his right to privacy under Article 8. The European Court found in favour of the applicant, noting that breach of confidence did not provide him with an actionable remedy on the facts of his case. The Court did not accept as relevant the UK Government’s argument that any acknowledgement of the need to have a remedy would undermine the important conflicting rights of the press guaranteed by Article 10 of the Convention.<sup>67</sup>

3.42 Since the provisions of the European Convention on Human Rights are similar to those of the ICCPR, we find the decisions of the European Court and Commission of Human Rights more relevant to Hong Kong than the decisions of the US courts in understanding how press freedom should be reconciled with privacy under the ICCPR and the Basic Law.<sup>68</sup> Bearing in mind that European Court judges are elected by the Parliamentary Assembly of the Council of Europe and the Assembly’s resolutions have an impact on the development of the jurisprudence under the European Convention on Human Rights, we study the resolutions of the Parliamentary Assembly that touch on media freedom and the right to privacy in the remaining part of this chapter.

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<sup>63</sup> Above.

<sup>64</sup> *Fressoz v France*, No 29183/95 (21.1.99), para 52.

<sup>65</sup> Above.

<sup>66</sup> Application No 44647/98 (date of judgment: 28.1.03). See also *Spencer v UK* (1998) 25 EHRR CD 105, 112.

<sup>67</sup> Above, para 113 (noting that the public authority concerned and the media could have achieved their objectives by properly masking, or taking appropriate steps to ensure such masking of, the applicant’s identity).

<sup>68</sup> Contrast the approach of the Court of Final Appeal in *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 and that of the Court of Appeal in the same case [1999] 1 HKLRD 783. Restrictions on freedom of expression under Article 19(3) of the ICCPR may go beyond those that would be permissible under the US Constitution. See Hannum and Fischer (eds), *US Ratification of the International Covenants on Human Rights* (1993), p 118. The HK courts may refer to the decisions of the European Court or Commission of Human Rights in interpreting the provisions of the ICCPR, the HK Bill of Rights and Chapter III of the Basic Law: *R v Sin Yau-ming*, (1991) 1 HKPLR 88, 107-108 (CA); *Ming Pao Newspapers Ltd v AG of HK* [1996] 3 WLR 272 (PC); *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381, para 59.

## Council of Europe

3.43 The Parliamentary Assembly of the Council of Europe stresses that the media are vital for the creation and the development of a democratic culture in any country. The media provide people with information which influences the process of shaping opinions and of making political choices. The media must therefore be free, pluralistic and independent, and at the same time socially accountable. These are also the conditions for establishing widespread credibility. On the other hand, the Assembly notes that the media can be used as an instrument for settling scores, both political and personal. The increasing commercialisation and competition in the media pushes even serious media towards “standardisation” and sensationalism, preference for “infotainment” and an excessive emphasis on crime and violence.<sup>69</sup> The Assembly expresses the view that the journalist’s profession comprises rights and obligations, freedoms and responsibilities. News organisations must treat information not as a commodity but as a fundamental right of the citizen. To that end, the media should exploit neither the quality nor the substance of the news or opinions for purposes of boosting readership or audience figures in order to increase advertising revenue.<sup>70</sup>

3.44 Noting that the exercise of the right to freedom of expression may conflict with the right to privacy, the Parliamentary Assembly has resolved that the exercise of the former right must not be allowed to destroy the existence of the latter.<sup>71</sup> The following are some of the principles laid down in the resolution on the Right to Privacy passed by the Assembly in 1998,<sup>72</sup> which have been endorsed by the English Court of Appeal in a judgment delivered by Lord Woolf CJ in March 2002,<sup>73</sup> and subsequently followed by the English High Court in at least two cases:<sup>74</sup>

*“6. The Assembly is aware that personal privacy is often invaded, even in countries with specific legislation to protect it, as people’s private lives have become a highly lucrative commodity for certain sectors of the media. The victims are essentially public figures, since details of their private lives serve as a stimulus to sales. At the same time, public figures must recognise that the special position they occupy in society - in many cases by choice - automatically entails increased pressure on their privacy. ...*

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<sup>69</sup> Parliamentary Assembly, Recommendation 1407 (1999) on Media and Democratic Culture, at <[stars.coe.fr/ta/ta99/EREC1407.HTM](http://stars.coe.fr/ta/ta99/EREC1407.HTM)>, paras 1, 2 & 7.

<sup>70</sup> Parliamentary Assembly, Recommendation 1003 (1993) on the Ethics of Journalism, at <<http://stars.coe.fr/ta/ta93/ERES1003.HTM>>.

<sup>71</sup> Declaration on Mass Communication, Media and Human Rights, Resolution 428 (1970), para C1, reproduced in Council of Europe, “Data Protection and Media – Study prepared by the Committee of Experts on Data Protection” (1990), at <[www.legal.coe.int/dataprotection/](http://www.legal.coe.int/dataprotection/)>.

<sup>72</sup> Parliamentary Assembly, Resolution 1165 (1998) on the Right to Privacy, at <[stars.coe.fr/ta/ta98/ERES1165.HTM](http://stars.coe.fr/ta/ta98/ERES1165.HTM)>, paras 6 to 11.

<sup>73</sup> *A v B & C* [2002] EWCA Civ 337, para 11(xii).

<sup>74</sup> *Naomi Campbell v Mirror Group Newspapers* [2002] EWHC 499 (QB), paras 43-48; *Naomi Campbell v Vanessa Frisbee* [2002] EWHC 328 (Ch), para 24.

8. *It is often in the name of a one-sided interpretation of the right to freedom of expression, which is guaranteed in Article 10 of the European Convention on Human Rights, that the media invade people's privacy, claiming that their readers are entitled to know everything about public figures.*

9. *Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts.*

10. *It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed by the European Convention on Human Rights: the right to respect for one's private life and the right to freedom of expression.*

11. *The Assembly reaffirms the importance of every person's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value.*

12. *However, the Assembly points out that the right to privacy afforded by Article 8 of the European Convention should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media."*

3.45 In relation to personal information published in any medium, the Committee of Ministers of the Council of Europe has resolved that the individual concerned should have an effective possibility for the correction of incorrect facts relating to him which he has a justified interest in having corrected, such corrections being given, as far as possible, the same prominence as the original publication. Besides, the individual concerned should have an effective remedy against the publication of facts and opinions which constitute an interference with his privacy, except where this is justified by an overriding legitimate public interest, where the individual has expressly or implicitly consented to publication or where publication is in the circumstances a generally accepted practice and not inconsistent with law.<sup>75</sup>

3.46 In the resolution on the Right to Privacy, the Parliamentary Assembly calls upon the Governments of the member States to pass legislation guaranteeing the right to privacy. The following are some of the guidelines laid down by the Assembly for this purpose:<sup>76</sup>

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<sup>75</sup> Parliamentary Assembly, Resolution 428 (1970) and Committee of Ministers, Resolution (74) 26 on the Right of Reply; Council of Europe, "Data Protection and Media – Study prepared by the Committee of Experts on Data Protection" (1990), at <[www.legal.coe.int/dataprotection/](http://www.legal.coe.int/dataprotection/)>.

<sup>76</sup> Parliamentary Assembly, Resolution 1165 (1998), above, para 14.



*“i. the possibility of taking an action under civil law should be guaranteed, to enable a victim to claim possible damages for invasion of privacy;*

*ii. editors and journalists should be rendered liable for invasions of privacy by their publications, as they are for libel;*

*iii. when editors have published information that proves to be false, they should be required to publish equally prominent corrections at the request of those concerned;*

*iv. economic penalties should be envisaged for publishing groups which systematically invade people’s privacy;*

*v. following or chasing persons to photograph, film or record them, in such a manner that they are prevented from enjoying the normal peace and quiet they expect in their private lives or even such that they are caused actual physical harm, should be prohibited;*

*vi. a civil action (private lawsuit) by the victim should be allowed against a photographer or a person directly involved, where paparazzi have trespassed or used ‘visual or auditory enhancement devices’ to capture recordings that they otherwise could not have captured without trespassing; ...*

*viii. the media should be encouraged to create their own guidelines for publication and to set up an institute with which an individual can lodge complaints of invasion of privacy and demand that a rectification be published. ...”*

3.47 The Parliamentary Assembly has also laid down the ethical principles for journalism which, it believes, should be applied by the profession throughout Europe.<sup>77</sup> The following are those that are related to privacy:

*“23. The right of individuals to privacy must be respected. Persons holding office in public life are entitled to protection for their privacy except in those cases where their private life may have an effect on their public life. The fact that a person holds a public post does not deprive him of the right to respect for his privacy. ...*

*25. In the journalist’s profession the end does not justify the means; therefore information must be obtained by legal and ethical means.*

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<sup>77</sup> Parliamentary Assembly, Recommendation 1003 (1993) on the Ethics of Journalism at <http://stars.coe.fr/ta/ta93/ERES1003.HTM> and Recommendation 1215 (1993). The texts are known as the European Code of Deontology on Journalism.

26. *At the request of the persons concerned, the news media must correct, automatically and speedily, and with all relevant information provided, any news item or opinion conveyed by them which is false or erroneous. National legislation should provide for appropriate sanctions and, where applicable, compensation. ...*

37. *In order to supervise the implementation of these principles, self-regulatory bodies or mechanisms must be set up comprising publishers, journalists, media users' associations, experts from the academic world and judges; they will be responsible for issuing resolutions on respect for ethical precepts in journalism, with prior commitment on the part of the media to publish the relevant resolutions. This will help the citizen, who has the right to information, to pass either positive or negative judgment on the journalist's work and credibility."*

3.48 The Council of Europe resolutions have influenced the development of the jurisprudence under Articles 8 and 10 of the European Convention. Irrespective of whether press freedom and privacy are of equal status under the Basic Law, the views of the Council of Europe serve as useful guidance when the two rights are balanced against each other. We examine in the next chapter whether media intrusion is a serious public concern in Hong Kong before we consider whether any measures should be introduced to protect individuals from unwarranted media intrusion.

## Chapter 4

### Media intrusion in Hong Kong

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4.1 The Sub-committee concluded in the Consultation Paper that unwarranted media intrusion represented a serious problem in Hong Kong. Since only a pressing social need would justify a curtailment of press freedom, we consider here whether the problem we identified in the Consultation Paper remains as serious.<sup>1</sup> We also examine in this chapter the privacy interests of plaintiffs complaining of sexual harassment, plaintiffs in personal injury actions, individuals in public places, relatives of deceased persons, victims of crime, and patients in hospitals. Whether accuracy of personal information is a privacy concern is discussed in Chapter 15.

#### Public opinion polls

4.2 A number of opinion polls have been conducted on this issue since the publication of the Consultation Paper.<sup>2</sup> Most of them appear to conclude that media intrusion is serious in Hong Kong:

- (a) Sixty per cent of respondents in a survey commissioned by *Apple Daily* and conducted by the HK Institute of Asia-Pacific Studies in August 1999 said that abuse of press freedom and infringement of privacy were serious. Only 14% replied that they were not.
- (b) Eighty five per cent of respondents in a survey conducted by The Society for Truth and Light in October 1999 considered that privacy intrusion by newspapers was serious.
- (c) Almost 60% of respondents in a survey conducted by the Democratic Party in October 1999 said that the extent of privacy intrusion by newspapers had reached a serious level.
- (d) The findings of surveys conducted by the HK Policy Research Institute in September, October and November 1999 show respectively that 42%, 49% and 52% of respondents agreed that media intrusion was serious. Those who disagreed in these three surveys amounted to less than 10%.
- (e) The survey conducted by the Cooperation Scheme of School and Social Work in November 1999 found that 19% of respondents were unhappy about media intrusion on privacy.
- (f) The latest survey was that commissioned by the HK Press Council and conducted by the Institute of Asia-Pacific Studies in January 2002. It found that 58% of the respondents considered that

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<sup>1</sup> As regards the position before 2000, see Chapter 2 of the Consultation Paper.

<sup>2</sup> See Chapter 2 above.

privacy intrusion by newspapers was serious. Only 11% replied that it was not.

4.3 We may add that 44% of the respondents in a survey targeted at media professionals and commissioned by the four journalists' associations in October 1999 agreed that "not paying enough respect to individual privacy" was one of the problems of the industry.

### **The case of *HKSAR v Lau Kong-kwun***

4.4 In *HKSAR v Lau Kong-kwun*,<sup>3</sup> the first defendant (D1) was a city crime reporter of *Apple Daily*. He pleaded guilty to two charges of conspiracy to offer an advantage to a public servant. The first charge related to bribes of \$4,000 per month paid between mid-1997 and November 1999 to the third defendant (D3), who was a Police Communications Officer. The second charge related to bribes of between \$6,000 and \$8,000 a month made between December 1997 and November 1999 to the second defendant (D2), who was a Senior Police Communications Officer. D1 admitted that he had asked for crime information and particulars of informants or victims of crimes. D2 admitted that he had provided reports and other information, while D3 admitted that he had provided details of police cases, the date, time and location of crimes, and background information on the victims, arrested persons and wanted persons, including their personal particulars, phone numbers, addresses and occupations. H H Judge Day said:

*"Victims are entitled to privacy, and should have their complaints treated privately, and on occasions sympathetically. Clearly, not all the information sold by the 2nd and 3rd defendant to the 1st would have resulted in an invasion of privacy or embarrassment to witnesses and victims, but the potential is obvious, and indeed the 2nd defendant admits [that] in November 1999, he gave to the 1st defendant information which enabled him to photograph a rape victim. ... Here, we have a lady who has already suffered the trauma and indignity of being raped now being confronted by a press photographer. What would she think, I wonder, if she realised that a member of the police force had caused her photograph to be published in the Apple Daily? What of the family of the child who has been assaulted or who has gone missing? Such crimes need understanding and careful investigation, not necessarily publicity. ..."*

*Counsel for the 1st defendant has been able to show me 12 newspaper articles from three newspapers, the Apple Daily, the Oriental Daily News and The Sun, all of which apparently are highlighted by the ICAC in the depositions, and cover 12 examples of how the Apple Daily supposedly stole a march on*

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<sup>3</sup> DCCC 76/2000, date of judgment: 30 May 2000; unreported. See 馬松柏, 香港報壇回憶錄, (HK: Commercial Press, 2001), pp 44-46.

*their competitors by these offences. It appears that the two competitor newspapers ran the same sort of stories at the same time with broadly similar information in them. ... There is no allegation that any police investigation has been in fact compromised by the activities of these three defendants. That is fortunate, but are we to expect the Apple Daily to behave responsibly in future in the fiercely competitive business of newspaper selling? The standards achieved by these newspapers is abundantly clear from the examples I have been shown. Will editors who publish photographs of dead babies shirk from printing the address of a suspect when it suits them? When I look at the articles from these newspapers, the phrase 'responsible journalism' is not one that springs to mind. ...*

*I have no way of knowing the extent to which the Apple Daily Newspaper was involved in these crimes. The 2nd defendant has said that he was told by D1 that his chief editor knew that the paper was paying for confidential information. The 1st defendant tells the court that he claimed the money he paid to the 2nd and the 3rd from his immediate superior, an editor of the city crime unit, as entertainment expenses. Whether this is the same editor or not, I do not know, and in any event, these people are not here to answer these allegations. The 1st defendant has corrupted the 2nd and 3rd defendants. One would hope that no responsible newspaper would be a part of such scandalous behaviour."*

## **The case of HKSAR v Wong Chung Ki**

4.5 In *HKSAR v Wong Chung Ki*,<sup>4</sup> an editor and a photographer of *Eastweek* magazine gained entry into the flat of a Madam Ng, an assistant to a district councillor, by falsely pretending to be officers of the Housing Department. Two days later, *Eastweek* carried a story concerning Madam Ng's relationship with the district councillor, accompanied by a photograph of Madam Ng's flat. Both the editor and photographer were later convicted of falsely pretending to be a public officer. At the trial, the editor admitted that there was no truth in the story. In sentencing the editor, the magistrate said that he had "*intruded into the home of another person without authority and by impersonating a public officer in pursuit of a speculative, lurid and, in the end, false story.*" Judge Toh also pointed out on appeal that the editor had abused his position as a member of the press. She said:

*"Members of the press hold an important position in a free society because they are the guardians of truth and, like the Hippocratic oath for doctors, journalists hold to the belief that the truth must be known. It is this unwavering pursuit of the truth that had over the years caused members of the public to*

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<sup>4</sup>

HCMA 653/2003.

*develop a deep respect and trust in the words that appeared in our newspapers and magazines. Therefore it is a serious matter when a member of the press in pursuit of a false story, gains entry, under false pretence, into the home of his victim."*<sup>5</sup>

## Extent of the problem

4.6 In order to illustrate the scope and magnitude of the problem, the Consultation Paper cited a number of cases taken at random from the best-selling Chinese-language newspapers. There were, however, submissions arguing that the problem was not serious enough to warrant the establishment of a statutory body to regulate press intrusion. The HKJA, for example, argued that the Sub-committee had failed to demonstrate that the situation was so serious as to merit immediate legislation.

4.7 We are not aware of any studies carried out on the prevalence of media intrusion in Hong Kong. In order to determine whether unwarranted media intrusion is still a problem that calls for immediate attention, we have studied on a random basis the three best-selling newspapers in Hong Kong, namely, *Oriental Daily News*, *Apple Daily* and *The Sun*, during 2000 and 2001. Cases that are found to have privacy implications are collected in Annex 2. The number of readers per day of each of these three newspapers from July 2000 to June 2001 is estimated to be 2,096,000, 1,521,000 and 614,000 respectively, accounting for over 70% of the total readership in 2000/2001.<sup>6</sup> The limited resources available at hand do not allow us to study all newspapers in Hong Kong. We selected these three newspapers for study because their circulation was the highest of all local newspapers and they have refused to participate in the self-regulatory scheme run by the HK Press Council.<sup>7</sup> Nonetheless, we have included at the end of the annex a number of cases from other newspapers to provide a more complete picture. A number of prominent cases in 2002 have also been included to illustrate that media intrusion is still a prevailing public concern.

4.8 About 300 cases are collected in Annex 2. Almost all of them were taken from newspapers published *after* the consultation period was over. Given that the Consultation Paper was published in August 1999 and that considerable public dissatisfaction at the performance of the press was expressed during the consultation period, the newspaper industry has had sufficient time to reflect on their practices and exercise self-restraint. It will be seen that most of the individuals whose privacy was invaded were not public figures prior to the events leading to the coverage. Many of them were vulnerable persons who were not in a position to protect their legitimate interests *vis-à-vis* the media.

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<sup>5</sup> Above, para 9.

<sup>6</sup> *HK Economic Journal*, 17.1.02, citing AC Nielsen RARD Report.

<sup>7</sup> See Chapter 8 below.

4.9 The collected cases serve as the best evidence available to us, second only to the first-hand experience of the individuals involved. However, we do not have sufficient information to enable us to determine that each and every case constitutes an invasion of privacy that was unwarranted in the circumstances. Nonetheless, on the face of the published articles, we are satisfied that all the cases disclose at least a *prima facie* ground of complaint which would have justified an investigation had a press complaints body already been put in place. The cases are therefore presented as *prima facie* examples of unwarranted media intrusion included for the purpose of giving some indication as to the magnitude and seriousness of the problem in Hong Kong.

4.10 The cases and materials in Annex 2 are classified into the following categories:

- (A) victims of crime, domestic violence and accidents (A1 – A59);
- (B) innocent parties (B1 – B14);
- (C) persons attempting suicide and related parties (C1 – C21);
- (D) patients in hospitals and related parties (D1 – D33);
- (E) persons attending funerals (E1 – E8);
- (F) surviving relatives and pictures showing the body or image of a deceased person (F1 – F15);
- (G) plaintiffs in personal injury actions (G1 – G7);
- (H) plaintiffs in actions for sexual harassment (H1 – H4);
- (I) children (I 1 – I 18);
- (J) persons having a mental or physical illness (J1 – J38);
- (K) disclosure of private information about an individual (K1 – K13);
- (L) trespass (L1 – L6);
- (M) following, harassment and use of hidden camera (M1 – M19);
- (N) cases involving *Ming Pao* and *Sing Pao* (N1 – N15).

This classification is for convenience only. The cases may be objectionable on more than one privacy ground.

4.11 It is worth keeping the following points in mind when assessing the prevalence of unwarranted media intrusion in Hong Kong:

- (a) The cases in Annex 2 represent only a portion of the cases raising privacy concerns in the three best-selling newspapers during the survey period.
- (b) Newspapers other than the three best-selling newspapers were not the main focus of our survey.
- (c) Apart from several prominent cases, our survey did not cover privacy intrusion by so-called “gossip magazines”.
- (d) Intrusive materials (whether in the form of images or words) may be republished by the same newspaper on more than one occasion.

- (e) Intrusive materials may also be published in the online version of the newspaper and archived in its website as a permanent record.
- (f) The same intrusive materials may appear in more than one newspaper on the day of publication, or it may be repeated later in other publications.
- (g) Privacy intrusion is not unwarranted if the newspaper has obtained the consent of the individual concerned. Hence, Annex 2 does not include cases in which the report led us to believe that the individual appeared to have no objection to the disclosure of private facts. That belief may, however, be wrong, as the individual may not have been fit to give consent; or the consent was not wide enough to cover the disclosure in question; or it was obtained by misrepresentation or fraud; or it was given subject to a duty of confidence.
- (h) The use of intrusive means to gather personal information is often conducted behind the scenes and would not come to light unless a newspaper discloses the means by which a story was covered.<sup>8</sup> Examples of the use of intrusive means to gather news are therefore under-represented in the Annex.<sup>9</sup>
- (i) Cases involving fabrications or misstatements of facts about an individual which have privacy implications are not included in the Annex.<sup>10</sup> These cases come to light only if the individual

<sup>8</sup> This would happen when the intrusive conduct has resulted in an accident or complaint which has become a newsworthy event in itself. These complaints are uncommon. Occasionally, it is the journalist who discloses that unethical means have been used to collect personal information: see, for example, (a) the editorial in *HK Daily News*, 17.1.01 (stating that some press photographers had forcibly removed the umbrellas used by the news subjects to hide their faces); (b) *HK Economic Journal*, 20.6.98, p 17 (a former journalist reported to have revealed that some journalists had obtained access to victims of traffic accidents in hospitals by disguising themselves as their relatives); (c) *Next Magazine*, No 430, Book B, p 14 (reporting that an artiste who had been admitted into hospital for acute hepatitis A was forced to meet the journalists after they had kept on pushing the door of his ward vigorously for a while); (d) *Ming Pao Daily News*, 3.9.1997, D1 (a press photographer reported to have admitted opening a coffin and taking pictures of the body without the consent of the surviving relatives).

<sup>9</sup> Nevertheless, we may sometimes infer from the information revealed in a report that the information could only have been collected in breach of privacy. An obvious example is the publication of a picture of a patient lying unconscious in a hospital bed.

<sup>10</sup> The following examples of inaccuracies are given to illustrate the difficulties faced by the victims concerned and the types of cases involved: (A) *Next Magazine* published an article on 2.9.94 alleging that the lecturers at the HK Polytechnic University were of a low standard, incompetent and had falsified their qualifications. Four lecturers were named in that article. It took more than five years to settle the dispute. The magazine eventually agreed to publish an apology accepting that the allegations were "without foundation" and be responsible for the university's legal costs. *Next Magazine*, No 512, 6.1.00. (B) An article carried in *Sudden Weekly* in June 1996 fabricated that a named businessman had cancer. (C) *Apple Daily* wrongly reported on 7.10.98 that a named solicitor was suspected of cheating clients' money: *Chu v Apple Daily* [2001] 1375 HKCU 1 (fabricating the fact that the Law Society had reported the matter to the police, the police had visited the plaintiff's home, and the plaintiff's office had been left vacant). The dispute had to be resolved in court and more than three years had elapsed before the court ruled in the plaintiff's favour. (D) After having been shown a report carried in *Apple Daily* on 5.10.99 mislabelling a man accused of murdering a child as a



concerned challenges the veracity of the published information and his complaint is made public in the press. It is also difficult to identify a *prima facie* case in the absence of a thorough investigation.

- (j) A case may involve more than one privacy concern. For example, the coverage may have involved following, intrusion into private property, unauthorised taking of photographs, disclosure of personal particulars, disclosure of family background, and publication of photographs taken without consent.
- (k) A case may involve more than one individual. For example, the report may disclose, without consent, images or private facts about a mentally ill patient and his family members.

4.12 We consider that there is a pressing social need to protect the public from unwarranted media intrusion for the following reasons:

- (a) Article 17 of the ICCPR expressly provides that everyone has the right to the protection of the law against arbitrary or unlawful interference with his privacy, family, home or correspondence. Article 19 of the Covenant also imposes an obligation on the media to be accurate and truthful in its coverage.
- (b) The majority of respondents in most of the public opinion polls conducted after the publication of the Consultation Paper agreed that media or press intrusion (which covers inaccuracy in reporting) was serious in Hong Kong.

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paedophile, a judge said that the report was “inaccurate”, “prejudicial” and “a disgrace of the first order”, and that the information was based on “no evidence whatsoever”. The paper submitted that the reporter “did not invent” that part of the story that was prejudicial but had used information published in other newspapers. The trial was aborted as a result. *SCMP*, 7.10.99; *HK Standard*, 7.10.99; *Oriental Daily News*, 7.10.99. (E) A large part of what was written about the victim in an article published in *Next Magazine* on 30.7.00 about friendship was alleged to be “complete fabrication”. *Kam Sea Hang Osmaan v Privacy Commissioner*, Administrative Appeal No 29 of 2001 (holding that the victim had no relief under the PD(P)O). (F) A victim whose genitals had been injured by his mentally ill wife complained that the report by *Apple Daily* that the tragedy was the result of him having an extra-marital affair was entirely without basis: HKPC complaint dated 18.1.01. (G) A victim of sexual assault accused a number of newspapers of fabricating the details of the crime committed against her: 小惠, “傳媒施暴”, in 燭光網絡, vol 3, no 6, Nov 2000, p 3. (H) *Apple Daily* published an apology one month after a senior government official had complained that a report about her husband’s alleged indebtedness and their marriage was incorrect: *Apple Daily*, 28.7.00, A 6, referring to the report in *Apple Daily* on 30.6.00. (I) A murder trial was adjourned after the defence counsel had complained that a report in *The Sun* about the case was “sensational, adverse, prejudicial, inaccurate and misleading”. The judge said, “A good deal of what appeared in the newspaper is simply untrue. It is a fiction, an extremely dangerous one.” *South China Morning Post*, 24.3.01, referring to an article in *The Sun* on 22.3.01. (J) A company director complained that *Apple Daily* had wrongly identified him as the man who had gambled away the prize he had won in a lottery and who had asked his wife to settle his gambling debts for him: *Oriental Daily News*, 17.11.01, A 12, referring to the front page story in *Apple Daily*, 22.10.01. (K) Shum Kin-fun complained that *Eastweek*, No 510, had fabricated the cover story that he had had an extra-marital affair: *HK Economic Times*, 29.8.02; HCA 3310/2002.

- (c) A significant percentage of the media professionals who responded to the survey commissioned by the four major journalists' associations considered that "untrue or exaggerated reports" (59%), "not paying enough respect to individual privacy" (44%), and "using unfair means to obtain news materials or photographs" (30%) are major problems.
- (d) The examples in Annex 2 suggest that press intrusion is common in Hong Kong. The severity of the problem should not be measured purely by the number of cases, however: even if the number of cases were markedly reduced, each invasion of privacy has the potential to cause significant distress to the victim concerned. Each victim is entitled to an effective remedy, whether or not unwarranted media intrusion is prevalent in Hong Kong
- (e) All members of the Newspaper Society and the majority of the respondents to the Consultation Paper perceived a need to establish an independent non-governmental press council to deal with complaints from the public.

4.13 The Sub-committee discussed some of the privacy concerns of the victims of media intrusion in Chapter 2 of the Consultation Paper. We supplement that discussion by focusing on the following issues in the remaining part of this 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.

### **Intrusion upon solitude or seclusion *versus* unwanted publicity**

4.14 Complaints about the media infringing an individual's right to privacy fall mainly into two categories: (a) the use of intrusive means (eg trespass, surreptitious recording, interception of private communications, constant monitoring and misrepresentation) to obtain personal information for publication or broadcasting; and (b) unwanted publicity, however obtained, concerning private information relating to an individual, whether the publicised information is accurate or not. Where a particular case involves the publication of a picture in a newspaper, the objection might relate to the taking or obtaining of the picture by a journalist, or the publication of the picture in the newspaper, or both. In some cases, it is the taking of a picture that is objectionable; in others, it is the publication in the press. The taking of a picture itself may be intrusive even though the individual concerned is not identifiable in the picture eventually published in the newspaper. Obvious

examples are the unauthorised taking of pictures inside a hospital ward or mourning hall, or when the court has already made an order prohibiting the media from disclosing the identity of a witness in a criminal trial. It should be noted that unwarranted publicity given to private life may, in exceptional circumstances, constitute a violation of the private life of the person to whom the facts relate, even though the identity of that person is not ascertainable from the report. For example, the publication of a picture showing a paedophile engaging in unlawful sexual conduct with a minor inside a hotel room may infringe the minor's privacy even though the face of the minor is concealed in the picture and his identity is not ascertainable from the report.<sup>11</sup>

4.15 Each case should be considered as a whole. The taking of a photograph of someone walking in a public place is innocuous in itself. However, the privacy of that individual is at stake if the photograph is used to identify or connect him to a news story in which details of his private life are disclosed. This is the case even though his name is not revealed in the story. The mere fact that a story is of public concern does not necessarily entitle a newspaper to identify the individual concerned. Whether a story is of public concern and whether an individual's identity should be disclosed are separate issues that should not be conflated.

4.16 **Consent of individuals concerned** – The fact that an individual is willing to be interviewed by a journalist does not necessarily mean that the individual has also consented to the journalist taking pictures of his likeness or property (eg private photographs put up on the walls or documents laid on the table), nor does it necessarily mean that the individual has consented to the newspaper publishing the individual's personal particulars (including his name, age and address) and the pictures taken by the journalist without the individual's consent. There are also cases where the consent of the individual concerned is not real or sufficient, as would be the case when the journalist does not disclose his real identity, or the individual is a minor, or is mentally handicapped, suffering from dementia, or affected by drugs. Any consent given by a minor or mentally retarded person to an interview, photo-taking or publication would not suffice if the consent of his guardian is lacking. The consent given by an individual may also be for a limited purpose. Thus, consent for a press photographer to take pictures of the injuries suffered by an individual does not normally entitle the photographer to include the individual's likeness in the picture. Consent on one occasion for one purpose does not extend to subsequent occasions or for other purposes.

## **Plaintiffs suing for sexual harassment**

4.17 We have included in Annex 2 a number of cases in which the identities of the plaintiffs in actions for sexual harassment were disclosed in

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<sup>11</sup> There was a public outcry when *Apple Daily* published on its front page, three pictures showing a man engaging in sexual conduct with a girl inside a room. *Apple Daily*, 9.1.03, A 1. One of the three pictures was also published in *Next Magazine*, No 671, p 30.

the news reports.<sup>12</sup> Although there is no law prohibiting the media from publicising the identities of victims of sexual harassment, victims of sexual harassment who are in a similar position to victims of sexual assault should not be subjected to a “second victimisation” by the media publicising their names with or without a picture taken against their will.<sup>13</sup> Publicising the identities of these plaintiffs would discourage victims in similar circumstances from seeking redress in civil courts, thus defeating the purposes of the Sex Discrimination Ordinance.<sup>14</sup>

## Plaintiffs in personal injury actions

4.18 As regards plaintiffs in personal injury actions, they have no choice but to reveal the effect of the injuries on them at the trial. These facts might relate to the plaintiff’s sex life, physical condition, mental health, financial position, and relationship with his or her intimate partner. Sensitive data might be revealed as a result, such as the fact that the plaintiff has to undergo an operation on an intimate part of his or her body, is incontinent, cannot have sex, is impotent, infertile, mentally retarded, mentally incapacitated, or is having psychiatric problems in consequent of the defendant’s wrongful act. The plaintiffs in personal injury actions are drawn into a public forum against their will. They bring a legal action only to attempt to obtain the only redress made available to them by the law. Whilst the physical and mental condition of the plaintiff is relevant to the amount of damages awarded by the court, disclosing his identity in the press does not advance the public’s interest in understanding and supervising the conduct of judicial proceedings or public affairs in general, but would cause injury to the feelings of the already unfortunate plaintiff.

## Privacy interests of individuals in certain public places<sup>15</sup>

4.19 The HK Journalists Association referred to a few cases cited in the Consultation Paper and suggested that information in the public domain and pictures taken in public places should not be suppressed on grounds of privacy. The Association further suggested that the conduct of journalists at funerals was not a privacy-related matter.<sup>16</sup>

<sup>12</sup> Note in particular that the court in Case H2 and H4 refused to make an anonymity order. Cf *L v Equal Opportunities Commission* [2002] 3 HKLRD 178 in which the Court of Appeal held that the administration of justice in disability discrimination cases is best served by making an anonymity order.

<sup>13</sup> It is an offence to publicise the identity of an alleged victim of sexual assault under ss 156 and 157 of the Crimes Ordinance (Cap 200).

<sup>14</sup> We have recommended in our *Civil Liability Report* that the District Court in proceedings under s 76 of the Sex Discrimination Ordinance should have the power to make an anonymity order.

<sup>15</sup> See also the paragraphs in Chapter 7 of our *Civil Liability for Invasion of Privacy Report* (2004) under the heading of “Facts concerning an individual’s private life that are available in the public domain”.

<sup>16</sup> Some codes of journalistic ethics acknowledge that an individual may have a privacy interest in certain publicly available facts or information. Eg, Guidelines for Good Journalistic Practice adopted by the Union of Journalists in Finland, para 29; Privacy Principles developed by the New Zealand Broadcasting Standards Authority, principle (ii); and Code of Practice ratified by the UK Press Complaints Commission, para 3.

4.20 The issues as to whether there can be an invasion of privacy in a place accessible or visible to the public, and whether there can be an invasion of privacy by publishing information in the public domain, are discussed in Chapter 7 of our report on *Civil Liability for Invasion of Privacy*. Suffice it to say that the aphorism that “what is public is not private and what is private is not public” is an oversimplification of the issues. “Public” and “private” are not mutually exclusive all-or-nothing categories but are matters of degree, existing on a continuum.<sup>17</sup> The following observations made by the European Court of Human Rights are also pertinent:

*“[Article 8 of the European Convention on Human Rights] also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of ‘private life’.”<sup>18</sup>*

*“A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (eg a security guard viewing through close circuit television) is of a similar character. Private life considerations may arise however once any systematic or permanent record comes into existence of such material from the public domain. ... In the case of photographs, the Commission previously had regard, for the purpose of delimiting the scope of protection afforded by Article 8 against arbitrary interference by public authorities, to whether the taking of the photographs amounted to an intrusion into the individual’s privacy, whether the photographs related to private matters or public incidents and whether the material obtained was envisaged for a limited use or was likely to be made available to the general public.”<sup>19</sup>*

4.21 In order to illustrate that privacy protection may extend to certain public places, we set out below some categories of persons who may reasonably expect that their privacy will be respected even though they appear in a place accessible or visible to members of the public:

- (a) cases where a picture showing the presence of an individual at a particular location in a public place would reveal a private fact

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<sup>17</sup> E Paton-Simpson, “Private Circles and Public Squares: Invasion of Privacy by the Publication of ‘Private Facts’” (1998) 61 MLR 318 at 324.

<sup>18</sup> *Peck v UK*, Application No 44647/98 (date of judgment: 28.1.03), para 57; applied by the UK House of Lords in *Campbell v MGN Ltd* [2004] UKHL 22, paras 122-123. The European Court held that disclosure by a public authority to the media of the footage recorded by a CCTV camera installed in a high street showing the images of a man who had attempted suicide was a serious interference with his right to respect for his private life.

<sup>19</sup> *PG and JH v UK*, Application No 44787/98 (date of judgment: 25.9.01), paras 57-58; applied by the UK House of Lords in *Campbell v MGN Ltd* [2004] UKHL 22, paras 122-123.

about him or her because of the proximity of that location to the premises of an institution – examples are:

- (i) students attending a school for mentally handicapped children;
  - (ii) drug addicts visiting a methadone clinic;
  - (iii) patients visiting a psychiatric centre or day hospital;
  - (iv) patients visiting a clinic treating AIDS or a venereal disease;
  - (v) pregnant women visiting an abortion centre; and
  - (vi) persons reading the recruitment notices put up on the windows of a job centre facing the street;
- (b) cases where an individual is in a place accessible or visible to the public but nevertheless has a reasonable expectation of privacy because of the functions of the place in question – examples are:
- (i) patients being treated in a general ward;
  - (ii) sick or injured persons waiting for admission into hospitals;
  - (iii) persons praying inside a church;
  - (iv) persons grieving inside the mourning hall of a funeral home;
  - (v) persons leaving a mortuary;
  - (vi) persons changing clothes inside a public changing room;
  - (vii) persons washing inside a public bathroom; and
  - (viii) persons reading the recruitment notices put up inside a Labour Department job centre;
- (c) cases where an individual is in a public place but has a reasonable expectation of privacy because he or she is then in a state where intimate facts about him or her are exposed as a result of an event outside his or her control – examples are individuals whose private parts or undergarments are exposed in public in consequence of a traffic accident, fire or suicide attempt, or while receiving first aid in a public place.

4.22 As regards the suggestion that details of an individual's private life should not be protected once disclosed in the public domain, we would like to point out that if we follow this logic to the extreme, then a nude photograph or intimate facts (such as the fact that a named person is mentally ill or has cancer) which have been wrongfully disclosed in the public domain could be further publicised even though this would cause significant harm to the individual concerned. This proposition is, in our view, untenable. In contrast to confidential information, details of an individual's private life do not in general lose their private character and, hence, should not be deprived of protection merely because they have been disclosed in the public domain.

### **Pictures showing the body or image of a deceased person**

4.23 A few newspapers do not refrain from publishing pictures of the body or image of a deceased person taken at the mortuary or at the death

site. There was a public outcry when *Next Magazine* published a picture of the corpse of a former starlet on its front cover, but there are many other instances in which pictures of the remains of ordinary citizens killed in a suicide or car crash have been published in newspapers.<sup>20</sup> In a poll conducted by Caritas, 89% of those interviewed considered that it was improper for newspapers to publish a picture of the uncovered body of a deceased person. Ninety-two per cent also thought that it was improper to publish an enlarged picture of a deceased person whose underwear was exposed.<sup>21</sup> The publication of these pictures was considered disrespectful to the deceased and an affront to the deceased's dignity. However, the HK Journalists Association considers that the pictures involve issues of culture and custom that are outside our privacy reference. We have therefore examined the jurisprudence of mainland China, Canada, France and the US on the privacy interests of deceased persons and surviving relatives. Annex 3 summarises the findings of that survey.

4.24 Most people contend that when a person dies, any valid privacy interests he has disappear. This seems to be the position in those jurisdictions which recognise a common law right of privacy. The courts held that the right of privacy is personal and can only be asserted by the individual whose privacy has been invaded. The right is limited to the living and may not be asserted by others after the deceased's death. The relatives of the deceased who are disturbed or outraged by reports about his death cannot assert the right unless their own privacy has been invaded.

4.25 However, some consider that the privacy interests of a deceased person survive his death but diminish over time. According to this view, the deceased's privacy should be protected for a limited period of time, such as one, five, ten or twenty years. The freedom of information and protection of privacy legislation in Canada adopts such a view and provides that personal information should not be released by an archival body unless the person concerned has passed away for more than twenty years.

4.26 Nonetheless, there is general agreement that gruesome pictures of a deceased person have privacy implications at least for his immediate relatives. Many of the court cases summarised in Annex 3 held that personal privacy extends to the memory of the deceased held by those tied closely to the deceased by blood or love. Pictures of a body which, if disclosed, would disgrace or injure the memory of the deceased should be withheld unless there are countervailing interests justifying their disclosure.

4.27 Inevitably, most families suffer profound grief when a loved-one dies. Deaths considered newsworthy by the press are usually tragic and sudden and the publication of graphic and explicit pictures of the deceased is likely to magnify the surviving relatives' grief and suffering. Such pictures, when published in mass circulation newspapers, are likely to have a significant impact, particularly on the deceased's children.

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<sup>20</sup> See Annex 2, section F.

<sup>21</sup> Caritas Community Centre – Kowloon, 家長對中文報章新聞圖片處理手法意見調查報告 (June 1999), para 7(2).

4.28 Bereavement, the process through which a person comes to terms with the loss of his relative or friend, is something that can be intruded upon. Having regard to the jurisprudence summarised in Annex 3, we consider that surviving relatives have at least a privacy interest in ensuring that pictures of a deceased person's body or image are not published, even though it is open to debate whether that interest falls within the ambit of the right to privacy under Article 17 of the ICCPR. Pictures of the deceased's body may degrade the memory of the deceased and affect the privacy of persons who are related to the deceased by blood or love. It is difficult to justify the publication of these pictures unless a vital public interest is at stake.

## Victims of crime

4.29 Victims of crime and tragedy are particularly vulnerable to media intrusion.<sup>22</sup> The *Handbook on Justice for Victims*,<sup>23</sup> which is prepared by experts from more than 40 countries and developed in cooperation with the Centre for International Crime Prevention of the UN Office for Drug Control and Crime Prevention, states that the dignity and healing of victims depends on the respect and assistance extended to them by professionals and others who come into contact with them, including the media. As far as media professionals are concerned, they should be encouraged to adopt a code of ethics specific to their coverage of crime and victimisation. The Handbook further states that when victim advocates consider proposing a code of ethics to media professionals, the following issues should be "seriously considered":<sup>24</sup>

*"The news media should:*

- *Present details about a crime in a fair, objective and balanced manner, avoiding over-dramatized news;*
- *Recognize the importance of publishing or broadcasting information that can contribute to public safety while, at the same time, balancing this need against the victim's need for privacy;*
- *Respect the privacy of individuals who choose to refrain from dealing with the media or who choose to address the*

<sup>22</sup> See also the section on "Facts concerning an individual's private life that are available in the public domain" in Chapter 7 of our *Report on Civil Liability for Invasion of Privacy* (2004).

<sup>23</sup> *Handbook on Justice for Victims – On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (New York: UN Centre for International Crime Prevention, UN Office for Drug Control and Crime Prevention, 1999), at <[www.uncjin.org/Standards/9857854.pdf](http://www.uncjin.org/Standards/9857854.pdf)>, ch III G. The General Assembly of the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985: General Assembly resolution 40/34, annex. In 1996, the UN Commission on Crime Prevention and Criminal Justice adopted a resolution to develop a manual on the use and application of the Declaration. The Handbook was developed in response to that resolution. See also M E I Brien & E H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85)11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (dissertation advisor: Professor Marc Groenhuijsen, University of Tilburg) (Nijmegen, The Netherlands: Wolf Legal Productions, 2000), chs 1 & 27, at <[www.victimology.nl/](http://www.victimology.nl/)>.

<sup>24</sup> Above, ch III, section 2.



- *media through a spokesperson of their choice;*
- *Provide a balanced perspective regarding a criminal act that reflects the concerns of the victim and the offender;*
- *Never report rumours or innuendoes about the victim, the offender or the crime unless such information has been verified by reliable sources;*
- *In crimes other than homicide, identify the victim by age and area where the crime occurred, omitting names, street addresses and block numbers;*
- *Refrain from using information gained from private conversations with victims or their relatives who are in shock or distress; ...*
- *Never publish the identity of a sexual assault victim without his or her prior consent, regardless of whether the case is in the criminal or civil courts;*
- *Never publish the identity of a child victim;*
- *Never identify alleged or convicted incest offenders when such actions could lead to the identification of the victim;*
- *In cases of kidnapping where it is determined that the victim has been sexually assaulted, stop identifying the victim by name once a sexual assault has been alleged;*
- *Never, without the victim's prior consent, identify the victim of fraud or other crime that tends to humiliate or degrade the victim;*
- *Refrain from photographing or broadcasting images that portray personal grief or shock resulting from a criminal act;*
- *Never publish photographs or broadcast images that could place the subject in danger;*
- *Refrain from showing photographs or broadcasting images of deceased victims, body bags or seriously wounded victims;*
- *Never publish photographs or broadcast images of funerals without the prior consent of the surviving family members; ...*
- *Approach the coverage of all stories related to crime and victimization in a manner that is not lurid, sensational or intrusive to the victim or his or her family."*

4.30 We note that the *Victims of Crime Charter* promulgated by the Department of Justice contains provisions on the victim's right to privacy.<sup>25</sup> However, these provisions are general in nature and do not provide any guidance on the treatment of victims by the news media.

<sup>25</sup>

Paras 2 & 9 of the Charter, at <[www.info.gov.hk/justice/new/depart/public15.htm](http://www.info.gov.hk/justice/new/depart/public15.htm)>. ("Members of the law enforcement agencies, prosecutors, court staff, counsel, and other persons dealing with victims of crime shall at all times treat them with courtesy, compassion, sensitivity and respect for their personal dignity and privacy. ... All those involved in the criminal justice system, from police officer to judiciary staff, shall respect the victim's right to privacy and confidentiality.")

### Recommendation 1

**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.**

## Patients in hospitals

4.31 One type of media intrusion which is clearly indefensible is the unauthorised taking of pictures of hospital patients and their publication in newspapers.<sup>26</sup> The publication of a picture of a patient lying in a hospital bed is objectionable not only on the ground that the newspaper has given unwanted publicity to his private life, but also on the ground that the press photographer has intruded upon the patient's solitude or seclusion in circumstances where the patient was not in a fit condition to give consent or raise objection. The taking of a picture in these circumstances is objectionable in itself whether or not the patient is identifiable in the picture published in the newspaper.

4.32 As illustrated by the cases collected in Annex 2, there are different levels of intrusion in the coverage of hospital patients. The intrusion is particularly objectionable when:

- (a) the journalist gained access to the ward by misrepresentation or subterfuge;
- (b) the journalist obtained an interview with the patient by falsely claiming that he was a social worker, a Government official, or a reporter from a reputable newspaper;<sup>27</sup>
- (c) the picture was taken without the knowledge and consent of the hospital, the patient and his relatives;
- (d) the patient is young, old, mentally unsound, unconscious or in a critical condition;
- (e) the journalist obtained the information by engaging in a conversation with the patient in circumstances where the latter was not mentally or physically fit to talk (as when the patient suffered brain or neck injury or was under the influence of drugs);

<sup>26</sup> See *Kaye v Robertson* [1991] FSR 62 in which the English Court of Appeal held that there was no right of action for breach of a person's privacy at common law.

<sup>27</sup> Depending on the circumstances of the case, a journalist who falsely claims that he is an officer of the Social Welfare Department may be charged with an offence under s 22 of the Summary Offences Ordinance (Cap 228) (falsely pretending to be a public officer); s 73 of the Crimes Ordinance (Cap 200) (using a false instrument with intent); s 75(1) of the Crimes Ordinance, (possessing a false instrument with intent); s 75(2) of the Crimes Ordinance (knowingly possessing a false instrument); or s 35(h) of the Social Workers Registration Ordinance (Cap 505).

- (f) the journalist removed the blanket on the patient's body or limbs when he or she was unconscious so that the journalist could take pictures of the patient's injuries;
- (g) the private parts of the patient were exposed when the journalist was present at the ward; or
- (h) the private parts of the patient were included in the pictures, whether or not the private parts have been concealed.

4.33 Media intrusion in hospital is a serious infringement of the right to privacy because:

- (a) hospital patients are vulnerable and are not in a position to protect themselves;
- (b) the photography or the mere presence of the journalist in the ward is in itself an intrusion if the permission of the patient and/or the hospital is wanting;
- (c) intimate facts about the patient may be exposed as a result; and
- (d) the intrusion or publication may affect the physical and mental health of the patient.

4.34 We find the conduct of the journalists and editors involved in these cases reprehensible. We are also disturbed by the fact that hospital patients on the mainland have also suffered at the hands of the local press. A number of pictures taken in mainland hospitals show that the private parts of seriously injured patients (one of them a child) were exposed when the pictures were taken.

4.35 Media intrusion in hospital can rarely be justified in the public interest, even when the patient is a public figure or suspected of committing a crime, let alone when the patient is a victim of crime or accident. We are, however, not aware of anyone (including the four journalists' associations, the public authorities and the human rights groups) condemning such practices.

4.36 Although bylaw 7(1)(f) of the Hospital Authority Bylaws makes it an offence to take a photograph, video or film of a patient in a public hospital without his consent,<sup>28</sup> we are not aware of any prosecution for this offence. A journalist could enter a ward by disguising himself as a friend or relative of a patient. He could also use a hidden camera to take pictures inside hospital without the staff and patient knowing it. In any event, the Hospital Authority (HA) does not have the power to arrest a press photographer suspected of committing the offence, which is non-arrestable in nature. Nor does the HA have the power to seize the press photographer's camera or compel him to produce his identity card. Furthermore, the newspaper publishing a photograph taken in contravention of that bylaw cannot be compelled to disclose the press photographer's identity. We also note that the HA does not have any internal guidelines or mechanism for dealing with these offences.

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<sup>28</sup> Hospital Authority Bylaws (Cap 113), bylaw 7(1)(f). Any person who contravenes this bylaw is liable to a fine of \$2,000 and to imprisonment for three months.

4.37 We acknowledge that the primary duty of the HA is to save lives and cure the sick. However, this does not absolve the HA from its duty to provide an environment where the privacy of its patients are protected from undue interference. Indeed, one of the objectives of the Authority stated in the HA Ordinance is to improve the environment in public hospitals to meet the needs of patients.<sup>29</sup> This objective encompasses the duty to protect the privacy of those who are under its care and are not in a position to look after their own interests. The HA is also equipped with the authority to prosecute a person who refused to leave a hospital when directed to do so or has wilfully obstructed, disturbed or annoyed a patient in the lawful use of a hospital or its facilities.<sup>30</sup>

4.38 We appreciate the difficulties faced by the HA in enforcing the Bylaws. We are also aware that the HA does take action to protect the privacy of its patients on occasions, as when the patient concerned is a public figure whose health information is much sought after by the press. However, the fact remains that the relevant Bylaws are apparently not strictly enforced and have not been effective in protecting patients from media intrusion. Understandably, the focus should be on the intruders rather than the hospitals, but the self-regulatory measures initiated by the journalists' associations do not seem to have any impact on such conduct.

4.39 What is required, at the minimum, is a change in the approach of the HA, the police and the news media. The HA should address the privacy concerns of patients and raise the awareness of the general public of their right to protection from media intrusion when being treated in public hospitals.

## **Recommendation 2**

### **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.**

<sup>29</sup> Hospital Authority Ordinance (Cap 113), s 4(c)(iii).

<sup>30</sup> Hospital Authority Bylaws (Cap 113), bylaws 8(2) and 9.

4.40 Education and better enforcement of the Bylaws are not sufficient in themselves. The Bylaws do not protect sick or injured persons who have not yet been registered by a public hospital as patients.<sup>31</sup> Nor do the Bylaws apply to patients or inmates in private hospitals, sanatoriums and convalescent homes. It is also not an offence to publish a picture taken in consequence of a violation of that bylaw. The need to introduce further measures will be reviewed after we have examined the self-regulatory initiatives and the Personal Data (Privacy) Ordinance in Chapters 7 to 9. Before that, we first explore in Chapter 5 the impact of media intrusion on its victims.

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<sup>31</sup> See definition of “patient” in bylaw 2.

## Chapter 5

### Impact of media intrusion on victims

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5.1 The interests protected by the right to privacy are intangible even though the effects of an infringement may be significant. To take the definition of privacy adopted by the Australian Law Reform Commission as an example, there are at least four categories of privacy interests requiring legal protection, namely: (a) the interest in controlling entry to the “personal place” (“territorial privacy”); (b) the interest in freedom from interference with one’s person and “personal space” (“privacy of the person”); (c) the interest of a person in controlling the information held by others about him (“information privacy”); and (d) the interest in freedom from surveillance and from interception of one’s communications (“communications and surveillance privacy”).<sup>1</sup> An infringement violating one of these interests does not normally have any immediate tangible effect on the body and property of the victim, but its secondary effects on the victim’s health and property can be significant and measurable in practice.

5.2 Although media intrusion affects ordinary citizens and public figures alike, our primary concern has been with ordinary citizens who usually have not sought publicity but suddenly become of interest to the media. These people are often thrust into the limelight solely because of the crimes committed against them or their involvement in accidents beyond their control. Media coverage that is insensitive, voyeuristic and uncaring can compound their emotional and psychological suffering. 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. It is only fair that they should be protected from such “secondary victimisation”.

5.3 A number of respondents expressed concern over the adverse impact that media intrusion could have on victims. **The HK Psychological Society** advised that its members had come across clients (ie people receiving psychological services) who had suffered significant distress caused by the mass media’s intrusion into their private lives. Their distress could appear as symptoms such as disturbed sleep, anxiety, lowered self-esteem, loss of confidence, diminution of trust, and breakdown of social relationships. The impact could be long lasting. In other cases, their clients had been through some critical incidents which attracted media attention and which in turn exacerbated symptoms of stress. Some clients had also complained of media organisations using unethical means to gather information, making judgements before facts were known, and being intrusive while they were in

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<sup>1</sup> Law Reform Commission of Australia, *Privacy* (Report No 22, 1983), vol 1, para 46.

grief. Members of the Society also expressed concern over the publication of gruesome photographs (eg of violent deaths) and detailed descriptions of methods of suicide. The Society stated that this might have a profound psychological impact on the audience.<sup>2</sup>

5.4 **Ms Mary M W Lee**, a professional psychologist, also advised that a number of clients, employees and members of the public had complained to her of media intrusion on their privacy, often at times when they were suffering from grief and distress, thereby exacerbating their trauma. Her clients had complained that the media had used unethical means to gather information about them, pre-judged events, or distorted the truth.<sup>3</sup> She further noted that there were instances where journalists had taken photographs when the victims were emotionally fragile, helpless and grief-stricken. Ms Lee said these photographs depicted the victims' emotional response to the trauma and aggravated their psychological injury "as if a knife was stabbed into a wound which was still bleeding". In some instances, the photographs showed signs of the victim's helpless and painful struggle against the intrusive media, triggered off by the intrusion itself. Ms Lee explained that the publication of these images might leave a permanent mark in the victims' memories. What lay behind the images of a victim was a complex and painful experience. By purchasing a newspaper containing such coverage, the purchasers became parties to the process by which the victims' psychological trauma was aggravated.

5.5 Ms Lee advised that what traumatised victims needed most was a peaceful and supportive environment so that they could come to terms with what had happened. However, in practice, victims were instead likely to be subjected to media harassment which was often offensive and insulting. That harassment might instil a feeling of helplessness in victims at a time when they were already experiencing an abrupt change in their lives. The stress which media harassment caused to victims might therefore be greater than that caused by the original trauma. Ms Lee noted that as a result of this harassment and coverage, some victims suffered symptoms of critical incident stress such as disturbed sleep, nightmares, anxiety, depression, lowered self-esteem, loss of confidence, diminution of trust, breakdown of relationships, and social withdrawal. The impact of such stress could be detrimental and long-lasting.

5.6 In the case of **public figures and their family members**, the following declaration by the HK Performing Artistes Guild is consistent with the comments made by the HK Psychological Society and Ms Lee:

*"Recently, some newspapers and weeklies surreptitiously photographed and followed artistes and their family members and exposed their private lives. They exaggerated when giving an account of a story; distorted the facts; highlighted incidents*

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<sup>2</sup> Submission from the HK Psychological Society to Privacy Sub-committee dated 27.11.99.

<sup>3</sup> Undated response submitted to Privacy Sub-committee; W M Lee, "極度追訪創傷心靈", *Ming Pao Daily News*, 9.2.02. See also W M Lee, "戲劇化報道的傷害", *Ming Pao Daily News*, 2.3.02.

*out of context; misled the public; and even attempted to force their way into private premises in order to take photographs inside, and interfered with the private lives of artistes and their family members. ... As a result, the artistes were constantly on edge, feeling helpless and were in great distress. [Such activities] became a nuisance to their friends and relatives, who were also in fear and under immense psychological pressure.”<sup>4</sup>*

5.7 With respect to **fabrications and misstatements of facts in the press**, their impact can be illustrated by the case of a pregnant solicitor who suffered psychiatric and physical illness, in addition to loss of profits, after she had been wrongly named in a newspaper article as the solicitor suspected of absconding with clients’ money.<sup>5</sup> The solicitor suffered such severe emotional distress that her daughter had to be sent away to be cared for by others, and the solicitor was recommended for psychiatric treatment. The resulting depression, anxiety and stress materially contributed to the premature birth of her child, which had to be kept in intensive care after she was discharged from hospital.<sup>6</sup>

5.8 The Boys’ & Girls’ Clubs Association of HK advised that **media intrusion affecting the privacy of children** would cause unnecessary embarrassment and additional psychological stress to the children and their parents. This would not only adversely affect the children’s self-image but would also jeopardise the rehabilitation process of children coming from families affected by misfortune. These children might have difficulty recovering from the trauma and returning to a normal life. Against Child Abuse also provided instances where **victims of child abuse and their family members** had been laughed at, frightened, disturbed or harassed because of the conduct of journalists or coverage in the press. A number of victims had even recanted or withdrawn their complaints as a result.<sup>7</sup>

5.9 The Association for the Advancement of Feminism has given evidence of the plight of **women who wish to pursue their remedies under the Sexual Discrimination Ordinance**.<sup>8</sup> The Association commented that publishing a photograph that identifies a victim of sexual assault would adversely affect the victim, particularly if she had started a new job or had developed a new personal relationship. The media should appreciate the harm caused to the victim and should not rub salt into the victim’s wounds. Information about the victims should not be provided if it was irrelevant to the case. The Association stated that the media should also avoid publishing photographs of the plaintiffs in sexual harassment cases, or of persons unrelated to the case, unless with their consent.

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<sup>4</sup> The declaration was made in 1995 and quoted in Y S Chan, “‘狗仔隊’所引發的社會公益問題” *HK Economic Journal*, 6.2.98.

<sup>5</sup> *Apple Daily*, 7.10.98, A 1.

<sup>6</sup> *Chu v Apple Daily*, HCA 17103/98, [2001] 1375 HKCU 1, paras 90-123 & 149-162.

<sup>7</sup> The cases are collected in Annex 2, section I.

<sup>8</sup> Case H 4 in Annex 2.



5.10 In relation to **the coverage of sexual offences**, some frontline social workers have advised that press reports which are accompanied by pictures of the victims (even where part of their facial features are concealed), or detailed information about the offences, cause extreme anxiety to the victims and make their recovery from the original trauma even more difficult.<sup>9</sup>

5.11 A social worker has also referred to a sexual assault case reported on the front pages of a number of newspapers. These reports disclosed the name of the building in which the offence was committed; the name of the district in which the building was located; the background of the victim's family; the number of her family members; and the characteristics of the school she attended. Although the reports did not disclose the victim's name, her neighbours and relatives were able to identify her by reading the reports. As a result, the victim felt that everyone knew that she was the victim. At one time, she was unwilling to go to the police station to identify the offender lest she would be hounded by the press. She eventually decided to move house to escape from the adverse consequences of becoming a public figure in the eyes of her neighbours. One of her family members was also in distress because of the reports and had to be counselled by a psychologist.<sup>10</sup>

5.12 The social worker further commented that much personal information about the victims of sexual assault could be gathered from the newspaper reports if they were read with care. Since the reports focused on the details of the offences committed against the victims, they caused both the victims and their family members emotional distress. This increased the difficulties faced by social workers in providing counselling services and directly affected the victims' recovery. The social worker added that although not everyone read those newspapers and knew who the victims were, in the eyes of the victims, everyone was able to identify them as the victims concerned. She concluded that the publication of personal information about the victims and inaccurate reports about the events were not merely a matter of media ethics but would aggravate the victims' mental suffering.<sup>11</sup>

5.13 A medical practitioner advised that **publishing details of the eccentric behaviour of mentally ill persons** was equivalent to publishing the symptoms of patients who were organically ill. While the latter were conscious of their privacy rights and were in a position to object to journalists taking pictures or could refuse to talk about their health conditions, mentally ill patients were unable to understand and judge the significance of their actions and the publication of their private facts. A mentally ill person was not competent to consent to the taking of pictures showing his likeness and the publication of the details of his illness. As there had been an increase in the coverage of mentally ill persons, he hoped that some measures could be

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<sup>9</sup> “嚴重抗議報章處理風化案手法！勿再踐踏性罪行受害人的尊嚴！” (Statement condemning the coverage of sexual crime by some sections of the press), *Sing Tao Daily*, 16.11.00, A 17. The statement, which was signed by 100 organisations and 3200 individuals, accused the newspapers concerned of promoting their sales by exploiting the suffering of another.

<sup>10</sup> 明愛家庭服務部社工林姑娘, “感同身受”, in 燭光網絡, vol 3, no 6, Nov 2000, p 3.

<sup>11</sup> Above.

introduced to protect the privacy of mentally unstable persons from media intrusion.

5.14 The impact of **unwanted publicity on homosexuals** is illustrated by a newspaper article that covered the activities inside a private club frequented by homosexuals.<sup>12</sup> Several pictures surreptitiously taken inside the common room, toilet and shower room of the club were published in the newspaper. Although the individuals' eyes were concealed, a columnist wrote that those who knew them would have no difficulty in identifying them. One of the individuals was known to the columnist and was concerned as to how he could explain the matter to his parents. The columnist stated that those in the pictures might lose their jobs or break up with their families as a result of the exposure.<sup>13</sup>

5.15 **A survey of public attitudes** towards certain groups of people revealed that about 54% of the respondents considered that homosexuals, sex workers and rehabilitated mental patients were discriminated against by society, while 43% considered that new immigrants, and 27% those who received social security assistance, were discriminated against by society.<sup>14</sup> In another **survey on out-patients of psychiatric clinics**: (a) 45% responded that their job applications were turned down when employers found out that they were mentally ill; (b) 34% were sacked because they were mentally ill; (c) 37% responded that the attitude of their employers, colleagues or classmates changed for the worse when the latter found out that they were mentally ill; and (d) 36% were shunned by their family members and relatives because of their mental illness.<sup>15</sup>

5.16 As regards **intrusion upon hospital patients** by journalists gaining access to their wards and obtaining information from them by false misrepresentation, a former *SCMP* reporter said that she had personally witnessed an accident victim in an extreme state of distress after such an intrusion.<sup>16</sup>

5.17 There are few victim support groups in Hong Kong able to advise us of the negative consequences which media intrusion has on victims here. In England, the views of Victim Support UK<sup>17</sup> and Women Against Rape London were expressed in their submissions to the National Heritage Committee of the UK House of Commons in response to that committee's inquiry into media intrusion. **Victim Support UK** stated:<sup>18</sup>

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<sup>12</sup> "私人會所變身同志陽台", *Oriental Daily News*, 16.5.99.

<sup>13</sup> 姬魯, "停止轟炸同志", *HK Economic Journal*, 21.5.99.

<sup>14</sup> "港人最排斥同性戀及妓女", *The Sun*, 27.11.00, A 6. The survey was commissioned by Caritas.

<sup>15</sup> "十港人一人患精神病", *Apple Daily*, 15.11.01, A 8. The survey was commissioned by the Equal Opportunities Commission.

<sup>16</sup> "黃宏發談老莊", *HK Economic Journal*, 20.6.98, p 17.

<sup>17</sup> Victim Support is a national charity which provides practical help and emotional support to victims of crime in the UK.

<sup>18</sup> "The Conduct of the Media in relation to Victims of Crime", in National Heritage Committee, *Privacy and Media Intrusion* (London: HMSO, 1993), vol III, Appendix 24.

*“1. A basic principle of Victim Support is that victims of crime and their families should be able, as far as possible, to recover and put their experiences behind them. Media reporting of the crime that is inaccurate or intrusive adds to their distress. Victims have not sought publicity and do not see why it should be thrust upon them, adding to the problems caused by the crime itself. ...*

*5. Many victims of crime simply do not wish their names [or photographs] to be published [with the details of the crime]; in one case where this was done, despite specific requests, a woman's recovery from the crime was seriously affected and the family felt compelled to move house. ...*

*7. It can be particularly hurtful when personal details about an individual, of little or no relevance to the case are published. Even when the name is not given, because of the prohibition against identifying rape victims, victims can still be identifiable from details in the story or a photograph of their home.*

*8. We believe that photographs of victims should not be published without their consent, particularly those showing facial disfigurement.*

*9. We are concerned by the development of magazines and television series whose stock-in-trade is re-telling sensational cases. These are the cases likely to have caused the greatest pain to the families of the victims. Publishing the stories again, sometimes with fresh details of which the families were not aware, disturbs not only those who are directly affected, but also all the other bereaved families who are left wondering when they will be subjected to the same treatment. ...”*

5.18 Victim Support UK added the following points in another policy paper:<sup>19</sup>

- (a) Victims of crime are of intrinsic interest to the media, and often at a time when they are least able to cope with it. When people are suffering from shock or trauma or grief, either soon after the incident or at a significant event such as the trial, they are often unable to think clearly and may act uncharacteristically. They say and do things which they sometimes later regret. They can find it extremely difficult to cope with assertive and persistent journalists.
- (b) To publish the name and address of a victim may be to put them at risk of further victimisation. In several cases drawn to the attention of Victim Support, victims have been subject to intimidation from

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*Victims of Crime and the Media – Victim Support Policy Paper (1996), included as an appendix to the Parliamentary All Party Penal Affairs Group Report (1996), pp 19-27.*

the friends of the offender following newspaper reports which have printed their names and addresses.

- (c) In some cases newspapers print details which are not relevant to the crime, but which make a good story. It is particularly true when the victim is dead, and cannot defend himself.
- (d) Filming at funerals and memorial services is often distressing to families of murder and disaster victims, who view it as intrusion into their personal grief.
- (e) Victim Support has received accounts from victims of journalists repeatedly shouting through the letter box, climbing into the back garden or refusing to leave the pavement outside of the house. Neighbours, friends and colleagues are also besieged.
- (f) Occasionally victims choose to respond to this pressure by agreeing to accept money for an exclusive interview with one paper in the hope that the others will then leave them alone. These deals might be a direct result of media pressure.
- (g) During Crown Court trials victims, witnesses and bereaved relatives are sometimes harassed by the media while travelling to and from court and within the court building.
- (h) There is a particular problem in relation to pleas in mitigation made in court by or on behalf of defendants after conviction. The victim has no opportunity to challenge these statements and they are repeated as fact in the media.
- (i) There is a lot of pressure on the media to produce strong and dramatic words and pictures, and often this is at the expense of accuracy or the privacy of the victim.
- (j) For some relatives bereaved by violent crime, a programme which retells the death of their loved one may be an invasion of privacy, whenever it is produced and broadcast.

5.19 The Memorandum submitted by **Women Against Rape London** to the National Heritage Committee stated:<sup>20</sup>

*“Few [victims of rape] would want to see their personal distress exposed to the curiosity of millions or face being pointed at by strangers on the street. But what is most likely to concern a rape survivor is being identified to people who know her, people she is close to or people she must deal with in her everyday life – a prospective employer, her classmates, the man in the corner shop, the plumber ... .*

<sup>20</sup>

“The Conduct of the Media in relation to Victims of Crime”, in National Heritage Committee, *Privacy and Media Intrusion* (London: HMSO, 1993), vol III, Appendix 25.

*This affects not only the woman herself, who may fear being discussed, pitied, blamed, mentally undressed, or engaged in the most intimate conversation by anyone she happens to meet. It also affects her family and friends. A woman must have the right to inform her parents, grandparents, partner, children and others she is close to, if and when she feels is best for her, for them, and for their relationship. Only she can judge whether they will be able to give her moral support, or whether they will condemn her, desert her, or be so distressed that she has to look after them.*

*It doesn't take a name and address or a photo to identify a woman to people in her own community. It is standard practice for the media to give enough personal details about where she lives or works, her family circumstances, and her occupation to leave little or no question of her identity to those who know her even slightly.*

*Another danger which came to public attention ... was described by the Press Council as jigsaw puzzle identification. Especially where the media decides that a particular rape is a potential best-seller, and all the newspapers are competing for information, the piecing together of different reports can disclose the woman's identity."*

5.20 Those who are unable to protect themselves because of their physical or mental conditions (such as children, patients in hospitals, persons who have mental problems, and those who have attempted suicide) are particularly vulnerable to the damaging effect of media intrusion. The more serious cases may result in the development of Post-Traumatic Stress Disorder in the victims, and may even lead to the victim taking his own life in an attempt to escape from the unwanted publicity to which he has been subjected.<sup>21</sup> Given their background and the circumstances in which they are thrust into the spotlight, these vulnerable victims need special protection from the intrusion of the media.

5.21 Media intrusion may be effected by the print media, the broadcast media, or other electronic media such as the Internet. Since the broadcasting industry is regulated by the Broadcasting Authority Ordinance, we deal with the regulation of privacy intrusion by the broadcast media first in the next chapter.

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<sup>21</sup> A 15-year-old victim of gang rape attempted to kill herself by taking an overdose of drugs three days after *Apple Daily* reported the trial on its front page on 26.1.02 with graphics reconstructing the evidence. The cause of the suicide attempt was unknown but the victim's mother and sister told the press that the victim was under great pressure and was disturbed by media reports of the trial: *HK Economic Times*, 30.1.02.

## Chapter 6

### Regulating intrusion by the broadcast media

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6.1 The potential impact of the medium concerned is an important factor in considering the “duties and responsibilities” of a journalist. Compared with the print media, the broadcast media have a much more immediate and powerful effect. The broadcast media have means of conveying through sound and moving images, meanings which the print media are not able to impart.<sup>1</sup> In Hong Kong, all television and radio programmes (except those produced by RTHK) are broadcast by licence of the Chief Executive-in-Council. All licensed television and sound broadcasters, including cable and satellite television broadcasters, are regulated by the Broadcasting Authority under the Broadcasting Authority Ordinance (Cap 391). These broadcasters are under a statutory duty to comply with the Codes of Practice on programme standards issued by the Broadcasting Authority. RTHK has also agreed that it would abide by the Authority’s Code of Practice on programme standards and submit to its jurisdiction.<sup>2</sup>

6.2 The Broadcasting Authority consists of three public officers and not less than six nor more than nine lay members appointed by the Chief Executive. Some of its functions are to monitor television and radio broadcasts in Hong Kong to ensure compliance with the regulations, codes of practice and licence conditions; to consider complaints about broadcasts relating to breaches of standards set out in the codes; and to issue and revise codes of practice on programming and advertising standards.

6.3 Upon receipt of a complaint, the Commissioner for Television and Entertainment Licensing, as the executive arm of the Authority, would investigate the complaint. If there is *prima facie* evidence of a breach of any of the provisions of the regulations, licence conditions or codes of practice, the complaint would be referred to the Complaints Committee which consists of not less than five members appointed by the Authority. The Committee will consider representations from interested parties and make recommendations to the Authority. The final decision on complaints rests with the latter. If the Authority rules against a broadcaster, it may impose a fine and issue directions requiring the broadcaster to take such action as the Authority considers necessary. A broadcaster who is aggrieved by a direction of the Authority or a provision of a code may appeal to the Chief Executive-in-Council.

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<sup>1</sup> *Jersild v Denmark* (1994) 19 EHRR 1, 26; *Purcell v Ireland*, 70 D & R 262, 278.

<sup>2</sup> RTHK Programme-makers are additionally required to follow the *RTHK Producers’ Guidelines*.

6.4 The Broadcasting Authority makes use of various mechanisms to ensure that the licensed broadcasters comply with the stipulated standards. These include: selective monitoring of television and radio broadcasts; meetings with senior management of the broadcasters; periodical surveys; public hearings; and public consultation through the Television Viewing Advisory Scheme. There is also an advisory committee to review the codes of practice.

6.5 Since the Broadcasting Authority is entrusted with powers and functions to ensure that the licensees fulfil their obligations and responsibilities, one way to strengthen the protection of privacy against intrusion by broadcasters would be to entrust the Authority with the task of monitoring whether the journalistic activities of the broadcasters are intrusive. The Consultation Paper therefore recommended that the Broadcasting Authority should adopt in its Codes of Practice on Programme Standards, provisions relating to (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 such programmes.

6.6 The Privacy Commissioner, the Law Society, the HK Democratic Foundation and the Hong Kong section of JUSTICE supported this recommendation. Television Broadcasts Ltd was of the view that the electronic media was adequately governed by the Codes of Practice issued by the Broadcasting Authority. HK Commercial Broadcasting “strongly” opposed the adoption of privacy provisions in the Codes. In their view, incidents of intrusion committed by licensed broadcasters when gathering and reporting news were few and far between. The RTHK Programme Staff Union also expressed reservations about adopting this recommendation. The Union was concerned about any move to give the Authority additional powers over the media. We note, however, that paragraph 3.7 of the RTHK Producers’ Guidelines contains detailed provisions concerning respect for privacy.<sup>3</sup> It is also fairly common for the broadcasting codes in other jurisdictions to include privacy provisions. Examples are the *Code on Fairness and Privacy* adopted by the Broadcasting Standards Commission in the UK;<sup>4</sup> the *BBC Producers’ Guidelines*;<sup>5</sup> the *Programme Code* of the Independent Television Commission in the UK;<sup>6</sup> the *Commercial Television Code of Practice* adopted by the Australian Broadcasting Authority;<sup>7</sup> the *Journalistic Standards and Practices* of the Canadian Broadcasting Corporation;<sup>8</sup> the *Guidelines for Programme-Makers* of the Radio Telefís Éireann in Ireland;<sup>9</sup> the *Free-to-Air Television*

<sup>3</sup> RTHK Producers’ Guidelines (2000), <[www.rthk.org.hk/about/guide/e47.htm](http://www.rthk.org.hk/about/guide/e47.htm)>.

<sup>4</sup> Codes of Guidance (June 1998), chs 7-15, at <[www.bsc.org.uk/index800.htm](http://www.bsc.org.uk/index800.htm)>.

<sup>5</sup> BBC Producers’ Guidelines (2000), chs 4, 5, 8, 12, 14 & 15, at <[www.bbc.co.uk/info/editorial/prodgl/contents.shtml](http://www.bbc.co.uk/info/editorial/prodgl/contents.shtml)>.

<sup>6</sup> The ITC Programme Code, section 2, at <[www.itc.org.uk/itc\\_publications/codes\\_guidance/index.asp](http://www.itc.org.uk/itc_publications/codes_guidance/index.asp)>. Where the Code has been breached, the ITC may apply sanctions against licence holders, including financial penalties.

<sup>7</sup> At <[www.aba.gov.au/tv/content/codes/commercial/index.htm](http://www.aba.gov.au/tv/content/codes/commercial/index.htm)>, section 4.3.

<sup>8</sup> At <[www.cbc.ca/aboutcbc/discover/standards.html](http://www.cbc.ca/aboutcbc/discover/standards.html)>, sections 3, 5 & 10.

<sup>9</sup> At <[www.rte.ie/about/organisation/guidelines.html](http://www.rte.ie/about/organisation/guidelines.html)>, pp 15-20. Radio Telefís Éireann is the Irish National Public Service Broadcasting Organisation. Section 18 of the Irish Broadcasting Act 1960 (as amended by s 3(1B) of the 1976 Act) obliges RTÉ not to make or broadcast programmes that unreasonably encroach on the privacy of an individual.

*Code of Broadcasting Practice* approved by the Broadcasting Standards Authority of New Zealand;<sup>10</sup> and the *Privacy Principles* adopted by the NZ Broadcasting Standards Authority in determining complaints alleging a breach of section 4(1)(c) of the Broadcasting Act 1989.<sup>11</sup>

6.7 The Broadcasting Authority responded that they would consult the Privacy Commissioner to ensure that there would be no overlapping of jurisdiction between the two statutory bodies. 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 the following rules on privacy:

*“1. The rights of individuals to privacy should be respected in all programmes. Complaints about programme invasion of privacy can arise from the gathering of material or from the way an individual is treated in the programme itself. In obtaining material for a programme, the licensees must ensure that the provisions of the Personal Data (Privacy) Ordinance (Cap. 486) are observed. The licensees shall only collect material for broadcast purpose by means which are lawful and fair in the circumstances of the case.*

*2. Licensees should be sensitive to the possibility of causing additional anxiety or distress when interviewing, filming or recording people who are already extremely upset or under stress. People in a state of distress should not be put under pressure to provide interviews. Normally funerals may only be covered with the permission of the family.*

*3. Children should not be questioned to elicit views on private family matters, nor asked for expressions of opinion on matters likely to be beyond their judgement.*

*4. Reporting of sexual offences against children should avoid identification of the child.”*

6.8 We welcome the initiative taken by the Broadcasting Authority. 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. We consider that the Broadcasting Authority Code should elaborate on the privacy requirements for broadcasters and provide guidelines on both the collection and use of personal information for broadcast purposes.

<sup>10</sup> At <[www.bsa.govt.nz/\\_g-bsacod.htm](http://www.bsa.govt.nz/_g-bsacod.htm)>.

<sup>11</sup> At <[www.bsa.govt.nz/\\_priv\\_princ.htm](http://www.bsa.govt.nz/_priv_princ.htm)>. NZ broadcasters are required to maintain standards that are consistent with the privacy of an individual under s 4(1)(c) of the Act.



6.9 The way the provisions are drafted also suggests that the Authority has sought to avoid an overlap of jurisdiction with the Privacy Commissioner. The Broadcasting Authority seems to have subscribed to the view that it should not assume jurisdiction if the conduct in question can be dealt with by the Privacy Commissioner under the Personal Data (Privacy) Ordinance. However, the Ordinance has limitations and does not protect individuals from all kinds of unwarranted media intrusion.<sup>12</sup> In our view, the Broadcasting Authority, being a specialist body with a mandate to balance freedom of broadcasting with other rights and freedoms, is a more appropriate body than the Privacy Commissioner to deal with complaints about intrusion by broadcasters. To conclude, we consider that detailed privacy provisions should be included in the Generic Code of Practice on Television Programme Standards to strengthen the existing protection afforded by the Broadcasting Authority Ordinance.

### **Recommendation 3**

**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.**

6.10 Given that intrusion by broadcasters can be adequately dealt with under the Broadcasting Authority Ordinance, the remaining part of this report will be focused on the regulation of intrusion by the print media. It should, however, be borne in mind that the introduction of new communications and information services, in particular online services, has blurred the lines between newspapers, broadcasting, telecommunications and informatics. These services may be used to the detriment of personal privacy if details of an individual's private life are disclosed or made available on the Internet. However, we refrain from making any recommendations for the regulation of unwanted publicity on the Internet. There is still no consensus in the international community about the measures that a Government should adopt to combat the misuse of new communications and information services for carrying out activities which are contrary to human rights. Self-regulation at the domestic and transnational level by providers and operators of these services (especially content providers) in the form of codes of conduct or other measures, with a view to ensuring respect for human rights is therefore

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<sup>12</sup>

See Chapter 9.

preferred.<sup>13</sup> There is, however, a narrow area which we look at more closely, namely, unwanted publicity in the Internet edition of printed newspapers. This subject will be discussed in Chapter 15 in the context of the Registration of Local Newspapers Ordinance.

6.11 Since some have argued that self-regulatory measures are sufficient to address the concerns arising from intrusion by the print media, we examine in the next two chapters the advantages and disadvantages of self-regulation, and whether the self-regulatory measures of the journalistic profession and the press industry are effective or not, with particular reference to the HK Press Council established subsequent to the publication of our Consultation Paper.

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<sup>13</sup> See Action Plan for the Promotion of Freedom of Expression and Information at the Pan-European Level within the Framework of the Information Society adopted at the 5<sup>th</sup> European Ministerial Conference on Mass Media Policy, Thessaloniki (Greece), 11-12 Dec 1997, in *European Ministerial Conferences on Mass Media Policy: Texts Adopted* (Strasbourg, Directorate of Human Rights, 1998), DH-MM(98)4, pp 53-56.

## Chapter 7

### Press self-regulation in Hong Kong

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7.1 This chapter examines the effectiveness of the self-regulatory measures adopted by the journalistic profession and the newspaper industry in Hong Kong. The first part gives an overview of the environment in which the media operates, followed by a summary of the advantages and disadvantages of industry self-regulation in general. The second part discusses the extent to which the profession's Journalists' Code of Professional Ethics and the codes of ethics issued by individual journalists' associations can uphold the ethical standards of journalists. The effectiveness of the HK Press Council promoted by the Newspaper Society is discussed in Chapter 8.

#### Environment in which the media operates

7.2 Any discussion of media intrusion should not overlook the fact that the media is both a social institution and an economic enterprise. It involves the production of goods and services that are both public (something that is necessary for the working of society as a whole) and private (commodities that satisfy the private needs of individuals).<sup>1</sup> The many social and cultural functions of the media and the political role of the media in acting as a watchdog of Government cannot obscure the fact that its activities are also economic in nature. Although there are media organisations whose primary object is to make their views known to the public rather than to make a profit, most media organisations are commercial entities that have to make a profit to survive. These organisations are run as business enterprises and have to operate according to the dictates of market economics.

7.3 The dominant criterion applied by most media organisations is therefore circulation or readership. A media organisation usually wants to attract as large an audience as possible so that it could increase its advertising value. To the extent that the goal of profit-maximisation may be at odds with the requirement of the "special duties and responsibilities" under Article 19 of the ICCPR, the self-interest of a media organisation may conflict

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<sup>1</sup> D McQuail, *Mass Communication Theory - An Introduction* (SAGE Publications, 1994), ch 6. After noting that information has become a "commodity" and that channels of information and communication now form an industry in many countries, Pierre-Henri Imbert, Director General of Human Rights of the Council of Europe, stated that it was important when addressing the question of the scope and possible limitations of freedom of expression to bear in mind "the significance and the effects of market pressure and competition between media": P-H Imbert, "Welcome address" in *Conference on freedom of expression and the right of privacy – Conference reports* (Strasbourg: Council of Europe, 2000), DH-MM(2000)7, at <[www.humanrights.coe.int/media/](http://www.humanrights.coe.int/media/)>.

with the public's interests when it purports to exercise freedom of the press under Article 27 of the Basic Law. It is therefore necessary to ensure that the media does not abuse its freedom to the detriment of the public's interests. The question is how the media can be regulated without hampering the press' checking function.

7.4 All newspapers or periodicals printed or produced in Hong Kong, whether for sale or free distribution, must be registered under the Registration of Local Newspapers Ordinance (Cap 268).<sup>2</sup> As at 30 September 2002, 50 newspapers<sup>3</sup> and 738 periodicals were registered under the Ordinance, including 25 Chinese-language newspapers, 13 English-language newspapers, 506 Chinese-language periodicals, and 109 English-language periodicals. However, the number of newspapers actually sold on the news-stands is less than these figures. Only two English-language dailies and about ten Chinese-language dailies are widely read by the local public.

7.5 Nonetheless, the press industry faces competition unknown in the past. New means of information dissemination such as subscription television, satellite television, video-on-demand programme services and the many services offered on the Internet, are taking business away from local publishers. In the face of intense competition and a downward economy, the overriding concern of some media proprietors has been to increase or maintain their market share. Commercial pressure may therefore prevail over professional and ethical considerations. A newspaper may find it difficult not to use material which other newspapers may wish to use. The fear that a competitor gets a scoop the next day puts some journalists under pressure to intrude into the private lives of individuals even though no vital public interest is at stake. To attract more readers and advertising revenue, a newspaper may provide more coverage for stories about people's private lives.

7.6 In September 1999, Professor Chan Yuen-ying, Director of the HKU Journalism and Media Studies Centre, wrote that it was "despicable" for newspapers to print pictures of sex-abuse victims, even though the women's faces were covered as they were led away by the police. She called on owners and editors of leading papers to pledge that they would stop publishing these pictures, and on reporters and photographers to stop hounding victims who were already traumatised. According to Professor Chan, her appeal was met with "dead silence".<sup>4</sup> Nonetheless, the journalistic profession and some sections of the press industry are aware of the problem and have taken steps to improve the situation. Before we examine the self-regulatory attempts of the journalists' associations and the HK Press Council, we first set out the advantages and disadvantages of self-regulation.

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<sup>2</sup> The Ordinance does not distinguish between newspapers and periodicals but a "newspaper" published less than five times a week is regarded as a "periodical" for statistics purposes.

<sup>3</sup> Eleven newspapers registered under the Ordinance were published on the Internet.

<sup>4</sup> 陳婉瑩, "請兩大報業老闆高抬貴手!", *HK Economic Journal*, 24.9.99; Y Y Chan, "The Problem Lies in Generalities", *South China Morning Post*, 17.3.00.

## Advantages and disadvantages of self-regulation

7.7 Self-regulation is generally characterised by the industry formulating rules which govern its relationship with the public, consumers or clients, with the industry solely responsible for enforcement. It implies that members of the industry have accepted mutual obligations and agreed that their behaviour be regulated by an organised body. There will normally be a procedure for resolving complaints and for the application of sanctions against those who infringe the rules.<sup>5</sup>

7.8 **Advantages of self-regulation** – The following are the major advantages of self-regulation:

- (a) It allows members of the industry more freedom to run their affairs.
- (b) It can be quicker and less costly to put in place than statutory regulation.
- (c) Internalising the costs of regulation to the industry would improve the efficiency and quality of regulation.
- (d) The self-regulatory body can normally command a greater degree of expertise and technical knowledge of practices than a Government agency.
- (e) The rules and procedure of the self-regulatory body are less formal.
- (f) The costs for the formulation, interpretation, amendment and enforcement of standards are lower.
- (g) Self-regulation can harness common interest in maintaining the reputation of those involved in the activity and can generate a sense of ownership amongst those in the industry. It is therefore more likely to secure a high level of compliance.
- (h) The rules are imbued with the moral authority of a document written by the industry for themselves. It would be embarrassing for a member of the industry when he has been found by his peers to have breached the rules.
- (i) Since the rules are developed by those directly involved in the industry, they are practicable and can best reflect the issues and needs of the particular sector.
- (j) The self-regulatory body acts with greater speed in decision making and can be easily adapted to reflect changing circumstances.

<sup>5</sup>

Better Regulation Task Force, UK, *Self-Regulation – Interim Report* (Oct 1999), at <[www.cabinet-office.gov.uk/regulation/TaskForce/pastreports.htm](http://www.cabinet-office.gov.uk/regulation/TaskForce/pastreports.htm)>, p 3.

- (k) Because of the flexibility of self-regulation, a self-regulatory system can resolve disputes quickly and in an informal manner. It can therefore provide a quicker and cheaper means of redress than legal remedies through civil proceedings.
- (l) Where the ethical standards extend beyond the letter of the law, self-regulation would raise the standards of the industry over and above the basic minimum requirements.
- (m) The complainants need not take any risks on the costs and uncertain outcome of a legal remedy.

**7.9 Disadvantages of self-regulation** – Self-regulation commonly lacks many of the virtues of conventional state regulation in terms of transparency, credibility, accountability, compulsory application to all, greater likelihood of rigorous standards being developed, cost spreading, and availability of a range of sanctions.<sup>6</sup> As a result, the self-regulatory standards are usually weak, the enforcement of standards is ineffective, and any punishment imposed is mild. The following are the major disadvantages of self-regulation:

- (a) Since a self-regulatory body is not the end-product of a political process, it may not be perceived as a fully legitimate dispute resolution body.
- (b) The self-regulatory body is not accountable to any body politic through the conventional constitutional channels.
- (c) The capacity of the self-regulatory body to make rules governing the activities of a profession may constitute an abuse if it lacks democratic legitimacy in relation to members of the profession.
- (d) The self-regulatory scheme may not cover all the members of an industry. Where there is only partial coverage, it is often those who have not joined the scheme which tend to be the main source of problems.
- (e) There can be distortion of the market. Non-members who do not follow the rules can under-cut the market with lower standards.
- (f) The industry may subvert regulatory goals to its own business goals.
- (g) There are doubts about the ability of professional or trade bodies

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<sup>6</sup> N Gunningham & J Rees, "Industry Self-Regulation: An Institutional Perspective", *Law and Policy*, Oct 1997, vol 19, no 4, 363 at 370, quoting K Webb & A Morrison, "The Legal Aspects of Voluntary Codes", draft paper presented to the Voluntary Codes Symposium, Office of Consumer Affairs, Industry Canada and Regulatory Affairs, Treasury Board, Ottawa, 12-13 Sept 96.

to represent both the interests of their members and the interests of the public. Doubts about independence and impartiality are particularly acute where the adjudicating body does not have public members.

- (h) The organisations involved in enforcement may not be open and transparent about their processes and outcomes.
- (i) It is unlikely to consult widely amongst the stakeholders before setting standards.
- (j) The standards set by the self-regulatory body may be lower than expected or treated as maximum standards by the industry.
- (k) The members may not take self-regulatory requirements seriously. A self-regulatory body often has difficulty enforcing its standards against recalcitrant members.
- (l) Only a limited range of sanctions may be available for breach of the self-regulatory code.
- (m) Self-regulatory bodies lack the powers essential for effective enforcement, such as the power to summon persons and order the production of documents.
- (n) Industry may be unwilling to commit the resources needed for monitoring, enforcement and carrying out wide-ranging research.
- (o) Self-regulation may fail when the threat of Government regulation recedes, and inadequate self-regulation may act as a barrier to adequate legislation.

7.10 The following observations made by the National Consumer Council in the UK on self-regulation are also pertinent:<sup>7</sup>

*“With some exceptions, a trade or professional organisation cannot be expected to carry responsibility for running a self-regulatory scheme. Its first job is to represent its members’ interests. At best, trade bodies have persuasive influence, rather than real power, over their membership and are generally in a weak position to secure commitment to a code’s provisions or to enforce them effectively. However committed, they will be caught between alienating their own membership yet still generating public scepticism about their impartiality. There appear to be real difficulties for most trade associations, too, in securing the resources and commitment needed for adequate monitoring and publicity.”*

<sup>7</sup>

National Consumer Council, UK, *Models of self-regulation* (Nov 2000), at <[www.ncc.org.uk/pubs/self.htm](http://www.ncc.org.uk/pubs/self.htm)>, pp 42 – 44.

## Codes of ethics adopted by journalists' associations

7.11 Journalism is not a licensed profession. Any person can practise journalism without studying journalism, and there is no need for a journalist to apply for any licence or to become a member of a journalists' association. Neither the Government nor the journalists' associations have the power to regulate who can practise the profession.

7.12 The most active journalists' associations in Hong Kong are the HK News Executives' Association (HKNEA), the HK Journalists Association (HKJA), the HK Federation of Journalists (HKFJ) and the HK Press Photographers Association (HKPPA).<sup>8</sup> They are reported to have had about 160, 500, 140 and 100 members respectively in 2000.<sup>9</sup> According to one source, only 18% of local journalists are members of a journalists' association.<sup>10</sup> Although these associations are vocal on issues concerning press freedom, they are also trade unions protecting the interests of their members. It is, however, open to a journalists' association to unilaterally adopt a code of ethics to regulate the behaviour of its members. Out of these four associations, the HKJA and the HKNEA have their own code of ethics.<sup>11</sup>

7.13 Membership of the HKJA is open to "any person employed as a journalist, photographer or artist in publishing and broadcasting and others who earn income from journalism".<sup>12</sup> It has an Ethics Committee composed of three members appointed by its Executive Committee. The Ethics Committee considers alleged violations of the Association's Code of Ethics referred to it by the Executive Committee. It does not initiate an investigation on its own motion. The Ethics Committee has guidelines for the handling of complaints but they are not posted on the Association's website. There are no representatives of the public participating in the adjudication process. The investigations and hearings of the Committee are also conducted in private. The Executive Committee may impose a fine of not more than \$100 on any member found to have been guilty of "conduct prejudicial to the interests of the union", or suspend or expel such a member from the union.<sup>13</sup> Any member so fined, suspended or expelled may appeal to an Appeals Tribunal, which comprises three members appointed by the AGM, and then to its General Meeting. Complainants dissatisfied with the decisions of the Ethics

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<sup>8</sup> Other journalists' associations in Hong Kong include the Foreign Correspondents' Club, HK Mass Media Professionals Association, and HK Publishers and Distributors Association.

<sup>9</sup> K Y Cheung, "一份香港新聞工作者專業操守守則的誕生"; paper presented at the conference on *Media Ethics in the Information Age* jointly organised by School of Communication of the HK Baptist University and the Centre for Asian Studies of Chu Hai College, 11-12 Nov 2000, p 2. The HKJA had about 480 members in August 2002.

<sup>10</sup> D Weaver "Journalists Around the World: Commonalities and Differences", in D H Weaver (ed), *The Global Journalist* (New Jersey: Hampton Press, 1998), p 466, table 23.4. A survey conducted in 1990 revealed that only about 5% of journalists in HK had joined HKNEA and 13% enrolled in HKJA: J M Chan, P S N Lee & C C Lee, *HK Journalists in Transition* (HK Institute of Asia-Pacific Studies, 1996), 45.

<sup>11</sup> The Code of Ethics of the HKPPA forms part of its constitution but is very brief.

<sup>12</sup> The website of HKJA is at <[www.freeway.org.hk/hkja/](http://www.freeway.org.hk/hkja/)>.

<sup>13</sup> HKJA Constitution, Rule 7(9).



Committee do not have any right of appeal. Although its decisions are not legally binding on media organisations and non-member journalists, the Ethics Committee does not deal with a complaint unless the complainant has waived his right to take legal action in respect of the subject matter giving rise to his complaint.<sup>14</sup>

7.14 In addition, HKJA members account for only a small proportion of local journalists. The Association has no jurisdiction over the vast majority of journalists who are not its members. 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. Given the one-sided nature of evidence available, the HKJA has at times found it “very difficult” to come to a definite conclusion.<sup>15</sup> Where a journalist or a media organisation is found to have engaged in unethical conduct, the organisation concerned is under no obligation to publish the adverse finding. Nonetheless, to increase the transparency of its adjudicating process, the HKJA decided in October 1999 to publish the findings of its Ethics Committee in its journal and on its website. As at 31 December 2002, a total of 13 judgments were put on the website.<sup>16</sup>

7.15 Apart from a Code of Ethics, the HKJA occasionally issues guidelines on important issues. The Association explains that such guidelines are labelled as “recommendations” because it wants “to avoid the impression that the HKJA wished to impose its will on members.” The Chairman of the Ethics Committee made it clear that the Association preferred a non-confrontational approach “insofar as the union does not impose standards on journalists”.<sup>17</sup> It would seem that the Association does not wish to force its members to comply with the minimal standards it has set down, even in those areas where it has found it necessary to regulate the conduct of its members. In a poll of HKJA members on media ethics conducted in October 1998, only 20% of the respondents thought that the Association’s Code of Ethics should be “strengthened”.

7.16 A HKJA member who is found to have breached its Code of Ethics is liable to a fine or expulsion by the Executive Committee. However, only 13% of the respondents in a poll of HKJA members supported the idea of “threaten[ing] to expel unethical members” in a bid to improve ethical standards.<sup>18</sup> In any event, membership of the Association is not compulsory for journalists. Expelling a member will not have any effect on the employment relationship between the expelled member and his employer. He may continue to practise journalism without being a member of any journalists’ association in Hong Kong. The possible role of the HKJA in regulating media intrusion is therefore limited.

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<sup>14</sup> “記協公開操守委員會裁決”, *HK Economic Journal*, 19.10.99.

<sup>15</sup> HKJA Ethics Committee, “Media Ethics: The HKJA Mechanism”, 22.11.98, p 3; FONG So, “Media Ethics: The HKJA Mechanism” in *HKJA 28th Anniversary* (1996), 30-31.

<sup>16</sup> See <[www.freeway.org.hk/hkja/ethics/index.htm](http://www.freeway.org.hk/hkja/ethics/index.htm)>.

<sup>17</sup> C Bale, “Journalistic Ethics - The Rights and Wrongs”, in *HKJA 25th Anniversary* (1993), 51.

<sup>18</sup> HKJA Press Release, 22.11.98.

7.17 The HKNEA comprises senior journalists who play a management role in the news operations of media organisations. Its Code of Professional Ethics is more detailed than that of the HKJA. However, the HKNEA does not represent the views of newspaper publishers; nor are news executives of all newspapers represented on the Association. The Code has no influence on publishers and journalists who are not members of the Association. We are not aware of any complaints mechanism set up by the HKNEA to back up the Code. Even if a complaints mechanism were put in place, it would still suffer the same limitations as those faced by the HKJA's Ethics Committee mentioned above. However, the HKNEA fully supports the establishment and functioning of the HK Press Council.

7.18 At a meeting of the Legislative Council's Home Affairs Panel held in April 1999, a representative of the HK Press Photographers Association informed the Panel that the Association would write to any media organisation which published offensive photographs in breach of professional ethics. However, media proprietors often ignored such complaints, or threatened to take legal action against individual officers of the Association. These threats tended to inhibit the HKPPA and its members from raising criticisms because of the expense involved in defending a lawsuit brought by a maverick newspaper. The Association's representative added that many newspaper photographs were taken by press photographers who were not news photographers. He admitted that there was "very little" the HKPPA could do, apart from refusing to allow those photographers to join the Association. He pointed out that there was no requirement on press photographers to undertake professional training, or to abide by any code of ethics.<sup>19</sup>

## **The Journalists' Code of Professional Ethics**

7.19 In response to growing pressure for improvements in the ethical standards of journalists, the HKNEA, HKJA, HKFJ and HKPPA jointly issued the Journalists' Code of Professional Ethics in June 2000. The adoption of the Code represents a major step forward. The standards in the Code apply uniformly throughout the industry. Members of the public no longer have to consult each of the four associations to find out the applicable standards. However, compliance with the Code is purely voluntary. Breach of the Code would not necessarily result in any disciplinary sanction by a publisher; nor does the Code have any supporting mechanisms. No institution or mechanism has been set up to investigate alleged breaches of the Code. Although 18 media organisations supported the Code when it was first promulgated, *Oriental Daily News* and *The Sun* refused to enter into dialogue with the four associations. However, even if all media organisations expressed support, there is no guarantee that a media organisation would take disciplinary action against the offending journalist and provide redress to the victim when the Code has been breached.

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<sup>19</sup> Minutes of special meeting of LegCo Panel on Home Affairs held on 26.4.99, LC Paper No CB(2)653/99-00, paras 19-20.

7.20 The Code could have an impact if all media organisations incorporated the Code into journalists' employment contracts by requiring them to abide by the Code. However, a survey of 288 journalists conducted in October 2002 revealed that none of the 13 mainstream newspapers and five broadcasting companies covered by the survey had incorporated the Code into their employment contracts, nor had these media organisations included the Code in their in-house training programmes.<sup>20</sup> This contrasts with the position in the UK where adherence to the Press Complaints Commission's Code of Practice is written into the employment contracts of the "vast majority of editors".<sup>21</sup> The Chairperson of the HKJA was quoted as saying that the four journalists' associations did not encourage news organisations to incorporate the Code into journalists' employment contracts. She said their legal advisers had suggested that the Code should be treated as a set of ethical standards rather than as a legal document: if the Code were incorporated into employment contracts, it would lead to more industrial disputes.<sup>22</sup> Yet even if a media organisation were willing to incorporate the Code into its employment contracts, the Code would not have any impact if the organisation concerned did not enforce the Code against its employee journalists. The publishers are not accountable to the public as to whether the ethical standards in the Code are enforced against their employees. Furthermore, it is a significant omission that the Code does not acknowledge that the exercise of the right to freedom of expression carries with it "special duties and responsibilities" required by the ICCPR. The phrase "accept social responsibility" was included in the draft code but was eventually excised because of "strong opposition" from the HKJA and HKPPA.<sup>23</sup>

## Initiatives of the Newspaper Society

7.21 The Newspaper Society and the Chinese Press Association are the two major press bodies representing the proprietors of local newspapers in Hong Kong. The Newspaper Society took the initiative to establish a press council as early as 1985. In that year, the Chairman of the Society, Mr Robin Hutcheon, set up a preparatory committee for that purpose with members drawn from both the journalistic profession and other sectors of the community. He subsequently gave the chair to Mr Justice Simon Li, who was then a judge of the Court of Appeal. Although most press councils in other jurisdictions have lay members and it is common to have a legally qualified person as the chairman, the HKJA had misgivings about the Society's initiatives and speculated that the Government was behind the move. In the face of opposition from the journalistic profession, the committee decided to dissolve itself. However, the Newspaper Society made a second attempt to establish a press council shortly after the Sub-committee recommended that

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<sup>20</sup> Justice & Peace Commission and Amnesty International (HK Branch), 新聞工作者人權意識研究, Oct 2002, para 5.2.4.1.

<sup>21</sup> PCC, "Key Benefits of the System of Self-Regulation", at <[www.pcc.org.uk/about/benefits.htm](http://www.pcc.org.uk/about/benefits.htm)> (3.1.03)

<sup>22</sup> "60% Media Supports Journalists' Code", *Ming Pao Daily News*, 19.6.00.

<sup>23</sup> K Y Cheung, "一份香港新聞工作者專業操守守則的誕生", above, p 5.

a Press Council for the Protection of Privacy be established by law. This time, the Society had the support of the HKNEA and HKFJ, but not of the HKJA and HKPPA. The operation and effectiveness of the HK Press Council is examined in Chapter 8.

## Chapter 8

# The Hong Kong Press Council

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### Objects and composition

8.1           **Objects and ambit** – The HK Press Council was incorporated in June 2000 as a company under the auspices of the Newspaper Society of HK, the HKNEA and HKFJ.<sup>1</sup> It is funded by donations and subscription fees paid by member newspapers. The primary object of the Council is “to promote the professional and ethical standard of the profession of the Newspaper industry and, in particular, to deal with the complaints of the public to the acts of the members of the Newspaper industry.” Initially, the Council only dealt with complaints relating to intrusion on privacy. As from July 2001, it also accepts complaints about articles of a prurient, indecent or sensational nature.

8.2           **Membership** – Members of the Council are the subscribers to the Memorandum of Association and such other persons as the Executive Committee may admit. Newspapers and magazines registered under the Registration of Local Newspapers Ordinance and professional journalists’ organisations are eligible to become Press Members.<sup>2</sup> The Public Members must not be less than 50% of all Council members.

8.3           As at March 2003, the Council had 29 members: 12 of them were Press Members and 17 were Public Members. Each of these members had one vote at a General Meeting. The 12 Press Members represented ten newspapers and two professional organisations, namely, *China Daily HK*; *HK Commercial Daily*; *HK Daily News*; *HK Economic Times*; *The Standard*; *Ming Pao Daily News*; *Sing Tao Daily*; *South China Morning Post*; *Ta Kung Pao*; *Wen Wei Po*; the HKNEA and the HKFJ. The ten newspapers accounted for less than 20% of Hong Kong’s total newspaper readership. The following newspapers were not members of the Council: *Apple Daily*, *HK Economic Journal*, *Metro*, *Oriental Daily News*, *Sing Pao Daily News* and *The Sun*. *Apple Daily*, *Oriental Daily News*, *Sing Pao Daily News* and *The Sun* are said to control 80% of the newspaper market by readership in 2002/03.<sup>3</sup> The HKJA and HKPPA also refuse to join. The HKJA is of the view that the best way to deal with media excesses is for individual publications to put their house in order, through the use of corrections and apology columns, the printing of letters from aggrieved individuals, and the appointment of news ombudsmen to consider complaints from readers.

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<sup>1</sup> At <[www.presscouncil.org.hk](http://www.presscouncil.org.hk)>.

<sup>2</sup> The word “newspaper” in the HKPC Articles of Association has the same meaning as it has in the Registration of Local Newspapers Ordinance (Cap 268), ie, it covers magazines (or periodicals) in addition to daily newspapers: HKPC Articles of Association, Article 1.

<sup>3</sup> “Next Media emerges as leader in bitter HK newspaper wars”, *SCMP*, 13.6.03.

8.4 The constitution of the Council provides that Public Members must comprise not less than 50% of all members. Public Members are appointed at the invitation of the Executive Committee, which has the power to withdraw, revoke, cancel or suspend any such invitation “if it considers that it is in the interests of the Council to do so”. Public Members should be “persons of eminent attainment, rank or situation or persons in the journalist, legal, education or other professions who are willing to render advice and service towards the attainment of the objects of the Council”. The Public Members of the Council in March 2003 included the head of a university, a retired High Court judge, a Senior Counsel, a former chairman of the Law Society, three education workers, two social workers, a law professor, the Vice-President of the HK Performing Artistes Guild, the General-Secretary of the Society for Truth and Light, an industrialist, a news executive and three journalism professors.<sup>4</sup>

8.5 **Executive Committee** – Members of the Executive Committee are elected by ordinary resolution at the AGM. The Executive Committee is responsible for the management of the Council, its property and funds. It meets at least once a month. It has power to appoint officers for its Secretariat and determine the number of members and appoint committees. The Chairman of the Executive Committee is nominated by Press Members and elected by the members at a general meeting.<sup>5</sup> He must not engage in the newspaper or journalistic profession at the time of his appointment and during his office as Chairman of the Committee. The Vice-Chairman is elected from Public Members but can be nominated by Press or Public Members. He should not be engaged in the newspaper profession when elected by the Members. As at March 2003, the Chairman was Professor Edward K Y Chen, President of Lingnan University and former Chairman of the Consumer Council, and the Vice-Chairmen were Professor Leonard Chu, Director of the Centre for Media and Communication Research at HK Baptist University, and Mr Melvin Wong, barrister and Vice-President of the HK Performing Artistes Guild.<sup>6</sup> The Executive Committee had 19 members in total, comprising nine Press Members and ten Public Members of whom two were journalism professors and one was a news executive.

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<sup>4</sup> The Public Members of the HKPC as at 1.3.03 were: Mr Au Pak Kuen, Prof Johannes M M Chan, Prof Joseph M Chan, Prof Edward K Y Chen, Mr Cheng Huan SC, Dr Cheung Kwai Yeung, Miss Ann Chiang, Mr Choi Chi Sum, Prof Leonard L Chu, Ms Christine Fang, Mr Arthur Garcia, Mr Leung Siu Tong, Dr Kenneth Leung, Mr Tai Hay Lap, Mr Melvin Wong, Mr Donald Yap and Prof Angelina Yuen.

<sup>5</sup> The Chairman is elected by two-thirds of the poll votes of the Members at a general meeting, failing which in the first round of voting, the Members shall vote again with the elimination of the candidate who obtains the lowest number of votes in the previous round until the Chairman is finally elected by two-thirds of the Members. If there is only one candidate left for the election, the Chairman shall be elected by simple majority. HKPC Articles of Association, Article 37.

<sup>6</sup> The first Vice-Chairman was Mr Arthur Garcia, JP, a retired High Court Judge and former Commissioner for Administrative Complaints.

8.6 **Journalist Practice Rules** – All members are required to comply with the Articles, Bye-laws and the Journalist Practice Rules of the Council.<sup>7</sup> Any refusal or neglect to do so, or any conduct unworthy of a member, shall render a member liable to expulsion. The Executive Committee has “in the interim period” adopted the Journalists’ Code of Professional Ethics (issued jointly by the HKNEA, HKJA, HKFJ and HKPPA) as guidelines for local journalists in carrying out their duties.<sup>8</sup> The Council may, after full consultation with the four journalists’ associations, modify the Code as and when necessary.

## Complaints procedure

8.7 A complaint may be made orally by an interview at the Secretariat or by lodging a notice of complaint. Upon receipt of a complaint, the Secretariat will direct it to the Screening Committee, which comprises not less than three members appointed by the Executive Committee, to consider whether there is a *prima facie* case against the respondent. Should the Screening Committee decide that a *prima facie* case has been made out, it will forward the complaint to a Complaints Committee, which comprises not less than three persons (including at least one Public Member and one Press Member) appointed by the Executive Committee. If the Screening Committee rejects the complaint, a decision in writing and the reasons therefor will be forwarded to the Executive Committee. If the Executive Committee upholds the decision, a reply together with the reasons therefor will be sent to the complainant.

8.8 Where the respondent is a not a member of the Council, the Screening Committee would invite it to comment on the complaint and obtain its consent to submit to the Council’s jurisdiction. If the Screening Committee receives no response but the complaint discloses a *prima facie* case, then the complaint would be forwarded to the Executive Committee to decide whether to issue a general statement commenting on the complaint.

8.9 A Press Member whose newspaper is the subject of a complaint is not eligible to be appointed as a member of the Complaints Committee. Any member of the Screening Committee or Executive Committee who is a director, partner, editor or employee of the respondent may not be involved in the consideration of the complaint, nor may he attend and vote in any meeting of the Screening Committee or Executive Committee in deciding whether or not there is a *prima facie* case against the respondent.

8.10 Upon the appointment of a Complaints Committee, the Director General will request the respondent to give a reply within 14 days. Upon receipt of the reply, he will send a copy thereof to the complainant. The respondent is free to seek legal advice in answering the allegation and dealing with the complaint. The Complaints Committee will assist the parties to

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<sup>7</sup> The Journalist Practice Rules is defined in the Articles of Association as the standard of practice for the journalistic profession as set out by the Council from time to time.

<sup>8</sup> See the discussion on the Code in paras 7.19 to 7.20 above.

resolve the matter through peaceful negotiation and conciliation if appropriate. If the Committee considers that an inquiry should be held, the respondent will be provided with copies of all documents made available to the Committee. The Committee may proceed even if the respondent fails to appear at a hearing. The Complaints Committee may receive such evidence as it considers relevant to the hearing, whether it would be admissible in a court or not. If the complaint is made against a non-member who is unwilling to submit to the jurisdiction of the Council, the Committee may nonetheless determine the matter in accordance with all the evidence before it.

8.11 If a Complaints Committee is satisfied that a complaint is substantiated, it will forward its findings to the Executive Committee, which may then decide that the respondent and/or its editor, publisher, employee, contributor or freelance writer be reprimanded; direct the respondent to publish the directive or a summary of findings; direct the respondent to give a written apology to the complainant in a form agreed by the Executive Committee; and direct the respondent to publish an apology in its newspaper. By joining the Council, the newspaper members have undertaken not to commence legal proceedings against the Council or any members of the Executive or Complaints Committee in connection with or arising out of an inquiry. The authority of the Council rests on the willingness of members to respect the Council's adjudications and to admit mistakes publicly.

## Operation

8.12 The Council handled 74 complaints between September 2000 and December 2002, ie, 32 complaints per year on average. About 15% of these related to privacy intrusion alone, 49% related to inaccurate reporting, and 26% related to indecency, violence and sensationalism.<sup>9</sup> It should be borne in mind, however, that an inaccurate report about an identifiable individual also gives rise to a privacy concern, and the percentage of complaints that are related to privacy may therefore be higher than it appears to be. Only 31% of complaints were directed at member newspapers, while complaints against non-member newspapers and magazines accounted for 58% and 11% respectively.

8.13 The number of complaints received by the Council has been low, but this may be due to: (a) the fact that the Council does not have jurisdiction over magazines and several popular newspapers; (b) the fact that inaccuracy and news-gathering activities fall outside the remit of the Council; (c) lack of publicity about the Council's complaints procedure; and (d) low awareness among members of the public of their right to be protected from unlawful or arbitrary interference with their privacy by the press. Only 5% of the respondents in an HKPC survey commissioned in January 2002 were aware that the Council provides an avenue for making a complaint against a newspaper.<sup>10</sup> In relation to the effectiveness of the Council in resolving

<sup>9</sup> HKPC, Chairman's Report 2001-2002, paras 12-15.

<sup>10</sup> The experience of the UK Press Complaints Commission has been that the higher the profile of the PCC, the greater the number of complaints. In countries where the press council is



complaints, the 2000/01 Annual Report said that “most” of the member newspapers were supportive and positive in responding to complaints against their newspapers, and that the Council had promptly resolved “most” of the complaints related to member newspapers. The fact that the Council is not able to fully address complaints against magazines and non-member newspapers will be discussed after we have examined the Council’s strengths and weaknesses.

## **Strengths and weaknesses**

8.14           **Strengths** – We welcome the formation of the HK Press Council and commend the efforts of all those who have contributed to its formation and smooth operation, in particular, the Newspaper Society of HK, the HKNEA, the HKFJ, the public members who have volunteered their service to the Council, and those who have provided the funds for its daily operation. The following are some of the strengths of the Council:

### ***(a) Independence***

- (i) The Government is not involved in the process, in particular the appointment of the Council members.
- (ii) Although the Council is initiated by the Newspaper Society, it is open to all local newspapers and is independent of the Society.
- (iii) The operation of the Council is independent of the founding members and the press industry.
- (iv) The Council regularly reviews the scheme in the light of changing circumstances and expectations. The Council’s decision to accept third party complaints and to publish their findings on their website are good examples.

### ***(b) Public membership***

- (i) The Council admits public members, who must be in the majority. There are also more Public Members than Press Members on the Executive Committee.
- (ii) Both the Chairman and the Vice-Chairman of the Executive Committee must be Public Members elected by the full Council.
- (iii) It is generally agreed that the Public Members are persons of integrity and the Chairman is a person of high standing in the community.

### ***(c) Procedural fairness***

- (i) The procedure of the Council is informal but fair to the parties.

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anonymous, low rates of complaints could be “the symptom of an unseen boil which will need to be lanced”. See I Beales, *Imperfect Freedom – The Case for Self-Regulation in the Commonwealth Press* (Commonwealth Press Union, 2002), p 32.

- (ii) The Bylaws ensure that the Screening Committee, Complaints Committees and Executive Committee are impartial and independent.

***(d) Industry code***

- (i) The Council starts off by using a code that is agreed by the four journalists' associations as the yardstick for deciding complaints.
- (ii) The Council recognises that there is a need to keep the code under review.

***(e) Complaints procedure***

- (i) The complainants do not have to incur any costs in lodging a complaint.
- (ii) The Council does not rule out third party complaints.
- (iii) The Council is assisted by a Director General who is an experienced journalist.

***(f) Funding***

- (i) Since the running costs of the Council are financed by one or more anonymous donors and not by the industry or the member newspapers, the well-being of the Council is not dependent on the financial support of those whose conduct is subject to its scrutiny.
- (ii) The taxpayers do not have to bear the costs of the Council.

***(g) Transparency***

- (i) The Council maintains a bilingual website, which contains useful information about its composition and complaints procedure.
- (ii) The Council has adopted the practice of publishing an annual report and complaints statistics.
- (iii) The outcome of the Council's investigations has also been made public on its Chinese website since early 2002. Members of the public are able to assess whether the rulings are proportional and consistent.

8.15           **Weaknesses** – Although the efforts made by the Newspaper Society, HKNEA and HKFJ are praiseworthy, the HK Press Council is not without weaknesses:

***(a) Press representation on the Council***

- (i) Although magazines are eligible to become press members, no magazines have been admitted so far. Magazines are

therefore not represented on the Council, and the Council generally does not rule on complaints about magazines.

- (ii) The HKJA, the largest journalists' union in Hong Kong, and the HKPPA are unwilling to support the Council by becoming its members.
- (iii) *Apple Daily*, *HK Economic Journal*, *Metro*, *Oriental Daily News*, *Sing Pao Daily News* and *The Sun*, representing about 80% of total newspaper readership, are not members of the Council.
- (iv) Press membership of the Council is voluntary and existing press members may withdraw at any time.
- (v) Since all newspaper members are treated alike with equal representation and voting on the Council irrespective of their readership, the Council may be dominated by newspapers that do not have a high circulation, while mass circulation papers such as *Oriental Daily News* and *Apple Daily* (with 40% and 27% of total Hong Kong readership respectively) may consider the current set up of the Council unfair to them.
- (vi) The Council may reject the application of a newspaper for membership without giving any reason.<sup>11</sup>

**(b) Public representation on the Council and its committees**

- (i) Although the Public Members of the Council must comprise not less than 50% of all Council members and, in March 2003, the actual number of Public Members on the Executive Committee exceeded that of Press Members (by one), there are no provisions in the Council's Articles of Association guaranteeing that the Public Members on the *Executive Committee*, which is responsible for the adjudication of complaints and the day-to-day operation of the Council, will always be in the majority.
- (ii) Since there is no requirement that the Public Members must be represented on the Screening Committee, this Committee might be controlled or dominated by the Press Members.
- (iii) A Complaints Committee, which may have three or more members, could have no more than one Public Member.
- (iv) There is no requirement that the Public Members must be independent of the press industry and journalistic profession. Public Members are defined in the HKPC's Constitution as

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<sup>11</sup>

HKPC Articles of Association, Article 5.

“persons of eminent attainment, rank or situation or persons in the *journalist*, legal, *education* or other professions who are willing to render advice and service towards the attainment of the objects of the Council”. Since journalists (whether working in the print or broadcast media) and journalism professors have close connections with the press, public representation on the Council may be diluted by the appointment of journalists, journalism professors and other persons working in the press industry (eg the legal officers or training managers of media organisations) to be “Public Members”. As a matter of fact, out of the 17 Public Members on the Council in March 2003, three were journalism professors and one was a senior journalist working in a broadcasting organisation. The same senior journalist and two of these three journalism professors were also Public Members of the Executive Committee. The Public Members would be in the minority in both the Council and its Executive Committee if the press-related Public Members are counted as Press Members instead.

- (v) Since Public Members who are journalists or journalism professors may be appointed by the Executive Committee to the Screening Committee and Complaints Committees, and one or two of these press-related Public Members may be the only Public Member or Members on the Screening or Complaints Committee in which the Public Members may or may not be in the minority, some may not have confidence in these committees dealing with the complaints in a fair and impartial manner.

### **(c) Effectiveness**

- (i) The number of cases satisfactorily dealt with by the Council is small. Within the first 22 months of its operation, the Council received only 11 complaints relating to privacy intrusion alone. The Council upheld four complaints. They took no further action in another three cases on the ground that they involved non-member newspapers.
- (ii) About 70% of the complaints were directed against non-member newspapers and magazines, which do not submit to the Council’s jurisdiction and are not bound by its adjudications. Hence, members of the public who suffered at the hands of non-member publications do not normally have an adequate remedy.
- (iii) The Council invariably asks non-member newspapers to respond to the allegations made against them, but they usually ignore the Council’s request for information and refuse to co-operate in the investigation.

- (iv) While the name of a newspaper respondent is disclosed in the case report if it is a member of the Council, the Council generally refrains from naming a newspaper respondent if it is not a member even though the complaint is upheld.
- (v) Although a member of the Council may lodge a complaint with the secretariat, the Council does not generally initiate its own investigations. Nor does the Council envisage that it is part of its duty to monitor compliance with the Code on a daily basis.
- (vi) The Council has no power to enforce its directive if an offending newspaper refuses to comply. It cannot compel a newspaper member to publish the findings promptly with due prominence. The only sanction available is to expel the defaulting member from the Council. But expelling a newspaper from the Council is not in the best interests of press self-regulation.
- (vii) The Chairman of the Council admitted that the way some of the member newspapers dealt with corrections and replies was far from satisfactory. He cited delays in publishing a correction or reply and the lack of prominence in a correction or reply as examples.<sup>12</sup>
- (viii) The Council and its members could be sued for defamation if they criticised the conduct of non-member publications for breaching the Code.

***(d) Purview of the Council and coverage of the Code of Conduct***

- (i) The Council rules out complaints about news-gathering activities that infringe personal privacy on the grounds that “news-gathering methods do not fall within the purview of [that] Council”.<sup>13</sup>
- (ii) The Council may decline to deal with complaints relating to inaccuracies or misleading statements on the grounds that these matters do not fall within its purview.

<sup>12</sup> “陳坤耀：民主派記協為反對而反對”，*HK Economic Journal*, 19.11.01.

<sup>13</sup> See the ruling of the HKPC on the complaint dated 15.1.01 concerning the complainants' car being pursued and intercepted by journalists on a highway (“由於採訪手法不包括於本會的工作範圍，本會未能根據附例處理此投訴”), at <[www.presscouncil.org.hk/c/defaultc.htm](http://www.presscouncil.org.hk/c/defaultc.htm)> (10.9.02); and the ruling on the complaint dated 26.10.01 about the news-gathering methods used by the journalists of a magazine in covering a story about truancy.

- (iii) The Journalists' Code used by the Council as the basis of adjudication is not detailed enough to provide practical guidance to journalists and members of the public.<sup>14</sup>
- (iv) To the extent that the Journalists' Code does not require journalists to accept social responsibility when discharging their duties, it fails to give recognition to the requirement under the ICCPR that the exercise of the right to freedom of expression carries with it "special duties and responsibilities".

**(e) Transparency**

- (i) The Annual Reports do not contain enough information to enable the public to judge whether the Council has been effective in providing a remedy to the victims. For instance, the reports do not disclose what directives have been issued by the Council; whether or not the offending newspapers have complied with the directives in full; and what action has been taken if an offending newspaper refused to comply.
- (ii) The complaints mechanism is not widely known to the public, particularly those who do not subscribe to the member newspapers.

**(f) Accountability**

- (i) Although the Council discharges an important public function, it is nevertheless a private company not accountable to anyone (whether the judiciary, the legislature, or the general public) other than to its members. The Council is under no legal obligation to observe the procedural requirements under Article 14 of the ICCPR, nor are its proceedings and decisions subject to the scrutiny of the Court. Hence, a complainant would not have any redress if:
  - the Council or any of its committees does not act in accordance with its constitution or bylaws;
  - the Council does not observe the rules of natural justice when dealing with his complaint;
  - the Council unreasonably rejects his complaint;
  - he is aggrieved by the ruling of the Council;
  - the defaulting newspaper fails to fully comply with the directive of the Council; or
  - a non-member newspaper or magazine ignores the ruling of the Council.
- (ii) The members of the public can do nothing if:

<sup>14</sup>

Cf the Press Code of the German Press Council, at <[www.uta.fi/ethicnet/germany.html](http://www.uta.fi/ethicnet/germany.html)> and the Privacy Standards developed by the Australian Press Council, at <[http://www.presscouncil.org.au/pcsites/priv\\_stand.html](http://www.presscouncil.org.au/pcsites/priv_stand.html)>.

- the Council is inactive or fails to discharge its functions;
  - the Council fails to secure enough funds to maintain its operations;
  - the Council amends its constitution or bylaws in such a way as would lessen the protection afforded to victims of press intrusion; or
  - the Council changes its practice in such a way as would decrease the transparency of its activities and decision-making process.
- (iii) A newspaper or magazine proprietor can do nothing if his application for membership is rejected by the Executive Committee without giving any reasons.

***(g) Funding***

- (i) Although one or more anonymous donors have been generous enough to finance the recurrent costs of the Council, there is no guarantee that the Council will continue to be adequately funded in the future.
- (ii) In the light of the present economic climate, the Council does not seem to have enough resources to publicise its services, monitor compliance with the code, obtain all the legal services it requires, promote media education, and undertake research into media ethics.
- (iii) The lack of resources to defend libel suits brought by non-member publications has precluded the Council from discharging its adjudicative and education functions to the fullest extent.

***(h) Publicity***

The Council maintains a website informing the public about its functions and activities. However, we are not aware of any newspaper members giving publicity to the services of the Council by donating space for advertisements in their newspapers, nor are we aware of the Council advertising its services in the media.

8.16 Of all the weaknesses highlighted above, four have been identified as the major obstacles to the Council's playing a greater role in protecting the public from press intrusion:

- (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.

We elaborate on the first two issues and explain how the Council deals with them in the following paragraphs.

### **Lack of remedies for intrusion by non-member newspapers**

8.17 Newspaper members have undertaken not to sue each other when joining the Council. They are, however, not immune from libel suits brought by non-members. If the Council issued an adjudication critical of a non-member newspaper and another newspaper published that adjudication, then the non-member might sue the Council and the publisher for libel. The Council is supported mainly by donations, and does not have the resources to meet the legal costs of defending a libel suit. A newspaper criticised by the Council might appeal all the way up to the Court of Final Appeal, and the Council would have to bear part of the legal costs even if it succeeds in its defence. The Council is therefore reluctant to issue adjudications critical of non-member newspapers. The Council has occasionally made general comments in these cases. However, these comments were usually made without naming the newspapers, unless the newspaper concerned already accepted responsibility. Hence, the Council may not be able to provide an effective remedy to individuals aggrieved by the conduct of non-member newspapers.

8.18 After pointing out that about 75% of the complaints in 2000/01 were directed against non-member newspapers and magazines, the Council's annual report in 2001 stated that it was "very difficult" for the Council to investigate these complaints. The report revealed that there was a "nagging frustration" among members at their inability to handle complaints against non-members that had been brought to their attention. The fact that the most widely read newspapers were unwilling to join made it "virtually impossible" for the Council to perform an effective self-regulatory role in enhancing journalists' professional standards. Since the Council had neither the power nor the authority to criticise any newspaper or magazine that was not a member of the Council, and it might incur legal liability or expenses for doing so, the Council was "handicapped" by not being able to provide any assistance to members of the public whose complaints related to non-member newspapers or magazines. The Council was concerned that if this problem could not be overcome, it would be difficult to build up public confidence; and the public would not bother to take up their complaints with the Council.<sup>15</sup> The Council therefore perceived a "desperate need" for the defence of qualified privilege so that the Council could undertake and fulfil its tasks and objectives.

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<sup>15</sup> HKPC, *Chairman's Report 2000-2001*, paras 3, 21-26.



The findings of a survey commissioned by the HKPC in January 2002 confirmed the Council's concerns, as 56% of the respondents considered that it had little impact on the ethical standards of newspapers, while only 6% considered that it had a significant impact.

8.19 Since the major players are not members of the Council and therefore not subject to its rules, member newspapers that are liable to be reprimanded by the Council and admit their faults in public are placed at a competitive disadvantage in the market. Member newspapers may feel that they have placed themselves in an unfair position by voluntarily submitting themselves to the scrutiny of the Council. We therefore consider it important to create a level-playing field for the ethical and responsible newspapers to flourish. However, universal subscription to a self-regulatory scheme is unlikely to be achieved without public or statutory intervention. The HK Press Council Bill promoted by the HKPC represents an attempt to achieve effective self-regulation with statutory backing without any Government intervention.

## **The Hong Kong Press Council Bill**

8.20 In October 2001, the HK Press Council published a consultation paper together with a draft HK Press Council Bill, which was intended to be introduced as a Private Member's Bill.<sup>16</sup> Apart from seeking to grant statutory status to the HKPC, the Bill provided that (a) no member or employee of the Council would be personally liable for any act done by the Council if the member or employee was acting in good faith in the course of the Council's operations;<sup>17</sup> and (b) a report of any finding or decision of the Council made at the conclusion of an investigation into a complaint should be protected by statutory qualified privilege.<sup>18</sup> The defence of qualified privilege would protect a newspaper that had published the Council's finding or decision from liability for defamation unless the publication was malicious. However, the defence would not be available if the newspaper defendant had been requested by the plaintiff to publish a reasonable statement by way of explanation or contradiction but had refused to do so.

8.21 The draft Bill did not have the full support of the major political parties. The HK Journalists Association opposed the Press Council's proposal on the following grounds:

- (a) the creation of a statutory body could harm press freedom;
- (b) it could open the door to Government intervention;

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<sup>16</sup> The Bill adopts the "through train" concept. All persons who are members of the HKPC immediately before the commencement of the Ordinance shall become either a press member or public member of the statutory Press Council. Likewise, the Executive Committee of the statutory Press Council shall consist of all members of the Executive Committee of the HKPC immediately before the commencement of the Ordinance. These persons shall hold office until the election of officers and members of the Executive Committee at the first AGM of the statutory body. Cf. Heung Yee Kuk Ordinance (Cap 1097).

<sup>17</sup> Clause 13(11).

<sup>18</sup> Clause 15.

- (c) it failed to take into account the fact that most democracies adopt a voluntary mechanism to keep an eye on the media; and
- (d) it ignored improvements in media ethics.<sup>19</sup>

8.22 We have seen from Chapter 4 that media intrusion is still a matter of serious public concern. We point out in Chapter 11 that statutory press councils also exist in democratic societies. We also argue in Chapter 14 that the operation of a statutory press council can be independent of the Government, and an independently constituted press council which operates as a self-regulatory body will not encroach on press freedom.

8.23 For present purposes, we agree that the HKPC is ineffective if it cannot pass judgment on the conduct of non-member newspapers without fear of litigation. We also agree that the media should be encouraged to publish the Council's critical judgments by making the defence of qualified privilege available to the publishers of these judgments. The Bill is therefore a step in the right direction. However, the draft Bill is not without shortcomings:

- (a) **Objects** – Whereas the objects of the HKPC are confined to the promotion of professional and ethical standards in the newspaper industry and the adjudication of public complaints against the conduct of newspapers, the proposed statutory council may, in addition to the promotion of standards and consideration of complaints, “uphold and defend freedom of the press, including but not restricted to publishing reports and making representation to the Government or otherwise on any matter concerning the freedom of the press”. Although these objectives are not conflicting, we have reservations asking the same body simultaneously to defend press freedom and to protect private citizens from abuses of press freedom.

In the UK, the twin objectives of the now defunct UK Press Council were to preserve press freedom and to adjudicate complaints against the press. This dual role had been criticised by the third Royal Commission on the Press, which pointed out that its objects of defending press freedom could be carried out by professional or trade associations. The Royal Commission was of the view that “the task of considering complaints against the press is the one object for which such a body as the Press Council is essential, and only if it is independent will citizens be satisfied that their interests are being safeguarded.”<sup>20</sup> The Press Complaints Commission that replaced the Press Council no longer has the preservation of press freedom as its mission.

<sup>19</sup> HKJA & ARTICLE 19, *The Line Hardens – New Threats to Freedom of Expression* (2002), p 20.

<sup>20</sup> Royal Commission on the Press, Cmnd 6810 (1977), para 20.2. See also G Robertson, *People Against the Press* (London: Quartet Books, 1983), pp 111-116 (arguing that a press council should not advocate press freedom because to do so with the necessary commitment would undermine its posture as an impartial and independent adjudicator of public complaints).

We agree that the defence of press freedom is a legitimate objective. However, it is unnecessary for a press council to be a defender of press freedom if there are already powerful advocates of press freedom and the Government is not a source of complaints. Moreover, the proposed council would be required to balance press freedom with other competing interests (including privacy) when adjudicating complaints. When carrying out this balancing exercise, the council must be, and be seen to be, independent and impartial. A press adjudicating body which is also a defender of press freedom would lose objectivity and not be perceived as independent and impartial in the eyes of the public.

The statutory framework for the protection of personal data is illustrative. The Privacy Commissioner, who is charged with the responsibility of balancing data privacy with other competing interests, is required to monitor, supervise and promote compliance with the provisions of the PD(P)O (which was drafted after taking due account of all the countervailing interests), but not to enforce, safeguard and promote the right to data privacy *per se*. Since the primary concern of the public is the absence of an effective remedy for unwarranted press intrusion, the press council should be set up as a press complaints body acting as a watchdog of the public, rather than a champion of the press.

- (b) **Coverage** – Local magazines would not be eligible to be admitted as press members of the statutory council.<sup>21</sup>
- (c) **Nomination of public members** – The nomination of public members would be under the control of press members because a public member would have to be nominated by at least two press members.
- (d) **Composition of public members** – The Bill seeks to ensure that public members are “broadly representative” of the members of the public by providing that the public members “shall” include two lawyers, one social worker, one teacher, and one academic in a tertiary institution. Bearing in mind that there is no limit to the number of public members on the Council other than the requirement that the number of public members must not exceed that of press members by 30%, and that there is no limit to the number of press members on the Council, the provision has the effect of placing a limit on the number of lawyers, social workers, teachers and academics on the Council irrespective of the total number of press or public members. Besides, there is no guarantee that these five members will be elected to the Executive Committee.

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A “Press Member” is defined in clause 2 as a news agency, a professional journalists’ organisation or a “daily newspaper”. Cf clause 9(5).

- (e) **Eligibility of newspapers for membership** – A local newspaper would only be *eligible* to be a member of the Council; it would not have a *right* to become a Council member and participate in the election of the Executive Committee. Under the Bill, the Executive Committee has a discretion to admit a local newspaper as a member. Although the Committee must provide written reasons if it decides not to admit an eligible person to be a press member, and an aggrieved newspaper may request the Council to review the decision, the Bill does not specify the grounds on which an Executive Committee or Council may reject an application.
- (f) **Residency requirement of complainants** – The Council would be able to reject a complaint if the complainant is not a Hong Kong resident. Hence persons who are not qualified to obtain a Hong Kong identity card, such as tourists, overseas students, foreign businessmen and overseas domestic helpers would not have a right to complain even though their right to privacy has been infringed by a local newspaper while they are staying in Hong Kong.
- (g) **Third party complaints** – The Council would be able to reject a complaint “if the alleged infringement of privacy is not related to the privacy of the complainant”. In other words, a privacy complaint must be made by the victim. The Council may refuse to entertain a complaint on the ground that it is made by a third party.
- (h) **Availability of alternative remedy** – The Council would be able to decline an investigation if the subject matter of the complaint “can be adequately dealt with elsewhere”. Hence the Council would be able to exclude a complaint if the complainant has a remedy at law by bringing legal proceedings. This requirement would deprive the victims of a cheap and speedy remedy as an alternative to legal actions.
- (i) **Code of Conduct** – The Code of Conduct could be amended by not less than three quarters of the press members at a general meeting without the endorsement of the public members or ratification by the full council.
- (j) **Scope of legal immunity** – The immunity to be enjoyed by the members and employees of the Council would extend to “any act done or default” made by the Council “acting in good faith in the course of the operations of the Council”. Since two objects of the Council are to uphold and defend freedom of the press (including making representations on any matter concerning press freedom) and to promote and uphold the highest professional and ethical standards of the newspaper industry, the protection covers acts other than those committed in the adjudication of complaints. While there is a need to render Council members immune from

lawsuits when exercising their adjudicating function, it is doubtful whether there is such a need when the Council upholds and defends press freedom.

- (k) **Enforcement of adjudications** – Although the Council may require an offending newspaper (whether a Council member or not) to publish a censure, an apology or a correction, it does not have power to enforce the requirement against the newspaper should the latter choose to ignore it.
- (l) **Duty to make public the findings** – The Bill provides that the Council “may” publish the full reports of the Complaint Committees. It does not impose any statutory obligation on the Council to report its adjudicative activities, nor does it require the Council to publish its findings, decisions and reasons therefor on a regular basis.
- (m) **Duty to publish annual reports** – The Bill does not require the Council to give an account of its affairs by publishing an annual report.

8.24 The HKPC is revising the draft Bill. Our comments may therefore be out of date by the time this report is released. As far as the draft Bill is concerned, however, we do not consider that it offers the most appropriate solution to the HKPC’s present inability to provide an effective remedy to victims who suffer at the hands of non-member newspapers and magazines. In the next two chapters, we therefore examine the various alternatives which have been suggested. Chapter 9 is devoted entirely to a discussion of whether issuing a code of practice under the Personal Data (Privacy) Ordinance or amending the Ordinance is a viable and desirable alternative to the creation of a statutory body to regulate privacy intrusion by the press.

## Chapter 9

### Personal Data (Privacy) Ordinance

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9.1 We examine in this chapter the extent to which the provisions of the Personal Data (Privacy) Ordinance (Cap 486) (“the PD(P)O”) provide protection for the individual from unwarranted privacy intrusion by journalists and media organisations.<sup>1</sup> We go on to recommend that the Privacy Commissioner for Personal Data (“the Privacy Commissioner”) should issue a code of practice in order to enhance the protection from such intrusion provided for under the PD(P)O. We then consider the limitations of the PD(P)O in this area and hence of such a code. Lastly, we consider whether the PD(P)O should be amended to provide for a comprehensive scheme of protection of privacy from intrusion by journalists and media organisations, not just privacy in relation to personal data, and conclude that this would not be desirable.

#### Application of the PD(P)O to the media

9.2 The PD(P)O aims to protect the privacy of individuals in relation to personal data.<sup>2</sup> News reports, newspaper and magazine articles, photographs and video footage relating to individuals from which it is practicable to identify the individuals concerned generally constitute personal data under the PD(P)O.<sup>3</sup> Accordingly, the collection, holding, use or processing of such material by journalists and media organisations are all governed by the provisions of the PD(P)O, including its data protection principles (“the DPPs”)<sup>4</sup>, subject to any applicable exemptions. On the other hand, to the extent that media organisations or their employees or agents engage in activities that do not result in the collection, holding, use or processing of personal data, then they are not subject to the PD(P)O. An example of such an activity would be the following of a known person by a journalist without actually taking any photograph of the person or otherwise recording his behaviour. No matter how intrusive such an activity may be with respect to the privacy of the individual concerned it is not something that is governed by the provisions of the PD(P)O.

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<sup>1</sup> See generally, M Berthold & R Wacks, *Hong Kong Data Privacy Law – Territorial Regulation in a Borderless World* (Sweet & Maxwell Asia, 2<sup>nd</sup> edn, 2003).

<sup>2</sup> See the long title of the PD(P)O.

<sup>3</sup> The definitions of personal data, data and document in s 2(1) of the PD(P)O refer (see below).

<sup>4</sup> The DPPs are set out in Schedule 1 of the Ordinance.

## ***The Data Protection Principles***

9.3 DPP 1(1) provides that personal data must not be collected unless: (a) they are collected for a lawful purpose directly related to a function or activity of the data user who is to use the data; (b) the collection is necessary for or directly related to that purpose; and (c) the data are adequate but not excessive in relation to that purpose. Sub-paragraph (a) poses no difficulty to a journalist or media organisation so long as the collection of personal data is for a journalistic purpose. Similarly, so long as the collection of personal data by a journalist or media organisation may reasonably be said to be necessary for or directly related to such a purpose and the personal data so collected are not excessive, sub-paragraphs (b) and (c) will be complied with.

9.4 DPP 1(2) requires that personal data shall be collected only by means which are both lawful and fair in the circumstances of the case. This means that a journalist or media organisation, in common with any other person, is prohibited from collecting personal data by means that are unfair in the circumstances of the case even if the means are lawful. For example, where personal data are collected by the use of deception, such a means of collection is likely to be treated as unfair if no public interest is at stake and hence contrary to DPP 1(2), even if the deception concerned is not unlawful. The Privacy Commissioner has advised that collection by means unknown to the individuals concerned (eg, photo-taking in public places using long-range lens or hidden cameras) is generally not considered to be a fair means of collection.<sup>5</sup> Other examples given by the Privacy Commissioner include the taking of photographs of individuals in private premises from outside without their consent, and the taking of photographs of individuals in public where they have made it clear that they do not wish to be photographed.<sup>6</sup> These means might nonetheless be considered fair if there is an over-riding public interest in the collection of personal data.<sup>7</sup>

9.5 Where personal data are collected from the individual who is the subject of the data (as may occur, for example, where a journalist records information given by an individual about himself during an interview) the provisions of DPP 1(3) require that all practicable steps shall be taken to inform the individual concerned of certain matters. In particular, the individual must be explicitly informed of the purpose for which the data are to be used. Accordingly, where a journalist or media organisation collects personal data from the individual who is the subject of the data for the purpose of publication or broadcasting, the individual should be explicitly informed of this.

9.6 The judgment of the Court of Appeal in *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data*<sup>8</sup> has, however, limited the application of the various requirements of DPP 1 reviewed above to the

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<sup>5</sup> Minutes of the Meeting of the Panel on Information Policy of the Provisional Legislative Council held on 26.9.97, para 27.

<sup>6</sup> Above.

<sup>7</sup> Above.

<sup>8</sup> [2000] 1 HKC 692.

collection of data relating to individuals whose identities are known to the collecting party or data of individuals the collecting party intends to identify (see below). Accordingly, where a journalist or media organisation, say, photographs or films an individual whose identity is unknown and whom the journalist or media organisation does not intend to identify, the photographing or filming of the individual is not subject to the provisions of DPP 1 even though the use of the photograph or film in a published or broadcast report may result in the individual being recognised and identified by his acquaintances.

9.7 DPP 2(1) requires that all practicable steps shall be taken to ensure that personal data are accurate having regard to the purpose for which the data are, or are to be, used. Given their time-sensitive nature, it will often be the case that there will be inaccuracies in personal data contained in news reports. However, so long as all practicable steps have been taken to check the accuracy of the personal data concerned, having regard to the fact that the purpose for which the data are to be used is news reporting, the requirements of DPP 2(1) will have been complied with.

9.8 DPP 2(1) also provides that where there are reasonable grounds for believing that personal data are inaccurate having regard to the purpose for which the data are, or are to be, used, the data concerned should either not be used for that purpose until those grounds cease to apply, or be deleted. Accordingly, a media organisation that includes personal data in, say, a news report knowing that the data are inaccurate would be in breach of DPP 2(1). Further, where it is practicable in all the circumstances of the case to know that personal data disclosed to a third party were and are materially inaccurate having regard to the purpose for which the personal data are, or are to be, used by the third party, DPP 2(1) provides that all practicable steps shall be taken to inform the third party that the data are inaccurate and to provide the third party with such particulars as would enable the rectification of the data.

9.9 At first sight, it might appear that these requirements of DPP 2(1) would require a media organisation to publish or broadcast (as the case may be) corrections of reports that contained inaccurate personal data. Indeed, in our *Report on Reform of the Law Relating to the Protection of Personal Data*<sup>9</sup>, we recommended that the media be required to take all practicable steps to disseminate a correction where inaccurate data have been published.<sup>10</sup> On closer examination, however, it is doubtful whether DPP 2(1)'s requirements that recipients of inaccurate personal data be informed of corrections to that data are applicable to inaccurate personal data that have been broadcast or published to a general audience. This is because the relevant requirements of DPP 2(1) presuppose that the party that disclosed the personal data knows the purpose for which the data are, or are to be, used by each of the parties to whom the data have been disclosed. Such a presupposition does not seem to hold good for a publisher to a

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<sup>9</sup> August 1994.

<sup>10</sup> Above, para 18.50.



general audience, such as a newspaper publisher or broadcaster.<sup>11</sup> We are also not aware that anyone has sought to require that this be done in reliance on the provisions of DPP 2(1).

9.10 In *Kam Sea Hang Osmaan v Privacy Commissioner for Personal Data*<sup>12</sup>, the Administrative Appeals Board was asked to consider a case in which an individual alleged that a magazine had published fabrications about him. The Board found, however, that a lie or fabrication about an individual falls outside the definition of personal data and, hence, that the provisions of the PD(P)O, including the provisions of DPP 2, did not apply at all in the case before it. Specifically, the Board said that:

*“The wordings of the definition [of personal data in section 2(1) of the PD(P)O] are clear enough to exclude any fabrication or lies told about a person by another person. ... A lie or fabrication always remains a lie or fabrication and can never convert into ‘personal data’.”*

9.11 With respect to the Board, there is no basis in the wording of the definition of personal data in section 2(1) of the PD(P)O for the contention that it excludes lies or fabrications. We also note that the Board’s view would mean that the requirements of DPP 2, and the PD(P)O generally, apply where personal data are inaccurate as a result of inadvertence but not where the inaccuracy is deliberate. We cannot find any justification for such a distinction in the Ordinance. It is also at odds with our recommendation in our *Report on Reform of the Law Relating to Personal Data* (on which the PD(P)O was based) that all data relating to an individual that facilitate directly or indirectly the identification of the individual to whom they relate should be regulated by law “whether true or not”.<sup>13</sup> A lie or fabrication is just as much an untruth as an inadvertent mistake. Accordingly, we respectfully consider that the views expressed by the Board on this matter are incorrect and hence that the application of DPP 2, and the PD(P)O generally, is not limited in the manner contended for by the Board in its decision referred to above.

9.12 DPP 3 provides that personal data must not, without the express consent of the data subject, be used for any purpose other than the purpose for which the data were to be used at the time of the collection of the data or a directly related purpose. Journalists and media organisations are therefore under an obligation to ensure that personal data collected by them for journalistic purposes are used only for these purposes or purposes directly related to them unless the data subject expressly agrees otherwise.

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<sup>11</sup> Similar arguments apply with respect to the provisions of s 23(1) of the PD(P)O, which require that corrections of personal data made pursuant to a data correction request be notified to third parties to whom the data had been disclosed within the previous 12 months unless there is reason to believe they have ceased to use the data for the purpose for which the data were disclosed. These arguments are set out in para 15.58 below.

<sup>12</sup> Administrative Appeal No 29 of 2001, unreported decision of the Administrative Appeals Board dated 28.2.02.

<sup>13</sup> August 1994, para 8.17.

9.13 As a general rule, compliance with the requirements of DPP 3 should pose little difficulty for journalists and media organisations because the personal data they publish or broadcast will usually have been collected for journalistic purposes. On the other hand, DPP 3 does pose potential problems for persons who wish to disclose personal data to journalists or media organisations. If such data were not collected by such persons for use for journalistic purposes or purposes directly related thereto, which will often be the case, then such disclosure would be contrary to the requirements of DPP 3 unless the express consent of the subject is obtained. To address this restriction, an exemption is provided for in the PD(P)O to permit the disclosure of personal data to journalists and media organisations where this is in the public interest. Specifically, in accordance with section 61(2) of the PD(P)O, journalistic sources are permitted to disclose personal data to a journalist or media organisation for publication or broadcasting if they have reasonable grounds to believe, and reasonably believe, that publication or broadcasting of the personal data concerned is in the public interest, even though such disclosure would otherwise contravene the requirements of DPP 3.

9.14 DPP 4 and DPP 5 provide respectively for various requirements with respect to the security of personal data and openness about the personal data policies and practices of persons who collect, hold, process or use personal data, and other matters. Like any other body, to the extent that a media organisation collects, holds, processes or uses personal data, it is subject to these requirements.

9.15 In *Apple Daily v Privacy Commissioner*,<sup>14</sup> the Administrative Appeals Board overturned a ruling by the Privacy Commissioner that the publisher of *Apple Daily* had breached DPP 4 by publishing the name of the street to which victims of an attack had moved out of fear of a further assault by their assailant. The basis for the Privacy Commissioner's decision was that the publication of the address in *Apple Daily* had put the individuals concerned at risk because their assailant might learn of their new location from the article and attack them again. The Privacy Commissioner concluded that this was a breach of DPP 4 because DPP 4 provides for a requirement to take all practicable steps to ensure that personal data are protected against unauthorised or accidental access having particular regard to the harm that could result from such access. The Privacy Commissioner ruled that *Apple Daily* had failed to meet this requirement by publishing the street name in the article.

9.16 The Administrative Appeals Board disagreed. It found that DPP 4 was intended to ensure that personal data are *held* in a secure manner. In publishing the personal data concerned, *Apple Daily* was using the data in such a way that the public would inevitably gain access to it and no question of "unauthorised or accidental" access arose. The Board concluded that: "Access is gained by reason of the publication and is not accidental in nature."

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<sup>14</sup> Administrative Appeal No 5 of 1999, unreported decision of the Administrative Appeals Board dated 30.11.99, discussed in R Wacks, "Privacy and Process" (1999) 29 HKLJ 176.

9.17 DPP 6 makes general provision for an individual to have the right to access and correct personal data of which he is the subject. These general provisions are elaborated upon in Part V of the PD(P)O, which contains detailed provisions on compliance with such data access and correction requests.<sup>15</sup>

9.18 Potentially, the exercise of these rights by individuals who are the subjects of personal data collected by journalists or media organisations for journalistic purposes prior to publication or broadcasting of the personal data concerned could have an inhibiting effect on the journalistic process. To avoid this consequence, section 61(1) of the PD(P)O provides that personal data held by a person, whose business consists, in whole or in part, of a journalistic activity,<sup>16</sup> solely for the purpose of that activity, or a directly related activity, are exempt from the requirement to comply with data access requests unless and until the data are published or broadcast. The net effect of this exemption is that under the PD(P)O individuals have no right of access to, and correction of, their personal data held by journalists or media organisations for a journalistic purpose before the data concerned are published or broadcast.

### ***Rights of redress***

9.19 An individual who believes that a journalist or media organisation has breached any of the provisions of the PD(P)O, including the provisions of the DPPs, in relation to personal data of which he is the subject may make a complaint to the Privacy Commissioner.<sup>17</sup> However, in accordance with section 61(1) of the PD(P)O, where the data are held for the purpose of a journalistic activity, the Privacy Commissioner may not carry out an investigation of the complaint unless and until the personal data concerned have been published or broadcast. Further, in accordance with the same section, the Privacy Commissioner may not carry out an investigation of a suspected breach of the PD(P)O on his own initiative, ie in the absence of a complaint from the data subject or a person duly authorised on his behalf to make a complaint,<sup>18</sup> in relation to personal data held by a journalist or media organisation for the purpose of a journalistic activity, whether or not such data have been published or broadcast.<sup>19</sup>

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<sup>15</sup> To the extent, if any, that there is an inconsistency between the provisions of DPP 6 and Part V of the PD(P)O, the latter prevail by virtue of s 4 of the PD(P)O.

<sup>16</sup> By virtue of the definition of “news activity” in s 61(3) of the PD(P)O all journalistic activities, including the gathering of news and various other news related activities are covered by the relevant provisions.

<sup>17</sup> Pursuant to s 37 of the PD(P)O.

<sup>18</sup> Pursuant to s 37(1) of the PD(P)O, a “relevant person” may make a complaint to the Commissioner about a possible contravention of the Ordinance on behalf of the individual who is the subject of the personal data concerned; a “relevant person” is defined in s 2(1) of the Ordinance.

<sup>19</sup> In addition, if the Commissioner wishes to require a media organisation to reveal the source of personal data that are the subject of an investigation and are held for a news activity, pursuant to s 44(2) of the PD(P)O he must first obtain an order to this effect from the Court of First Instance.

9.20 If, having carried out an investigation of a complaint against a journalist or media organisation over which he has jurisdiction, the Privacy Commissioner concludes that the journalist or media organisation concerned is contravening a requirement of the PD(P)O, including a requirement of the DPPs, or has contravened the PD(P)O and is likely to continue or repeat the contravention, he may serve an enforcement notice on the journalist or media organisation concerned.<sup>20</sup> Such a notice may direct the person on whom it is served to take such steps as are specified therein to remedy the contravention found by the Privacy Commissioner. For example, in a suitable case such a notice could require a journalist or media organisation not to engage in a specified means of collecting personal data that the Privacy Commissioner has concluded is unfair in all the circumstances of the case. While a breach of a DPP is not by itself an offence,<sup>21</sup> a contravention of an enforcement notice is an offence,<sup>22</sup> as is a breach of any of the requirements of the main body of the PD(P)O.<sup>23</sup> Up until 1 March 2003, the Privacy Commissioner had issued only two enforcement notices against the media: the first against a magazine publisher<sup>24</sup> and the second against a newspaper.<sup>25</sup> Since the Administrative Appeals Board has set aside the enforcement notice in the second case on the ground that the Commissioner had misconstrued DPP 4,<sup>26</sup> and the Privacy Commissioner's decision in the first case was based on the same construction of DPP 4 it too must be regarded as wrongly decided.

9.21 Where a data subject suffers damage, including injury to feelings, by reason of a contravention of the PD(P)O in relation to personal data of which he is the subject, he has a right to compensation for that damage.<sup>27</sup> To enforce this right the data subject must initiate legal proceedings. To date there has been no publicised case in which such proceedings have been brought against a journalist or media organisation. Indeed, as far as is known, only one action involving a claim for compensation under the PD(P)O has been brought to trial.<sup>28</sup>

### ***Protection of freedom of the press***

9.22 The PD(P)O contains a number of provisions to prevent its being used to interfere unduly with journalistic activities. Some of the provisions concerned are based in part on the relevant recommendations made in our *Report on Reform of the Law Relating to the Protection of*

<sup>20</sup> Section 50 of the PD(P)O.

<sup>21</sup> Section 64(10) of the PD(P)O.

<sup>22</sup> Section 64(7) of the PD(P)O, the maximum penalty on conviction is a fine at level 5 and imprisonment for 2 years.

<sup>23</sup> Section 64(10) of the PD(P)O, the maximum penalty on conviction is a fine at level 3.

<sup>24</sup> See Complaint Case Notes 6/99 at p 73 of the Privacy Commissioner's Annual Report 98/99.

<sup>25</sup> See Appeal Case Notes 4/99 at p 99 of the Privacy Commissioner's Annual Report 98/99.

<sup>26</sup> See *Apple Daily v Privacy Commissioner* (Administrative Appeal No 5 of 1999, unreported decision of the Administrative Appeals Board dated 30.11.99) referred to above.

<sup>27</sup> Section 66 of the PD(P)O.

<sup>28</sup> *Kwan Chi-shan v Yeung Yin-fang* DCCJ 7812 of 1997 (Unreported judgment of Judge CB Chan) (4.12.97).

*Personal Data*<sup>29</sup> “to accommodate free speech rights of the media”.<sup>30</sup> The remainder were either included by the Administration in the Personal Data (Privacy) Bill or introduced in amendments to the Bill at its Committee Stage in response to concerns expressed in the relevant Bills Committee of the Legislative Council.

9.23 By virtue of section 61(1) of the PD(P)O, the Privacy Commissioner may not carry out inspections of personal data systems used by media organisations. As already noted, by virtue of the same section he also cannot undertake an investigation on his own initiative into a possible breach of the Ordinance in relation to personal data held for the purpose of a journalistic activity, whether or not the data have been published or broadcast. Even where the Privacy Commissioner receives a complaint of such a contravention, he cannot investigate it unless and until the personal data concerned have been published or broadcast. In addition, where the Privacy Commissioner does exercise his investigatory powers within the aforementioned limits, journalists’ sources are protected from disclosure by the provisions of section 44(2) of the PD(P)O. According to this section, a journalist cannot be compelled to disclose his source of information unless a judge of the Court of First Instance, on an application made by the Privacy Commissioner, directs the journalist to furnish the Commissioner with such information. Lastly, as also noted above, exemptions are provided for in the PD(P)O from: (a) the use limitation provisions of DPP 3 to enable the disclosure of personal data to journalists and media organisations where it is in the public interest for the data to be published or broadcast; and (b) the data subject’s right of access to his personal data where the data are held for the purpose of journalistic activities unless and until the data are published or broadcast.<sup>31</sup>

## **Codes of practice under the PD(P)O**

9.24 In accordance with section 12(1) of the PD(P)O, the Privacy Commissioner may approve and issue codes of practice for the purpose of providing practical guidance for the observance of the DPPs and other requirements of the PD(P)O. In the event that a person fails to observe any provision of an approved code of practice, evidence of that failure may be given in evidence in any proceedings against that person for a contravention of the relevant provision of the Ordinance.<sup>32</sup>

9.25 Accordingly, the Privacy Commissioner may approve and issue a code of practice on the application of the DPPs and other provisions of the PD(P)O to the news media. Such a code would be particularly helpful in giving guidance on what types of data collection methods may be deemed unfair under DPP 1(2), and how the requirements of DPP 2 governing the accuracy of personal data may be complied with by the print and broadcast

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<sup>29</sup> August 1994, see Chapter 18 in particular.

<sup>30</sup> Above, para 18.1.

<sup>31</sup> Section 61(1) of the PD(P)O refers.

<sup>32</sup> Section 13 (2) of the PD(P)O refers.

media. It could also clarify under what circumstances the collection of personal data would be regarded as excessive in relation to journalistic purposes contrary to DPP 1(1) and how the notification requirements of DPP 1(3) may be complied with by journalists and media organisations when collecting personal data from individuals who are the subjects of the data. In addition, such a code could give guidance on the application of the exemption from DPP 3 provided for in section 61(2), which permits the disclosure of personal data to journalists and media organisations in certain circumstances that would otherwise contravene the provisions of DPP 3 (see above). It could also spell out clearly the limitations of the protection provided by the PD(P)O with respect to privacy intrusion by journalists and media organisations, a matter we address in detail below.

9.26 The Consultation Paper recommended that the Privacy Commissioner should issue a code of practice on the collection and use of personal data for journalistic purposes for the practical guidance of publishers, broadcasters, journalists, Internet users, and other members of the public. The Privacy Commissioner is a body independent of both the industry and the Government and the code could be enforced by the use of the Privacy Commissioner's statutory powers and the sanctions provided for under the PD(P)O. In the event that an individual believed that the code had been contravened in relation to his personal data, he could make a complaint to the Privacy Commissioner, subject to the limits already mentioned, who has a well-established machinery to handle complaints of contraventions of the PD(P)O. Issuing such a code would also increase the awareness and understanding of the public and the media of the application of the Ordinance to the media, including the limitations to the protection from privacy intrusion that it provides for in this area.

9.27 The Law Society, the Hong Kong section of JUSTICE, and HK Democratic Foundation supported the sub-committee's proposal. The HKJA appeared to have no objection to the Privacy Commissioner's drawing up a code provided that the media is involved in the process and clear public interest defences are included so that legitimate investigative journalism is not threatened. The Privacy Commissioner has not made any specific comment on this proposal.

9.28 We see no reason why we should depart from the view expressed in the Consultation Paper that the Privacy Commissioner should approve and issue a code of practice in this area, other than to make it clear that such a code should not be limited only to the collection and use of personal data. We have already indicated a number of other provisions of the PD(P)O that we believe the code should cover, including the provisions of DPP 2 on the accuracy of personal data. We leave it to the Privacy Commissioner to decide what further provisions should be covered by the code having carried out the necessary consultation with interested parties.<sup>33</sup>

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<sup>33</sup> Section 12(9) provides that the Privacy Commissioner shall carry out consultation with representative bodies and other interested persons as he thinks fit before approving a code of practice.

#### **Recommendation 4**

**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.**

### **Limitations of the PD(P)O**

9.29 As the protection that a code of practice under the PD(P)O may provide is constrained by the limits of the provisions of the PD(P)O itself, it is necessary to consider what those limits are in order to determine whether the issuing of a code as recommended above could on its own provide adequate protection and redress to potential and actual victims of unwarranted privacy intrusion by journalists and media organisations.

9.30 **Protection of privacy in relation to personal data** – The object of the PD(P)O is to protect the privacy of individuals *in relation to personal data* by regulating the collection, holding, processing and use of personal data. It does not aim at protecting individuals from unwarranted privacy intrusion as such.<sup>34</sup> “Personal data” is defined as meaning any data:

- “(a) relating directly or indirectly to a living individual;*
- (b) from whom it is practicable for the identity of the individual to be directly or indirectly ascertained; and*
- (c) in a form in which access to or processing of the data is [reasonably] practicable”.<sup>35</sup>*

“Data” is in turn defined as meaning “any representation of information (including an expression of opinion) in any document”, and “document” is defined as including documents in writing and discs, films, tapes or other devices in which data are embodied and are capable of being reproduced.

9.31 **Personal data relating to a living individual** – Since the PD(P)O defines “personal data” as data relating to a living individual, the proposed code could not cover unwarranted publicity given to a deceased person’s private life. Accordingly, bereaved relatives and friends have no right to complain under the Ordinance if personal data about their deceased relative or friend have been collected or used in a manner that would be a breach of the DPPs if the deceased were alive.

<sup>34</sup> See the long title and the remarks of Ribeiro JA (as he then was) at 704I to 705E of *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data* [2000] 1 HKC 692.

<sup>35</sup> Section 2(1) of the PD(P)O.

9.32           **Information must be in a recorded form** – By virtue of the definitions of personal data, data and document (see above), the PD(P)O does not apply to information relating to an individual that is not recorded. If the personal information disclosed by someone does not involve the disclosure of a record of the information or of information inferred from a record of the information, the disclosure does not constitute a disclosure of personal data within the meaning of the PD(P)O and hence could not be governed by a code of practice issued under it.<sup>36</sup> Likewise, if the personal information collected by someone is not subsequently put into a recorded form, the collection does not constitute a collection of personal data within the meaning of the Ordinance. Accordingly, information concerning an individual that is communicated orally is not subject to the provisions of the Ordinance so long as it has not been inferred from a written record. On the other hand, if such information is subsequently put into a recorded form (for example, written down or inputted into a computer file), it becomes personal data at that point and hence subject to the provisions of the PD(P)O provided it is practicable to identify the individual who is the subject of the information and the information is in a form in which access or processing is practicable.

9.33           By the same token, the PD(P)O does not, and hence a code of practice issued under it could not, operate to control visual or aural surveillance by a journalist using only his own senses unless and until the information obtained by these means has been recorded and even then only if the resulting data meet all the other parts of the definition of personal data. Likewise, an individual who carries out a body search or who searches the premises of another without authority could not have any liability under the Ordinance and hence these activities could not be governed by a code of practice issued under it.

9.34           **Practicable to ascertain the identity of data subject** – On its face, the requirement of the definition of personal data that it must be practicable to ascertain the identity of the individual to whom the data relate is a purely objective test to be applied by reference solely to the data concerned and without reference to any other information known by the party holding or receiving the data concerned. On this basis, a media report about an individual that does not directly identify him, and from which it is not practicable to identify him indirectly from the report alone, would not constitute personal data and hence would not be subject to the requirements of the Ordinance. This would be so even though the relatives or other acquaintances of the individual concerned are able to identify him indirectly through a combination of what is said in the article about him and their own knowledge of him. One example of this in this context is the publication of a photograph of an individual without otherwise identifying him in the related article. The individual's relatives and other acquaintances are able to identify him because they recognise him in the photograph but no one else is.

9.35           However, given that this part of the definition of personal data is given such fair, large and liberal construction and interpretation as will best

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<sup>36</sup> Under s 2(1) of the PD(P)O, disclosing in relation to personal data includes disclosing information inferred from the data.



ensure the attainment of the object of the PD(P)O,<sup>37</sup> the better view appears to be that account should be taken of other information that may be in the possession of the party holding or receiving the data concerned. On this basis, the photograph and accompanying article in the example given above (insofar as they relate to the individual concerned) would be considered personal data as far as the individual's relatives and other acquaintances are concerned. The Legal Director of the Privacy Commissioner's Office has expressed his personal view that where data about an individual are made available to third parties "generally" (as opposed to a specific party), it is "usually impossible" to give individual consideration to the question of whether a party who has thus acquired the data happens to possess other information which would render it practicable for him to ascertain the identity of the individual to whom the data relate.<sup>38</sup> While this is undoubtedly the case, it is reasonable to expect media organisations to have general regard to the fact that their broadcasts or publications may be seen by persons, such as relatives or other acquaintances of the subjects of their reports, who have knowledge that would enable them to identify the subjects concerned, even though the reports do not directly identify them. Indeed, the reason why the facial features of individuals in photographs or film clips are commonly obscured is presumably to prevent their identification by persons whom the media organisation concerned reasonably believes may otherwise identify them.

9.36        **The *Eastweek* case** – In *Eastweek Publisher v Privacy Commissioner for Personal Data*,<sup>39</sup> the plaintiff's photographer took a photograph of the complainant in a public street. The photograph was later used to illustrate an article about women's fashion in Hong Kong, in which the complainant's dress sense was criticised. After a hearing as part of his investigation into the complaint, the Privacy Commissioner found *inter alia* that the photograph had been taken using a long-range lens without the complainant's knowledge or consent, and that after it appeared in the magazine concerned, the complainant's colleagues and others made fun of her and made her too embarrassed to wear the same clothing (which was new) again. As a result of his investigation into the complaint, the Privacy Commissioner concluded that there had been a breach of the requirement of DPP 1 to collect personal data by means that are fair in the circumstances of the case (ie that the taking of the photograph had been a collection of personal data by means that were unfair in the circumstances of the case).<sup>40</sup> The Court of First Instance upheld the Privacy Commissioner's finding on an application for judicial review.<sup>41</sup> However, a majority of the Court of Appeal held otherwise.<sup>42</sup>

<sup>37</sup> In accordance with s 19 of the Interpretation and General Clauses Ordinance (Cap 1).

<sup>38</sup> E Pun, "Meaning of 'personal data' and 'collection' in the PD(P)O", collected in *E-Privacy in the New Economy – Conference Presentations* (Hong Kong: Office of the Privacy Commissioner for Personal Data, 2001), <[www.pco.org.hk/english/infocentre/speech\\_20010326.html](http://www.pco.org.hk/english/infocentre/speech_20010326.html)>, p 102.

<sup>39</sup> [2000] 1 HKC 692. Cf *Aubry v Éditions Vice-Versa Inc*, 157 DLR(4th) 577.

<sup>40</sup> Above, *per* Ribeiro JA (as he then was) at 696C.

<sup>41</sup> *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data*, HCAL 98 of 1998 (Unreported judgment of Keith JA, sitting as an additional judge of the Court of First Instance) (24.9.99).

<sup>42</sup> [2000] 1 HKC 692; Godfrey VP and Ribeiro JA (as he then was) in the majority, Wong JA dissenting.

9.37 **Requirement to identify or intend to identify the data subject** – DPP 1(2) provides *inter alia* that personal data shall be collected by means that are lawful and fair in the circumstances of the case. The Court of Appeal in the *Eastweek* case held that a contravention of DPP 1(2) requires two elements to be present: (a) an act of personal data collection; and (b) doing this by means which are unlawful or unfair in the circumstances. With respect to (a), a majority of the Court was of the view, as noted above, that it is of the essence of the required act of personal data collection that the data user must thereby be compiling information about “an identified person” or about “a person whom the data user intends or seeks to identify”.<sup>43</sup> That this requirement is not expressly provided for in the Ordinance was explicitly recognised by one of the judges in the majority, Godfrey VP, thus: “I know this is not expressly spelled out in the legislation but I am satisfied from the way in which that legislation is framed that that is its underlying purpose ...”.<sup>44</sup> The majority further pointed out that if the identity of the person to whom the information relates is not known to the data user, then the latter could not comply with a data access or correction request under the Ordinance.<sup>45</sup>

9.38 The Court found that the photographer, the reporter and *Eastweek* remained completely indifferent to, and ignorant of, the complainant’s identity right up to and after publication of the offending issue of the magazine. The Court therefore held (Wong JA dissenting) that taking her photograph did not constitute an act of personal data collection relating to the complainant. The fact that the photograph, when published, was capable of conveying the identity of the subject to a reader who happens to be acquainted with that person did not make the act of taking the photograph an act of data collection if the photographer and his principals were acting without knowing or being at all interested in ascertaining the identity of the person being photographed.<sup>46</sup>

9.39 **Personal privacy vs information privacy** – In the view of Ribeiro JA, as he then was, the complainant in the *Eastweek* case would be entirely justified in regarding the article and the photograph as an unfair and impertinent intrusion into her sphere of personal privacy.<sup>47</sup> Indeed, the Court of First Instance observed that the complainant’s real complaint related to the invasion of her privacy, which the publication of her photograph in the magazine represented, rather than the unfair collection of data about her.<sup>48</sup> But as Ribeiro JA pointed out, the PD(P)O does not purport to protect “personal privacy” as opposed to “information privacy”. The Ordinance is not intended to establish general privacy rights against all possible forms of intrusion into an individual’s private sphere.<sup>49</sup> The complainant was therefore left without a remedy under the PD(P)O and the consequence of the principles laid down in *Eastweek* is that any individual whose privacy is intruded upon by

<sup>43</sup> Above, *per* Ribeiro JA (as he then was) at 700A-B and *per* Godfrey VP at 711D.

<sup>44</sup> Above, at 711D-F.

<sup>45</sup> Above, *per* Ribeiro JA (as he then was) at 702D-703H.

<sup>46</sup> Above, *per* Ribeiro JA (as he then was) at 702B-D.

<sup>47</sup> Above, at 705H-I.

<sup>48</sup> *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data*, above, at 17E-H.

<sup>49</sup> [2000] 1 HKC 692 at 704I to 705B.

a journalist has no redress under the PD(P)O if the journalist or his employer or principal has not identified and does not intend to identify the individual concerned.

9.40           **Security Safeguards Principle (DPP 4)** – As noted above, in *Apple Daily v Privacy Commissioner*,<sup>50</sup> the Administrative Appeals Board ruled that DPP 4 is not applicable to personal data when the data are used for publication. On the basis of this ruling, DPP 4 provides no protection for an individual the publication of whose personal data by a media organisation creates a risk that he may suffer harm from someone who “accesses” the data as a result of the publication. Hence, a code of practice issued under the PD(P)O could not help prevent such a risk based on the provisions of DPP 4.

9.41           **Enforcement notices** – The Privacy Commissioner does not have a power to award compensation to a person who suffers damage because of a contravention of a DPP, nor does he have the power to undertake proceedings on behalf of such a person. However, as noted above, a person who believes that there may have been a contravention of the PD(P)O with respect to his personal data may make a complaint to the Privacy Commissioner. As already noted in this context, however, the Privacy Commissioner’s powers of investigation in relation to such complaints are restricted to those concerning personal data that have been published or broadcast.<sup>51</sup> Where, following such an investigation, the Privacy Commissioner is satisfied that the person complained against is contravening the PD(P)O or has contravened it “in circumstances that make it likely that the contravention will continue or be repeated”, he may serve on the person concerned an enforcement notice directing the person concerned “to take such steps as are specified in the notice to remedy the contravention” within the specified period.<sup>52</sup> However, other than his power to publish a report of the result of his investigation and make such recommendations or other comments as he thinks fit,<sup>53</sup> the Privacy Commissioner has no power to take further action against the party complained against where there is no likelihood of a further or continued contravention of the Ordinance.

9.42           **Privacy Commissioner’s views** – The Privacy Commissioner agreed that existing legislation and the common law were not sufficient to provide adequate protection against privacy intrusion by media organisations and unwanted publicity.<sup>54</sup>

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<sup>50</sup> Administrative Appeal No 5 of 1999.

<sup>51</sup> Section 61(1) of the PD(P)O.

<sup>52</sup> Section 50 of the PD(P)O.

<sup>53</sup> Section 48 of the PD(P)O.

<sup>54</sup> Submission from the PCO in November 1999.

9.43 **Conclusion** – 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 for this 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.

9.44 Further, 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.<sup>55</sup> In addition, some provisions of the PD(P)O are not easily applied to personal data that are published generally or broadcast.<sup>56</sup> As noted above, the Administrative Appeals Board has pointed out the inapplicability of the security provisions of the Ordinance to personal data when they are so used.<sup>57</sup> Generally published or broadcast personal data also do not appear to be susceptible to the application of the PD(P)O's provisions on the dissemination of corrections of inaccurate personal data.<sup>58</sup>

## Alternative of amending the PD(P)O

9.45 Some respondents asked the Sub-committee to consider the alternative of expanding the scope of the PD(P)O to cover general privacy rights so that the Privacy Commissioner may protect privacy in general as opposed to privacy in relation to personal data only. A number of legislators and district councillors are also inclined to give additional powers to the Privacy Commissioner to deal with complaints about press intrusion.<sup>59</sup> A related option is to empower the Privacy Commissioner to rule on alleged breaches of a journalists' code on media intrusion.

9.46 For the following reasons, however, 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:

- (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. Indeed, the process of selecting the right

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<sup>55</sup> On the authority of the *Eastweek* case, above.

<sup>56</sup> The concept of "fair use or disclosure" (as opposed to "fair collection") is lacking in DPP 3 (which implements the Purpose Limitation Principle in the OECD Privacy Guidelines 1980). Cf Article 6(a) of the EU Data Protection Directive 1995, which requires that personal data must be "processed" (a term defined as including "use, disclosure by transmission, dissemination or otherwise making available") not only lawfully but also "fairly".

<sup>57</sup> Para 9.15 above.

<sup>58</sup> Para 15.59 *et seq.*

<sup>59</sup> See R Wacks, "Privacy and the Press", *The Correspondent*, Oct-Nov 1999, pp 6-9.

candidate to fill the post left vacant by the first Privacy Commissioner has been criticised on the ground that the Government had not invited applications from interested parties to fill the post.

- (b) Under the current structure of the Ordinance, the press has no say in the adjudication and appeal processes. The application and interpretation of the Ordinance is a matter solely for the Privacy Commissioner, the Administrative Appeals Board, and the Courts by way of judicial review or in civil proceedings brought by individuals who have suffered damage by reason of breaches of the PD(P)O in relation to personal data of which they are the subjects. Amendments could be made to address this objection but that would create a two track system of complaint handling, one for media complaints and the other for all other complaints.
- (c) Entrusting the task of balancing personal privacy and press freedom to the Privacy Commissioner, whose brief is to protect personal privacy in relation to personal data in accordance with the provisions of the PD(P)O, may not command the confidence of some sections of the press.
- (d) Empowering the Privacy Commissioner to deal with complaints against the press would result in a single person ruling on the conduct of a journalist or media organisation, albeit subject to appeal to the Administrative Appeals Board in certain circumstances and judicial review generally. In contrast, the decisions of a press council would be collective and a council with press and public representatives could bring in a diversity of opinion and experience to the issues concerned.
- (e) Widening the scope of the Privacy Commissioner's remit would have resource implications for the Government as his office is wholly funded from the public purse. If the necessary additional funding were not forthcoming, the Privacy Commissioner would find himself having to undertake new responsibilities with insufficient resources. This would inevitably result in his being less able to carry out his existing responsibilities.

9.47 Since the PD(P)O does not, and hence a code of practice issued under it could not, protect individuals from all kinds of unwarranted media intrusion and we consider it undesirable to widen the scope of the Ordinance to provide for it to do so, in the following chapter we consider other options that do not require the establishment of a press council.

## Chapter 10

### Other suggested options

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10.1 Apart from the suggestion that the Personal Data (Privacy) Ordinance should be strictly enforced and/or amended to give better protection to victims of press intrusion, the following options have been put forward as an alternative to regulation by a statutory independent press council for the protection of privacy:

#### ***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.

## **Actions in the public domain**

### ***Rely solely on market forces***

10.2 Based on previous experience in Hong Kong, it is unlikely that market forces alone can rectify the situation. Firstly, both intrusive news-gathering activities and unwanted publicity have negative consequences on third parties who are not involved in the production or consumption of newspapers. These external or social costs are neither reflected in the price of a newspaper, nor compensated for by the newspaper.

10.3 Secondly, the newspaper market does not normally provide readers with information about the fairness of the means used by journalists to cover news; nor are readers provided with information about the negative consequences that unfair means of collection or an intrusive story or picture can have on the individuals concerned. Such knowledge cannot be gained by glancing through the newspapers because it is not in the interests of a newspaper to provide such information. Although the findings of the HK Press Council are now disclosed on its website, the public cannot get a full picture of the ethical standards of magazines and newspapers in relation to privacy because the privacy-invasive conduct of magazines and non-member newspapers is not subject to the scrutiny of the Council. It is difficult for the public to judge the standards of these publications if their victims are not provided with an avenue to voice their grievances in public. Unless there is an effective complaints and monitoring mechanism and the public is made aware of its findings, readers are unable to make an informed decision as to which newspaper they should subscribe.

10.4 Given that competition in the press industry is intense and the gap between the private and public interest is large, the failure of the market in providing adequate information and internalising the social costs of producing newspapers cannot be corrected by the market itself. It is also impractical to rely upon an individual newspaper taking steps voluntarily to remedy the situation, particularly when there is an absence of effective external pressure to do so.<sup>1</sup> There have been instances of a newspaper or

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<sup>1</sup> Such pressure might come from the market, pressure groups, political parties, the legislature, or the threat of government intervention. The success of self-regulation varies with the strength of these pressures. N Gunningham & J Rees, "Industry Self-Regulation: An Institutional Perspective", *Law and Policy*, Oct 1997, vol 19, no 4, 363 at 390-391.

magazine publishing an apology for overstepping the mark, but public apologies are rare and are published only in extreme cases after there has been a public outcry.

### ***Promote education on media literacy***

10.5 Many respondents supported the promotion of media literacy education. They argued that an increase in media literacy could help the public to evaluate the standards of the media. The public could then use their purchasing power to boycott newspapers that were frequent intruders of privacy, and support quality newspapers instead. Some respondents also suggested that the Government should provide subsidies to schools and grassroots organisations to promote media literacy education.

10.6 Dr Kwan Kai-man was in favour of the promotion of media education but considered that this would be unable to solve the problem entirely.<sup>2</sup> He said victims of media intrusion would still be unable to obtain compensation or fair treatment. The effects of education would take a long time to realise. Dr Kwan further noted that many commentators who were against the statutory press council proposal had previously argued that, to be effective against discrimination, education had to be complemented by anti-discrimination legislation. He commented that the same logic should also be applied in tackling the problem of media intrusion.

10.7 We have no objection to the Government encouraging the elaboration and development of media literacy programmes for children and adults.<sup>3</sup> All citizens should understand the role of the press in society as well as the rights and responsibilities of the press in a democracy. Media literacy programmes can also improve market functioning by allowing people to make better-informed decisions. However, education and persuasion in themselves are insufficient. Media education focuses on consumers and is no substitute for providing relief to victims of media intrusion. There is also a need to deter intrusive behaviour by imposing sanctions (be it publicity or otherwise) on those who fall below the standards.

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<sup>2</sup> Submission from Dr Kwan Kai Man entitled "Which is More Important: Press Freedom or Media-Monitoring? – Comments on the Press Council Debate" (1999).

<sup>3</sup> See Parliamentary Assembly of Council of Europe, Recommendation 1466 (2000) on Media Education, at <<http://stars.coe.fr/ta/ta00/EREC1466.HTM>>. The Secretary for Home Affairs reported at the LegCo meeting on 17.11.99 that: (a) the curricula of primary and secondary schools contained messages on media education; (b) the tertiary institutions and the Education Department offer media education courses for teachers; and (c) the Quality Education Fund had approved a sum of \$5.8 million for youth organisations and four schools to organise activities on media education: *Legislative Council – 17 November 1999*, p 1432. Project No 2000/2296 of the Quality Education Fund has also allotted \$415,600 to the Society for Truth and Light for the purpose of organising media education workshops in 40 secondary schools in 01/02 and 02/03.



### ***Boycott newspapers that fall below ethical standards***

10.8 Some respondents have suggested that those who are dissatisfied with a newspaper should cease patronising it. They argue that the problem of media intrusion will disappear as readers grow tired of ethical breaches, or when fewer readers subscribe to the more intrusive newspapers. Newspapers that the public accept and support will survive, while newspapers that the public dislike or reject will suffer.

10.9 Dr Kwan Kai-man pointed out in his submission that there were problems with this approach. He suggested that a newspaper with questionable ethics must have some merits or appeal, and the public's disapproval of its conduct may not fully offset these attractions. An individual citizen has little influence compared with the media organisations and the all-pervasive media culture. The effect of a boycott would therefore be limited and could not last long.

10.10 We note that public opinion and advertisers could exert an influence on the behaviour of magazines or newspapers in the short run in extreme cases. For example, the public outcry over the coverage of the bizarre behaviour of a widower at Tin Ping Estate resulted in *Apple Daily* publishing an apology, and the same newspaper published another apology after it had named the wrong person as the solicitor who had been suspected of absconding with clients' money. The publication on the front cover of *Eastweek* magazine of a picture of a semi-nude actress in distress resulted in that magazine offering an apology in November 2002.

10.11 However, cases of a media organisation offering a public apology are rare and sometimes made only after the victim has threatened to take legal action against it. Moreover, the apologies may be half-hearted, qualified or do not come with a full explanation. For example, in the widower's case above, the paper admitted that it had "indirectly paid" \$5,000 to the widower and others, but maintained that it had not used money for the purpose of fabricating news.<sup>4</sup> *Eastweek* also apologised in respect of the semi-nude picture of an actress only when it was clear that the public did not accept the magazine's argument that publication could be justified on the basis of the public's right to know, the media's obligation to report the truth, and the media's monitoring function. As regards the apology made in relation to the report about an absconding solicitor, the newspaper explained that the error was due to "a moment's negligence" without further explaining why the victim had been wrongly named in the report, causing the victim "continued distress". The victim likened the apology to "having had her hands chopped off, followed by the assailant saying sorry".<sup>5</sup> It appears that few of the cases in Annex 2 led to public condemnation, and even fewer resulted in a public apology from the newspaper or magazine concerned.

10.12 We are not aware of any evidence that public opinion or a call for boycott could have a lasting or long term impact in Hong Kong. In the

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<sup>4</sup> *Apple Daily*, 9.11.98, A 1.

<sup>5</sup> *Apple Daily*, 8.10.98; *Chu v Apple Daily* [2001] HKCU 1, paras 66 and 96.

case involving the widower above, the Society for Truth and Light urged the public to boycott *Apple Daily* but that call had no apparent impact on the sales of the newspaper. As for the *Eastweek* case, copies of the magazine were sold out on the day of issue and have since become a collector's item. It is true that *Eastweek* closed down after that incident but it is unclear whether the closure reflected the public outrage or the fact that the magazine had been losing money in recent years. Just as the public was criticising *Eastweek* for publishing the picture, *Three Weekly* published the same picture three days later in covering the *Eastweek* case; this time with the actress' breasts concealed but not her eyes. Although the practice of *Three Weekly* was roundly condemned by the public, the magazine was sold out quickly and a second edition was published to satisfy unmet demand. Also significant is the fact that *Three Weekly* did not close down as a result of the public uproar. This provides an example of public opinion failing to stop a media organisation publishing details of a victim's private life. Shortly after the closure of *Eastweek*, another magazine, *Express Weekly*, hired former *Eastweek* staff and its covers, paper and design have evolved to be almost indistinguishable from *Eastweek*.<sup>6</sup>

10.13 As pointed out by Thomas Gibbons, the effect of a boycott on a newspaper is bound to be marginal because newspapers are complex packages of which only a portion might offend the readers.<sup>7</sup> John Merrill elaborates:

*"Market accountability ... implies that audience groups will want or demand more responsible communication and will insist that the media be more ethical in their practices. In reality, we know that, by and large, audiences know little or nothing about moral quandaries of the media and care little about them. The media are 'mixed bags' anyway, with some 'irresponsible' segments mixed with 'responsible' segments. The public in our society has learned to accept the good with the bad and ... to take on faith the mass of information that lies in the large neutral area between responsible and irresponsible journalism.*

*It is very difficult for a mass audience to respond adequately to perceived irresponsibility in a communication medium. The mass audience is too heterogeneous, scattered, and anonymous to provide a potent (at least, short-term) force of accountability. Some members of the audience may cancel their subscriptions to a newspaper because of perceived media weaknesses or irresponsibilities. But other members will either condone such media activities or, at least, be unconcerned about them."*<sup>8</sup>

<sup>6</sup> The sales of all "scandal magazines" were said to have gone up six weeks after *Eastweek*'s closure: "Scandal mags mutate and thrive", *South China Morning Post*, 16.12.02.

<sup>7</sup> T Gibbons, *Regulating the Media* (London: Sweet & Maxwell, 1998), pp 46-48.

<sup>8</sup> J C Merrill, "The Marketplace: A Court of First Resort", in E Dennis, D M Gillmor & T L Glasser (ed), *Media Freedom and Accountability* (Greenwood Press, 1989), ch 2, p 16.

10.14 Even if a boycott is successful and the resultant drop in patronage has an impact on the advertising revenue of the newspaper, it provides no meaningful redress to the individuals whose privacy has been invaded. Our primary focus has been to protect individuals from press intrusion and to provide an effective remedy for the victims. A possible reduction in the market share of an offending newspaper is of no concern to the victim and is no substitute for adequate remedies for him. Further, complaints of press intrusion are disputes between a newspaper and persons caught in the news. Newspaper readers are third parties to these disputes. In any event, a press intrusion is no less an intrusion because it is committed by a newspaper with a low circulation. The readership of the newspaper at fault only goes to the seriousness of the intrusion.

10.15 More importantly, press intrusion is an area where the readers' desire to be informed may conflict with the interest of those whose privacy has been unjustifiably invaded. The average reader is more likely to subscribe to an intrusive newspaper that provides detailed private information about those in the news than one that fully respects their privacy. The use of intrusive news-gathering methods and the publication of private facts are factors that contribute to the commercial success of a newspaper. A newspaper that respects privacy is at a competitive disadvantage in comparison to those that unjustifiably exploit the private lives of individuals. It is therefore impractical to rely solely on the free market to solve the problem.

10.16 In conclusion, our major concern is the plight of victims of press intrusion, not the profits and turnover of a newspaper company. A drop in the readership of a newspaper that has abused press freedom to the detriment of personal privacy will not alleviate the pain, suffering, embarrassment and inconvenience of the victims. Members of the public should be protected from unwarranted intrusion by newspapers irrespective of the profitability and circulation of the newspaper concerned.

### ***Encourage more public complaints***

10.17 Complaining to the media organisations is much less effective than complaining to an independent and impartial adjudicating body whose decisions are binding on its members. In the absence of such an adjudicating body, members of the public may complain to a quality newspaper about the conduct of other newspapers. However, newspapers are usually reluctant to criticise their peers.<sup>9</sup> The survey commissioned by the HKPC in 2002 revealed that those who believed that complaining to the offending newspapers or other media organisations had a large effect amounted to only 7% and 19% respectively, while 85% considered that Hong Kong needed an independent press complaints body.

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<sup>9</sup> 戴胡子, “明報不是冤情大使”, 23.11.98, D6.

### ***Encourage the establishment of independent media monitors***

10.18 Few would object to the establishment of more media monitors by the NGOs. However, a media monitor which does not have the support of media proprietors, editors and journalists cannot command the respect and confidence of the press, and hence, cannot be effective in curbing media excesses. This suggestion is also asking too much of NGOs that do not have the time, money and expertise to monitor the media. It is therefore not surprising that the efforts made by the HKJA to set up a Media Ethics Forum to maintain professional standards and handle public complaints have not been successful.<sup>10</sup>

### **More effective self-regulation by newspaper industry and journalistic profession**

#### ***Exhort individual newspapers to adopt their own codes of ethics***

10.19 The implementation of unilateral codes by individual newspapers is one of the purest forms of self-regulation. The need to adopt a unilateral code is particularly pressing for newspapers that do not have their own codes and have not adopted the Journalists' Code of Professional Ethics. Although unilateral codes amount to some form of self-restraint on the conduct of journalists towards the general public, it is a private initiative and is purely an internal matter. We are not aware of any newspaper codes promoted to the readers. In any event, an internal code is not binding on the newspaper concerned. It is not enforceable against the newspapers by the readers, *a fortiori*, the victims of media intrusion who have no contractual relationship with the newspapers. What each newspaper does is a matter for its own judgement without any outside oversight.

#### ***Exhort individual newspapers to appoint news ombudsmen***

10.20 A newspaper may appoint a distinguished and independent ombudsman to accept and investigate complaints from the public.<sup>11</sup> In the UK, some newspapers retain an internal ombudsman but they all rely upon the Press Complaints Commission to manage complaints. According to our understanding, the first news ombudsman in Hong Kong was appointed by *Next Magazine* in 1997. The ombudsman's comments were published on the magazine's website after he had asked the journalists concerned to respond. That scheme was discontinued in September 1998 on the ground that the magazine "had less than 10 complaints in over a year".<sup>12</sup>

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<sup>10</sup> HKJA press release, 22.11.98.

<sup>11</sup> For an overview of the institution of "news ombudsman", visit the Organisation of News Ombudsmen at <[www.infi.net/ono/what.htm](http://www.infi.net/ono/what.htm)>.

<sup>12</sup> F Ching, "Learning Self-Control – Hong Kong's media are torn between ethics and profits", *Far Eastern Economic Review*, 17.12.98, p 25, quoting Yeung Wai-hong.

10.21 We agree that an *independent* news ombudsman, whose investigations the newspaper has bound itself to assist and whose adjudications it undertakes to publish, could be a useful medium in holding a newspaper accountable. However, news ombudsmen are not the public's representatives. Not all of them can become neutral mediators between the newspapers and their readers. Some may end up being the complaints officers or public relations officers of the newspapers, while others may find themselves serving two masters or owing their loyalty to the newspapers appointing them. The fact that news ombudsmen are appointed and paid by a particular newspaper renders them not independent in the eyes of the public. Many readers therefore see news ombudsmen as advocates of newspapers rather than their representatives. Even if a newspaper gives its ombudsman a free hand to represent the interest of the readers, he can only advise or exhort: the final say about what should be published rests with the editor – unless the newspaper has undertaken to publish his adjudications in full. Moreover, it is not clear whose interests a news ombudsman should represent. The problem is particularly acute when the interests of the newspaper and its readers conflict with those of innocent third parties who are caught in the news.

10.22 We may mention in passing that *Apple Daily* advised the Sub-committee in November 1999 that the management of the newspaper agreed with the recommendation of their three-member steering group that an internal ombudsman be appointed within the newspaper to respond directly to complaints by members of the public. They further stated that the paper would explore what concrete steps should be taken to set up such a mechanism, and review the mechanism from time to time after it has been put in place.<sup>13</sup> The Sub-committee wrote to *Apple Daily* in May 2002 enquiring about progress but the paper failed to give any response.

### ***Legislate for compulsory licensing of journalists***

10.23 One option would be to make compulsory membership in a professional association a prerequisite to the practice of journalism. The law could require that the association maintain a register of journalists so that a journalist could be suspended or struck off if found by a disciplinary body to have engaged in unprofessional conduct, including unwarranted invasion of privacy. To improve the professional standards of journalists, the law could further require that only persons who had complied with the requirements prescribed by the professional association with respect to training and education could become members of the association. Examples of practitioners subjected to a licensing or registration regime include solicitors, architects, doctors, midwives, social workers, lift engineers, fire service installation contractors and estate agents.

10.24 Although there are jurisdictions requiring journalists to be accredited, Article 19(2) of the ICCPR, which provides that everyone has the

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<sup>13</sup> *Apple Daily's* submission was published in their newspaper on 1.12.99.

right to freedom of expression through any media of his choice, effectively makes it impossible to introduce a licensing regime for journalism. The Inter-American Court of Human Rights has also held that a law licensing journalists, which does not allow those who are not members of a professional association to practice journalism and limits access to the professional association to university graduates who have specialised in certain fields, is not compatible with the American Convention on Human Rights. In the opinion of the Court, such a law contains restrictions to freedom of expression that are not authorised by the Convention and would consequently be in violation not only of the right of each individual to seek and impart information through any means of his choice, but also of the right of the public at large to receive information without any interference.<sup>14</sup>

10.25 The Inter-American Court pointed out that the argument that a law on the compulsory licensing of journalists does not differ from similar legislation applicable to other professions does not take into account the basic problem that is presented with respect to the compatibility between such a law and the American Convention on Human Rights. The profession of journalism involves the seeking, receiving and imparting of information, and the practice of journalism requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees. Unlike journalism, the practice of law and medicine is not an activity specifically guaranteed by the Convention. It is true that the imposition of certain restrictions on the practice of law or medicine would be incompatible with the enjoyment of various rights that the Convention guarantees. But no one right guaranteed in the Convention exhaustively defines or embraces the practice of law or medicine, as does the article guaranteeing the right to freedom of expression, which encompasses the activity of journalism.<sup>15</sup>

10.26 It is now generally understood that the right to freedom of expression implies free access to the journalistic profession and voluntary membership of journalists in professional associations without any requirement of an official admission by state organs. These principles are reflected in the Declaration of Chapultepec,<sup>16</sup> the Declaration of Santiago,<sup>17</sup> and a resolution adopted by the 4<sup>th</sup> European Ministerial Conference on Mass Media Policy.<sup>18</sup> Bearing in mind the opinion of the Inter-American Court of

<sup>14</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Inter-Am Ct HR (Series A) No 5 (1985), para 81. Article 13(1) & (2) of the American Convention is similar to Article 19 of the ICCPR.

<sup>15</sup> Above, paras 70-73.

<sup>16</sup> Adopted by the Hemisphere Conference on Free Speech held in Mexico City on 11.3.94, Principle 8, which provides: *"The membership of journalists in guilds, their affiliation to professional and trade associations and the affiliation of the media with business groups must be strictly voluntary."*

<sup>17</sup> Declarations on Promoting Independent and Pluralistic Media, 6.5.94, agreed by the participants in the UN/UNESCO/UNDP "Seminar on Media Development and Democracy in Latin America and the Caribbean" held in Santiago from 2-6 May 94, para 8 (declaring that *"In accordance with the fundamental rights of expression and association as stated in the Universal Declaration of Human Rights, the access to and the practice of journalism must be free, and not limited by any means"*).

<sup>18</sup> Resolution No 2 on Journalistic Freedoms and Human Rights by the 4<sup>th</sup> European Ministerial Conference on Mass Media Policy (Prague, 7-8 Dec 1994), Principle 3(a), declaring that "unrestricted access to the journalistic profession" enables journalism to contribute to the maintenance and development of genuine democracy.

Human Rights and the principles laid down in these declarations, we do not believe that a licensing regime for journalists is compatible with the ICCPR.

## **More effective self-regulation by the HK Press Council**

### ***Urge publications to accept the jurisdiction of the HKPC***

10.27 By joining the HK Press Council, all the newspaper members have undertaken to comply with its Articles of Association, Bye-laws and code of conduct. However, membership of the HKPC is unnecessary if a newspaper is willing to submit to its jurisdiction and rulings by contract. Hence, one option would be to urge magazines and all newspapers that are not yet members of the HKPC to enter into contracts with the Council, agreeing to accept its jurisdiction and publish its adjudications with due prominence. This option would be particularly attractive to publications with a low circulation, which support the self-regulatory scheme but do not want to share its costs and become involved in the management of the Council. However, it would not have a significant effect if the mass circulation newspapers that are not yet members of the HKPC are unwilling to be bound by the Council. In the light of the past attitude displayed by these newspapers toward the HKPC, it is unlikely that they will either become members of the Council or submit to its jurisdiction by contract. There are also no signs that the major news magazines are willing to accept the Council's jurisdiction either. One may safely conclude that there is no prospect of universal consent being forthcoming from the major newspapers and magazines for the HKPC to be enabled to perform its self-regulating function effectively.

### ***Extend legal aid to media organisations sued for publishing the findings and decisions of the HKPC***

10.28 It has been suggested that the Government should extend legal aid to media organisations sued for publishing the findings and decisions of the HKPC and other media monitors. At present, only individuals are entitled to apply for legal aid. Allowing legal persons to apply for legal aid involves a major change in policy which would open the floodgates and add to the burden of the Government. There are other more effective ways to afford better protection to the media in such circumstances. Of particular relevance is the proposal to treat a fair and accurate report of any matter issued for the information of the public by the HKPC as privileged under the Defamation Ordinance (Cap 21). We examine the desirability of this option below.

### ***Protect reports of the findings and decisions of the HKPC by statutory qualified privilege***

10.29 The purpose of this suggestion is to treat a fair and accurate report of any matter issued for the information of the public by the HKPC as privileged, subject to the plaintiff's right of reply in the defendant's newspaper.

Without the benefit of a comprehensive review of the law of defamation similar to that conducted by the Faulks Committee and the Neill Committee in the UK,<sup>19</sup> we are not in a position to judge whether or not the law should accord qualified privilege to reports of statements made by the HKPC, which is a private company free to change its objects and powers at any time without any constraints. Yet even if this measure is desirable and practicable, it cannot give adequate redress to the victims of media intrusion, who deserve to have their grievances vindicated with due prominence in the offending newspapers, nor would it act as a sufficient deterrent to offenders that ignore the Council's adjudications persistently. The adjudications and comments made by the Council should be brought to the attention of the readers of the offending newspapers so that they can decide for themselves whether to continue to patronise those newspapers or not.

### ***Require all newspapers to be members of the HKPC***

10.30 Since a major problem with the HKPC is its low coverage of local newspaper readership, one option would be to pass legislation making membership of the HKPC compulsory for anyone wishing to register under the Registration of Local Newspapers Ordinance. An example of such an approach can be found in the complaints mechanism offered by the voluntary Travel Industry Council of HK ("the TIC"). The TIC has a Consumer Relations Committee, which deals with disputes between travel agents and their customers that cannot be settled by mediation. The Committee has six trade members and six non-trade members in addition to the convenor who is a TIC Board director. The rulings of the Committee are binding on the member agents, who could lodge an appeal to the Board of Directors if they are not satisfied with the rulings. The decision of the Board is final but an aggrieved complainant may pursue a legal remedy if he wishes.<sup>20</sup> The TIC has real power over all member agents because all licences granted under the Travel Agents Ordinance (Cap 218) are subject to the condition that the agent is and remains a member of the TIC.<sup>21</sup> An agent cannot carry on its business if its membership is terminated by the Council. The law also requires a travel agent to pay a levy to the TIC and contribute to the Travel Industry Compensation Fund. The Travel Industry Compensation Fund Management Board may impose a financial penalty on any agent that fails to pay such levies.<sup>22</sup> An agent that defaults in payment is also liable to have its licence suspended or revoked.<sup>23</sup>

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<sup>19</sup> The Faulks Committee made recommendations on the practice and procedure relating to actions for defamation, while the Neill Committee proposed changes to reduce the complexity of the procedure without having an adverse effect on the interests of justice.

<sup>20</sup> J Tung, "Redress Mechanisms – Trade and Professional Related Complaints Resolution Mechanisms"; paper delivered at the Consumer Council Conference on Consumer Redress Mechanism on 26.4.00.

<sup>21</sup> Section 11.

<sup>22</sup> Travel Industry Compensation Fund (Amount of Ex gratia Payments and Financial Penalty) Rules (Cap 218), r 6.

<sup>23</sup> Cap 218, s 19(1)(d).



10.31 The advantage of this option is that the HKPC could cover all newspapers without making the Council a statutory body, thus avoiding any arguments as to whether the establishment of a statutory press complaints body is compatible with the ICCPR. Once a newspaper becomes a member of the HKPC and bound by its Articles of Association, the Council may enforce its adjudication by contract against the newspaper for any breach of its journalistic code.

10.32 However, not all newspapers are willing and able to finance the Council by paying a levy. Besides, the idea of de-registering a newspaper on the ground that it has been expelled by the HKPC for failing to pay a levy or to comply with its adjudication on one or more occasions does not sit comfortably with “freedom of speech, of the press and of publication” under the Basic Law. The powers of the HKPC would be excessive if failure to comply with its adjudication would result in the offending newspaper being deprived of its right to freedom of expression. It is, of course, possible not to give the Council a power to expel a newspaper for flagrant or persistent violation of its code of conduct. The law may provide that all newspapers could retain their membership as long as they pay the prescribed levy. However, having regard to the decision of the Inter-American Court of Human Rights on compulsory membership in a journalists’ association and the Declaration of Chapultepec which states that “the membership of journalists in guilds, their affiliation to professional and trade associations ... must be strictly voluntary”,<sup>24</sup> it is open to an unwilling newspaper to challenge the lawfulness of the requirement on the basis that making the exercise of freedom of expression conditional on membership in the HKPC is contrary to Article 19 of the ICCPR and unconstitutional under Article 27 of the Basic Law. Due to these difficulties, we have decided not to pursue this option further.

## **Better protection of media critics**

### ***Make legal aid available for defamation proceedings***

10.33 Legal aid is not available for defamation proceedings other than the defence of a counterclaim alleging defamation. This means not only that the wealthy could enjoy privileged access to court, but also that a resourceful media organisation may tarnish the reputation of the less well-off or publish a deliberate lie about them, knowing that they can never afford to pay the vast legal fees of a defamation action. Making legal aid available for defamation proceedings has the advantage of protecting the public’s freedom to criticise abusive media practices without the fear of having to face expensive litigation on their own.

10.34 The HKJA and the HKPPA supported extending legal aid to defamation proceedings. The HKJA pointed out that defamation proceedings, particularly those involving the media, are lengthy and involve highly

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<sup>24</sup> Principle 8. See also Declarations on Promoting Independent and Pluralistic Media, above.

experienced counsel. Journalists are therefore wary when covering large companies and tycoons. On the other hand, ordinary citizens have little recourse when an inaccurate news report seriously injures their reputation, or even their livelihood. This is particularly so when some publishers may take less care reporting events about ordinary citizens than those about the rich and powerful.<sup>25</sup> The Association believed that this proposal would obviate the need to provide the HK Press Council with immunity from libel actions and the need to protect the Council's statements by qualified privilege.

10.35 However, the HKPC had reservations with the proposal to extend legal aid to cover all defamation proceedings. They pointed out that it would encourage some members of the public to sue media organisations for personal gain, and would result in a proliferation of libel suits filed against the press, thereby increasing the drain on public funds and bringing a negative impact on press freedom.<sup>26</sup>

10.36 The Law Society of HK was of the view that extending legal aid to defamation proceedings would not be a wise use of funds for the following reasons:

- (a) public funds are limited;
- (b) defamation proceedings are instituted to enforce rights that are not essential to a person's well-being;
- (c) the Legal Aid Department would be flooded with applications from persons who claimed that they have been defamed in a domestic dispute or otherwise; and
- (d) the legal costs of defamation proceedings are notoriously high.<sup>27</sup>

10.37 In 1983, Geoffrey Robertson, QC, expressed the opinion that extending legal aid for libel was not a satisfactory solution to the problem of securing redress for factual misstatements. Libel law could not "provide a remedy for all, or even most, factual mis-statements" since it could only be invoked when the false statement had damaged the individual's reputation. Extending legal aid to libel actions would result in "more 'gagging' writs, more gold-digging actions, more public-interest stories put on the spike because of the impossibility of proving them by admissible evidence, and more dilution of free speech".<sup>28</sup>

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<sup>25</sup> Submission to the LegCo Panel on Administration of Justice and Legal Services from the HKJA on the provision of legal aid services, LC Paper No CB(2)1692/01-02(07) (25 April 2002); HKJA, "HKJA Position Paper on Defamation Legal Aid" at <[www.freeway.org.hk/hkja/press\\_free/statement/Legal%20Aid.htm](http://www.freeway.org.hk/hkja/press_free/statement/Legal%20Aid.htm)> (26.6.02).

<sup>26</sup> Submission from the HKPC to the LegCo Panel on Administration of Justice and Legal Services, LC Paper No CB(2)1692/01-02(03) (25.4.02), para 3.

<sup>27</sup> Submission from the Law Society to the LegCo Panel on Administration of Justice and Legal Services, LC Paper No CB(2)1692/01-02(06) (25.4.02), para 4.

<sup>28</sup> G Robertson, *People against the Press: An Enquiry into the Press Council* (London: Quartet Books, 1983), p 136.

10.38 The Administration considered that defamation proceedings should be excluded from the legal aid scheme for the following reasons:<sup>29</sup>

- (a) It is difficult to predict the outcome and assess the merits of a case alleging defamation in determining whether to grant legal aid to the parties involved.
- (b) Making legal aid available to the parties in defamation actions may lead to a proliferation of disputes and frivolous litigation.
- (c) Defamation actions are not covered by legal aid in many jurisdictions, such as Australia, Denmark, Ireland, Ontario, Singapore, Sweden and the UK.
- (d) Excluding legal aid for defamation proceedings does not deprive a person of his right of access to court, nor does it interfere with a person's right to freedom of expression.<sup>30</sup>
- (e) Legal aid is funded by the public coffers which have limited resources.

10.39 Although extending legal aid to defamation proceedings would enable media critics to defend defamation proceedings with legal assistance, the fact that the Administration, the HKPC and the Law Society were all against the proposal renders it unlikely that the proposal would be implemented in the near future.

***Attach qualified privilege to media reports of statements made by journalists' associations on media ethics***

10.40 The four major journalists' associations proposed to accord qualified privilege to statements issued by the professional journalists' associations on the ethical standards of individual news organisations.<sup>31</sup> This proposal aims at protecting the journalists' associations instead of affording a remedy for the victims. It would not provide sufficient relief to the victims because it is highly unlikely that the newspaper concerned would publish critical statements issued by the associations. Besides, the journalists' associations usually speak out against unethical practice in extreme cases only. Even if an association has issued a critical statement, it provides no relief if it is not widely reported in the press. There are also a number of difficulties with the proposal. For example, what kind of journalists' associations should be included?<sup>32</sup> What type of statements should be privileged? Are there any policy objections to according privilege to statements issued by a private association with low membership that may criticise the conduct of a non-member? Should the law give preferential treatment to comments on media ethics as opposed to ethical issues of other professions? Should the law distinguish between discussion of media ethics

<sup>29</sup> Information Paper on "Legal Aid for Proceedings in respect of Defamation" from the Chief Secretary for Administration's Office to the LegCo Panel on Administration of Justice and Legal Services, Nov 2000.

<sup>30</sup> *Steel and Morris v UK*, Application No 21325/93 (European Commission of Human Rights).

<sup>31</sup> Statement issued by the HKNEA, HKJA, HKFJ and HKPPA on 19.9.99, para 5.

<sup>32</sup> There are other journalists' associations in existence apart from the HKNEA, HKJA, HKFJ and HKPPA.

and discussion of other matters of serious public concern?<sup>33</sup> We therefore doubt if this option is viable.

### ***Introduce a new defence to defamation actions***

10.41 It has been proposed that the law of defamation be developed or reformed so that the US Supreme Court decision in *New York Times v Sullivan*<sup>34</sup> could be followed in Hong Kong.<sup>35</sup> The Court in *Sullivan* held that a “public figure” (a concept that may be expanded to include the media) has to show that the statement published by the defendant was not only defamatory but also actuated by malice, that is, the statement was made with knowledge of its falsity or was made with reckless disregard of whether it was true or not.

10.42 Various law reform bodies in Australia have studied the desirability of introducing the public figure test but all rejected its adoption in Australia.<sup>36</sup> Both the Faulks Committee and the Neill Committee were also against its adoption in the UK.<sup>37</sup> The Neill Report stated:

*“Standards of care and accuracy in the press are, in our view, not such as to give any confidence that a ‘Sullivan’ defence would be treated responsibly. It would mean, in effect, that newspapers could publish more or less what they liked, provided they were honest, if their subject happened to be within the definition of ‘public figure’. We think this would lead to great injustice. Furthermore, it would be quite contrary to the tradition of our common law that citizens are not divided into different classes. What matters is the subject-matter of the publication and how it is treated, rather than who happens to be the subject of the allegations.”*<sup>38</sup>

10.43 We agree that the test is simple and easily understood, and accords more weight to freedom of expression on matters of public interest. However, we do not believe that it should be adopted in Hong Kong. Firstly, the constitutional privilege accorded in *Sullivan* is essentially founded on the First and Fourteenth Amendments to the US Constitution, which are not relevant in the Hong Kong context.<sup>39</sup> Secondly, the trade-off for a wider defence and the plaintiff having the burden of proof is the requirement of full disclosure by way of pre-trial discovery. Unless the rule against disclosure of

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<sup>33</sup> Cf *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609.

<sup>34</sup> (1964) 376 US 254.

<sup>35</sup> 李少南, “報業評議會矯枉過正”, *Apple Daily*, 16.9.99.

<sup>36</sup> J Tobin, “The US public figure test: Should it be introduced into Australia?” (1994) 17 UNSWLJ 383; New South Wales Law Reform Commission, *Defamation* (Report 75, Sept 1995), ch 5 (noting that the public figure test appears to contribute to the problems of lengthy and costly proceedings).

<sup>37</sup> Report of the Committee on Defamation (London: HMSO, Cmnd 5909, 1975) (Chairman: The Hon Mr Justice Faulks), para 617. (“We oppose it most strongly because we believe that here it would in many cases deny a just remedy to defamed persons.”)

<sup>38</sup> Supreme Court Procedure Committee, *Working Group Report on Practice and Procedure in Defamation* (Chairman: Lord Justice Neill), July 1991, section XIX 3.

<sup>39</sup> Faulks Report, above, para 610 & 617; *Reynolds v Times* [1998] 3 WLR 862, 908-909 (CA).

journalistic sources is also reformed so that a plaintiff is entitled to a pre-trial enquiry into the sources of the story and editorial decision-making, it is unacceptably difficult for the plaintiff to prove reckless disregard of the truth.<sup>40</sup>

## **More effective remedies for victims of press intrusion**

### ***Reform the law of libel***

10.44 The Citizens Party submitted that libel law should be reformed so that aggrieved citizens could afford to bring a libel action against a well-funded media organisation. The Party did not put forward any concrete proposals as to how the law should be reformed. We have no objection to reforming the law of libel. However, such reform cannot provide a solution to the problem of unwarranted press intrusion for the following reasons:<sup>41</sup>

- (a) Libel law is irrelevant if what a newspaper disclosed about an individual's private life or behaviour is true.
- (b) Not all inaccurate or misleading statements can be rectified by libel law. Libel law provides a remedy only if a false statement has a tendency to injure a person's reputation. Most false or inaccurate statements published in the newspapers about an individual do not bear a defamatory meaning. A statement is not defamatory simply because it is false.
- (c) Libel law and procedure is technical and complicated.
- (d) Libel cases can be protracted and expensive.
- (e) It is difficult to predict the outcome of a libel action.
- (f) It is difficult to predict the damages awarded by the court.
- (g) Libel law discourages the making of statements about matters of public interest because a newspaper has the burden of proving that the statements published by it are true. It will be difficult for a newspaper to discharge this burden according to the strict rules of evidence if the informant has died, is out of the jurisdiction, supplied the information in confidence, or refuses to give evidence.

### ***Seek civil remedies under the proposed privacy torts***

10.45 We have recommended in our report on *Civil Liability for Invasion of Privacy* that the following acts or conduct should be civil wrongs if they are committed without justification:

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<sup>40</sup> *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010 (HL). "[A] plaintiff's ability to obtain a remedy if he can prove malice is not normally a sufficient safeguard. Malice is notoriously difficult to prove. If a newspaper is understandably unwilling to disclose its sources, a plaintiff can be deprived of the material necessary to prove, or even allege, that the newspaper acted recklessly in publishing as it did without further verification." Per Lord Nicholls.

<sup>41</sup> See G Robertson, *People Against the Press: An Enquiry into the Press Council* (London: Quartet Books, 1983), pp 135-139.

- (a) intrusion upon the solitude or seclusion of another or into his private affairs or concerns in circumstances where he has a reasonable expectation of privacy, provided that the intrusion is seriously offensive or objectionable to a reasonable person;
- (b) giving publicity to a matter concerning the private life of another, provided that the publicity is of a kind that would be seriously offensive or objectionable to a reasonable person.

10.46 If those recommendations were implemented, they would go some way towards resolving the problem. Under the proposals, victims of media intrusion would be able to seek redress by bringing a civil action if the conduct of a journalist or media organisation constitutes one of the two torts of invasion of privacy. If journalists and media organisations may be held responsible for their actions and required to pay damages, there would be incentives for them to take appropriate level of care. The victims would also be able to take private action to enforce their rights rather than relying on Government action to do so.

10.47 As far as intrusion upon solitude or seclusion is concerned, it may be difficult for the victim to find out the name of the journalist concerned if the intrusion is effected with the assistance of a hidden device or without the notice of the victim, as when he is asleep, unconscious or bedridden at the material time. Where details of the victim's private life are published in a newspaper but his name is not disclosed in full or his facial features are obscured in the picture, the victim may have difficulties showing that the impugned publication constitutes an unwarranted "publicity" concerning his private life.

10.48 Furthermore, the majority of victims of media intrusion are not persons of means. The civil remedies would not benefit them to the same extent as the rich unless they are entitled to legal aid *and* are willing to take the time and trouble to bring a civil action. A victim who cares to sue a newspaper has to pay court fees; bear his own costs, such as taking a day off to attend trial; pay the costs of his lawyer; pay the costs of any expert testimony or witnesses; and run the risk of losing the case and having to pay the other party's legal costs. Where the complaint is of minor financial importance, the injury is intangible and difficult to prove, or the victim suffers no injury to feelings because he is unconscious or have mental problems, the risks do not warrant instituting legal proceedings because the court is likely to award only nominal damages. Going to court is time-consuming and stressful not only because the victim has to follow the legal procedures, but also because the newspaper may appeal against a ruling in the victim's favour, thus adding to his legal costs.

10.49 Another drawback is that civil procedure is formal and adversarial in nature. It is not geared to mediation or conciliation. A victim of unwarranted publicity may also want to avoid the risk of the press pursuing him or his family members after filing the writ, and giving further publicity to the very information which the victim once sought to keep private. There is

also a risk of a newspaper giving publicity to other private information about the victim or a family member that is irrelevant to the original complaint. Those who are bereaved or have attempted to take their own lives or are victims of crime, accidents or tragedies are particularly vulnerable. They are unlikely to seek redress by commencing legal action in open court against the journalists or publishers concerned.

10.50 Furthermore, some cases may or may not be covered by our civil liability proposals. Examples are:

- (a) journalists taking pictures of a victim of an alleged rape or other offence at the scene of the crime or when she is attending trial without her consent;
- (b) newspapers taking or publishing pictures that would intrude into the grief or shock of persons who have lost their loved ones;
- (c) newspapers publishing the pictures of:
  - (i) a person who has failed in an attempt to take his own life;
  - (ii) a person whose genitals or breasts have been injured as a result of a crime or accident;
  - (iii) a mentally ill person who is, or has been, acting strangely in a public place;
  - (iv) a person whose private parts or underwear are exposed in public as a result of a crime or accident if the private parts or the facial features are obscured in the pictures;
  - (v) the friends and relatives of persons caught in the news;
- (d) newspapers revealing the full names and/or residential addresses of the parties concerned when covering the events leading to the suicide, crime, accident or tragedy;
- (e) newspapers publishing the details of the private life of a victim or a witness which have been disclosed in open court. These facts may relate to the victim's intelligence, occupation, financial position, sexual orientation, sex life, ability to conceive a child, medical history, family background, or relationship with an intimate partner;
- (f) newspapers publishing the private or family photographs of an individual in which the individual or his friends or family members are included; and
- (g) newspapers reporting that a named person is "suspected of" having a mistress on the mainland, or "suspected of" having cancer or AIDS.

10.51 Victims of media intrusion want their complaints looked into by an independent, impartial and competent body, but they also want a quick,

simple, informal and fair procedure that is free of charge to deal with their complaints without the assistance of a lawyer. Besides, not all victims are interested in seeking monetary compensation or injunctive relief; they may well be satisfied with a declaration in their favour plus a public apology from the media organisation concerned. It is necessary to establish an effective alternative forum for the resolution of disputes – a forum which can provide a quicker and cheaper remedy than that provided by a court of law.

### ***Set up a legal fund to help victims of press intrusion***

10.52 If the privacy torts proposed in our *Civil Liability Report* were created, then plaintiffs who are willing to bring civil proceedings for invasion of privacy would be entitled to apply for legal aid. However, not all aggrieved individuals can satisfy the means test. In this connection, we note that Professor Leonard Chu has suggested that a fund be set up to help victims seeking legal redress.<sup>42</sup> The purpose of the fund would be to make access to court less financially prohibitive to ordinary citizens.

10.53 However, the legal costs involved may be very high and a major newspaper may appeal against an adverse ruling all the way up to the Court of Final Appeal. Given the current economic climate, it is doubtful whether the Government or any private bodies would provide the necessary funds for the establishment and maintenance of such a fund.

10.54 Furthermore, the actions for invasion of privacy and defamation could not fully address the concerns of victims of media intrusion. The suggestion overlooks the fact that the ability to pay legal costs is not the victims' only consideration. The fund would not save victims from the time and trouble of bringing a lawsuit even though a legal remedy is available and victims do not have to bear the legal costs. Many victims of media intrusion are unwilling to become involved in litigation, particularly when they have already experienced a trauma by reason of a crime, accident or tragedy. Nor is monetary compensation their primary concern. Any compensation awarded by the court is unlikely to be significant unless the victim has suffered psychiatric injury or his career or business interests have been ruined as a result. Many victims also prefer to pursue their remedies away from the glare of publicity, which is difficult to achieve if they bring legal proceedings. Their primary purpose is usually to vindicate their claim by asking the newspaper concerned to publish an apology or correction. Creating a litigation fund is of no practical assistance to these victims.

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<sup>42</sup> He proposes that a fund be set up to pay for the legal costs incurred by citizens involved in litigation. The fund would have the right to decide whether to proceed with a lawsuit or not, and any damages awarded by the court would be paid into the fund. He hopes that wealthy people and other members of the public could contribute to the fund. Comments made by Prof Chu at the RTHK television programme *Media Watch* on 27.11.99.



### ***Establish a statutory commission without sanctions against media intrusion***

10.55 This option is modelled on the existing Consumer Council created by the Consumer Council Ordinance (Cap 216).<sup>43</sup> The functions of the commission could be confined to the protection of individuals from unwarranted media intrusion by:

- (a) collecting, receiving and disseminating information about media intrusion;
- (b) receiving and investigating complaints about media intrusion;
- (c) advising members of the public of their right to be protected from media intrusion;
- (d) resolving their complaints by mediation;
- (e) assisting victims to obtain redress through court actions if a remedy is available at law;
- (f) conducting surveys and research on media intrusion;
- (g) promoting public awareness of their right against media intrusion under Article 17 of the ICCPR through education and publicity;
- (h) prescribing a voluntary code with detailed guidelines for the media to follow; and
- (i) publishing its findings and general information about media intrusion for the information of the industry and the public.

10.56 The emphasis of the commission would be on education, publicity, mediation, research and standards setting. It would seek to induce changes in the behaviour of journalists by bringing public pressure to bear. However, the commission would have no sanctions at its disposal, nor would its findings and recommendations be binding on the media organisations. In our view, victims of media intrusion should be entitled to have their grievances vindicated by the offending organisations publishing the findings of an adjudicating body with due prominence. Bearing in mind the experience of the HK Press Council and the attitude of the public and certain newspapers towards the Council, we do not believe that a commission without sanctions would have a deterrent effect and succeed in achieving its objects.

### ***Appoint a statutory Press Ombudsman***

10.57 This option is modelled on that recommended by the National Heritage Committee of the House of Commons in the UK.<sup>44</sup> Under this option, anyone dissatisfied with the outcome of an investigation by the HK Press Council could have recourse to a statutory Press Ombudsman with an independence and authority equivalent to that of a High Court Judge. The Ombudsman would be obliged to:

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<sup>43</sup> Reports of statements issued for the information of the public by the Consumer Council are protected by statutory qualified privilege.

<sup>44</sup> *Privacy and Media Intrusion, Fourth Report*, (London: HMSO, 294-I, 1993) Volume I - Report & Minutes of Proceedings, pp xxi – xxiii.

- (a) investigate complaints submitted to the HKPC whose outcome is not satisfactory to one of the parties involved;
- (b) consider complaints which the HKPC has declined to investigate; and
- (c) institute investigations where no complaint has been made.

10.58 The Ombudsman would be empowered to:

- (a) require the publication of corrections, retractions or apologies;
- (b) publish an adjudication;
- (c) award compensation to those affected by breaches of a privacy code; and
- (d) impose a financial penalty on newspapers responsible for flagrant or persistent breaches of the code.

10.59 Where a newspaper refuses to pay a fine or compensation, the Ombudsman would be able to seek an order from the Court requiring the newspaper to pay. Any newspaper which dissents from the Ombudsman's decision would be entitled to ask the Court to discharge the order.

10.60 We are not aware of any jurisdiction having a statutory press ombudsman to adjudicate on public complaints about the press. Sweden has a press ombudsman but his rulings may be reviewed by the Swedish Press Council, not the other way round. It is unusual to have the collective decisions of a press council reviewed by a press ombudsman who is not acting in a judicial capacity.

### ***Government regulation by setting up a Press Authority***

10.61 Explicit Government regulation attempts to change the conduct of a business by detailing how members of an industry should act. It generally relies on Government inspectors and/or monitoring to detect non-compliance and imposes punitive sanctions (such as fines) if the regulations are not complied with. This option entails the establishment of a Press Authority with the backing of a Government department, using the Broadcasting Authority and its executive arm, the Television and Entertainment Licensing Authority, as a model. Although there is a pressing social need to protect individuals from unwarranted press intrusion, we do not consider that it warrants the intervention of the Government to the same extent as that called for by the broadcasting industry.

### ***Regulation by a Press Privacy Complaints Tribunal***

10.62 The option of setting up a Press Privacy Complaints Tribunal draws on the experience of the Obscene Articles Tribunals, the Small Claims Tribunal and the Labour Tribunal.<sup>45</sup> The proposed Tribunal would be a

<sup>45</sup> Control of Obscene and Indecent Articles Ordinance (Cap 390), Part II; Small Claims Tribunal Ordinance (Cap 338); and Labour Tribunal Ordinance (Cap 25). Note that this option is not

judicial body with jurisdiction to deal with complaints about unwarranted press intrusion. Its Chairman would be a magistrate appointed by the Registrar of the High Court. For hearings, the Chairman could sit with four adjudicators selected from a panel appointed by the Chief Justice, with half of the adjudicators at each hearing representing the press and the other half representing members of the public.

10.63 The pool of adjudicators representing the press could include the chief and deputy editors of all the mainstream newspapers and magazines, journalists and editors recommended by the journalists' and publishers' associations, and all the academics at the journalism institutes. As for adjudicators representing members of the public, they could be drawn from applications submitted by members of the public as well as nominations made by NGOs. To ensure fairness, the adjudicators in the panel could be selected to attend hearings according to a roster.

10.64 The Press Privacy Complaints Tribunal would be able to inquire into complaints from individuals whose privacy has allegedly been unjustifiably invaded by a newspaper or magazine (including complaints about inaccuracies); to attempt conciliation; to hold hearings; to rule on complaints; to warn an offending newspaper or magazine; to require it to publish an apology, correction or decision of the Tribunal; and to award compensation up to a specified limit.

10.65 The Tribunal could be assisted by investigation officers whose duty is to inquire into the facts of the complaint and prepare a summary of facts for the Tribunal.<sup>46</sup> To encourage amicable settlement of complaints, an investigation officer could attempt conciliation before a hearing.<sup>47</sup> The hearings could be conducted in an informal manner and the parties would not be represented by lawyers except with permission. There could be a right of appeal to the Court against an adverse ruling or on any point of law. Reports of the public proceedings of the Tribunal could be protected by qualified privilege.<sup>48</sup>

10.66 The advantages of this option include the following:

- (a) The Tribunal would be an independent body.
- (b) The running costs of the adjudicating body would be met from public funds and would not therefore be a burden on the industry itself.
- (c) Having a magistrate as the Chairman would ensure public confidence in the fairness and impartiality of the proceedings.
- (d) Since the Tribunal would be free to develop principles on a case-by-case basis, many of the problems arising from the drafting and enforcement of a code of ethics or practice could be avoided.

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modelled on the press complaints tribunal recommended by David Calcutt QC in his *Review of Press Self-Regulation* (1993). Cf the Press Arbitration Commission in South Korea introduced in Chapter 11.

<sup>46</sup> Cf Labour Tribunal Ordinance (Cap 25), s 14.

<sup>47</sup> Cf Labour Tribunal Ordinance (Cap 25), s 15.

<sup>48</sup> Defamation Ordinance (Cap 21), section 14 and para 10 of the Schedule.

- (e) Since the Tribunal would have jurisdiction over all local newspapers and magazines, the problem of the HKPC not covering the whole industry would disappear.

10.67 However, these advantages are outweighed by the following significant disadvantages:

- (a) The Tribunal would not be a self-regulatory body. The role played by the press in the development of standards would be minimal. The press would not have any sense of ownership over the proceedings.
- (b) The appointment of adjudicators representing press or public interests would be in the hands of the Judiciary, not the industry or the profession, or the community at large.
- (c) It would be undesirable to draw the Judiciary into an area of likely controversy by making the Chief Justice responsible for appointing members to the panel of adjudicators.
- (d) Since different adjudicators would hear different cases without the assistance of a code, the standards applied by the Tribunal would differ from case to case. The Tribunal may therefore produce findings that are inconsistent and cause confusion to the industry.
- (e) The concept of unwarranted press intrusion is vague. In the absence of a code of practice, the Tribunal would have difficulty forming a view as to whether an intrusion is warranted or not. The development of the principles underlying the concept of unwarranted press intrusion would be slow and there would be a period of uncertainty at least during the initial stage. Although the Tribunal may be empowered to have regard to such jurisprudence or codes as it considers relevant in adjudicating a complaint,<sup>49</sup> there is no consensus as to which codes or precedents it should follow. Different tribunals may consult different codes and precedents in different jurisdictions, resulting in even more uncertainty.
- (f) If the Tribunal were to have the power to award compensation, there would in effect be a new tort created, overlapping with those recommended in our Report on *Civil Liability for Invasion of Privacy*.
- (g) Vesting a tribunal with the power to provide judicial remedies would defeat the purpose of finding an alternative means of dispute resolution for victims of press intrusion.

***Prescribe a mandatory press privacy code without creating a statutory body***

10.68 This option involves legislation prescribing a privacy code for the press, enforceable by private legal action against all publications. A statutory

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<sup>49</sup> Cf. Control of Obscene and Indecent Articles Ordinance (Cap 390), ss 2(2), 2(3) & 10; Human Rights Act 1998 (UK), s 12 (referring to “any relevant privacy code”).

code is desirable where the standards prescribed in a voluntary code cannot meet public expectations or the voluntary code fails to achieve compliance by all major players. Any risk of undue influence from the Government could be minimised by the creation of an independent code committee with the members nominated by the press, with or without the participation of NGOs. To make the code effective, the law could provide that any individual aggrieved by a breach of the code has a right of action against the newspaper concerned in a court of law.

10.69 The advantage of this option is that the statutory code can be enforced by private action by the aggrieved individuals, and not by public action by a statutory authority. It therefore does not require the involvement of a statutory body such as the Privacy Commissioner or a Press Authority to enforce the code. However, the enforcement of a privacy code for the press by private action overlaps with the civil remedies proposed in our *Civil Liability Report*. It suffers from the same weaknesses as civil remedies<sup>50</sup> and cannot help victims who prefer extra-judicial remedies.

### ***Provide legislative backing to a voluntary press privacy code***

10.70 The HK Press Council already applies the Journalists' Code of Professional Ethics but few, if any, mainstream newspapers have incorporated the Code into their journalists' employment contracts. The Government may therefore choose to enforce the Code by giving it legislative backing in one way or another. Underpinning a code is justified where self-regulation has failed through inadequate compliance and coverage. Legislative measures are not objectionable if they merely provide the means for the industry to achieve effective self-regulation on the basis of a voluntary code.

10.71 One way to implement this option would be to provide that any alleged victim of press intrusion may bring legal proceedings against a newspaper or journalist for breach of the Journalists' Code of Professional Ethics. Making the Journalists' Code enforceable by private action would have the effect of making a breach of the voluntary code into a statutory tort. However, this option is not preferred because: (a) the remedy would overlap with the privacy torts proposed in our *Civil Liability Report*; (b) the press is likely to object to the introduction of legislation attaching legal consequences to breaches of a voluntary code; and (c) many victims prefer an alternative remedy which is speedier and more accessible than seeking redress in a court of law.

10.72 Another way to underpin a voluntary code would be to create an independent press complaints body which has power to grant extra-judicial remedies for breaches of a voluntary code adopted by the complaints body. Since this option requires the creation of a statutory body, the press might be concerned that it would lead to Government interference with press freedom. In order to enable us to have an informed discussion as to the best way

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<sup>50</sup> See section on "Seek civil remedies under the proposed privacy torts" in Chapter 10 above.

forward, we withhold discussion of this option until we have examined in the next chapter the experience of press councils and similar bodies in other jurisdictions.

# Chapter 11

## Press councils and similar bodies in other jurisdictions

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### Press councils in general<sup>1</sup>

11.1 According to a survey conducted in Hong Kong in 1990, 58% of the journalists surveyed considered that there was an “urgent” or “very urgent” need to set up a press council. Only 9% said there was no urgent need.<sup>2</sup> In the survey commissioned by the four major journalists’ associations in 1999, 74% of the journalists objected that a “government-appointed” press council be created, but as many as 56% agreed that Hong Kong should have a “non-governmental statutory monitoring body”, with only 24% disagreeing. The findings of the public opinion poll commissioned by the HKPC in 2002 also revealed that 85% of the respondents considered that Hong Kong needs an independent body to monitor the press.

11.2 At the First International Conference of Press Councils and Similar Bodies, the delegates declared that the institution of press councils and similar bodies is a desirable method whereby freedom of the press and the corresponding responsibility of the press may be developed and enhanced.<sup>3</sup> They also determined that the method whereby a press council or similar body is constituted is a matter for each country or region, and will necessarily reflect such factors as its legal traditions, constitution, socio-economic development, culture and civilisation. However, a press council or a similar body must be autonomous and independent of Government or any

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<sup>1</sup> H Pigeat & J Huteau, *DÉONTOLOGIE DES MÉDIAS: Institutions, pratiques et nouvelles approches dans le monde* (UNESCO, 2001); P Sonninen and T Laitila, “Press Councils in Europe” in K Nordenstreng (ed), *Reports on Media Ethics in Europe* (University of Tampere Publications Series B 41/1995), pp 3-22; K Nordenstreng, “European Landscape of Media Self-regulation” in Organization for Security and Co-operation in Europe, *Freedom and Responsibility Yearbook 1998/99* (Vienna, 1999), at [www.osce.org/fom/documents/books/files/yb1998\\_1999.pdf](http://www.osce.org/fom/documents/books/files/yb1998_1999.pdf), pp 169-185; J Bröhmer & J Ukrow, *Self-Regulation of the Media in Europe* (Saarbrücken: Institute of European Media Law, 1999) at [www.eu-seminar.de/index3-2en.html](http://www.eu-seminar.de/index3-2en.html); U Sonnenberg (ed), *Organising Media Accountability – Experiences in Europe* (Maastricht: European Journalism Centre, 1997), at [www.ejc.nl/hp/mas/jigenius.html](http://www.ejc.nl/hp/mas/jigenius.html); P Lahav (ed), *Press Law in Modern Democracies - A Comparative Study* (Longman, 1985); K S Venkateswaran (ed), *Media Monitors in Asia* (Asian Media Information and Communication Centre, 1996), Introduction; Cees J Hamelink, *Preserving Media Independence: Regulatory Frameworks* (UNESCO Communication and Development Series, 1999); “The Alliance of Independent Press Councils of Europe”, [www.aipce.org/index.html](http://www.aipce.org/index.html); European Journalism Centre, “European Media Landscape”, [www.ejc.nl/jr/emland/index.html](http://www.ejc.nl/jr/emland/index.html); I Beales, *Imperfect Freedom – The Case for Self-Regulation in the Commonwealth Press* (Commonwealth Press Union, 2002).

<sup>2</sup> J M Chan, P S N Lee & C C Lee, *Hong Kong Journalists: A Summary of the Survey Findings* (c. 1991), para 4 and table 19 (Very Urgent (22%); Urgent (36%); Doesn’t Matter (23%); No Urgent Need (7%); Not Urgent At All (2%); No Opinion (10%)).

<sup>3</sup> Kuala Lumpur Declaration 1985, paras 3 & 4.

other outside interference. The Constitution of the World Association of Press Councils also notes that the creation of an independent press council is a method whereby the freedom, the responsibility and the accountability of the press may be maintained and enhanced.<sup>4</sup>

11.3 The functions and positive effects of a press council are manifold:<sup>5</sup>

- (a) It protects the rights of the public in relation to the press.
- (b) It protects the press against the state, other governmental powers, and the public, thus enabling the industry to enjoy a greater degree of press freedom.
- (c) It provides a democratic, efficient and inexpensive forum for the hearing of complaints against and by the press.
- (d) It offers a forum for the discussion of ethical questions in journalism and helps to reconcile the conflict between press freedom and individual rights.
- (e) The variety of interests represented on a press council can produce well-balanced ethical rules and decisions.
- (f) It can stave off statutory or other forms of regulation by Government.
- (g) It can serve as a mediator between the media and the public. Where a council is trusted by both the media and the public, it can act as a safety-valve, or as a buffer-state.
- (h) It can improve the quality of journalism by judging what is good and what is bad media performance with reference to a code of ethics.
- (i) It can promote greater adherence to ethical standards by utilising peer pressure.
- (j) It allows the press to enter into a dialogue with the general public and persons adversely affected by its work.
- (k) It can act as an effective alternative forum for the resolution of disputes by offering a quicker and cheaper remedy to the aggrieved parties than a court of law.
- (l) It can perform a valuable service in aiding research on the conduct and development of the mass media.
- (m) It may be able to provide professional training to journalists in certain areas.

11.4 It can be seen that one of the major functions of a press council is to prevent abuses of press freedom. A press council provides a mechanism through which the standards of care and responsibility on the part of the media can be maintained without jeopardising press freedom. Citizens

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<sup>4</sup> Preamble of World Association of Press Councils, in "Press Council of India" at <[www.nic.in/pci/](http://www.nic.in/pci/)>.

<sup>5</sup> P Sonninen & T Laitila, "Press Councils in Europe", above, pp 4 – 5; K S Venkateswaran (ed), above, pp 1-2; N Dietrich, "Self-regulation of the press – a model for Asia?", paper presented at a seminar on "Libel, Litigation and Self-Regulation: Media's Struggle to Reform Itself - An International Perspective" organised by the HKU Journalism & Media Studies Centre and The Konrad Adenauer Foundation, 19.6.00; C-J Bertrand, "Press Councils and Media Accountability Systems", at <<http://www.freemedia.at/masart.htm>> (6.9.01), p 1.



unwilling or unable to bring legal proceedings against the media may hold the media accountable by lodging a complaint with the council. Publishers can also save legal fees and court costs. Investigation and public condemnation of bad journalism by a press council would contribute to higher professional standards. The public is likely to have a higher respect for journalism if the media organisations are subject to the scrutiny of an independent body. The press council therefore provides a model whereby conflicts between press freedom and the right to privacy can be resolved.

11.5 The observations of the UK National Consumer Council on industry self-regulation are instructive:<sup>6</sup>

*“It is striking that the more successful self-regulatory schemes – the advertising, ombudsmen and direct marketing schemes, for instance – are all enforced through dedicated organisational structures outside the industry itself ... . It also seems to be important that the controlling influence – notably the membership of the governing body – should be genuinely independent, coming from outside the industry that is the subject of regulation. This does not necessarily mean a majority of consumer representatives: it might include professionals, academics, representatives of other interests or industries, or statutory regulators. ...*

*As with the court process, there is little doubt that any redress mechanism should be free from pressures from the trade or professional body to deliver decisions which suit its purpose or appear to favour members. So the running of the redress system should always be separated from the rest of the scheme, and with lay members in a majority.*

*Similarly, the body for code monitoring and enforcement ... should usually have a majority of independent lay members. Trade bodies find it very difficult to impose sanctions on their own members and may also be tempted to stint on the effort needed to monitor compliance with a code.*

*In practice, it is in drawing up the rules that a lay majority is most often missing. ... Making the rules is the area that professional bodies, and those with special expertise, guard most jealously. There is a feeling that outsiders do not have the knowledge needed to judge what is appropriate. We are not persuaded that this is the case, or that insiders can always distinguish between what they think is in consumers’ interests and what is their preferred way of carrying on.”*

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<sup>6</sup> National Consumer Council, UK, *Models of self-regulation*, above, pp 42 – 44.

## Overview of press councils in other jurisdictions

11.6 We have studied the press councils and similar bodies in about 50 jurisdictions, including Australia, Austria, Bangladesh, Belgium, Canada, Cyprus, Denmark, Egypt, Estonia, Fiji, Finland, Germany, Ghana, India, Indonesia, Ireland, Israel, Italy, Japan, Kenya, Lithuania, Luxembourg, Macao, Nepal, the Netherlands, New Zealand, Nigeria, Norway, Peru, the Philippines, Portugal, Russia, South Africa, South Korea, Sri Lanka, Sweden, Switzerland, Taiwan, Tanzania, Turkey, the UK and the US. Twenty seven of them are voluntary bodies without any state support; six are voluntary bodies with some state support; and 14 have a statutory basis. Their major features are summarised in the two tables at Annex 4.

11.7 **Voluntary press councils without any state support** – Self-regulatory bodies that operate without any Government backing or involvement include the following:

- (a) Australia – Australian Press Council;
- (b) Austria – Austrian Press Council;
- (c) Canada – the press councils in Alberta, the Atlantic Provinces, British Columbia, Manitoba and Ontario;
- (d) Cyprus – Code of Conduct for Journalists Committee;
- (e) Estonia – Estonian Press Council;
- (f) Fiji – Media Council;
- (g) Israel – Israel Press Council;
- (h) Japan – Newspaper Ethical Standards Monitoring Chamber of the Japan Newspaper Publishers and Editors Association;
- (i) The Netherlands – the Press Council of The Netherlands;
- (j) New Zealand – New Zealand Press Council;
- (k) Norway – Norwegian Press Council;
- (l) Peru – Peruvian Press Council;
- (m) The Philippines – The Press Council of the Philippines;
- (n) Russia – Grand Jury for the Media;
- (o) South Africa – Press Ombudsman and Appeal Panel;
- (p) Sweden – Press Ombudsman and Press Council;
- (q) Switzerland – Press Council of Switzerland;
- (r) Taiwan – the National Press Council;
- (s) Tanzania – Media Council of Tanzania;
- (t) Turkey – Turkish Press Council;
- (u) United Kingdom – Press Complaints Commission;
- (v) United States – news councils in a small number of states, eg, Minnesota News Council and Washington News Council.

11.8 It will be seen that an important reason for the press to establish a voluntary self-regulatory mechanism is to avoid the creation of a statutory council. Press councils created under the threat of legislation can found in Canada, Cyprus, Fiji, Germany, Israel, Kenya, the Netherlands, New Zealand, Tanzania and the UK. As observed by Nicole Dietrich, the declared readiness of a state to react to a permanent and substantial disproportion (or gap) between lawful and fair reporting by the press clearly improves the

environment for voluntary measures. In her view, Government plans to increase legal restrictions or to raise the public's awareness of media ethics could motivate the press to participate in the self-regulatory system.<sup>7</sup>

11.9 Although voluntary press councils provide a forum for the general public to express their criticisms and opinions concerning the performance of the press, most of them do not have any sanctions or their sanctions are not respected by the press. It is a common criticism of voluntary press councils that they do not have effective sanctions other than to make their adjudications public and to require the offending newspapers to publish the adjudications. The success of a voluntary council depends on moral persuasion rather than law to promote compliance with its code. The council can do nothing if a newspaper refuses to publish a critical adjudication. Another problem with a voluntary council is its coverage. Even if a council has sanctions enforceable against its members, it is not effective if a number of newspapers are not bound by its adjudications. Some councils also do not have enough financial resources to discharge their functions.<sup>8</sup>

11.10 However, a voluntary press council can be effective if the following conditions exist: (a) the operation of the council is regulated by a contract which requires an offending member to publish the adjudication with due prominence and/or pay a fine; (b) all newspapers and periodicals are members of the council and therefore subject to its jurisdiction and bound by the terms of that contract; (c) the overwhelming majority of members comply with the adjudications; and (d) the council is prepared to enforce the contract against any defaulting member. A model of a successful voluntary press council is the Press Council in Sweden, which has legally binding contracts with almost all newspapers in the country, requiring an offending newspaper to publish the adjudication and pay an administrative fee to the council.

11.11 **Voluntary press councils with some state support** – Contrary to suggestions that press councils in other jurisdictions are predominantly voluntary in nature, our study reveals that many press councils or similar bodies have a statutory basis or are supported by the state in some way. The following are press councils or similar bodies that are not created by statute but are supported by the state or underpinned by a statute:

- (a) the Council of the Mass Media in Finland (about half of its costs are funded by the state);
- (b) the Press Council of Germany (underpinned by the Law for Guaranteeing the Independence of the Complaints Committee of the Press Council 1976; about half of its costs are funded by the state);
- (c) the National Committee for Accuracy and Reliability of Information in Italy (a Regional Council of the Order of Journalists may commence disciplinary proceedings under Law No 69 of 3

<sup>7</sup> N Dietrich, "Self-regulation of the press – a model for Asia?", above.

<sup>8</sup> P Sonninen and T Laitila, "Press Councils in Europe" above, pp 18 – 19. The responses were from the press councils, journalists' unions and journalism training centres in Europe.

- February 1963 if the behaviour of a journalist is held by the Committee to be in breach of a code);
- (d) the Media Council of Kenya (its membership includes the Director of Information, an ambassador and a former ambassador);
- (e) the Quebec Press Council in Canada (receiving some funding from the Government); and
- (f) the Press Complaints Commission of Sri Lanka (receives public funds and its decisions are enforceable under the Arbitration Act).

11.12        **Statutory press councils** – Contrary to the suggestion made by the HKJA that there are “very few” statutory press councils, there are at least 14 statutory press councils or similar bodies created by statute.<sup>9</sup>

- (a) Bangladesh – Press Council (Press Council Act 1974);
- (b) Belgium – Council of the Flemish Media (decree of 2 March 1985);
- (c) Denmark – Press Council (Media Liability Act 1991);
- (d) Egypt – Supreme Press Council (Article 211 of the Constitution of the Arab Republic of Egypt and Law No 148 of 1980);
- (e) Ghana – National Media Commission (Articles 166 and 167 of the Constitution of the Republic of Ghana and The National Media Commission Act 1993);
- (f) India – Press Council (Press Council Act 1978);
- (g) Indonesia – Press Council (Article 5(2) of the Constitution and Press Act 1999);
- (h) Lithuania – Inspector of Journalistic Ethics and the Ethics Committee for Journalists and Editors (Law on the Provision of Information to the Public 1996);
- (i) Luxembourg – Press Council (Law of 20 December 1979);
- (j) Nepal – Press Council (Press Council Act, No 2048);
- (k) Nigeria – Press Council (Nigerian Press Council Decree No 85 of 1992 & Decree No 60 of 1999);
- (l) Portugal – High Authority for the Mass Media (Article 39 of the Constitution of the Republic of Portugal; established by a law of 1990 and supplemented by the Law of the High Authority for the Mass Media in 1998);
- (m) South Korea – Press Arbitration Commission (Law Relating to Registration, etc of Periodicals 1981); and
- (n) Sri Lanka – Press Council (Sri Lanka Press Council Law 1973).

We may mention, in passing, that there is a frequent phenomenon across the Commonwealth in which press organisations seek statutory guarantees for enforcing semi-autonomous regimes, often financed by parliament.<sup>10</sup>

11.13        Although an authoritarian state may establish a statutory press council to muzzle the press, a number of jurisdictions established a statutory

<sup>9</sup> Excluding the Press Council of Cyprus provided for by the Press Law of 1989, which is not functioning at the moment, and the Press Council of Macao which has yet to be established pursuant to its Press Law No 7/90/M August 6.

<sup>10</sup> I Beales, *Imperfect Freedom*, above, p 15. Other examples not mentioned in this report are Malaysia, Sierra Leone and the Gambia.

press council only to redress the failure of the local media in regulating its activities to the satisfaction of the people. The statutory councils in these jurisdictions provide evidence that a press council created by statute can be independent of the Government. These precedents can be found in Bangladesh, Belgium, Denmark, Ghana, India, Lithuania and Portugal. The legislation in these jurisdictions contains an elaborate scheme which ensures the independence of the press council and to keep the Government at arms length in the appointment of its members, thus ensuring that press freedom will not be compromised when providing relief for victims of press abuses. For example, instead of asking a Government minister to make all the appointments, the legislation may provide that the press members of a statutory press council be returned by the journalists' unions and/or publishers' associations, and the lay members be returned by persons who do not have connections with the Government, such as the Judiciary, the barristers' association, the solicitors' association, the University Grants Commission, Members of Parliament, the Speaker of Parliament, a religious body, the association for the protection of consumers, the teachers' association, and journalists' training institutes.

11.14 It is important not to overlook that a statutory press council may or may not have any effective sanctions. While it is common to label a voluntary press council as a paper tiger, a statutory press council may also be established in such a way that it does not have any teeth. Thus, although the Danish Press Council and the High Authority for the Mass Media in Portugal may impose a fine on an offending organisation, and the National Media Commission in Ghana and the Press Complaints Commission in Sri Lanka may apply to the Court to enforce their orders, the Bangladeshi Press Council, the Indian Press Council, the Indonesian Press Council, the Council of the Flemish Media in Belgium, and the Ethics Commission of Journalists and Editors in Lithuania cannot compel an offending organisation to publish their adjudications, nor do they have the power to impose a fine for unethical conduct. It is therefore not necessarily true that the establishment of a statutory press council is a draconian measure to muzzle the press, nor is it necessarily true that a statutory press council is effective in curbing press abuses. A statutory press council is merely a paper tiger if it is not backed up with any sanctions that are enforceable against a defaulting newspaper.

## **Voluntary press councils and similar bodies without any state support**

### ***Australia***<sup>11</sup>

11.15 The Australian Press Council (APC) was established after discussion between publishers and the Australian Journalists' Association. It is dependent upon the newspaper industry for its funding. The aim of the

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<sup>11</sup> "Australian Press Council", at <[www.presscouncil.org.au/](http://www.presscouncil.org.au/)>; APC News, "The Press Council and Self-Regulation", vol 11, no 4, Nov 1999; APC, *Australian Press Council 1987 - 97 - A Ten Year Report* (1998).

Council is twofold: to help preserve the traditional freedom of the press within Australia and to ensure that the free press acts responsibly and ethically. To carry out its latter function, it serves as a forum to which anyone may take a complaint concerning the press.

11.16 The APC consists of: (a) ten publisher members appointed by the Council on the nomination of constituent bodies to represent the newspaper and magazine industry; (b) seven public members appointed by the Council on the nomination of the Chairman (after public advertisement of vacancies) to represent the general public; (c) three journalist members (including one former editor) appointed by the Council on the nomination of the Chairman to represent the viewpoint of print media journalists and editors, chosen from persons who are not employed by a constituent member; and (d) a Chairman appointed by the Council from persons who have not had any previous connection with the press. The number of public members and journalist members shall together be not greater than the number of newspaper members. The Vice-Chairman is elected from the public members. The Chairman has been, by tradition, a distinguished person with a legal background. Members vote as individuals, not as representatives of the bodies that nominated them.

11.17 The procedure normally requires advertisement for vacancies. The Council's practice is that neither the renewal of appointment nor appointing alternates as full members requires further advertisement. In addition, the Council is not precluded from inviting a particular person to be nominated. Applications are considered by a committee, normally consisting of the Chairman, Vice-Chairman and one or two public members. The advice of other members, especially public members, may be, and is often, sought.

11.18 The APC deals with complaints against newspapers, magazines and periodicals printed or published in Australia, whether or not the publisher belongs to an organisation affiliated with the Council. The effect of this approach is that complaints are accepted against many small newsletter type publications. As long as they have a public circulation the Council will deal with them. The APC also accepts complaints from third parties, ie persons not immediately affected by an article where the victim remains silent.

11.19 The APC has adopted a Statement of Principles against which it determines whether a complaint against a publication should be upheld. The Statement is drafted by the Council with the co-operation of the publishers and their editors, after consultation with the industry following the publication of the results of a survey of past complainants to the Council.

11.20 If the Executive Secretary considers the complaint could be the basis for a legal action against the publication, the complainant will be requested to sign a document waiving his legal rights before the Council will proceed further. The Council secretariat will first try to mediate a settlement to the satisfaction of the parties. But if the attempt at a negotiated settlement fails, the complaint will be sent to the publication for a formal written response. The parties may, by consent, agree to use the services of a locally-

situated Public Member to act as a mediator of the complaint. Where mediation is unsuccessful, or the option is rejected by either party, the complainant may refer the matter to the Council for adjudication.

11.21 When a complaint has been referred to the Council, the Executive Secretary arranges for the complaint to be considered by the Complaints Committee. Members of the Committee are appointed by the Council. The Chairman and Vice-Chairman are *ex officio* members of the committee. The remainder of the members is determined by the Council, subject to the requirement that the public members and an *ex officio* member shall together constitute a majority of the membership, and the other members shall include at least one journalist member and one newspaper member. Lawyers may not appear as a representative of either party. There is no formal taking of evidence at the hearing. The Complaints Committee drafts an adjudication that goes to the Council as a recommendation.

11.22 In its adjudication, the Council may uphold a complaint in whole or in part or it may dismiss all aspects of the complaint. Alternatively, it may simply express an opinion on the matter. The publication concerned is required to prominently print any adjudication concerning it. The Council has no requirement that the adjudication be printed verbatim but requires that, where edited, the conclusion and spirit of the adjudication remain clear and unchanged. The authority of the Council rests solely on the willingness of publishers to respect the Council's views. It does not have power to punish publishers who fail to meet its standards or to direct the publication of an apology; nor does it have power to enforce publication of its censure.

11.23 In a survey conducted in 1995, some complainants felt that the printing of the adjudication was not prominent enough. In order to overcome this concern, the Complaints Committee now monitors the printing of adjudications from the previous month at its monthly meeting, ensuring that they are published and published with appropriate prominence. If the adjudication has not been printed in the publication affected, or the committee believes that the publication has misrepresented the finding or not printed it with adequate prominence, it can recommend to the Council such action as would be appropriate in the circumstances. A summary of all printing of adjudications known to the Council (both in the publication cited, and in other publications) is published in the annual report. The Council also publishes all adjudications in its quarterly newsletter. All adjudications are posted to the Council's website and maintained there until archived at the AustLII website.

11.24 The APC reports that self-regulation works because the newspaper and magazine publishing industry is committed to it. Throughout the last ten years, every critical adjudication against a mainstream newspaper or magazine by the APC has been printed with due prominence. However, some smaller country and suburban newspapers, not affiliated with the Council, have not co-operated with the Council.<sup>12</sup> A survey of past complainants shows that many believe that the number of public members

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<sup>12</sup> APC, "Press Law in Australia", at <<http://www.presscouncil.org.au/pcs/site/fop/auspres.html#mechan>> (14.11.02), §9.1b.

should be increased, the median indicating that public members should account for 50% of the Council and the remaining 50% should be filled by publishers and journalists in equal number. Further, although about 60% of the respondents were not primarily concerned with monetary compensation, a majority of them strongly indicated that the Council should be able to impose a fine if it rules against the publication.<sup>13</sup> The APC has also been spurned as “window dressing”, and ABC-TV’s *Media Watch* presenter, Stuart Littlemore, branded it a lap-dog rather than a watchdog.<sup>14</sup> Others see the Council as something of a rubber-toothed apologist for the press, lacking the bite to deal effectively with readers’ complaints. In a case in which the APC ruled that the *Daily Telegraph* had committed an unjustified breach of privacy, the *Telegraph* buried the adjudication at the bottom of page 22 under a bland and ambiguous headline “Press Council rules”, even though it had splashed the sneak photographs, plus headlines and text across pages one and three.<sup>15</sup> Frank Sharman, a lecturer in legal studies, notes that it is very rare for a newspaper to refuse to publish a report adverse to itself, but more often the report will not get as much prominence as the original story.<sup>16</sup>

11.25 **Online self-regulation**<sup>17</sup> - Since 2000, the APC also accepts complaints against the on-line version of members’ newspapers. The Chairman of the Council says that Council members accept that press responsibility is not determined by the medium in which the story is presented. They therefore support the public’s right also to lodge complaints about the members’ on-line publications.<sup>18</sup> When the Council makes a finding about material appearing on a website, a link will be included in the relevant on-line site pointing to the adjudication as published on the Council’s website. This link would appear on the front page of the on-line site published on the day requested by the Council if the original article which is the subject of the complaint appeared on the front page; otherwise the link will appear on the news index of the day requested by the Council. Additionally, an annotation, with the appropriate link, will be placed in the on-line archive of the article which was the subject of the complaint.

11.26 The APC is also considering whether it could play a role in relation to on-line news reporting by non-member publications. Once it has gained experience in the handling of complaints about on-line publications, the Council would draw up a plan whereby, on the payment of a fee, on-line publishers who are not members could become affiliates of the Council and note on their sites that they were subject to the Council’s self-regulatory

<sup>13</sup> APC, *Survey of Complainants: Preliminary Report* (1994); D A Kirkman, “Whither the Australian Press Council? Its Formation, Function and Future” (APC, 1996), Part IV.

<sup>14</sup> P Reid, “Press Council under scrutiny: watchdog, lap-dog or window dressing?” *Green Left Weekly*, Issue No 303, 28 Jan 1998, at <<http://jinx.sistm.unsw.edu.au/~greenlft/1998/303/303p14.htm>>.

<sup>15</sup> Above.

<sup>16</sup> At <<http://members.ozemail.com.au/~faslaw/ic16c.htm>> (15.10.99).

<sup>17</sup> “Self-Regulation of Online News”, *Australian Press Council News*, vol 12, no 2, May 2000, at <[www.presscouncil.org.au/pcs/site/public/may00/online.html](http://www.presscouncil.org.au/pcs/site/public/may00/online.html)>.

<sup>18</sup> To facilitate the new procedures, publisher members have agreed that their Internet sites would contain a statement such as: “This site abides by the Principles of the Australian Press Council and complaints about its contents can be made to the Council”, and provide a link to the Council’s website.



scheme. The APC approach to the resolution of complaints relating to on-line news material seems to provide an appropriate model for self-regulation of this aspect of the on-line industry.

## **Austria**<sup>19</sup>

11.27 The Austrian Press Council was founded in 1961 by the Austrian Journalists Union and the Association of Austrian Newspaper Publishers. It is an organisation of representatives of the Austrian press. It has 24 members. Half of them elected by the journalists' associations and the other half by the editors' associations. The Association of Austrian Newspaper Editors & Newspaper Publishers and the Trade Union for the Arts & the Media each appoint 10 members; two further members are appointed by the Austrian Newspaper Association and Concordia Press Club respectively. The aims of the Council are to ensure that the press fulfils its professional obligations, and that the freedom of the press is not violated. It is responsible for maintaining the press' reputation and for determining and preventing abuses.

11.28 The Austrian Press Council adjudicates complaints of violations of their Code of Ethics for the Austrian Press. Any person can lodge a complaint with the Council; not only those who are directly injured by a publication. The Council can also take action on its own initiative. Complaints are dealt with either by one of the two Senates (of 12 members each) or by an ombudsman, who is a specially designated member of the Press Council.<sup>20</sup> A hearing then takes place, to which the parties are summoned. The parties try to find a solution acceptable to both, or they decide to bring the case before the Press Council. If proceedings before the Press Council are initiated, a report must be submitted. The Council either approves this report or decides to open proceedings. The Council has no punitive powers except to publish its judgment and to direct the offending newspaper to publish the judgment. It cannot compel publication, although the vast majority of the newspapers publish as recommended.

11.29 Sonninen and Laitila reported in 1995 that two boulevard papers did not pay attention to the council's decisions because their owners were not members of the publishers' association.<sup>21</sup> Walter Berka reported in 1993 that although most of the press publications respected and published the Austrian Press Council's findings, the most powerful Austrian newspaper, *Neue Kronen-Zeitung*, against which there had been many negative judgments, refused to do so. The Council was also criticised for having only publishers and journalists as members and for not including impartial experts or representatives of the public. As a consequence, the public was largely unaware of the Press Council's work and it was viewed by many as having

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<sup>19</sup> J Bröhmer & J Ukrow, above, pp 56, 59-61. The regulatory framework for the Austrian media is based on the Media Act 1981, which includes penal provisions on the journalists' duty to exercise due care, provisions governing the journalistic profession and provisions regarding the right of reply: C J Hamelink, above, Austria, section 2.1.

<sup>20</sup> It is possible to appoint several members as ombudsmen.

<sup>21</sup> P Sonninen and T Laitila, "Press Councils in Europe", above, p 18.

little authority.<sup>22</sup> In 1999, the Council was said to be preparing agreements with the publishing houses on the voluntary publication of its judgments.<sup>23</sup>

## **Canada<sup>24</sup>**

11.30 All but one of Canada's ten provinces have a press council. Most, but not all, dailies are members of the councils. All the press councils in Canada are funded by news organisations and foundations, though the Quebec Press Council received some funding from the Government. None of the councils have legal power to enforce their decisions.

11.31 The first press councils were created in the early 1970s, largely in response to proposals for greater Government regulation of the press. In Ontario, for example, a provincial commission investigating human rights in the late 1960s proposed the establishment of a press council to control and discipline the press and other news media. In Quebec, also during the late 1960s, the provincial government created a special legislative committee to investigate the impact of a concentration of ownership on freedom of the press. The committee did not make any recommendations but premier Jean-Jacques Bertrand thought that a provincial press council would be an excellent idea.

11.32 In 1970, the Special Senate Committee on Mass Media increased the pressure on the news media by urging the creation of a national press council. Although the proposed press council was to be non-governmental, publishers perceived an implicit threat of direct government regulation of the news media. Eventually, the first press council in Canada was created in Windsor in 1971. A year later the Ontario and Alberta press councils were formed. The Quebec Press Council also began operations in 1973.

11.33 The second wave of press council creation in Canada was triggered off by the report of the Royal Commission on Newspapers in 1981. The Commission said that "newspapers which do not become enthusiastically involved in the establishment and operation of press councils are exceedingly short-sighted".<sup>25</sup> The Commission proposed a Canada Newspaper Act, which would have required creation of local press councils in communities with chain-owned monopoly newspapers. The Act would also have created a federal Press Rights Panel, one of the functions of which would have been to "observe the performance of newspapers in Canada ... and to publish annually a review of that performance with any comment and advice to newspapers or government that it deems appropriate".

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<sup>22</sup> W Berka, "Austria", in *Press Law and Practice – A Comparative Study of Press Freedom in European and Other Democracies* (ARTICLE 19, 1993), p 29.

<sup>23</sup> C J Hamelink, above, Austria, section 7.1.

<sup>24</sup> D Pritchard, "The Role of Press Councils in a System of Media Accountability: The Case of Quebec" (1991) *Canadian Journal of Communications*, vol 16, no 1, pp 3 – 4.

<sup>25</sup> Royal Commission on Newspapers, *Report* (Ottawa: Minister of Supply and Services Canada, 1981), p 226.

11.34 Although few of the Royal Commission on Newspapers' recommendations were incorporated into legislation, a bill that would have enabled the federal Government to create a federal council to hear complaints from provinces without press councils was introduced in Parliament by the Trudeau Government. The message to newspaper publishers was clear: create voluntary press councils or face the possibility of Government regulation. The result was a resurgence of interest in press councils in the provinces that did not have them. Although the bill was not enacted into law, there were voluntary press councils for British Columbia, Manitoba, and the Atlantic Provinces by 1983.

11.35 **Alberta**<sup>26</sup> - The Alberta Press Council was formed in 1972 at the initiative of Alberta newspaper publishers. It is an independent, voluntary body that serves to protect the public's right to full, fair and accurate news reporting. Member newspapers each pay a share of the cost in proportion to circulation. The Council has 17 directors, including the chairman:

- (a) One public member is elected by Council from each circulation area of the daily newspapers – a total of seven.
- (b) The publisher of each daily newspaper appoints one staff member as a press representative – a total of seven.
- (c) The Alberta Weekly Newspapers Association appoints one publisher/editor from a weekly newspaper and one public member.
- (d) The Chairman is elected by the Council from the public.

11.36 The Council considers complaints from the public about the conduct and performance of Alberta's newspapers. It does not consider complaints where the complainant is pursuing litigation. Nor does it pursue third party complaints. Decisions of the Press Council must be published in full and in a prominent location by the newspaper against which the complaint has been lodged. The decisions can also be published in all other member newspapers if they choose to do so.

11.37 **The Atlantic Provinces**<sup>27</sup> - The Atlantic Press Council is a voluntary organisation that aims at maintaining a high professional standard of journalism in the Atlantic provinces by adjudicating complaints from the public about the conduct of the press and complaints from members of the press about the conduct of individuals towards the press. Members of the Council include one professional member drawn from each sponsoring newspaper, and one public member chosen by each newspaper as broadly representative of their constituencies. The Council does not have its own Code of Practice.

11.38 **British Columbia**<sup>28</sup> - The British Columbia Press Council consists of 11 elected members, five from member newspapers and six from the public. The former chairman was a judge in Saskatchewan before he

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<sup>26</sup> "Albert Press Council" at <[www.bowesnet.com/abpc/](http://www.bowesnet.com/abpc/)>.

<sup>27</sup> "Atlantic Press Council" at <[www.media-awareness.ca/eng/indus/newsmag/atpress.htm](http://www.media-awareness.ca/eng/indus/newsmag/atpress.htm)> (22.9.01).

<sup>28</sup> "British Columbia Press Council" at <<http://www.bcpresscouncil.org/>> (22.9.01).

moved to British Columbia. He is now a public member. Of the five professional members, three are publishers and two are editors. All of British Columbia's dailies and more than 100 community papers are members of the Council. The Council considers unsatisfied complaints from the public about the conduct of member newspapers. It uses its Code of Practice as a yardstick for assessing complaints. Complaints against a newspaper which is not a member will be considered only if the newspaper agrees. The newspaper involved is obliged to publish the adjudication as written.

11.39        **Manitoba**<sup>29</sup> - The Manitoba Press Council is an independent non-judicial body that seeks to promote high quality journalism. Its objectives include preservation of press freedom and consideration of complaints from the public and members of the press. It does not consider a complaint if the newspaper involved is not its member, but may request a complainant to sign a waiver agreeing not to take legal action on a complaint if such action is contemplated. The Council has nine directors; four professional members from the newspaper industry, and five members (including the chairman) representing communities throughout Manitoba.

11.40        **Ontario**<sup>30</sup> - The Ontario Press Council (OPC) is a voluntary association of Ontario newspapers. It considers unsatisfied complaints from the public about the conduct of the press in gathering and publishing news, opinion and advertising, and complaints from members of the press about the conduct of individuals and organisations toward the press. The Council may deal with a complaint against a newspaper that is not a contributing newspaper if that newspaper so chooses.

11.41        There are 21 council members, including the Chairman who must not be from the press, 10 Public Members who are broadly representative of society, and 10 Professional Members who must fairly represent publishers, editorial staff and advertising employees, aiming at the following breakdown: two publishers; seven editorial employees made up of two editors or executive editors, two departmental editors, and three reporters; and one advertising representative. All members are elected at an Annual Meeting.

11.42        The OPC has four Standing Committees, namely,

- (a) an Executive Committee;
- (b) an Inquiry Committee to examine complaints and report its findings to the Council, recommending the action it considers appropriate;
- (c) a Finance Committee; and
- (d) a Nomination Committee, consisting of the Chairman, two Public and two Professional Members, to consider and propose to the Council the names of persons for election as Council Members; the names of Council Members proposed for appointment to

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<sup>29</sup> "Manitoba Press Council" at <[www.media-awareness.ca/eng/indus/newsmag/mapress.htm](http://www.media-awareness.ca/eng/indus/newsmag/mapress.htm)> (20.8.02).

<sup>30</sup> "Ontario Press Council", at <[www.ontpress.com/](http://www.ontpress.com/)> (20.8.02).

Standing Committees, and the name of a Council Member proposed as Vice-Chairman.<sup>31</sup>

The Council may establish a Special Committee, consisting of three Public and two Professional Members, to propose appointment or reappointment of a Chairman.

11.43 The Inquiry Committee consists of five Council members. Three of them, including the Chairman, are Public Members. After the committee has decided on a recommendation, the Council will make a final decision. The Council and its committees may hear and question witnesses, but no one may be represented or accompanied by counsel. The Council does not normally deal with a complaint that involves litigation, whether launched, threatened or in prospect. It may, under some circumstances, ask a complainant to sign a waiver agreeing not to take legal action on any complaint heard by the Council on which the Council makes a finding. Member newspapers are obliged to publish the text of the adjudication in a prominent place in the newspaper.

11.44 **Observations** – Hamelink reports that the complaints process of the Canadian press councils is “generally respected” by the press.<sup>32</sup> However, Raphael Cohen-Almagor observes that the staff of the press councils is very small, consisting of between two and four salaried officers. The councils have a small budget and the media are not particularly interested in publicising the complaints mechanism. As a result, most people are oblivious to their work. Members of the councils are also fairly prominent people who are busy with their own work. The councils therefore meet infrequently. For example, the Ontario PC meets three times a year. Usually it takes several months from the time a complaint is made until its adjudication.<sup>33</sup> Enn Raudsepp also points out that although the press is obliged to publish a summary of the Council’s adjudication, it publishes the adjudication in brief, with a tiny headline at the bottom of the page.<sup>34</sup>

## **Cyprus**<sup>35</sup>

11.45 **Press Council** – The Press Law of 1989 provides for the establishment of a Press Council and a Press Authority but the relevant provisions have not been implemented. A Press Council and a Press Authority were initially formed after the passage of the law. The Press Council had three journalists, three editors, four members representing parliamentary

<sup>31</sup> The Committee’s search for candidates to fill vacancies include a canvass of Contributing Newspapers for suggestions.

<sup>32</sup> C J Hamelink, above, Canada, section 7.1.

<sup>33</sup> R Cohen-Almagor, *Speech, Media and Ethics – The Limits of Free Expression* (New York: Palgrave, 2001), pp 134-136.

<sup>34</sup> Above, p 136; interview with Professor E Raudsepp, Concordia University Montreal (22.9.98).

<sup>35</sup> P Sonninen and T Laitila, “Press Councils in Europe” in K Nordenstreng (ed), *Reports on Media Ethics in Europe*, above, pp 3 – 22; Republic of Cyprus, Press and Information Office, FAQ at <[www.pio.gov.cy/pio/eng/faq.htm](http://www.pio.gov.cy/pio/eng/faq.htm)> (15.11.02), Question No 8; P Petrides, “Cyprus”, in I Beales, *Imperfect Freedom*, above, pp 48-49.

parties and an experienced lawyer as the president. However, the two bodies ceased to function after a few sessions because of strong objections from the Cyprus Union of Journalists and the Publishers' Association who withdrew their representatives from these bodies. They argued that journalism was a matter requiring self-regulation, not Government involvement. This rendered the two bodies inoperative and various attempts to revive them failed. After demise of the Press Council, and following instances of misconduct by journalists, the Government issued several warnings that the media had to choose either self-regulation or regulation by law. The media opted for self-regulation.

**11.46 Code of Conduct for Journalists Committee** – The Cyprus Union of Journalists, in co-operation with the owners of the print and electronic media, approved a code of conduct in 1997. A Code of Conduct for Journalists Committee (also known as the Media Complaints Commission) was also set up to oversee the implementation of the code and deal with complaints. The Committee is financed by the founding members and made up of a Chairman and 12 members. Three members are appointed by the Union of Journalists, three by the Publishers' Association and three by the owners of the electronic media. The Cyprus Union of Journalists, the Publishers Association and the owners of the electronic media jointly appoint the Chairman and another three members. The present Chairman is a former judge and former Permanent Secretary of the Foreign Ministry. The Committee usually acts when a complaint is filed by an interested person, or on its own initiative, if in its opinion there is a serious breach of the code. It does not have the power to impose penalties on offenders or ask for damages to be paid, but it can publish its decisions. The offenders are expected to publish the decisions and findings of the Committee.

## ***Estonia***<sup>36</sup>

**11.47** The Estonian Press Council (EPC) was set up by the Estonian Newspaper Association in 1992. In 1997 several media organisations decided to reorganise the EPC on a wider basis. As a result, a non-profit-making organisation was founded by the Newspaper Association, the Association of Broadcasters, the Journalists' Union, the Association of Media Educators and the Consumers' Association. At present, the Network of Estonian Non-Profit-Making Organizations, the Estonian Council of Churches and the Baltic News Service are also members of the EPC. Every member-organisation delegates one to four representatives to the Press Council. The total number of members is limited to 17, of which seven need to represent non-media organisations. At present, there are 16 members in the EPC: 2 chief editors (national daily, local paper); 2 deputy chief editors (newspapers); 1 department head (TV); 2 journalists (radio, cultural magazine); 4 professors (one of journalism, psychology, ethics, and philosophy); 2 from Consumer Union; 2 managers from media associations; and 1 clergyman. The EPC is

<sup>36</sup> "General Information about the Estonian Press Council", at <[www.asn.org.ee/english/in\\_general.html](http://www.asn.org.ee/english/in_general.html)> (17.8.01); U Loit, "Estonia: Self-regulation rather than State-Regulation" in U Sonnenberg (ed), above.

mainly financed by the membership fees, though some projects have been financed by foundations.

11.48 The aims of the EPC are to protect press freedom; to examine complaints about media ethics; and to support the development of journalists' professional skills and ethics and adherence to the good tradition of journalism. The basis for examining complaints is the Code of Ethics introduced by the Estonian Newspaper Association, the Association of Estonian Broadcasters and the EPC. The EPC examines both complaints received and cases on their own initiative. It does not examine a case if it is obvious that a legal issue is at stake. If the complaint is upheld, the newspaper or station must print or announce the full text of the adjudication within 10 days. If the media organisation does not comply, the EPC must make the adjudication public by other means of mass communication.

## ***Fiji***

11.49 The Thomson Foundation consultants of the UK presented a report to the Fiji Government in 1996 on the future of media legislation and regulation in Fiji. The report recommended that a new Media Act be enacted to cover the qualitative aspects of content and conduct in both the print and the broadcast media and to establish an independent media council to which regulation of these matters should be entrusted. After the Government had expressed an intention to set up such a media council by legislation, the industry-sponsored News Council changed its name to Media Council and expanded its membership to include an equal number of public and media members with an independent Chairman and an independent Complaints Committee. The Council now has 14 members, with seven representing media organisations and seven representing the public.<sup>37</sup> Apart from upholding freedom of speech, the Council promotes a media code and adjudicates complaints through a Complaints Committee, which consists of three public members (including its Chairman) without any media representative. To strengthen the public membership of the Council, its Constitution has also been amended so that the public members must be appointed by the Complaints Committee.<sup>38</sup> The Council will also advertise and invite interested parties to apply.

11.50 The Complaints Committee deals with complaints concerning any media organisation, whether it is a Council member or not, according to the Council's General Media Code of Ethics and Practice. The Council asks complainants to sign a legal waiver before accepting their complaints. Legal representation is not allowed. Offending organisations are expected to publish the adjudications. The Committee has no power to enforce its adjudications. There have been instances of a media organisation refusing to reply to the complaint and co-operate with the Committee. In 2003, the

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<sup>37</sup> "The Media Council of Fiji", at <[www.fijimediacouncil.com/index.html](http://www.fijimediacouncil.com/index.html)>.

<sup>38</sup> D Tarte, "Media Councils in an Unstable Political Environment", speech at the Seminar on Press Freedom and Responsibility in the Asia-Pacific Region hosted by the Australian Press Council on 1-2 Oct 2001.



Government published a draft Media Bill to establish a statutory media council, purporting to implement the recommendations of the Thomson Foundation.<sup>39</sup> The Bill provides for an Appeals Committee to hear appeals from the Council's Complaints Committee and to make recommendations to the Council, which has a lay chairman and an equal number of press and lay members.

## **Israel**<sup>40</sup>

11.51 In response to pressures within the Government to enact a press law and to restrict journalistic activities, the journalists in 1956 formed an Ethics Committee to pre-empt "intervention from above". In 1963, the National Union of Journalists, the Press Editors' Committee and the Union of the Dailies Management established the Israel Press Council. The Council comprises representatives of the journalists (30%), representatives of publishers and editors (30%), and public representatives (40%). Sixty members sit in the Council, and ten in the Executive Committee that implements the decisions of the Council. The functions of the Council are to protect freedom of the press and information, to crystallise ethical codes, and to examine alleged violations of the codes.

11.52 Upon receipt of a complaint, the President of the Council or the Secretary-General will examine whether it has any substance. The Council does not deal with complaints that are handled by the court or by the police. If the complaint is not rejected, it will be passed to the Council's legal advisor to review whether there is a *prima facie* case. If so, the Council will request the media organisation concerned to give a response. After receipt of the response, the legal advisor will pass the complaint to the Chairperson of its Ethics Tribunal if there is a *prima facie* violation of the Code of Ethics. The Chairperson of the Tribunal will then form a tribunal consisting of three members: a public representative (who will also be the Chairperson of the tribunal), a journalists' representative, and a representative of publishers and editors. Appeals from the tribunal are adjudicated by a larger panel of the Tribunal, consisting of five or seven members nominated by the Chairperson of the Ethics Tribunal. Two members of the panel must be public representatives. The other three are representatives of journalists, publishers and editors. If a complaint is upheld, the Tribunal may issue a warning or reprimand; require that an apology be published; or suspend the newspaper from the Council for a limited period of time. The newspapers "usually" comply with the rulings of the Tribunal.<sup>41</sup>

11.53 The image of the Council has been described as one of a stagnant, ineffective body, whose work is obscure and whose existence is

<sup>39</sup> The draft Media Council of Fiji Bill 2003 and the recommendations of the Thomson Foundation Report are at <[www.fiji.gov.fj/MEDIA\\_BILL/submissions.shtml](http://www.fiji.gov.fj/MEDIA_BILL/submissions.shtml)> (31.7.03).

<sup>40</sup> R Cohen-Almagor, *Speech, Media and Ethics – The Limits of Free Expression* (New York: Palgrave, 2001), ch 7 (The Work of the Press Councils in Great Britain, Canada, and Israel: a Comparative Appraisal).

<sup>41</sup> Interviews with Attorney Slonim (20.12.98) and Secretary-General Eyal (27.12.98); quoted in R Cohen-Almagor, above, p 142.



questionable.<sup>42</sup> In 1996, the Minister of Justice and the Minister of the Interior set up a Public Committee on Press Laws headed by the President of the Press Council to review the work of the press in Israel. With regard to the Press Council, the Committee concluded that its voluntary status and the fact that the Council's decisions were not binding hindered its ability to enforce the Code of Ethics. It recommended the enactment of a Press Council Law that would compel the press to abide by the Code drawn up by the Council. Under its proposals, the authority to write and enforce the Code would remain in the hands of the independent Press Council, while the law would stipulate that all journalists and newspapers are obliged to conduct their affairs in accordance with the Code, and that they must respect the rulings of the Ethics Tribunal. However, there would be no sanctions for violations of the Code other than public and moral sanctions determined in accordance with the Council's bylaws with reference to its Code.

### **Japan**<sup>43</sup>

11.54 There is no press council or press ombudsman in Japan. However, the Japan Newspaper Publishers & Editors Association (NSK), which is the leading association of newspaper editors and publishers in Japan, plays a pivotal role in maintaining the ethical standards of the press. To monitor the ethical standards of newspapers, NSK set up a Newspaper Ethical Standards Monitoring Chamber within its secretariat.<sup>44</sup> The Chamber is staffed by several veteran newsmen with extensive experience as journalists. Every day these newsmen monitor every page of all the papers published by NSK member companies and examine them against the Canon of Journalism adopted by NSK. If they find any article which appears to contravene ethical standards or arouse social criticism, it is referred to the Editorial Affairs Committee (a body consisting of managing editors) for consideration. When the alleged contravention is affirmed, NSK will issue a warning to the offending newspaper. If the newspaper does not heed the warning, its membership may be suspended or it may be expelled from the Association. There have been a few cases of such expulsions in the past.

### **The Netherlands**<sup>45</sup>

11.55 The Netherlands Press Council (NPC) was created in 1960, in response to public calls for Government regulation to protect individuals against journalistic excesses. It is an independent body established by the NPC Foundation, which comprises representatives of the Netherlands

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<sup>42</sup> Above, p 144.

<sup>43</sup> K Ito, "Media Monitors in Japan" in K S Venkateswaran (ed), above, pp 35 - 40.

<sup>44</sup> At <[www.pressnet.or.jp/](http://www.pressnet.or.jp/)> (5.9.01).

<sup>45</sup> "The Press Council in The Netherlands" at <[www.rvdj.nl/summ.html](http://www.rvdj.nl/summ.html)> (9.8.01); S Buurke, "The Dutch Media Landscape" at <[www.ejc.nl/jr/emland/netherlands.html](http://www.ejc.nl/jr/emland/netherlands.html)> (30.3.00); J Bröhmer & J Ukrow, above, pp 20-22; F van Lenthe & I Boerefijn, "Netherlands", in *Press Law and Practice – A Comparative Study of Press Freedom in European and Other Democracies* (ARTICLE 19, 1993), pp 103 – 104.

Association of Journalists and several newspaper and television companies. The Council is financed entirely by the Foundation.

11.56 The Council consists of a chairman, three vice-chairmen at most, 10 journalists and 10 non-journalists. All of them are appointed by the Board of the NPC Foundation. The chairman and vice-chairmen are members of the judiciary, usually from a high justice office. As far as the journalist members are concerned, the appointments are made on the recommendations of the Netherlands Association of Journalists and the Netherlands Society of Editors-in-Chief, as the case may be. Some of the non-journalist members are (former) politicians, including a former Minister of the Interior and a former Member of Parliament. They are appointed because of their personal social experience.<sup>46</sup> The secretary must be a lawyer.

11.57 The Netherlands Press Council is charged with the examination of complaints against violations of good journalistic practice by journalists working for newspapers, periodicals, press offices, radio and television. Only persons or organisations directly or indirectly mentioned in the challenged publication can complain. In addition, the complaint must be directed against a professional journalist (whether or not he is a member of the Dutch Association of Journalists) rather than a publication or editor, unless the complaint concerns an editorial comment.

11.58 The chairman, assisted by the secretary, makes a preliminary examination of the complaint. In most cases he decides to arrange a hearing, in which case the complaint will be heard by a committee consisting of the chairman, two journalist members and two non-journalist members. The NPC decides complaints on the basis of “whether the boundaries of that which is socially acceptable have been exceeded, in view of the demands of journalistic responsibility”. There is no written code governing journalism in the Netherlands, but most trade associations abide by the Code of Ethics of the International Federation of Journalists.

11.59 The Netherlands Press Council can only give an opinion on a complaint. The findings of the Council are published online and in the biweekly magazine of the Association of Journalists. They are also sent to the national news agency and to the media. The newspaper, magazine or broadcasting programme concerned is requested to publish the adjudication, but it is not obliged to do so. As advised by the NPC, about 70% of the media concerned published the council’s decisions. Nonetheless, the Council does not consider the lack of sanctions a real problem.<sup>47</sup>

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<sup>46</sup> Correspondence between the Chairman of the NPC and the Chairman of the Privacy Subcommittee in October 2002.

<sup>47</sup> Above.

## **New Zealand<sup>48</sup>**

11.60 The New Zealand Press Council is a self-regulatory body established in 1972 when there was a real possibility of statutory intervention.<sup>49</sup> It adjudicates on complaints made against the editorial content of newspapers and magazines. It may also consider complaints by a newspaper about the conduct of persons and organisations towards the press. In the past five years, the Council has extended its jurisdiction to all print media with an appreciable readership including websites. The Council comprises six public members (including the chairman who is a former judge) and five industry members. The industry members are appointed by the Newspaper Publishers Association (2), the journalists' union (2) and the magazine publishers (1). The public members are appointed by a panel which includes the Chief Ombudsman. The Council is funded entirely by the publication industry. In circumstances where a legally actionable issue may be involved, the complainant will be required to provide a written undertaking that having referred the matter to the Press Council, he will not take or continue proceedings against the newspaper or journalist concerned. Its purpose is to avoid the possibility of a Council adjudication being used as a "trial run" for litigation. The Council is prepared to accept complaints made in good faith by third parties. Its Statement of Principles is not a rigid code but may be used by complainants to give an indication of the nature of their complaints. Its only sanction is to require an offending newspaper or magazine to publish the essence of the decision, giving it fair prominence. Since it is not backed by a statute, the Council has difficulties dealing with publishers "who point blank refuse to submit to a complaint from the public".<sup>50</sup> The Council does not have any power to insist a newspaper follow any set course.

## **Norway<sup>51</sup>**

11.61 The Norwegian Press Council was established in 1936. It consists of two journalists, two editors and three public representatives. Its members are appointed by the board of The Norwegian Press Association, which is an organisation founded by the National Union of Journalists, the Editors' Association and the Publishers' Association. The Council hears complaints against virtually all publications that traditionally fall within the term "press". Individuals, organisations and public authorities may file complaints with the Council. The Secretary-General of the Press Association, who is not a member of the Council, may also file complaints on his own initiative. The Council will not consider a complaint if legal action has been commenced or if the complainant declares an intention to take such action. However, it does

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<sup>48</sup> "The New Zealand Press Council" at <[www.presscouncil.org.nz](http://www.presscouncil.org.nz)> (20.8.02).

<sup>49</sup> The possibility of statutory intervention was a factor in 1997 when the NZPC embarked on an extensive appraisal of itself and its mission to serve the public as an independent body mainly concerned with complaint resolution for the public: J Jeffries, "Establishing a Code of Ethics", speech at the Seminar on Press Freedom and Responsibility in the Asia-Pacific Region hosted by the Australian Press Council on 1-2 Oct 2001.

<sup>50</sup> J Jeffries, above.

<sup>51</sup> S Wolland, "Norway", in *Press Law and Practice*, above, pp 120 & 129.

not require that the right to legal action be waived. As a consequence, complainants may bring legal proceedings if they are not satisfied with the Council's decisions.

11.62 If the Norwegian Press Council determines that there was a press abuse, it will issue a condemnation, which should be printed in a conspicuous place in the offending publication and should also carry the Council's logo. Although the Council does not have any enforcement power, the right of correction set forth in the Penal Code and right of reply recognised in the Code of Ethics provide the public with speedy and often adequate remedies. The press on the whole respects the Press Council and the ethical standards enunciated in the Norwegian Press Association's Code of Ethics.

## **Peru**<sup>52</sup>

11.63 The Peruvian Press Council is a voluntary body jointly established by 12 national publishers representing a total of 15 newspapers and five magazines. It has a five-member Board of Directors and an Honour Council, both comprised entirely of representatives of the press industry. The Honour Council is responsible for accepting and suspending members, as well as for approving the procedures that the Ethics Tribunal should follow. The Board of Directors takes positions on issues relating to freedom of the press and supervises administrative matters. The five members of the Ethics Tribunal are elected by the five directors and another five external electors recognised for their prestige and honesty, including the federal Ombudsman, a rector of a university, and a priest. The President of the Tribunal is a lawyer and none of its members are from the press.

11.64 The Ethics Tribunal responds to requests from people affected by publications who are members of the Council, and any complaints involving the alleged transgression of journalistic ethics by any print publication, whether or not it is a member. The Ethics Tribunal can issue public pronouncements on complaints not resolved in the first instance by its Executive Secretary. Recently, *Expreso*, a daily, withdrew from the Council after it had repeatedly chosen not to fulfil its commitment to the Council by refusing to publish the Board of Directors' press releases and the Tribunal's decisions.<sup>53</sup>

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<sup>52</sup> "Consejo de la Prensa Peruana", at <[www.consejoprensaperuana.org.pe/index.htm](http://www.consejoprensaperuana.org.pe/index.htm)> (18.6.02); International Freedom of Expression Exchange, "Press Council of Peru established", 6.10.97, at <[www.ifex.org/alert/00002445.html](http://www.ifex.org/alert/00002445.html)>.

<sup>53</sup> " 'Expreso' withdraws from the Peruvian Press Council", 17.7.00, at <[www.ifex.org/alerts/view.html?id=7070](http://www.ifex.org/alerts/view.html?id=7070)>.

## ***The Philippines***<sup>54</sup>

11.65 The Press Council of the Philippines was founded by the Philippine Press Institute in 1965. It was established at a time of public outrage against an increasingly sensational trend in crime reporting. The publishers decided that establishing a self-policing agency was preferable to state regulation, which was being considered by Congress.

11.66 The Press Council of the Philippines used to have a former judge as chairman and a number of civic leaders, apart from senior editors, as members. It had an investigation panel that consisted of two former Supreme Court judges, the executive director of the Philippine Press Institute, the president of the Philippine Newspaper Publishers Association, the dean of the School of Mass Communication at the University of the Philippines and the managing editor of a newspaper. Investigations could be launched either on complaints brought before the Council or on the Council's own initiative. The sanctions that could be imposed were mainly moral. The Council ceased to function after President Marcos declared martial law in 1972.

11.67 After the fall of Marcos, the publishers, instead of reviving the Press Council, decided to appoint resident ombudsmen in the major newspapers to hear complaints against unfair or inaccurate reporting. Although most newspapers complied, the ombudsmen were not effective: few complaints were brought to their attention and they did not take the initiative to unearth cases of corruption or abuse. Subsequently, the Press Institute resurrected the idea of a Press Council in 1993. However, the Council reconstituted in 1994 has a limited scope. Its object is to guarantee "every news subject's right to reply". It is now composed of the editors of the Institute's member newspapers. As at 2001, it has 11 members and a chairman and vice chairman elected by the Press Institute from its members.

11.68 The Council decides by consensus and may require a newspaper to publish the disregarded side of a story, and, if it refuses to do so, cause the publication of the Council's findings in other newspapers and in the Institute's publication. The existence alone of the Council seems to have had some moderating effect. Newspapers invariably make redress on first notice to avoid the risk of sanction by public exposure.

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Vergel O Santos, "Drawing the Line" in Asad Latif (ed), *Walking the Tightrope – Press Freedom and Professional Standards in Asia* (Asian Media Information and Communication Centre, 1998), ch 24; S S Coronel & T H Stuart, "Media Monitors in the Philippines" in K S Venkateswaran (ed), above, pp 55 – 72 & Appendix 21.

## **Russia**<sup>55</sup>

11.69        **Judicial Chamber on Information Disputes** – The Judicial Chamber was established by a presidential decree dated 31 January 1994 (No 228). Although it was described as a judicial chamber, almost all its members were former journalists and its jurisdiction was separated from that of the Court. The Chamber aimed at restraining violations of media rights and abuses of media freedom by journalists. It adjudicated on “disputes and other cases involving the mass media”, and had the power to censure and make recommendations. The Chamber performed its functions independently without interference and even ruled against the Government on occasion. Although the Chamber was awarded the Honorary Prize for Outstanding Contribution to the Development of Russian Media Law founded by the Law and Mass Media Centre, it was disbanded a year later in 2000.

11.70        **Grand Jury for the Media** – In 1995, the Journalists’ Union initiated the establishment of regional Ethics Councils within the union. It also launched an educational campaign to induce journalists to follow its Code of Professional Ethics. The result was, however, unsatisfactory. The Union therefore established a press council known as the Grand Jury for the Media in 1998. The Grand Jury deals with complaints on the basis of the Code. The sanctions at its disposal are warnings, publication of critical adjudications, and suspension or termination of union membership. Since membership of the Union is not compulsory, an expelled journalist may continue to work in the media.<sup>56</sup>

## **South Africa**<sup>57</sup>

11.71        The journalists and publishers’ associations in South Africa set up a self-regulatory mechanism by way of a Press Ombudsman and an Appeal Panel in 1997. The two bodies are financed by the Newspaper Association of Southern Africa. The Ombudsman mediates, settles and, if necessary, adjudicates complaints in accordance with the Code of Conduct adopted by the founding bodies.

11.72        The Press Ombudsman (PO) is a person with extensive experience of press editorial work at a senior level and also of mediation of disputes. However, he is not allowed to have a material financial interest in the media or be in the employ of the media. As regards the Appeal Panel, it consists of a Chairperson and 12 members. The Chairperson should have extensive experience in press law and adjudication or be a person with

<sup>55</sup> S Kalmykov, “Russia: lost illusions” in U Sonnenberg (ed), above; V Monakhov, “The Judicial Chamber’s Role in the Origination, Development and Implementation of the Right to Campaign in Elections via the Mass Media”, at <[http://democracy.ru/english/library/comments/eng\\_1999-39/page6.html](http://democracy.ru/english/library/comments/eng_1999-39/page6.html)> (22.7.03); Moscow Media Law and Policy Institute, “Review of the Legal Regulation of the Mass Media in the Nizhny Novgorod and Rostov-On-Don Regions of Russia”, Jan 2002, at [www.medialaw.ru/selfregulation/en/4/](http://www.medialaw.ru/selfregulation/en/4/) (22.7.03).

<sup>56</sup> H Pigeat & J Huteau, above, ch 38.

<sup>57</sup> “Press Ombudsman and Appeal Panel Constitution”, at <[www.suntimes.co.za/sitemap/ombudsman.asp](http://www.suntimes.co.za/sitemap/ombudsman.asp)> (7.9.01).

extensive experience in the application of the rules of natural justice. He is not allowed to have a financial interest in the media or be in the employ of the media. Six members of the Panel should, judged as a group, have practical editorial and journalistic experience in the printed media ("press representatives"), and the other six members should be members of the public ("public representatives"). No member may be a member of, or in the employ of, any legislative authority or be an employee of the executive branch of such an authority; nor shall a member be an employee or official of any political party or similar organisation.

11.73 The PO and the Chairperson and members of the Appeal Panel are appointed by an Appointment Panel. According to the Constitution:

- (a) the Founding Bodies Committee has to advertise in the printed media for nominations for members of an Appointment Panel and for the post of PO and for members and a Chairperson of the Appeal Panel;
- (b) the Founding Bodies Committee shall request a fit and proper person to appoint four persons from those nominated for the Appointment Panel in response to that advertisement;
- (c) the fit and proper person and the four persons nominated by him shall constitute the Appointment Panel;
- (d) the Appointment Panel shall, after public interviews with nominees as selected by them after consultation with the Chairperson of the Founding Bodies Committee, appoint a PO, a Chairperson and the 12 members of the Appeal Panel;
- (e) if the post of Chairperson of the Appeal Panel becomes vacant, the Founding Bodies Committee shall convene or reconvene an Appointment Panel to fill the vacancy.

11.74 The PO is appointed for five years on a contract with the Chairperson of the Founding Bodies Committee in consultation with his Committee. The contract may only be terminated on abolition of the post or by the death or resignation of the PO or upon commission of any act or omission which would disqualify him from acting as a director of a public company, or on a complaint unanimously lodged by the Founding Bodies Committee with the Appeal Panel which shall only terminate such a contract on grounds of incompetence.

11.75 Complaints about infringements of the Code are lodged by private individuals or institutions first with the PO, who will try to settle the matter. The PO does not accept any complaint where legal action has been threatened or is considered by the Ombudsman to be a possibility, unless the complainant waives any right to claim civil relief. If the parties fail to reach a friendly settlement, the complaint becomes a formal one. The PO may require the parties to verify on oath any evidence advanced to support an averment of fact and call upon the parties to furnish further information. He may make his decision on written statements and evidence submitted by the parties but if in his opinion it is necessary, the PO may meet the parties in the form of a round table discussion. Following the investigation, the PO may reprimand an



offending respondent and direct that a correction and its findings be published by it in such manner as may be determined by the PO.

11.76 Either party may lodge an appeal against the PO's decision with the Appeal Panel. Upon receipt of the relevant documents, the Chairperson of the Appeal Panel may appoint an Adjudication Panel consisting of himself and one press representative and one public representative, though the chairperson may appoint two press and two public representatives if necessary. The parties are not entitled to legal representation when appearing before the PO or Adjudication Panel, but may be accompanied by advisers. The findings of the Panel are public documents.

11.77 Although newspapers have complied with all orders from the PO or Appeal Panel decisions, the Government wanted stricter regulation as per the SA Human Rights Commission proposal that the PO and the Broadcasting Complaints Commission be merged and strengthened and established by legislation. Political pressures are reported to be mounting, with signs of Government dissatisfaction with the press as a whole.<sup>58</sup>

## **Sweden**<sup>59</sup>

11.78 Sweden established the first press council in the world in 1916. The Council originally consisted only of members with a journalistic background. Later, in 1969, it introduced Public Members and established the Office of the Press Ombudsman for the General Public (PO). The Press Cooperation Board (comprising the Association of Newspaper Publishers, the Swedish Federation of Journalists and the National Press Club) contributes to the financing of the Council and the Ombudsman, although the Association of Newspaper Publishers plays the dominant role. Pecuniary sanctions also partly finance the council's work. The Press Co-operation Board is also responsible for the charter of the Press Council and the rules for the PO. It has adopted a Code of Conduct for the Press, Radio and Television, which protects individuals against unwarranted suffering caused by publicity.

11.79 The Press Ombudsman is appointed by a committee made up of the Head of the Parliamentary Ombudsmen, the Chairman of the Swedish Bar Association, and the Chairman of the Press Cooperation Board. He is employed by a foundation, which separates the office from the media and the Government. The PO has traditionally been chosen from highly qualified lawyers and the first two ombudsmen were both judges prior to their selection for the post. However, the post has also been filled by an experienced

<sup>58</sup> Ed Linington, "South Africa", in I Beales, *Imperfect Freedom*, above, pp 51-52.

<sup>59</sup> P-A Jigenius, "Media accountability in Sweden: the Swedish press ombudsman and press council" in U Sonnenberg (ed), above; P-A Jigenius, "The Role of a Press Council in Cases of Defamation or Invasion of Privacy by Print Media Journalists" in Council of Europe, *Proceedings of the information seminar on self-regulation by the media (7-8 Oct 1998)* (Strasbourg: Directorate of Human Rights, 1999), DH-MM (99) 7, at <[www.humanrights.coe.int/media/](http://www.humanrights.coe.int/media/)>, pp 20 - 26; Gustaf von Dewall, *Press Ethics: Regulation and Editorial Practice* (The European Institute for the Media, Media Monograph 21, 1997), ch 6; H Strömberg, "Press Law in Sweden", in P Lahav (ed), above, at 248-250.



publisher who can talk to the responsible persons at the papers in their own terms. The duty of the PO is:

- (a) to provide advice and assistance to individuals who feel themselves to have been wronged or offended by the publicity they have received in a newspaper or periodical;
- (b) to investigate deviations from “good journalistic practice”, either on the initiative of the PO himself or following complaint from the public;
- (c) to refer a complaint to the Press Council for decision if necessary; and
- (d) to further adherence to a high standard of press ethics by moulding public opinion.

11.80 The Press Council consists of two different groups (known as the Opinion Boards) working on a parallel basis with six members each. Three members are appointed by the three press organisations and two members represent the general public. The representatives of the general public must not have any connections with the press. The Public Members are appointed jointly by the Head of the Parliamentary Ombudsmen and the Chairman of the Bar Association. The five members then appoint the chairman who is usually a judge from either the Supreme Court or the Supreme Administrative Court.

11.81 Anyone who considers himself to have been wronged or offended by a Swedish publication can file a complaint to the PO, whether or not the publication is a member of the Association of Newspaper Publishers. A condition for filing a complaint is that the applicant is directly affected by the article or news item. The PO can examine a complaint on his own initiative only if he has the consent of the affected party. The PO can also accept a complaint from an outsider with the affected party's consent. The PO is obliged to consider whether or not there is any unwarranted suffering as a result of the publicity. If a complaint is found to be invalid by the PO, the complainant can appeal to the Press Council.

11.82 In some cases, the complainant and the PO both find that the best solution would be a printed correction, a rejoinder or a complementary article. The PO then negotiates with the editor over the phone. If the matter is settled in this way, the case is dismissed. If the PO cannot find a way to settle the complaint through a correction or a rejoinder and there has been a clear breach of the Code, he will refer it after investigation to the Press Council, which then adjudicates the claim. Both the Press Council and the PO examine cases that appertain to “good journalistic practice”. They have the freedom to determine what good journalistic practice means without any formal reference to the Code of Conduct.

11.83 If the Press Council finds a complaint valid it will issue a critical adjudication, stating that the newspaper or the periodical concerned has “disregarded”, “violated” or “seriously violated” good journalistic practice, depending on the seriousness of the case. The Council has legally binding

contracts with almost all the press in Sweden that require an offending publication to publish the statement without delay. The offending newspaper must also pay a fine in the form of an “administrative fee” to the Council, amounting to approximately 25,000 Swedish krona. Newspapers with a circulation of less than 10,000 are required to pay a smaller fee. The fees are not meant to be an effective deterrent, but are used as a revenue-raising device for the PO and the Council on the basis that those whose conduct generates their work should contribute toward their costs.

11.84 Neither the PO nor the Council has the power to award damages to a successful complainant. The redress for the applicant lies in the fact that the paper has to publish the decision indicating that the paper has treated the person against the Code of Conduct. The national news agency is informed of the findings of the Council, and interesting cases are referred to all of the press. Since a complaint could be pursued in court after it has been dealt with by the Press Council, a decision rendered by the Council can be used by the complainant in subsequent legal proceedings.

11.85 The self-regulatory system in Sweden is respected by the press. The adjudications of the Press Council are taken very seriously, even by the tabloid press. The present PO, Pär-Arne Jigenius, says that he cannot recall any case where a paper has refused to publish a critical adjudication.

### **Switzerland<sup>60</sup>**

11.86 The self-regulatory body of the Swiss press was originally founded by the Swiss Federation of Journalists in 1972. It was reformed into the Swiss Press Council when the Foundation for the Swiss Press Council was created in 1999 with a wider base. The newly established Press Council has 21 members, comprising 15 professional journalists and six representatives of the public, elected by the Foundation’s Council. Each sex is entitled to at least eight seats on the Council.

11.87 The Swiss Press Council considers complaints about media ethics made by journalists and members of the public. It may also initiate its own complaints. The decisions of the Press Council are based on the Declaration on the Duties and Rights of a Journalist issued by the Foundation’s Council and the directives on the Declaration. The Press Council has three chambers directed by the President and the two Vice-Presidents. The composition of the chambers is determined by the Press Council. The President and Vice-Presidents are professional journalists elected by the Foundation’s Council.

11.88 Complaints received by the Press Council are first examined by the President. All decisions of the President have to be circulated to the Council members before publication. However, a complaint may be referred to a chamber at the request of two members. A chamber deals with a

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<sup>60</sup> “Schweizer Presserat” at <[www.presserat.ch](http://www.presserat.ch)> (18.6.02).

complaint by holding meetings. Where a complaint raises questions of professional ethics of a fundamental nature, the chamber can be turned into the full Council. Decisions of the chamber must be endorsed by the Council before publication. The Swiss Press Council can make observations and recommendations in deciding on a complaint but does not have any means of sanctions at its disposal. The decisions of the Council are usually published in the media and on the Council's website.

11.89 The Swiss Press Council may consider a complaint even though legal proceedings are being brought in respect of the same subject matter giving rise to the complaint unless there is risk of such proceedings being influenced by the procedure of the Council and no fundamental question of professional ethics is at stake.

### ***Taiwan, China***<sup>61</sup>

11.90 The first self-regulatory body in Taiwan was the Taipei Press Council formed by the Newspaper Society of Taipei in 1963. Eight years later, the Press Council was replaced by the Taipei News Council which was formed to deal with complaints about the press, television broadcast, radio broadcast and news agencies. The News Council had power to initiate its own enquiries as to whether a media organisation was in breach of the council's Codes of Ethics. In 1974, the Taipei News Council was expanded into a news council for the whole of Taiwan. Since martial law was lifted in 1987, the news media in Taiwan are no longer under Government control.

11.91 The National Press Council is sponsored by eight news associations representing the news editors, news agencies, broadcasters, newspaper companies and journalists in Taiwan. It has 11 members who are veteran journalists, journalism scholars, legal experts and prominent civic figures invited by the eight associations. The Chairman is elected from its members, who must not be engaged in journalism or government administration. The main functions of the Council are to accept complaints about news reports, commentaries, broadcast programmes or advertisements; to carry out investigations and hearings before arriving at a decision; to rule on the complaints; and to conduct studies for the elevation of journalistic ethical standards. The Council accepts third party complaints and may initiate an investigation. It may deal with a case whether or not the media organisation concerned is a member of one of its member associations. The Council uses its own codes of ethics as the basis for its deliberations and resolutions. Funding is shared among the member associations.

11.92 Upon receipt of a complaint, the Chairman will consider whether to make a decision on his own. If the Chairman cannot reach a decision, then

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<sup>61</sup> E Liu & P K Chau, *The Regulation of Media Intrusion of Privacy: The Experiences in Taiwan, the UK and the US* (Hong Kong: Legislative Council Secretariat, 1999), paras 14-20; Ma Chi-shen, 新聞倫理 (Hong Kong, 1997), ch 3; "National Press Council" at <[www.gio.gov.tw/info/yb97/html/ch1603t.htm](http://www.gio.gov.tw/info/yb97/html/ch1603t.htm)> (26.6.00).

the complaint will be investigated by a committee of one to three members. After investigation by the committee, the Council will decide whether to hold a public hearing. When investigation is completed, the Council will adjudicate on the complaint. Both parties may apply for a review of the adjudication. The findings of the Council are made public and recorded in its journal.

11.93 The number of complaints handled by the Press Council is small. It has been commented that the Council has not been effective in regulating the conduct of the Taiwan media. All the Council members are appointed by the media. The Council is also said to have a close relationship with the Government. It has no power to impose sanctions on an offending organisation, nor is an offending organisation obliged to comply with its rulings. Some newspapers have ignored the rulings or refused to publish the adjudications with prominence.<sup>62</sup>

11.94 The case involving *Scoop Weekly* illustrates how extreme press intrusion in Taiwan can be. In that case, a former female government official was secretly filmed in her apartment having sex with a married man. Subsequently, a 40-minute VCD showing the sexual encounter was distributed free with the magazine. The Government ordered the disc be withdrawn from the news-stands, but the film was uploaded on the Internet and illegal copies were on sale in Taiwan and Hong Kong. The victim writes: "Suddenly I became transparent and totally exposed in public eyes. No matter how much clothing I wrap myself up in, I am still naked."<sup>63</sup>

### **Tanzania**<sup>64</sup>

11.95 The non-governmental Media Council of Tanzania (MCT) is set up to promote press freedom in Tanzania, following a concerted campaign to pre-empt a Government decision to establish a statutory council. A major objective of the Council is to consider and adjudicate upon complaints from the public and amongst the media *inter se* against alleged infringements of the code of ethics.

11.96 The membership of the MCT consists of media outlets, journalists' training institutions, journalists' associations and press clubs. The Council has a National General Convention (the highest decision making body of the Council), a Governing Board, an Ethics Committee and a Finance and Administration Committee. The Governing Board has a President, a Vice-President, an Executive Secretary, seven media representatives and four public representatives. The President is required to be "an eminent citizen of impeccable integrity and proven intellectual ability". Two public representatives are lawyers and at least one third of the board members are women. All the board members are elected at the General Convention,

<sup>62</sup> 陳桂蘭主編, 新聞職業道德教程, (Shanghai: Fudan University Press, 1997), 215-216; 林照真, "當前台灣近似媒體觀察組織的幾個盲點" at <[www.mediawatch.org.tw/sub\\_c1.htm](http://www.mediawatch.org.tw/sub_c1.htm)> (1.6.99).

<sup>63</sup> Quoted in "Double Exposure", *SCMP*, 11.4.02, from the preface of a book about her.

<sup>64</sup> At <[www.mct.or.tz](http://www.mct.or.tz)> (30.8.02)

except that the Vice-President is elected by the board members themselves and the Executive Secretary is an *ex officio* member.

11.97 The Ethics Committee is an autonomous adjudication body constituted by the Governing Board from amongst its members. Its members have no voting rights on the Board in matters relating to cases adjudicated before it. The Ethics Committee has no less than six members, including two jurists of high professional standing, two persons of high moral standing drawn from the civil society, and the rest are media representatives of high professional standing. The Committee hears complaints in public. Legal representation is not allowed as the primary objective is amicable settlement and reconciliation, but the Committee may, on request, allow legal representation for the parties.

11.98 The Committee may settle a complaint amicably or reconcile the parties, order publication of an apology in the manner directed by the Committee, suspend membership temporarily, and order “token payment of damages and costs”. A complainant who is not satisfied with the outcome may take legal action. All member associations are required to sign documents in a form prescribed by the Council with a view to ensuring their submission to the Council’s jurisdiction and the binding effect and enforcement of any orders made by the Council.

11.99 The MCT receives financial support from the Swedish International Development Agency, the Friedrich Ebert Foundation, the Netherlands-based Communication Assistance Foundation, and the annual fees paid by its members. The Council is striving to be self-sustainable in the long run but has difficulty in collecting fees from a section of its members at present. The MCT enjoys much respect and about 98% of its rulings are complied with.<sup>65</sup> It runs seminars and workshops on ethical issues for media practitioners. Some of the African countries such as Uganda, Kenya and Zambia are looking to the MCT as a model.

## **Turkey<sup>66</sup>**

11.100 The Turkish Press Council (TPC) is a voluntary organisation established in 1988 by a group of journalists with the support of some publishers. Journalists, media organisations and press associations are eligible to become members of the Council. The TPC has two major organs, namely, the Members’ Council and the Supreme Board. The Members’ Council is composed of individual members, readers, members of press associations, and the representatives of organisations mentioned in the Press Council Charter. It serves as the General Assembly of the Press Council.

11.101 The Supreme Board considers complaints about violations of the Professional Principles of the Press. It has 34 members: 16 members elected in the annual meeting (eight journalists and eight lay members) and

<sup>65</sup> At <[www.mct.or.tz/Media%20survey%20report/media%20organisation.htm](http://www.mct.or.tz/Media%20survey%20report/media%20organisation.htm)> (30.8.02).

<sup>66</sup> At <<http://www.basinkonseyi.org.tr/english.htm>> (3.6.02).

18 members representing dailies, radio and television broadcasters that subscribe to the Press Council Charter. The Supreme Board considers complaints put to the Council. If a complaint involves a journalist or a media organisation, the Supreme Board may reprimand the journalist, or censure the journalist or media organisation concerned if the violation is serious. The Board adjudicates on complaints concerning the print media, the broadcast media and Internet publications. The results of its adjudications are published by the Council.

11.102 The TPC is financed by income and donations from its members. The newspapers, news agencies, radio and television broadcasters, and journalists' associations contribute on a pro-rata basis, while individual members pay a yearly fee equal to five pounds Sterling. The income is collected by a foundation set up to support the Press Council and all expenses are paid out of this foundation.

11.103 The complainant may seek redress from the Court and the TPC at the same time on the same set of facts. An aggrieved party may lodge an appeal to the Press Council on the ground that the Supreme Board has made a mistake. Upon receipt of the application, the Chairman, Vice-Chairman and Secretary-General would review the case and submit a report to the Supreme Board. If the report is adopted by a two-thirds majority, the new report supersedes the old one.

### ***United Kingdom***

11.104 Since some sections of the Hong Kong press have looked to the UK Press Complaints Commission as a model when discussing press self-regulation in Hong Kong, we have devoted Chapter 12 to a discussion of press self-regulation in the UK.

### ***United States***

11.105 Many local news councils were formed in the 1950s and 1960s. This grassroots movement gave impetus to the formation of the National News Council in 1973. It was self-appointed and supported by the Twentieth Century Fund and the Markle Foundation. It received and investigated complaints to which the media themselves declined to respond. The Council comprised 18 distinguished citizens. Only eight members were from the industry. Both the media and the complainants might be represented by lawyers at hearings. The Council's findings included both majority and dissenting opinions. Due to lack of funding and resistance from major news organisations, it was dissolved in 1984. There are, however, regional news councils in some states, including Minnesota, Washington and South Florida.

11.106 **Minnesota**<sup>67</sup> - The Minnesota News Council comprises a chairperson and 12 public and 12 media members. Media members do not represent the outlets they work for; they participate as independent professionals. The Council is the oldest and most active council in the US. It has had four state supreme court justices (all sitting judges) as chairmen. Bob Shaw, a founding member of the Council, says judges are good because they exude authority and know how to run a hearing, and they command prestige.<sup>68</sup> The News Council receives and adjudicates on complaints. It will hold a hearing if the media outlet refuses to take action to satisfy the complainant, or the complainant feels that the action taken was inadequate, and the complainant waives the right to sue. The news outlet may decline to attend, but the hearing will proceed anyway. The adjudication process is on a case-by-case basis, without any reference to any code or guidelines. The news outlet involved in the complaint is encouraged to report the determination. The Council can only use adverse publicity as penalties for violations of good journalistic practice.

11.107 **Washington State**<sup>69</sup> – The Washington News Council (WNC) is a voluntary, independent and non-partisan organisation formed by a group of concerned citizens. The nomination and application process when it first set up was open and widely publicised. Almost 1,000 nomination forms were mailed or faxed to the media and to citizens statewide. Anyone could nominate up to three people: one media, one public, plus themselves in either category. 180 nominations were received from all over the state, about equally divided between media and public members. About half of those in each group were self-nominated. Every nominee was mailed an application form, along with a personal letter explaining the responsibilities of Council membership and a page describing the Council's anticipated first-year activities. Applicants were also asked to submit a brief resume. In the end, 65 applications were received and a Selection Committee was named to assess the applications.

11.108 Start-up funding for the Council was provided by foundations, corporations, associations and individuals across the state of Washington, but the major support has come from the Bill and Melinda Gates Foundation. The mission of the WNC is to help maintain public trust and confidence in the news media by promoting fairness, accuracy and balance. If a reader, viewer or listener feels personally harmed by a story that has been written or broadcast about him, and believes it is inaccurate, unfair or incomplete, he may file a complaint with the Council. He must first agree not to sue the media outlet for libel or other damages.

11.109 Members of the WNC participate in hearings, forums and other events. They also serve as the Board of Directors, overseeing the organisation's staff, operations and budget. The Council and, hence, the Board are divided evenly between Media Members and Public Members. The

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<sup>67</sup> At <[www.mtn.org/~newscncl/](http://www.mtn.org/~newscncl/)> (22.9.01).

<sup>68</sup> B Shaw, "How to Start a News Council", at <[www.mtn.org/newscncl/General/Shaw.html](http://www.mtn.org/newscncl/General/Shaw.html)>, p 4.

<sup>69</sup> At <[www.wanewscouncil.org](http://www.wanewscouncil.org)> (9.8.01); G Overholser, "Washington News Council Worthy of Emulation", 6.2.01, at <<http://seattlepi-i.nwsource.com/opinion/geneva1.shtml>>.



Public Members include business people, a representative of the Bill and Melinda Gates Foundation, a professor of public affairs, a citizen activist, a principal, a farmer and a teacher. The Chair is the former Chief Justice of the Washington State Supreme Court. The WNC has no authority to order any news organisation to do, or not do, anything. Its purpose is to generate public discussion of the issues raised in complaints. The Council's only weapon is whatever publicity is given to its hearings.

## **Voluntary press councils and similar bodies with some state support**

### ***Finland***<sup>70</sup>

11.110 The press council in Finland was founded in 1927, making it the second oldest in the world. It was reconstituted in 1968 as the Council for Mass Media (CMM), which is a self-regulatory body for publishers and journalists in the mass media, including the print media, the broadcast media and, recently, the Internet. Its task is to interpret good professional practice and defend freedom of speech and of publication. The CMM comprises a chairman and nine members. Of the nine members, three are nominated by journalists' associations and three are by editors' associations. These six media representatives are appointed by a selection committee, which comprises representatives of media organisations affiliated to the CMM. The remaining three members represent the public. These public members are selected by a special sub-committee instead of co-opted by the media members prior to the reform in 1998.

11.111 A complaint may be filed by any individual requesting the investigation of a breach of good professional practice or a question of freedom of speech or publication. The complaint need not come from a person directly affected by information that has been published. However, the CMM may not take up a case against the will of the party affected unless particularly pressing reasons exist. If the complainant is involved in a related criminal or civil case in a court of law, the Council would not take up the matter or would terminate its deliberation during those legal proceedings. Apart from dealing with complaints, the CMM may, on its own initiative, bring up an issue concerning the freedom to publish, or raise a matter of principle relating to good journalistic practice.

11.112 The Council applies the code of practice adopted by the Union of Journalists in Finland. Any media organisation which has been found to have violated good journalistic practice must publish the findings and decisions of the Council promptly and without comments. So far this has happened almost without exception. The findings and decisions are also

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<sup>70</sup> "Council for Mass Media in Finland" at <[www.jsn.fi/english/council.html](http://www.jsn.fi/english/council.html)> (9.8.01); A Heinonen, "The Finnish Journalist: Watchdog with a Conscience" in D H Weaver (ed), *The Global Journalist* (New Jersey: Hampton Press, 1998), ch 10; A Heinonen, "Journalists and Self-Regulation: The Finnish Case" in K Nordenstreng (ed), *Reports on Media Ethics in Europe* (University of Tampere Publications Series B 41/1995), p 115.



published in the journal of the journalists' union. The Council is generally respected by the Finnish journalists. A survey in 1994 among members of the journalists' union shows that 84% were satisfied with its decisions

11.113 The Council is funded by the Council for Mass Media Relief Association by way of annual fees, but the Association may accept state assistance in support of the functions of the Council. The CMM is therefore jointly funded by the professional organisations and the state. In 1998, about half of the Council's costs were paid by the member organisations, while the other half were met by the Finnish Government. Ari Heinonen advises that state funding does not endanger the Council's independence because it is merely part of the regular aid for non-governmental organisations. The state has only a financing role. It is excluded from the working of the council.

## **Germany**<sup>71</sup>

11.114 In 1952, the Federal Ministry of the Interior drew up a draft Federal Press Act which would provide for the establishment of a self-regulatory body in the form of a corporation under the Civil Code. Although the legislation did not come into existence, four associations of journalists and publishers (namely, the Association of German Newspaper Publishers;<sup>72</sup> Association of German Magazine Publishers; German Journalists' Association; and the Trade Union of Journalists) founded the German Press Council in 1956.

11.115 The German Press Council (GPC) operates in accordance with the 1985 constitution of the Association of the Sponsors of the GPC, the general assembly of which consists of two representatives of each of the four supporting associations. The GPC consists of 20 members, half of them representing the publishers and the other half representing journalists. Each of the four supporting associations nominates five members who are active in the German press either in publishing or journalism but members appointed to the Council are independent of the delegating associations.

11.116 The Association of the Sponsors of the GPC has provided for the establishment of a Complaints Committee, which consists of 10 members elected from the Council. The Committee consists of publishers and journalists who are appointed in equal numbers on the recommendation of the four supporting associations. Every year, the chairmanship of the committees alternates in turn among the four supporting associations. In January 2002,

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<sup>71</sup> "Deutscher Presserat", at <[www.presserat.de/site/service/lang\\_english/index.shtml](http://www.presserat.de/site/service/lang_english/index.shtml)> (8.6.02); "Complaints procedure of the German Press Council" at <[www.presserat.de/english.htm](http://www.presserat.de/english.htm)> (9.8.01); L Tillmanns, "Media Accountability in Germany: the German Press Council" (1997), at <[www.ejc.nl/hp/mas/tillmanns.html](http://www.ejc.nl/hp/mas/tillmanns.html)>; "Media Self-Regulation in the Federal Republic of Germany – A Report by the Federal Government Commissioner for Cultural Affairs and Media" (Bonn, 1999), at <[www.eu-seminar.de/index3-1en.html](http://www.eu-seminar.de/index3-1en.html)>; Gustaf von Dewall, *Press Ethics: Regulation and Editorial Practice* (The European Institute for the Media, Media Monograph 21, 1997), ch 4 and pp 226 & 232.

<sup>72</sup> All major newspapers in Germany are members of the Association of German Newspaper Publishers and have signed the undertaking to publish a public reprimand.

the GPC set up another complaints committee to deal specifically with complaints about improper handling of personal data by an editorial office.

11.117 Anyone may file a complaint with the GPC about publications or events depicted in the German press. The Council itself may also initiate complaint proceedings. Complaints are examined on the basis of the Press Code, which was first drawn up by the GPC in collaboration with the press associations and presented to the Federal President in 1973. The Council is also responsible for the editorial content of the on-line services of publishing houses.

11.118 Complaints are first dealt with by the Chairperson of the Complaints Committee. Cases that are not clearly ill-founded are referred to the Complaints Committee for consideration. Complaints of fundamental significance are forwarded to the plenum of the GPC for adjudication. As a rule, a complaint will not be handled if a ruling on the matter could influence the outcome of a pending criminal investigation or court case. The Federal Parliament enacted a law in 1976 to facilitate the work of the Complaints Committee and to guarantee the Committee's independence.<sup>73</sup>

11.119 If a complaint is justified, the Complaints Committee may issue a public reprimand; a censure; or an advice for the editorial staff. Newspapers and magazines participating in the self-regulatory system are under a moral obligation to publish public reprimands. Generally speaking roughly 90% of German publishers have signed a declaration undertaking to publish any opinion or reprimands that might be issued by the GPC.<sup>74</sup> The Committee can waive the obligation to publish if it is necessary to protect the interests of an affected person. About two thirds of the complaints are dealt with at an early stage without a formal decision of the Committee. The Council publishes an annual report, which is respected by the members.<sup>75</sup>

11.120 The Federal Parliament and Government support GPC with federal funds by supplying a maximum of 49% of the funds necessary for its operation. By virtue of the Law for Guaranteeing the Independence of the Complaints Committee of the Press Council enacted in 1976, the GPC received a fund from the Federal Government every year to guarantee its independence in "working on, discovering and removing defects" within the press. The fund is appropriated for the work of the Complaints Committee, and the amount is DM240,000 in recent years. The federal fund from the Ministry of the Interior represented about 45% of the budget of the Council in 1997 but has been dropped to about 30% in 2001. The Ministry of the Interior does not have any influence over how the money is used nor does it interfere with the work of the Council.

11.121 Gustaf von Dewall reported in 1997 that some had criticised the GPC as a "toothless tiger" on the ground that it had no power to enforce its

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<sup>73</sup> Law for Guaranteeing the Independence of the Complaints Committee of the Press Council.

<sup>74</sup> Email from the Public Affairs Manager of the GPC to the secretary of the Privacy sub-committee on 7.6.02.

<sup>75</sup> H Pigeat & J Huteau, above, ch 48.

sanctions and the sanctions were not sufficient to deter publishers. He noted that 13 public reprimands were issued in 1995 but five of them were never published. Several newspapers had no objection to publishing the adjudications so long as they agreed with the criticism, but not if they disagreed. He also reported that the critical adjudications were published by very few newspapers, suggesting that the public were not aware of the Council's activities. Gustaf von Dewall therefore concluded that the GPC was not an efficient regulator. He stressed that for self-regulation to be effective, all newspapers must participate in the system.<sup>76</sup>

11.122 However, the GPC advised the Privacy sub-committee in June 2002 that the Council was more effectively in recent years. Not only had the number of complaints risen steadily from 1998 to 2001, more and more people and institutions also sought their advice. The Council also clarified that almost all newspapers that had signed the undertaking published the public reprimands whether or not they agreed with the decisions. In some cases, even newspapers that had not signed the undertaking also published a reprimand if they received one. Nonetheless, the GPC admitted that although newspapers with a high standard invariably published the reprimands, there were poor quality newspapers that had signed the undertaking but refused to publish them. In addition, there are publishers that have not signed and will not publish a reprimand issued against them.<sup>77</sup>

### *Italy*<sup>78</sup>

11.123 Regulation of ethics in journalism is based on Law no. 69 of 3 February 1963, which sets up regional professional bodies (the Regional Councils of the Order of Journalists) as well as a National Council of the Order of Journalists. The Regional Orders are composed of six professional journalists and three publishers from each region. They are responsible for controlling the qualifications of journalists before registering them in the roll. They also have the power to punish professional abuses, to supervise the behaviour and the integrity of journalists, and to impose sanctions when a journalist registered in the roll acts in a manner contrary to the prestige and dignity of the profession. Thus, Regional Orders may issue an oral warning or reprimand, suspend a journalist from practising for a short period of time, or even expel him from the Orders.

11.124 The National Council of the Order co-ordinates the Regional Orders' activities and functions as an organ of appeal against the disciplinary sanctions decided by the Regional Orders. It is also possible to appeal against the decision of the National Order via the regional court where the relevant Regional Order is seated all the way up to the Court of Appeal and the High Court.

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<sup>76</sup> Gustaf von Dewall, above, pp 226 & 232.

<sup>77</sup> Email from the Public Affairs Manager of the GPC to the secretary of the Privacy sub-committee on 6, 10 & 18 June 2002.

<sup>78</sup> Gustaf von Dewall, above, ch 5 and pp 232-233; H Pigeat & J Huteau, above, ch 57.

11.125 The Orders have been criticised by some for being the bureaucratic instrument of a powerful guild which does not allow the free exercise of freedom of expression, and which does not guarantee professionalism and respect for the ethical rules. Against this background the National Order and the National Federation of the Italian Press (FNSI) adopted the Charter of Duties of Journalists in 1993. Although the Charter is a set of regulations established on a voluntary basis by the Order, its sanctions have the backing of statutory regulation.

11.126 In 1994, the National Order and the FNSI established the National Committee for Accuracy and Reliability of Information. Its members are appointed by the President of the National Order and the President of the FNSI. The Committee consists of five members, comprising a judge who is also the chairman, two journalists, a representative of the National Council of Radio-Television and Telecommunication Users, and a representative of the Committee for the Protection of Minors and the Weak. Publishers and the media industry did not participate in the establishment of the Committee.

11.127 Anyone who believes that he has been prejudiced by media reports, or who believes that the behaviour of a particular journalist is in breach of the principles set out in the Charter, can file a complaint with the Committee. If the complaint is valid, the Committee notifies the appropriate Regional Order. The Regional Order can then decide whether to commence disciplinary proceedings under the Law of 1963. The Order is, however, under no obligation to do so. The Committee functions as a centralised body of inquiry, but it is not clear how far the Regional Orders are bound by its decisions and whether or not they are prevented from making their own investigations. In any event, the Committee informs the editor of the newspaper about its decision, and asks the newspaper to publish it promptly with the same prominence as the report that triggered the Committee's involvement. If the editor does not agree, the Committee will publish it by other means, including in the journal edited by the Order.

11.128 According to Gustaf von Dewall, there is a lack of confidence on the part of both politicians and the press in the ability of the Orders to supervise press ethics. The public is generally unaware both of the Charter and of the possibility of filing a complaint with the Orders. Journalists themselves also feel that the Orders do not amount to an effective regulator nor to a promoter of press ethics. Instead they are seen as bureaucratic bodies that serve to maintain a "closed shop" style of journalism. The Orders have, however, become more active in the nineties, but this seems to be mainly because of outside pressure, both from the public and from a pressure group of journalists.<sup>79</sup>

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<sup>79</sup> Gustaf von Dewall, above, p 233.

## **Kenya**<sup>80</sup>

11.129 The self-regulatory Media Council of Kenya was launched in 2002. It has 17 members, half of whom are media practitioners and the other half are lay people. Members representing the public include an author, a lawyer, an educationist, an ambassador, a university lecturer and the former Kenyan ambassador to Sweden. Those representing the media include newspaper owners and editors, a journalism lecturer, the Secretary-General of the Kenya Union of Journalists, and the Director of Information. The training institutions are represented by a lecturer. The Media Owners Association has promised to assist the Council financially but noted that their success will depend on their integrity.

## **Quebec, Canada**<sup>81</sup>

11.130 The principal activity of Quebec Press Council (QPC) is adjudicating complaints about infringements of the public's right to complete and honest information, or of press freedom. Its Board of Directors has 22 members – seven designated by management organisations, seven designated by journalists' organisations, and eight members of the public (including the Chairman). Unlike the other major Canadian press councils, which accept complaints only against member newspapers, QPC accepts complaints against any news organisation, even those that are not members of its constituent organisations. It also welcomes complaints from journalists who believe they have been hindered in their work. The parties generally represent themselves, without the aid of a lawyer.

11.131 The complainant need not be an individual or organisation who has been directly involved in a dispute. Any individual, group, or organisation that believes its right to information has been infringed may complain. The underlying assumption is that low-quality information harms all consumers of information, and thus any consumer of information has the right to complain. He need not be identified in the offending media content.

11.132 The Council has a Complaints Committee that has nine members from the Board of Directors: three members appointed by journalists' organisations, three appointed by management organisations, and three representatives of the public. A complainant dissatisfied with the decision may appeal to an Appeals Board. The QPC has no legal power to enforce its decisions, nor does it impose any sanctions. It can do little more than publicise its decisions in the hope that publicity about violations of ethical principles will educate and influence journalists. Pritchard stated in 1991 that the Council has won widespread praise for being dynamic and effective.<sup>82</sup>

<sup>80</sup> "Media Launch Independent Self-Regulating Council", *The East African Standard*, 5.6.02, at <<http://allafrica.com/stories/200206050363.html>> (17.6.02).

<sup>81</sup> D Pritchard, "The Role of Press Councils in a System of Media Accountability: The Case of Quebec" (1991) *Canadian Journal of Communications*, vol 16, no 1, pp 6-13; "Quebec Press Council" at <[www.conseildepresse.qc.ca/](http://www.conseildepresse.qc.ca/)> (20.8.02).

<sup>82</sup> But see R Cohen-Almagor, *Speech, Media and Ethics – The Limits of Free Expression* (New York: Palgrave, 2001), pp 134-136. The QPC meets only four to five times a month. Above.

The QPC is funded by the industry, but it also receives some funding from the Government.<sup>83</sup>

### **Sri Lanka<sup>84</sup>**

11.133 The Newspaper Society, the Editors Guild and the Free Media Movement established a Press Complaints Commission (PCC) in 2003 to hear complaints by the public against any wrongful acts or omissions by newspapers. The Commission is also responsible for the implementation of the Code of Professional Practice drawn up by the Editors' Guild and adopted by the Sri Lanka Press Institute, which is the umbrella body of the three media organisations.

11.134 The Commission comprises 11 members, six (including the Chairman) from the community at large and five from the press. The first Chairman was formerly the Secretary-General of Parliament and a former Ombudsman. A Director-General mediates and settles disputes between the public and the press in the first instance, failing which the Commission will settle the disputes by arbitration. A decision of the PCC may be enforced through the courts under the Arbitration Act if the offending newspaper does not comply. Since start-up costs are too heavy for the local press to carry, the Government will provide a large part of the funds necessary to establish the PCC. This will be done by re-routing the existing statutory Press Council's budget and by using the state press' portion of the publishers' levy.<sup>85</sup> The statutory Press Council (discussed below) will be abolished in the near future.

## **Statutory press councils or similar bodies**

### **Bangladesh<sup>86</sup>**

11.135 The Press Council in Bangladesh is a quasi-judicial body established by the Press Council Act 1974 with the twin aims of preserving the freedom of the press and maintaining and improving the standard of newspapers and news agencies in Bangladesh. The Council consists of a Chairman and 14 members. The Chairman is nominated by the President of Bangladesh and must be a person who is, or is qualified to be appointed as, a judge of the Supreme Court of Bangladesh. The remaining 14 members are chosen from a wide range of backgrounds, including:

- (a) three working journalists nominated by such association of working journalists as the Chairman may notify (ie, the Bangladesh Union of Journalists);

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<sup>83</sup> M Sufrin, "Canada" in I Beales, *Imperfect Freedom*, above, 44.

<sup>84</sup> "Press Complaints Commission of Sri Lanka", *Sunday Observer*, 23 Feb 2003, at <[www.sundayobserver.lk/2003/02/23/new17.html](http://www.sundayobserver.lk/2003/02/23/new17.html)>; S Ratnatunga, "Sri Lanka", in I Beales, *Imperfect Freedom*, above, pp 14, 52-53.

<sup>85</sup> S Ratnatunga, "Sri Lanka", in I Beales, *Imperfect Freedom*, above, pp 14 and 53.

<sup>86</sup> M T Anwar, "Media Monitors in Bangladesh" in K S Venkateswaran (ed), above, pp 12 – 16 and Appendix 1.

- (b) three editors nominated by such association of editors as the Chairman may notify (ie, the Council of Editors);
- (c) three owners or managers of newspapers and news agencies nominated by such association of owners or managers of newspapers and news agencies as the Chairman may notify (ie the Association of Owners of Newspapers and News Agencies);
- (d) three experts in the field of education, science, art, literature and law of whom respectively one shall be nominated by the University Grants Commission, one by the Bangla Academy and one by the Bangladesh Bar Council; and
- (e) two Members of Parliament nominated by the Speaker of Parliament.

11.136 Before notifying any association under (a), (b) or (c), the Chairman must consult such associations, individuals and interests concerned as he thinks fit. Where a nomination body fails to send the names of its nominees to the Chairman when invited by him to do so, or where a nominating body does not exist for the time being, the Chairman may nominate members to represent the category concerned. The names of persons nominated by the Chairman are notified in the official gazette and the nominations take effect from the date on which they are so notified.

11.137 The Council has the power to entertain and adjudicate complaints on any matter falling within its mandate, whether on receipt of a complaint made to it or otherwise. If a complaint discloses a *prima facie* case of violation of journalistic ethics, the Council would, after giving the newspaper or news agency an opportunity of being heard, hold an inquiry into the complaint. The Council has the same powers as a civil court, so that it can summon and enforce the attendance of witnesses, require the production of documents, receive evidence on affidavits, requisition any public record and issue commissions for the examination of witnesses. The Council cannot, however, hold an inquiry into any matter which is pending before a court. The Government may pay to the Council in each financial year such sums as may be considered necessary for the performance of the functions of the Council.

11.138 If the Council upholds the complaint, it may warn, admonish or censure the newspaper, news agency, editor or journalist concerned and require the newspaper to publish its findings. It cannot compel an offending newspaper to publish its judgment against the newspaper. The Council and its members are immune from legal actions in respect of anything that is done under the Press Council Act in good faith. Newspaper reports of matters published under the authority of the Council are also absolutely privileged. Given the lack of real sanctions, the strength of the Council lies in whatever moral force it can exert in making the industry abide by that the code. According to Tawhidul Anwar, there is “widespread agreement” that the Council has, on the whole, performed that task reasonably well,<sup>87</sup> but Victor

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M T Anwar, above, p 14.

Gunewardena comments that communication ethics tend to be disregarded in Bangladesh, and the Press Council “seem[s] to be regarded with defiance”.<sup>88</sup>

### **Belgium**<sup>89</sup>

11.139 Although Belgium does not have a national press council,<sup>90</sup> a regional media council known as the Council of the Flemish Media was created in the Flemish community by a decree of 2 March 1985. It is an official body established and financed entirely by the state to express an opinion on media topics. Its jurisdiction extends to the print and broadcast media. It has a president and a general assembly of 30 members elected by associations representing the proprietors, editors and journalists. There is also a committee of experts consisting of 10 members representing editors, trade unions, news agencies, the audio-visual sector and political authorities. The committee of experts only provides technical assistance to the general assembly. Apart from dealing with complaints from the public, the Council may also give an opinion at the request of the Government or on its own initiative. However, the Council does not base its opinion on any code, nor does it have any sanctions apart from the publication of its opinion.

### **Denmark**<sup>91</sup>

11.140 The publishers in Denmark established a press council in 1964 that acted only on complaints brought to its notice. Since it operated through the voluntary compliance of publishers, the council had not been successful in making press self-regulation effective. As a result, the Government had to take legislative measures and took control of the council.<sup>92</sup> The current Danish Press Council (DPC) is established in accordance with the Media Liability Act 1991 (also known as the Law on the Responsibility of the Media). Before the Act was enacted, representatives of the press, the Union of Danish Journalists, the Ministry of Justice, the Law Society and the Council of the Danish Bar took part in the work of the committee that produced a report that formed the basis of the Media Liability Bill. The DPC has jurisdiction over the following mass media: (a) newspapers, daily papers, weekly magazines, local papers, professional papers and other national, periodical publications which are published at least twice a year; and (b) Danmarks Radio (Danish

<sup>88</sup> V Gunewardena, “Communication Ethics and the Role of the State” in *Communication Ethics: A South Asian Perspective* (Singapore: Asian Media Information and Communication Centre, 1997), p 9.

<sup>89</sup> K Nordenstreng, “European Landscape of Media Self-Regulation”, above, pp 174 & 178; H Pigeat & J Huteau, above, ch 50.

<sup>90</sup> The Belgian journalists’ association has an Ethics Council which consists entirely of journalists and deals with complaints on the basis of a code of conduct.

<sup>91</sup> “The Danish Press Council” at <[www.pressenaevnet.dk/english/indhold.html](http://www.pressenaevnet.dk/english/indhold.html)> (15.10.99). See also E E Paraschos, *Media Law and Regulation in the European Union – National, Transnational and US Perspectives* (Iowa: Iowa State University Press, 1998), ch 9, p 208.

<sup>92</sup> P-A Jigenius, “The Role of a Press Council in Cases of Defamation or Invasion of Privacy by Print Media Journalists” in Council of Europe, *Proceedings of the information seminar on self-regulation by the media (7-8 Oct 1998)* (Strasbourg: Directorate of Human Rights, 1999), DH-MM (99) 7, at <[www.humanrights.coe.int/media/](http://www.humanrights.coe.int/media/)>, p 20 at 22.



Broadcasting Corporation), TV2, TV2's regional enterprises, and undertakings authorized in Denmark to broadcast radio or television programmes.

11.141 The DPC is an independent public tribunal. It comprises a chairman, a vice-chairman and six other members appointed by the Minister for Justice. The appointment of the chairman and the vice-chairman, who must be lawyers/judges, are made on the recommendation of the President of the Danish Supreme Court. Two members are appointed on the recommendation of the Danish Journalists' Union, two members are appointed to represent the editors and owners of the print and broadcast media on their recommendation, and two members are appointed as public representatives on the recommendation of the Danish Council for Adult Education.

11.142 According to the Media Liability Act, the content and conduct of the mass media must be in conformity with "sound press ethics". The Act leaves the contents of the code of ethics entirely up to the professional organisations. In practice, the DPC uses the Press Ethical Rules as guidelines in determining whether a media organisation is in conformity with "sound press ethics". The Press Ethical Rules were drawn up by and agreed upon by the Association of Danish Daily Newspapers in 1981. The National Union of Journalists and a number of publishing houses have also agreed to the Rules. With the enactment of the Media Liability Act, the Rules are listed as an annex to the Act and apply to all the print and broadcast media. The mass media must also comply with requests for reply in the mass media to published information of a factual nature which might cause anyone significant financial or other damage, except where the correctness of the information is unquestionable.

11.143 The DPC has jurisdiction to rule on whether the content or conduct of a media organisation is contrary to "sound press ethics", or whether a media organisation is under an obligation to publish a reply, including the content, form and location of the reply. In cases concerning sound press ethics, the DPC can express its criticism. In cases about reply, the Council may direct the editor of the media organisation in question to publish a reply. The Chairman may reject complaints from persons with no legal interest in the matter against which a complaint has been made. However, the DPC may try a case of its own accord where the case is "essential or leading". If so, the Council shall seek the opinion of the injured party. The name of the injured party shall be mentioned only if that party consented.

11.144 When making a ruling, the Council shall in addition to the chairman or the vice-chairman be composed of three members: one nominated by the Danish Journalists' Union; one representing the editorial management; and one appointed as public representative. The Council may summon the parties to oral proceedings. Where without due cause the plaintiff fails to turn up for such proceedings, the Council may reject the complaint or try it on the basis of the particulars available. Where the media

organisation against which the complaint has been lodged fails to appear, the case shall be tried on the basis of the particulars available.

11.145 The DPC may direct the editor of the media organisation against which the complaint has been lodged to publish its decision to an extent specified by the Council. Such a publication must be made without comments and in such conspicuous manner as may reasonably be demanded. The decisions of the Council cannot be brought before another administrative authority. The Council itself does not have jurisdiction to impose a sanction on an editor. Once it is established that an editor is unwilling to publish a reply or a decision of the Council, the Council will request the police to take action. The decision to charge the editor and bring the case to court lies with the prosecution, while the decision to impose a sanction on the editor lies with the Court.<sup>93</sup> An editor who fails to comply with an order for publication is punishable by a fine or imprisonment.<sup>94</sup> Since imprisonment will only be imposed in exceptional circumstances, no editor has been imprisoned under the Act so far. However, four editors have been fined for a sum ranging from DKK 3000 to 5000 for refusing to publish a reply or a decision regarding sound press ethics. Default fines were also imposed in another three cases. None of the editors brought their cases to the European Court of Human Rights.

11.146 The DPC prepares annual reports on its activities for the Minister for Justice. These reports are made public. The DPC's rules of procedure are laid down by the Minister for Justice after negotiations with the Council. The Minister for Justice may direct that the expenses appertaining to the activities of the DPC be defrayed by the mass media according to a scale fixed in the Council's rules of procedure. Although the expenses are entirely covered by the media under the rules of procedure, part of the expenses are indirectly covered by state funds because 50% of the expenses are borne by two major public service television channels, DR and TV2. DR is exclusively financed by a fee payable by every household in possession of a television set or a radio, whereas TV2 is partly financed by the fee and partly by funds provided by commercials.<sup>95</sup>

11.147 The findings of the DPC are generally respected by the press and the public, as illustrated by the relatively few instances of the media refusing to publish its findings. The Council is of the opinion that a free, fast and discreet consideration of complaints constitutes a better alternative to many people than taking the matter to court. It truly believes that its existence has in no way circumscribed freedom of expression as originally predicted by some critics when the statutory council was first established.<sup>96</sup>

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<sup>93</sup> Letter from DPC Chairman to Chairman of Privacy Sub-committee dated 6.9.02.

<sup>94</sup> The Danish Media Liability Act, s 53(2). Cf s 49.

<sup>95</sup> Letter from DPC Chairman to Chairman of Privacy Sub-committee dated 6.9.02.

<sup>96</sup> Letter from DPC Chairman to Chairman of Privacy Sub-committee dated 6.9.02.

## **Egypt**<sup>97</sup>

11.148 The Supreme Press Council of Egypt is an independent press authority created by Law No 148 of 1980 in accordance with Article 211 of the Constitution, which provides that the Council shall deal with matters concerning the press and shall exercise its jurisdiction with a view to consolidating the freedom and independence of the press, upholding the basic foundations of society, and maintaining national unity and social peace. The major functions of the Council are to express an opinion on draft laws affecting the press; adopt measures to support the press; guarantee a minimum wage for journalists; endorse the press code of ethics and rules for its implementation; deal with complaints about attacks on press freedom and infringements of the rights and dignity of individuals; issue licences to journalists who want to work in non-Egyptian newspapers or press agencies; and publish a report on the situation of the press. The Council is financed by the state.

11.149 The members of the Supreme Press Council are appointed by the President of Egypt. They include:

- (a) the president of the consultative Assembly, who is also the president of the Supreme Press Council;
- (b) the presidents of the national press companies;
- (c) chief editors of national newspapers;
- (d) chief editors of political newspapers;
- (e) senior journalists;
- (f) the president of the Centre of Public Information;
- (g) the chairman of the Administration Council of the Middle East News Agency;
- (h) the president of the broadcasting and television union;
- (i) the president of the journalists' union;
- (j) persons interested in the problems of the press; and
- (k) two lawyers chosen by the consultative Assembly.

Any journalist who has allegedly violated the press law or the rules of the trade unions has to answer before a commission of inquiry which consists of three members of the Council. Disciplinary action may be taken against a defaulting journalist.

## **Ghana**

11.150 The press was under state monopoly during the two decades of military rule in the 1970s and the 1980s. However, the conditions for the media in Ghana have improved considerably since the promulgation of the Constitution in 1992. Apart from guaranteeing freedom and independence of the media, the Constitution mandates the establishment of the National Media

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<sup>97</sup>

H Pigeat & J Huteau, above, ch 66.

Commission (NMC), which was eventually established by the National Media Commission Act 1993.<sup>98</sup> The Commission consists of 15 members:<sup>99</sup>

- (a) One representative each nominated by: (i) the Ghana Bar Association; (ii) the Publishers and Owners of the Private Press; (iii) the Ghana Association of Writers and the Ghana Library Association; (iv) the Christian group (the National Catholic Secretariat, the Christian Council, and the Ghana Pentecostal Council); (v) the federation of Muslim Councils and Ahmadiyya Mission; (vi) the training institutions of journalists and communicators; (vii) the Ghana Advertising Association and the Institute of Public Relations of Ghana; and (viii) the Ghana National Association of Teachers;
- (b) two representatives nominated by the Ghana Journalists Association;
- (c) two persons appointed by the President; and
- (d) three persons nominated by Parliament.

11.151 Two functions of the NMC are: (a) to promote and ensure the freedom and independence of the media for mass communication or information; and (b) to take all appropriate measures to ensure the establishment and maintenance of the highest journalistic standards in the mass media, including the investigation, mediation and settlement of complaints made against or by the press or other mass media. The administrative expenses of the NMC are charged on the Consolidated Fund.

11.152 Articles 172 and 173 of the Constitution expressly provide that the NMC must not be subject to the direction or control of any person or authority in the performance of its functions; on the other hand, the Commission, apart from exercising its functions, must not exercise any control or direction over the professional functions of a person engaged in the production of newspapers or other means of communication.

11.153 Any person aggrieved by a publication or by the act or omission of any journalist, newspaper proprietor or a publisher in respect of any publication in the media may lodge a complaint with the NMC. The complaint will then be referred to a Complaints Settlement Committee for investigation. The Settlement Committee consists of the Chairman of the Commission and six members of the Commission, three of whom are persons not ordinarily employed or involved in the media industry. The Committee is obliged to comply with the rules of natural justice. Persons appearing before the Committee may appear in person or be represented by counsel. Investigations are held in private unless in the interest of justice or for any sufficient cause the Committee directs the hearing to be held in public. The complainant must, unless he withdraws the complaint, exhaust all avenues available for settling the issue by the Commission before seeking relief by recourse to the courts.

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<sup>98</sup> At <[www.mediacomgh.org/about\\_commission/act\\_of\\_comm.htm](http://www.mediacomgh.org/about_commission/act_of_comm.htm)>.

<sup>99</sup> Constitution of the Republic of Ghana, Articles 166-167, at <[www.panos.sn/lois/ghana.htm](http://www.panos.sn/lois/ghana.htm)>.

11.154 The Commission may, where it considers it necessary for the discharge of its functions, refer to the Settlement Committee for formal investigation any publication, act or omission of any journalist, newspaper proprietor or publisher in respect of any publication in the media. The complainant may withdraw the complaint and discontinue with the investigation, but if the Settlement Committee is of the opinion that the withdrawal is not made in good faith or voluntarily, the Committee is obliged to continue with the investigation.

11.155 Although the Commission has not adopted any code of practice, it has engaged a group of media experts to draw up a National Media Policy to serve as the benchmark for measuring media performance generally. Under the Act, the Settlement Committee may make any or all of the following orders: (a) order publication of a correction and an apology with equal prominence as the original offensive material; (b) order publication of a rejoinder; (c) direct disciplinary action for a breach of the code of ethics. The Settlement Committee may also publish (in full or in an edited version) its findings with the prior approval of the Commission. Where an order is made against any person, a recommendation will be made, where applicable, to the appropriate professional association for disciplinary action. Where a person fails to publish a rejoinder, the aggrieved person may apply to the NMC or the High Court for an order to enforce the relevant provision in the Act.

## **India**<sup>100</sup>

11.156 The Press Council of India (PCI) was set up by Parliament on the recommendation of the First Press Commission. The Commission noted in 1954 that some sections of the Indian press had been criticised for unethical practice. It recommended that a Press Council be established on a statutory basis on the ground that the Council should have legal authority to make inquiries as otherwise each member, as well as the Council as a whole, would be subject to the threat of legal action from those whom it sought to punish by exposure.

11.157 The PCI was first established in 1965 but was suspended in 1976 in the wake of the state of emergency declared the previous year. Following the termination of the emergency, the Council was re-established under the Press Council Act 1978. The objects of the Council are to preserve the freedom of the press and to maintain and improve the standards of newspapers and news agencies in India.

11.158 **Membership of the Council** – The PCI consists of a Chairman (who is usually a retired Supreme Court judge) and 28 members. Twenty members are nominated by press associations and news agencies recognised and notified for the purpose by the Council as all India bodies of

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<sup>100</sup> “Press Council of India” at <[www.nic.in/pci/](http://www.nic.in/pci/)>; “Organisational History of Press Council of India” at <[www.nic.in/pci/History.html](http://www.nic.in/pci/History.html)>; R V Rajan, “Media Monitors in India” in K S Venkateswaran (ed), above, pp 17 – 24; S Bhatia, *Freedom of Press – Politico-legal Aspects of Press Legislations in India* (Jaipur: Rawat Publications, 1997), pp 250-279.

editors, working journalists and owners and managers of newspapers; three members are chosen from among experts in the fields of education and science, law, and literature and culture; and five are Members of Parliament. The term of the Chairman and the members of the Council is three years. A retiring member is eligible for re-nomination for not more than one term.

11.159        **Nominations** – The Chairman is nominated by a Committee consisting of the Chairman of the Council of States, the Speaker of the House of the People, and a person elected by members of the Council from among themselves. Of the other members:

- (a) 13 are nominated from among the working journalists, of whom six shall be editors of newspapers and the remaining seven shall be working journalists other than editors (the number of such editors and working journalists in relation to newspapers published in Indian languages must be not less than three and four respectively);
- (b) six are nominated from among persons who own or carry on the business of management of newspapers, with two representatives from each of the categories of “big newspapers”, “medium newspapers” and “small newspapers”;<sup>101</sup>
- (c) one is nominated from among persons who manage news agencies;
- (d) three should have special knowledge or practical experience in respect of education and science, law, or literature and culture, of whom respectively one is nominated by the University Grants Commission, one by the Bar Council of India and one by the Sahitya Academy;
- (e) five are members of Parliament, of whom three are nominated by the Speaker from among the members of the House of the People and two are nominated by the Chairman of the Council of States from among its members.

11.160        Before making any nomination under (a), (b) or (c) above, the Central Government in the case of the first Council (and the retiring Chairman of the previous Council in the case of any subsequent Council) invites panels of names comprising twice the number of members to be nominated from such associations of persons of the categories referred to in (a), (b) or (c) as may be notified by the Central Government in the case of the first Council (and by the Council itself in the case of subsequent Councils). For the purposes of (b), a “newspaper” is deemed to be:

- (i) a “big newspaper” if the total circulation of all its editions exceeds 50,000 copies for each issue;
- (ii) a “medium newspaper” if the total circulation of all its editions exceeds 15,000 copies but does not exceed 50,000 copies for each issue;

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<sup>101</sup> The nominations under (a) and (b) are so made that among the persons nominated there is not more than one person interested in any newspaper or group of newspapers under the same control or management.

- (iii) a “small newspaper” if the total circulation of all its editions does not exceed 15,000 copies for each issue.

11.161 Despite being a statutory body, the Government and its authorities have been kept out of the nomination process except for publishing the notification in the official gazette of the names of the members nominated. Nor has it been left to any individual to decide, no matter how eminent or highly placed he may be. The procedure leaves no scope for the interference or influence by Government or any other agency.

11.162 **Power to receive complaints** – The Council is empowered to receive and adjudicate on complaints from any source against the press for violation of journalistic ethics, or by the press for interference with its freedom by the authorities. It can also take action in such cases on its own initiative. Furthermore, the Council may, if it considers necessary for the purpose of carrying out its objects or for the performance of any of its functions, make such observations as it may think fit in any of its decisions or reports respecting the conduct of any authority, including the Government.

11.163 The PCI requires that the complainant should first write to the editor of the newspaper concerned before seeking recourse to the Council. It is also incumbent on the complainant to make a declaration that no proceedings are pending in any court of law in respect of any matter alleged in the complaint; and that he shall inform the Council if any matter alleged in the complaint becomes the subject matter of any legal proceedings. The Council does not deal with matters that are *sub judice* in a court.

11.164 **Inquiry Committees** – If the Chairman finds that there are insufficient grounds for inquiry, he may dismiss the complaint and report this to the Council; otherwise, the editor or the journalist concerned is asked to show cause why action should not be taken against him. On receipt of the written statement and other relevant material from the editor or the journalist, the Secretariat of the Council places the matter before the Inquiry Committee. The parties are given an opportunity to adduce evidence before the Inquiry Committee by appearing personally or through their authorised representatives, including legal practitioners. On the basis of the written and oral evidence given before it, the Committee formulates its findings and recommendations and forwards them to the Council. The Council does not judge the complaints on the basis of a code.

11.165 For the purpose of performing its functions or holding any inquiry, the Council enjoys the same powers as a civil court in respect of the following matters:

- (a) summoning and enforcing the attendance of witnesses and examining them on oath;
- (b) requiring the discovery and inspection of documents;
- (c) receiving evidence on oath;
- (d) requisitioning any public record; and

- (e) issuing commissions for the examination of witnesses or documents.

11.166 **Power to warn, admonish or censure** – Where the PCI is satisfied that a newspaper or news agency has offended against the standards of journalistic ethics or that an editor or working journalist has committed professional misconduct, the Council may warn, admonish or censure the newspaper, the news agency, the editor or journalist, or disapprove the conduct of the editor or the journalist, as the case may be. It may also require the offending newspaper to publish the contradiction of the complainant or a gist of the Council's decision, and require newspapers to publish any particulars relating to an inquiry, including the name of the newspaper, news agency, editor or journalist concerned. The decisions of the Council are final and cannot be questioned in any court of law.

11.167 **Finance** – The PCI may, for the purpose of performing its functions, levy fees from registered newspapers and news agencies, and different rates may be prescribed from different newspapers having regard to their circulation and other matters. No fee is levied on newspapers with circulation less than 5000 copies. In addition to levies, the Central Government may, after due appropriation made by Parliament, pay to the Council by way of grants such sums of money as the Central Government may consider necessary for the performance of the functions of the Council. Despite the fact that a substantial part of its funds comes from the Government, the Council has full autonomy and is independent of Government control in discharging its statutory responsibilities.

11.168 **Annual report** – The Council has to prepare an annual report, giving a summary of its activities during the previous year, and giving an account of the standards of newspapers and news agencies and the factors affecting them. Copies of the report are laid before both Houses of Parliament.

11.169 **Protection of action taken in good faith** – No legal proceedings shall lie against the Council or any of its members in respect of anything which is done or intended to be done in good faith under the Press Council Act. Further, no legal proceedings shall lie against any newspaper in respect of the publication of any matter under the authority of the Council.

11.170 **Effectiveness** – The composition and procedure of the PCI are fairly autonomous and free from governmental interference. Although the Council is established by law and has been criticised by some as unwieldy and legalistic, it is independent and efficient.<sup>102</sup> The fact that it is totally financed by the state has not been regarded as morally compromising. Nonetheless, the Council is merely a court of honour that exerts moral authority. It does not have any penal powers, nor can it enforce a requirement against an offending newspaper that its findings be published. Indeed, the

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Speech delivered by C-J Bertrand on the role of press councils as reported in J Herman, "Making the Media Accountable: The Role of Press Councils", Australian Press Council News, vol 8, no 4, Nov 1996, at <[www.presscouncil.org.au/pcs/site/public/nov96/claude.html](http://www.presscouncil.org.au/pcs/site/public/nov96/claude.html)>, p 5.



opinion of the Council and its requests to publish its admonition or censure are often ignored.<sup>103</sup> The PCI has therefore been labelled as a paper tiger, and the lack of enforcement power is said to have contributed to the ineffectiveness of the Council.<sup>104</sup> However, Rajan says that it is generally agreed that the Council, for all its shortcomings, has performed a valuable role in maintaining press standards. It usually directs its efforts at achieving friendly settlements, thus reducing the need for complainants to seek legal redress.<sup>105</sup> The Information and Broadcasting Minister said in April 2002 that the PCI had performed the role of a regulator “very efficiently”.<sup>106</sup>

## **Indonesia**<sup>107</sup>

11.171 The Press Council in Indonesia derives its authority from Article 5(2) of the Constitution and the Press Act 1999. It was first introduced by the Press Act 1966, which was subsequently amended by the Press Act 1982.<sup>108</sup> After the fall of President Soeharto in 1998, the Press Council was replaced by one created under the Press Act 1999, which also repealed previous press laws.<sup>109</sup> The newly created Press Council (also known as the Press Board) is an independent statutory body covering the print and electronic media. It protects press freedom; issues a journalistic code of ethics; controls compliance with the code; deals with public complaints about media reportage; and collects data about media companies. It comprises journalists nominated by journalists’ associations, media executives nominated by media companies’ associations, and “public figures” and experts nominated by journalists’ and media companies’ associations. All members are endorsed by presidential decree. The first Council has nine members, including three journalists, four media managers and two society leaders. The Chairman and Vice-Chairman are appointed from and by members. The Council is financed by the media associations and media companies with unattached assistance from the state and contributions from others.

11.172 The day-to-day operation of the Council is run by the Daily Executive Committee which consists of the Chairman, the Vice-Chairman and the Executive Director of the Council. The Press Council also has a Commission for Public Complaints and the Upholding of the Press Code, which is set up to formulate and supervise the observance of the press code as well as to assist the resolution of complaints. The Press Council does not deal with any complaint relating to a media report that is being tried in court or

<sup>103</sup> H Pigeat & J Huteau, above, ch 25.

<sup>104</sup> S Bhatia, *Freedom of Press: Politico-legal Aspects of Press Legislations in India* (Jaipur: Rawat Publications, 1997), pp 257-256, 260-261 & 276-277.

<sup>105</sup> R V Rajan, above, p 21.

<sup>106</sup> “Government rules out imposing control over media”, at <<http://in.news.yahoo.com/020429/20/1muzl.html>>.

<sup>107</sup> A Astraatmadja, “Establishing the Press Council in Indonesia”, speech at the Seminar on Press Freedom and Responsibility in the Asia-Pacific Region hosted by the Australian Press Council on 1-2 Oct 2001; A Razak & S Tobing, “Media Monitors in Indonesia” in K S Venkateswaran (ed), above, pp 25 - 34.

<sup>108</sup> The old Press Council served as a policy-making body on newspaper-related matters and assisted the Minister of Information in promoting the development of the national press.

<sup>109</sup> National Law No 40 of 1999 on the Press.

might be used in a trial, unless the complainant has agreed not to use the Council's recommendation in any legal proceedings. The Commission's decisions do not have any legal effect. However, a person has the right to correct or amend incorrect information published by the media, and the right to respond or object to news reports that injure his reputation. The media organisation concerned could be fined if it does not recognise these rights.

### **Lithuania**<sup>110</sup>

11.173 There was an increase in the number of infringements by the Lithuanian media on persons' respect and dignity after the collapse of the communist regime. To remedy this state of affairs, 200 delegates, representing all journalists' and editors' associations, adopted a code of professional ethics in March 1996. Parliament subsequently passed the Law on the Provision of Information to the Public in July 1996, which provides for the setting up of two self-regulatory bodies responsible for ensuring that journalists respect the code adopted by the 200 delegates. They are the Inspector of Journalistic Ethics and the Ethics Commission of Journalists and Editors. The Law also provides that professional ethics in the sphere of the provision of information to the public must be regulated by the Code of Ethics of Journalists and Editors.

11.174 The Inspector of Journalistic Ethics is a state officer, having the same functions as the Press Ombudsman in Scandinavian countries. He is appointed by the Lithuanian Parliament on the recommendation of the Ethics Commission of Journalists and Editors. He is required to report to Parliament at least once a year. The first Inspector is a well-known writer and journalist. Any person in Lithuania who considers that his rights, honour or dignity have been breached by a newspaper, magazine, or radio or television station can appeal to the Inspector. Despite making a complaint to the Inspector, the complainants retain the right to appeal directly to the courts. If a complaint is upheld, the Inspector asks the editorial managers concerned to apologise to the offended party or to offer that person the right of reply. If a newspaper refuses to do so, all the Inspector can do is to refer the person's complaint to the Ethics Commission. Any person dissatisfied with the Inspector's decision can also lodge a complaint with the Ethics Commission.

11.175 The Ethics Commission was created in 1997 in accordance with the Law on the Provision of Information to the Public. It is a self-regulatory body consisting entirely of representatives of journalists and editors. Each of the following organisations delegates two members to the commission: the Journalists' Union, the Association of Journalists, the Association of Publishers of Periodicals, the Association of Radio and Television, National Radio and

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<sup>110</sup> G Babravicius, "The New Self-Regulatory System in Lithuania" in Council of Europe, *Proceedings of the information seminar on self-regulation by the media (7-8 Oct 1998)*, above, pp 52 – 59; R Paleckiene, "Self-regulation Better Than Control", Baltic Media Centre Update 26/98, at <[www.dk-web.com/bmc/update26/selfreg.htm](http://www.dk-web.com/bmc/update26/selfreg.htm)>; C J Hamelink, *Preserving Media Independence: Regulatory Frameworks* (UNESCO, 1999), Lithuania, section 7.1.

Television, and the Journalism Centre.<sup>111</sup> The functions of the Commission are threefold: Firstly, it examines complaints concerning breaches of the Code of Ethics. Secondly, it considers cases referred to it by the Inspector if he fails to reach an agreement with the management of a particular publication or broadcasting company. Thirdly, it deals with complaints by any individual who is dissatisfied with the Inspector's decision in his case.

11.176 When the Ethics Commission finds serious breaches of the Code of Ethics, it obliges the publication or broadcasting company concerned either to publish the names of those responsible and to apologise to the offended party, or to publish the report prepared by the Commission with regard to the breach. If the editors fail to fulfil their obligation, the Commission would send its report to the media. Between 1996 and 1998, only once has an editor failed to comply with the Commission's decision. Within a short period of time, the self-regulatory bodies have won public confidence and the level of professional ethics has improved. The Commission is financed by associations of journalists and editors.

11.177 Some experts consider that self-regulation backed by the law is an acceptable solution in Lithuania, which is a new democracy with little practice in empowering media professionals to regulate their own activities. They observe that the establishment of self-regulatory bodies by law is a middle-way solution that give such bodies a degree of authority and made the system acceptable in the eyes of public authorities.<sup>112</sup> However, Rytis Juozapavičius says that the media violate the Code of Ethics on a daily basis. All big national dailies publish names (and sometimes photographs) of crime or accident victims, ignoring Article 42 of the Code. It is rare that publishers are subject to sanctions. He points out that one of the problems is that the Ethics Commission and the Inspector do not examine violations on their own initiative but only react to official complaints.<sup>113</sup>

## **Luxembourg<sup>114</sup>**

11.178 The Luxembourg Press Council was established by the Law of 20 December 1979 relating to the recognition and protection of the professional title of journalists. The Council represents the journalists and editors in the Luxembourg Association of Journalists and the Union of Luxembourg Journalists. Its main task is to decide whether the statutory conditions for the issuing of press cards to journalists have been fulfilled. It

<sup>111</sup> Babravicius reported in 1998 that Parliament was considering amendments to the law that half or one third of the Ethics Committee members be replaced by representatives of non-media organisations.

<sup>112</sup> Council of Europe, Proceedings of the information seminar on self-regulation by the media (7-8 Oct 1998), above, pp 6-10.

<sup>113</sup> R Juozapavičius, "Lithuania Media Violate Code of Ethics", Baltic Media Centre Update 32/99, at <<http://www.bmc.dk/>>.

<sup>114</sup> "Conseil de Presse Luxembourg" at <[www.press.lu](http://www.press.lu)> (30.7.03); "Conseil de presse" at <[www.gouvernement.lu/gouv/fr/sip/media/assocpro/consPRES.html#commissionappel](http://www.gouvernement.lu/gouv/fr/sip/media/assocpro/consPRES.html#commissionappel)> (18.6.02); J Bröhmer & J Ukrow, above, pp 51 – 52; E E Paraschos, *Media Law and Regulation in the European Union – National, Transnational and US Perspectives* (Iowa: Iowa State University Press, 1998), ch 9, p 204.

may also make recommendations and issue directives about journalism; express an opinion on questions of freedom of expression; and provide vocational training for journalists and editors. The Council now has 40 members (comprising 20 journalists and 20 editors) appointed on the recommendations of the professional bodies. Members of the Council are appointed for two years at a time and the presidency is filled by a journalist and an editor alternately. The Council has a code of ethics defining the rights and duties of journalists and editors. It has a Complaints Committee dealing with complaints about information published in the media. That Committee has two journalist members and two editor members.

### **Macao, China**

11.179 The press industry in Macao is regulated by the Press Law (出版法) enacted in 1990. The Law guarantees the right to information, liberty of the press and the right of access to sources of information. The Law also provides for a right of reply, the establishment of a Press Council (*Conselho de Imprensa*) (出版委員會) and the promulgation of a Journalists' Code.<sup>115</sup> However, the provisions on the Press Council and the Journalists' Code have not yet been implemented.

11.180 Chapter 1 of the Law provides that the right to information includes the right to gather, report and receive information, and that the right to freedom of expression enjoyed by the press shall not be subject to any kind of restrictions relating to censorship, authorisation, storage, guarantee or prior recognition of qualification. It also provides that journalists have the right to access sources of information. However, journalists do not have this right if it involves the protection of facts or documents relating to the intimacy of private or family life.<sup>116</sup>

11.181 Chapter 3 of the Law creates the right of reply. Any person who considers that an article or picture in a newspaper or periodical is directly offensive or discloses false or erroneous information which would affect his reputation or honour and has suffered damage as a result is entitled to the right of reply, denial and correction.. If the publication does not publish the reply, denial or correction as required, the aggrieved individual may apply for a court order requesting the legal representative of the publication to publish it within the specified period. A person who refuses to publish without good cause is liable to a fine.

11.182 Chapter 4 of the Law provides for the establishment of the Press Council whose duty is to safeguard the independence of the press, the plurality of the press, freedom of expression, and the public's right to information. The composition and operation of the Council shall be in accordance with the rules made pursuant to the Law. The Council has the following powers:

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<sup>115</sup> Lei de Imprensa (Law No 7/90/M August 6). The Chinese translation of the Press Law is at <[www.imprensa.macao.gov.mo/bo/i/90/32/lei07\\_cn.asp](http://www.imprensa.macao.gov.mo/bo/i/90/32/lei07_cn.asp)>.

<sup>116</sup> Article 5(2)(d).

- (a) to express an opinion, give an advice or make a recommendation on matters falling within the scope of its duty;
- (b) to consider complaints from journalists, publishers, proprietors and any other persons about a contravention of the Press Law;
- (c) to consider complaints from those who allege that their rights have been infringed;
- (d) to ask a publication to clarify on a matter on which the Council should express an opinion;
- (e) to decide whether to set up an investigation committee;
- (f) to prepare an annual report about the press in Macao; and
- (g) to express an opinion about compliance with professional ethics and observation of professional secrecy.

11.183 Members of the Council are immune from civil, criminal and disciplinary actions arising from any resolutions passed or comments made by them in the exercise of their powers.<sup>117</sup> The Journalists' Code shall be promulgated by the Chief Executive of Macao after consultation with the professionals and associations of the press industry.<sup>118</sup>

### **Nepal**<sup>119</sup>

11.184 The Press Council of Nepal was established in the early 1970s but re-organised in 1991 under the Press Council Act (No 2048), which envisaged it as an organisation that would facilitate the development of the media through healthy competition. The Council was also empowered to formulate and enforce a code of conduct for journalists.

11.185 The Press Council consists of 12 members and a chairman. Two members are Members of Parliament nominated by the Speakers of each House of Parliament. The chairman and the remaining 10 members are nominated by the Government from among editors, publishers, working journalists, writers and lawyers. The Director of the Department of Information acts as the Secretary of the Council. Among other things, the Council is empowered to advise the Government on policies affecting the press, to implement the Code of Conduct for Journalists and to keep records of the registration and circulation of newspapers.

11.186 The Council has powers to investigate complaints of violations of the Code of Conduct. The complainants are required to declare that no legal proceedings are pending and must agree not to bring any legal action before the Council makes a decision. After investigation, the Council may direct the newspaper concerned to publish a correction and/or apology, or recommend the Government withdraw any official concessions or subsidies granted to the newspaper. The Council may also openly condemn any journalist or publisher who refuses to obey its decisions.

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<sup>117</sup> Article 27.

<sup>118</sup> Article 56.

<sup>119</sup> D H Adhikary, "Media Monitors in Nepal" in K S Venkateswaran (ed), pp 47-50 & App 19.

## **Nigeria**<sup>120</sup>

11.187 The Nigerian Press Council was established pursuant to the Nigerian Press Council Decree No 85 of 1992, which also regulated the entry into, and practice of, journalism in Nigeria. The Council was dissolved in 1994 when Nigeria was under dictatorship but was revived by a decree of 15 July 1999 after the country returned to democracy with free elections in 1999.

11.188 The Press Council is set up to promote high professional standards for the Nigerian press and to deal with complaints from members of the public about the conduct of journalists. It deals with complaints from the press about the conduct of individuals or organisations towards the press, and resolves disputes between the press and the public involving a breach of a Code of Ethics. The Code is a joint effort of the Press Council and the Nigerian journalists' profession and has been ratified by the Nigerian Press Organisation, which represents the Nigerian Union of Journalists, the Nigerian Guild of Editors and the Newspaper Proprietors Association of Nigeria. An offending journalist can be suspended or expelled from the profession for breach of the Code.

11.189 Recently, there have been calls for the Nigerian Press Council Act to be reformed to secure its independence and effectiveness.<sup>121</sup> The industry has opted for a "constitutionally guaranteed self-regulatory scheme" to replace the state-funded Press Council and head off Government plans for a media commission.<sup>122</sup>

## **Portugal**<sup>123</sup>

11.190 Both the print and broadcast media in Portugal are regulated by the same body, namely, the High Authority for the Mass Media, which was established by the law of 30 June 1990 to replace the council for the regulation of the broadcast media and the press council set up under the Press Council Order of 1975. The High Authority is a constitutional body governed by Article 39 of the 1997 Constitution, which provides that the Authority is an independent body safeguarding the right to information, freedom of the press, the independence of the mass media, freedom of opinion, the right to broadcasting time and the right of reply.<sup>124</sup> The Article further provides that the High Authority shall be composed of 11 members: (a)

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<sup>120</sup> "Nigerian Press Council" at <[www.nigeria.gov.ng/ministryinformation/npc.htm](http://www.nigeria.gov.ng/ministryinformation/npc.htm)> (3.6.02) and "Nigeria: Code of Ethics / Nigerian Press Organization" at <[www.ijnet.org/3a6de3a4c68b0.html](http://www.ijnet.org/3a6de3a4c68b0.html)> (3.6.02).

<sup>121</sup> Media Rights Agenda, "Workshop Draws up Proposals on Ethics and Regulation", at <[www.internews.org/mra/mrm/sep00/sep00\\_workshop.htm](http://www.internews.org/mra/mrm/sep00/sep00_workshop.htm)> (7.6.02).

<sup>122</sup> I Beales, *Imperfect Freedom*, above, p 15; "Nigerian Media Bill goes through second reading at House of Representatives", at <[http://www.internews.org/mra/mrm/oct02/oct02\\_front1.htm](http://www.internews.org/mra/mrm/oct02/oct02_front1.htm)>.

<sup>123</sup> "Alta Autoridade para a Comunicação Social (AACS)" at <[www.aacs.pt](http://www.aacs.pt)> (19.6.02); J Bröhmer & J Ukrow, above, pp 12 –13; E E Paraschos, above, ch 9, p 204.

<sup>124</sup> The High Authority is also responsible for the granting of radio and television licences and the appointment of directors in public media organisations.



a judge appointed by the Supreme Court of Justice (who shall also be the president); (b) five members elected by the House of Commons (Lower House) by a system of proportional representation and the d'Hondt highest average method; (c) one member appointed by the Government; and (d) four members representing public opinion, the mass media and the arts sector.

11.191 The Authority was reformed by the Law of the High Authority for the Mass Media in 1998, which was promulgated to reinforce its independence. It sets out in detail the functions and powers of the Authority and provides that the four public members shall be returned in the following manner: (a) a person appointed by the employers in the mass media; (b) a person appointed by the National Consumer Council; (c) a professional appointed by journalists with social security cards; and (d) a person co-opted by the Authority. As at June 2002, the five members elected by the House of Commons comprised a journalist, a writer-cum-journalist, an economist and two jurists. The Government has appointed a professor to the Authority. While the President is always a judge, the Authority may elect from among themselves one member to be the Vice-President. The Vice-President is now the journalist elected by the House of Commons. The members cannot be removed except in limited circumstances.

11.192 The Authority applies its own code of ethics. One of the many functions of the High Authority is to adjudicate complaints about breaches of journalistic ethics by media organisations. The Authority may initiate its own investigation. Apart from issuing directives and recommendations, the Authority may impose a fine on a media organisation that is found to have breached the regulatory requirements, and require a media organisation to publish its opinion and recommendations. The directives are published in the Official Journal. The Authority is financed by the state.

### **South Korea**<sup>125</sup>

11.193 The newspaper companies established the Newspaper Ethics Committee in 1961 to monitor the contents of newspapers and wire services for compliance with certain ethical norms. Although the Committee can recommend disciplinary action, including suspension or expulsion of the offending journalist from its membership, it ordered only ten corrections, one revocation and four statements of apologies between 1964 and 1992. The Committee has therefore been criticised for its lacklustre performance as a guardian of newspaper ethics.

11.194 In 1981, the Press Arbitration Commission (PAC) was established in accordance with the provisions of the Law Relating to Registration, etc of Periodicals. It is funded by a Public Interest Fund which receives its revenue from fees charged to broadcast advertisers. The Commission comprises 40 to 80 members commissioned by the Minister of Culture and Tourism from among those of learning, experience and high moral

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<sup>125</sup> Chang-Keun Lee, "Media Monitors in South Korea" in K S Venkateswaran (ed), above, pp 81-86; "The Press Arbitration Commission of South Korea", <[www.pac.or.kr/english/](http://www.pac.or.kr/english/)> (5.9.01).

repute. At least two-fifths of the members are recommended by the Head of the Judiciary from those qualified to be a judicial officer, and more than one-fifth are commissioned from among persons in the press circle. The chairman and two deputy chairmen are elected from among the members. No person registered with a political party (including any person registered as a candidate for an election), public official (excluding those qualified to be a judicial officer and the education officials), or active journalist belonging to a press agency, may be a member of the Commission.

11.195 The Law mandates the PAC to arbitrate disputes involving inaccurate, unfair or libellous reporting and invasion of privacy in both the print and electronic media and to help readers, viewers and listeners exercise their right to reply. The PAC resolves a dispute by an arbitration committee, which comprises five members. The Chairman is a judge in active service recommended by the Head of the Judiciary, and the other members are: a lawyer, an ex-journalist, a professor and a prominent person in the community, who are learned, experienced and have moral reputation.

11.196 When a complaint is found to be justified, the PAC orders the offending newspaper or broadcaster to publish a correction within nine days. An arbitration award has the same effect as “judicial conciliation”. In addition to the arbitration of disputes, the PAC is empowered to monitor and investigate media output for its compliance with the expected standards without any formal complaint being brought to it. The jurisdiction, composition and procedure of the arbitration committee are determined by Presidential Decree. According to Lee Chang-keun, it is generally agreed the PAC has helped ordinary readers and viewers who do not have the necessary legal resources to sue the media for suitable redress.<sup>126</sup>

### ***Sri Lanka***<sup>127</sup>

11.197 The Press Council of Sri Lanka is a statutory body established by the Sri Lanka Press Council Law of 22 February 1973. The main objectives of the Council are to ensure the freedom of the press in Sri Lanka, to prevent abuses of that freedom and to safeguard the character of the Sri Lanka press in accordance with the highest professional standards. It consists of seven members appointed by the President of Sri Lanka. They include the Director of Information, a working journalist selected from a panel of not more than seven persons nominated by the Journalists’ Association, and a representative of the (non-journalist) employees of newspaper businesses, who is selected from panels of not more than three persons nominated by each registered trade union of such employees. The other members represent the public and include lawyers. No person who is or becomes a Member of Parliament shall be eligible for appointment, or to continue in office, as a member of the Council. The Council is financed by the state.

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<sup>126</sup>

Above.

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I Weerackody, “Media Monitors in Sri Lanka” in K S Venkateswaran (ed), pp 98-100 & App 26.



11.198 The Council has the power to entertain complaints concerning alleged acts of professional misconduct by journalists or alleged breaches of the Code of Ethics, which was drafted by the Council and approved by Parliament in accordance with the press council law.<sup>128</sup> The Council may also take action for such acts on its own initiative. It may summon and compel the attendance of any person, compel the production of any documents, and administer oaths to persons tendering evidence. After inquiring into the complaints, the Council may censure the proprietor, editor, printer, publisher, journalist or other officer of authority of the offending newspaper; order that a correction approved by it be published in the offending newspaper; or order that an apology be tendered to the aggrieved party. The Council may apply to the court for an injunction if the newspaper does not comply.

11.199 The Government has recently agreed to support the self-regulatory Press Complaints Commission established by the Sri Lanka Press Institute in 2003 and accordingly intends to disband the existing statutory Press Council described in the preceding paragraphs.<sup>129</sup>

## **Ireland<sup>130</sup>**

11.200 Ireland does not have a press council. Many politicians view newspapers with suspicion and many have expressed concern that Ireland lacks an independent mechanism to which complaints about the press can be addressed. Shortly after the general election in 2002, the Minister for Justice, Equality and Law Reform established a Legal Advisory Group on Defamation chaired by Hugh Moran, SC. This initiative implemented the agreed Programme for Government between Fianna Fáil (the “Labour” party) and the Progressive Democrats, which stated that “[the Government] will, in the context of a statutory Press Council and improved privacy laws, move to implement reforms of libel laws designed to bring them into line with those of other states.”<sup>131</sup>

11.201 In its report published in 2003,<sup>132</sup> the Legal Advisory Group acknowledged that press freedom was fundamental in a democratic society and that freedom of information must be recognised as an indispensable element in building the values which inform such a society. The Group was sceptical, however, as to whether it necessarily followed that any statutory intervention would run counter to such desiderata. It preferred the view that, subject to appropriate safeguards, it should be possible to construct a statutory model which would respect fully the autonomy of the press while, at the same time, providing an important element of independence and transparency which would secure public confidence in any process which

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<sup>128</sup> Press Council (Code of Ethics for Journalists) Rules 1981.

<sup>129</sup> See the section on “Voluntary press councils and similar bodies with some state support” above.

<sup>130</sup> NNI, “Libel and Press Standards” at <[www.nni.ie/press.htm](http://www.nni.ie/press.htm)> (15.11.02).

<sup>131</sup> Press Release “Minister McDowell announces the establishment of a Legal Advisory Group on Defamation” dated 9.10.02 at <[www.justice.ie/802569B20047F907/vWeb/pcCAMC5ERDXZ](http://www.justice.ie/802569B20047F907/vWeb/pcCAMC5ERDXZ)>.

<sup>132</sup> *Report of the Legal Advisory Group on Defamation* (March, 2003), at <<http://www.justice.ie/802569B20047F907/vWeb/wpRXHR5NSGB6>>.

might be established. After noting that the case for a statutory press council appeared to be compelling, the Group recommended that:<sup>133</sup>

- (a) a statutory Press Council should be established with functions including the preparation of a Press Code of Conduct and the investigation of complaints concerning alleged breaches of that Code;
- (b) key elements of the Code should address, *inter alia*, the accuracy of any facts or information relating to the honour or reputation of any person, living or dead, and unreasonable encroachment upon the privacy of any person, living or dead;
- (c) in appointing the members of the Council, the Government should have regard to the interests of the public as readers, the interests of relevant publications, and the interests of journalists and other employees of the publications;
- (d) the Council should be able to regulate its own practice and procedure;
- (e) compliance with the Code should be mandatory;
- (f) the remedies available should include directing the relevant publication to publish the substance of the Council's decision or to publish a correction or retraction of the material complained of;
- (g) it should be able to give directions as to the manner in which a correction, etc, should be published;
- (h) if a publication refuses to comply with the Council's decision, the Council should be able to apply to the Court for an order compelling compliance. Failure to comply with the court order could result in the publication in question being found to be in contempt of court.

11.202 The Group considered that its proposals for a statutory Press Council could work well in practice and would not encroach in any way upon the traditional freedoms which the press enjoyed in society.

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Above, paras 23-36. The draft provisions establishing the statutory Press Council can be found in Part 7 of the Defamation Bill at Appendix III of the Group's Report.

## Chapter 12

### The history of press self-regulation in the United Kingdom

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12.1 Since the general public and some sections of the local press have expressed an interest in the developments in the UK, we have devoted a whole chapter to the history of press self-regulation in that country.<sup>1</sup> Also included at the end is an assessment of the effectiveness of the UK Press Complaints Commission. It will be seen that the relationship between the press and the State is not as simple as some have suggested in Hong Kong.

#### General Council of the Press

12.2 **The first Royal Commission on the Press** was appointed in 1947 amidst public and parliamentary concern at the deterioration in the quality of the press and fears of a monopolistic tendency. The Commission recommended that the press should set up a General Council of the Press consisting of at least 25 members representing proprietors, editors, and other journalists, and having lay members amounting to about 20 per cent of the total, including the chairman. Further, the lay members should be nominated jointly by the Lord Chief Justice and the Lord President of the Court of Session, who should consult the chairman in choosing the lay members.

12.3 After the industry was threatened with the **Press Council Bill** introduced in 1952 by C J Simmons, MP, for the purpose of setting up a statutory press council, a **General Council of the Press** was established by the industry in 1953. However, all the Council members were drawn from the publishers and journalists' associations, and its chairman was the then proprietor of *The Times*. Out of the 25 members, 15 were editorial members (including seven journalists members) and 10 were managerial representatives. The Council had no lay members, a small budget and did not have any enforcement powers. It also failed to implement the Press Commission's recommendation that the Council should censure undesirable types of journalistic conduct and build up a code of practice.

12.4 **The second Royal Commission on the Press** was set up in February 1961 to examine the economic and financial factors affecting the production and sale of newspapers and periodicals in the UK. In March 1961, Lord Mancroft introduced a **Right to Privacy Bill** in the House of Lords,

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<sup>1</sup> See generally, T O'Malley & C Soley, *Regulating the Press* (Pluto Press, 2000), Part I; R Shannon, *A Press Free and Responsible: Self-regulation and the Press Complaints Commission, 1991-2001* (London: John Murray, 2001).

which would enable the public to claim damages for the “unjustifiable publication of matter concerning private and personal affairs”. The Bill gained sufficient support to get a Second Reading before being withdrawn.

12.5 In its report, the second Royal Commission criticised the General Council for failing to implement the first Royal Commission’s recommendations. The second Commission agreed that there were important advantages in a voluntary press council which derived its authority, not from statute, but from the press itself. However, the Commission warned that the Government should step in to establish a statutory body with definite powers and the right to impose a levy on the industry if the press was unwilling to invest the Council with the necessary authority and to contribute the necessary finance. The Commission gave the press another opportunity to establish an authoritative press council with “a lay chairman and a substantial lay membership”, but at the same time recommended that “the Government should specify a time limit after which legislation would be introduced for the establishment of such a body, if in the meantime it had not been set up voluntarily”.<sup>2</sup>

## The Press Council

12.6 As a result, the General Council of the Press was replaced by the **Press Council** in 1963. The new Press Council had a lay chairman, 20 members nominated by the press industry and five lay members. The first chairman was Lord Devlin, a retired Law Lord. The Council also increased its funding by almost three times. In a departure from the practice of the General Council of the Press, the new Council considered complaints about the conduct of the press, or the conduct of persons and organisations towards the press.

12.7 The Press Council issued a declaration of principle on payments to criminals and witnesses in 1966. However, the *News of the World* rejected the idea of non-payment to criminals as a blatant attempt to muzzle the press. The Council’s lack of sanctions was further illustrated in 1968 when the *Guardian* published a critical adjudication with the offending article reprinted beneath it. In January 1969, the *News of the World* refused to attend an inquiry into the paper’s decision to pay a Government minister for her part in a sex scandal. Speaking on his retirement as Chairman in October 1969, Lord Devlin said: “It must be remembered that a single great newspaper, if it chose to go its own way, could gravely weaken the basis on which the Press Council rests.”<sup>3</sup>

12.8 After Brian Walden had introduced a **Privacy Bill** in 1969, and in response to wider concerns about privacy, the Government decided to invite Kenneth Younger to chair a committee on the topic. **The Younger Committee on Privacy** reported in 1972 that the Press Council could not

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<sup>2</sup> Royal Commission on the Press, Cmnd 1811 (1962), para 325.

<sup>3</sup> Quoted in T O'Malley & C Soley, above, p 66.

command public confidence in its ability to take account of the reactions of the public, unless it had at least an equal membership of persons who were qualified to speak for the public at large.<sup>4</sup> It therefore recommended that one half of the membership should be drawn from the public. It further recommended that the lay members be appointed by an independent appointments commission which would be so composed that there could be no reasonable doubt about its independence of the press, its varied experience of public life, and its standing with the general public.

12.9 Subsequently, the Press Council increased its lay membership from five to 10. However, it also increased the total membership from 21 to 31, thus ensuring that lay members remained in a minority. The Council's general adjudication on privacy was codified but it remained opposed to the publication of a formal code of practice. It also made no commitment that a critical adjudication would be published with a prominence equal to that given to the original offending article.

12.10 In response to growing concern about the economic problems of the press and questions of bias and standards, the Government established **the third Royal Commission on the Press** in 1974. Apart from examining questions of independence, diversity and editorial standards of the press, the Commission also reviewed the responsibilities, constitution and functioning of the Press Council. In its report,<sup>5</sup> the Commission criticised the Council for placing greater emphasis on preserving press freedom than on maintaining the highest ethical standards. The predominantly professional membership of the Council also tended to be satisfied with less than rigorous standards. There were also no standards against which the public could judge the performance of the press. The third Commission therefore recommended that the Council should:

- (a) have an equal number of lay and press members;
- (b) invite nominations for vacancies among the lay members from any source;
- (c) draw up a code of conduct on which to base its adjudications;
- (d) supply detailed reasons for its decisions;
- (e) be provided with enough funds to enable it to advertise its services in the same way as the Advertising Standards Authority;
- (f) obtain undertakings from publishers that they would publish adjudications that upheld complaints on the front page of the newspaper in question, or, in the case of magazines, with a prominence at least equal to that of the offending passage;
- (g) initiate more investigations into the conduct of the press without waiting for a formal complaint; and
- (h) support an effective right of reply.

12.11 In response to the criticism that the Press Council failed to command public confidence, the Press Council adjusted its membership to

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<sup>4</sup> *Report of the Committee on Privacy* (Chairman: The Rt Hon Kenneth Younger) (London: HMSO, Cmnd 5012, 1972), para 189.

<sup>5</sup> *Royal Commission on the Press*, Cmnd 6810 (1977).

give parity between lay and professional members with a lay chairman. The lay members were appointed by an appointments commission that comprised members selected by the Press Council. Where the Council upheld a complaint, the only remedy available to the complainant was the publication of the adjudication in the offending newspaper, subject to the co-operation of the newspaper. It did not insist on front-page publication of its adjudications, nor produce a code of conduct. Later it became clear that the Declaration of Principles on Privacy published in 1976 was routinely ignored. There were also instances where the offending newspapers refused to publish the adjudications with any prominence. In 1982, Frank Allaun, MP, presented a **Right of Reply Bill**. During the debate, it was pointed out that the Press Council had been held by some newspapers openly in contempt, and others completely ignored its findings. The Bill got 90 votes in the Second Reading, ten short of the number it needed to proceed to the Committee stage.

12.12 In 1983, **Geoffrey Robertson** published “an enquiry into the Press Council”, which had been endorsed by a group of journalists, politicians, trade unionists and academics.<sup>6</sup> Robertson recommended the establishment of a Press Ombudsman by statute (with the same authority as a High Court judge) to replace both the libel law and the Press Council as a method of securing correction of mistakes by newspapers.<sup>7</sup> The Ombudsman would be obliged to consider serious complaints alleging that a newspaper failed to correct statements containing errors of facts, or to publish replies to comments based on factual mistakes. In addition, the Ombudsman would be able to order an offending newspaper to publish a correction or reply. Where a newspaper refused to publish as directed, the Ombudsman could obtain a court order obliging it to do so. In addition, the Ombudsman would be empowered to award compensation for any loss suffered by the complainant. The compensation fund would be provided by a levy on newspapers, with contributions fixed by reference to their circulation figures.

12.13 Robertson further recommended that the Press Council, whose primary concern would be the formulation and maintenance of ethical standards, be reformed along the following lines:<sup>8</sup>

- (a) The press members should be drawn from proprietors, editors, journalists and print unions, while the lay members should be experienced at assessing evidence and promoting consumer interests.
- (b) The Council should advertise its services by donating newspaper space.
- (c) It should be much more active in monitoring the press, and in drawing attention to breaches of standards which had not been raised by individual complainants.

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<sup>6</sup> G Robertson, *People Against the Press: An Enquiry into the Press Council* (London: Quartet Books, 1983).

<sup>7</sup> Above, pp 139-143.

<sup>8</sup> Above, pp 145-151.

- (d) The Council should have sufficient resources to scrutinise newspapers and magazines on a regular basis.
- (e) It should issue regular assessments of the performance of the press in complying with its Declaration of Principle.
- (f) The major newspapers should enter into contracts with the Council, under which newspapers would undertake to publish the Council's adjudications with a degree of prominence dictated by the Council itself.
- (g) The contractual obligation to publish would be enforceable by obtaining a court order for specific performance. Alternatively, each contract with the Council could specify a sum of liquidated damages to be paid by the newspaper if it failed to comply with the order to publish. This sum could be fixed at a level which would supply the Council with sufficient funds to take advertising space (in rival newspapers and even on radio or television) to publicise its unpublished adjudication.
- (h) The Council should insist that publishers incorporate, in all contracts with journalists, a conscience clause to the effect that no journalist can be obliged to act in breach of the Council's Declaration of Principle. In this way, any attempt by an editor to discipline or dismiss a journalist for acting in accordance with Council rulings would be punished by an award of damages, in claims either for breach of contract or for unfair dismissal.
- (i) The Council should be involved in formulating, teaching, examining and promoting courses on press ethics.

12.14 During the 1988/89 Parliamentary session, John Browne, MP, introduced a **Protection of Privacy Bill** while Tony Worthington, MP, backed by the Campaign for Press and Broadcasting Freedom, presented his **Right of Reply Bill**. Both Bills had substantial cross-party support. They completed the Committee stages in the House of Commons but progress was halted when the Government invited David Calcutt, QC, to chair a committee to consider what measures were needed to give further protection to individual privacy from the activities of the press. The Press Council, then chaired by Louis Blom-Cooper, QC, reacted by drawing up a code of practice covering matters such as privacy, opportunity for reply and prompt correction. All the national newspapers also appointed an in-house ombudsman to handle complaints.

12.15 **The Calcutt Report on Privacy and Related Matters** (1990) noted that the Press Council was not regarded as independent, partly because of its financial dependence on newspaper and magazine publishers.<sup>9</sup> It considered that there was an inherent conflict between its roles as a defender of press freedom and as an impartial adjudicator in disputes.<sup>10</sup> There was insufficient interdependence between the responsibility of defending press freedom and that of considering press complaints to make it necessary for the same body to have to undertake both. It therefore

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<sup>9</sup> *Report of the Committee on Privacy and Related Matters* (London: HMSO, Cm 1102, 1990).  
<sup>10</sup> Paras 14.28 & 14.29.

recommended that the Press Council be replaced by a press complaints commission (PCC), specifically charged with adjudicating on complaints of press malpractice. The Report also suggested that the PCC should have an independent chairman and no more than 12 members. All appointments to the Commission were to be made by an appointments commission that would be independently appointed by the Lord Chancellor instead of by the press industry. In order to attract the support and confidence of the industry, a significant proportion of those responsible for adjudications should have experience of the industry.

12.16 The Calcutt Report further recommended that the PCC should have the following features:

- (a) It must be seen to be authoritative, independent and impartial.
- (b) It must have jurisdiction over the press as a whole, must be adequately funded and must provide a means of seeking to prevent publication of intrusive material.
- (c) It should publish, monitor and implement a comprehensive code of practice for the guidance of the press and the public.
- (d) The adjudications should, in certain cases, include a recommendation that an apology be given to the complainant.
- (e) Where a complaint concerns a newspaper's refusal to give an opportunity to reply to an attack or to correct an inaccuracy, the PCC should be able to recommend the nature and form of reply or correction including, in appropriate cases, where in the paper it should be published.
- (f) The PCC should have clear conciliation and adjudication procedures designed to ensure that complaints are handled with the minimum delay.
- (g) It should have a specific responsibility and procedure for initiating inquiries whenever it thought it necessary.

12.17 The Calcutt Report made it clear that should the press fail to set up and support the PCC or should it become clear that the self-regulatory mechanism was failing to perform adequately, the PCC should be replaced by a statutory tribunal with statutory powers implementing a statutory code of conduct. This Press Complaints Tribunal would be appointed jointly by the Lord Chancellor and the Home Secretary. The Government accepted the major recommendation that a press complaints commission be established. **The Home Secretary** said:

*"If a non-statutory commission is established, the Government will review its performance after 18 months of operation to determine whether a statutory underpinning is required. If no steps are taken to set up such a commission, the Government, albeit, with some regret, will proceed to establish a statutory framework, taking account of the committee's recommendations."*<sup>11</sup>

<sup>11</sup> Statement by David Waddington, the Home Secretary, on 21.6.90; quoted in T O'Malley & C Soley, above, at 89. That position was backed by the Labour Party.



## The Press Complaints Commission

12.18 Subsequent to the Calcutt Report, a Press Standards Board of Finance (Pressbof) was set up by the Newspaper Publishers Association and other press interests to collect funds from the industry to pay for the establishment of a **Press Complaints Commission** in 1991. The first chairman of the PCC was Lord McGregor, an academic who had chaired the third Royal Commission on the Press. The Commission had six lay members and nine press members. They were selected by an Appointments Commission consisting of the PCC Chairman, the Pressbof Chairman and a public nominee. The appointments of the members therefore remained in the hands of the industry. However, press freedom was no longer the concern of the Commission, whose object was to enforce a code of practice by adjudicating complaints that newspapers had infringed the code. Whereas the old Press Council claimed jurisdiction only over those traditional elements of the press, the Commission covered the press as a whole.

12.19 **Robertson and Nicol** commented in 1992 that the PCC would not live up to the expectations of the Calcutt Committee:<sup>12</sup>

- (a) The rulings of the PCC were not backed by sanctions. Although the adjudications were published in a bulletin, the Commission did not have the power to require a censured editor to publish its censure. Nor was it concerned that its adjudications were published with prominence.
- (b) Maverick newspapers continued to publish sensational stories in disregard of adverse adjudications. Without any effective sanctions, there were bound to be newspapers not respecting their adjudications.
- (c) The code of practice was produced and monitored, not by the Commission itself, but by the press industry.
- (d) The PCC was reluctant to undertake the responsibility of monitoring compliance with its code. It would not act unless and until a member of the public lodged a complaint.
- (e) The PCC was not bound to give the complainant a hearing. Complainants might feel that they had not been given a fair hearing if their complaints were not upheld.
- (f) The members of the PCC were appointed, not by a body which was itself independent of the press, but by a body which was the creature of the industry.
- (g) The majority of the members were from the press and the PCC was perceived to be dominated by press interests.

<sup>12</sup>

G Robertson & A Nicol, *Media Law* (Penguin, 3rd edn, 1992), 542-545. See also David Calcutt, *Review of Press Self-Regulation* (London: HMSO, Cm 2135, 1993).

- (h) There was no appeal procedure to which unsuccessful complainants could resort.

12.20 Public confidence in the British press was low at that time. Clive Soley, MP, backed by the Campaign for Press and Broadcasting Freedom, presented his **Freedom and Responsibility of the Press Bill** in June 1992. The Bill provided for the establishment of a statutory Independent Press Authority, the members of which would be appointed by a seven-member appointments committee, which would in turn be appointed by the Secretary of State. The Bill also created a right to a published correction of a factual inaccuracy in editorial material published in a newspaper. Where a newspaper refused to comply with an order to publish a correction made by the Authority, the latter could apply to the Court to enforce the order. It was against this background that in July 1992 the UK Government invited Sir David Calcutt, QC, to conduct an assessment of the effectiveness of press self-regulation. The National Heritage Committee of the House of Commons also undertook an inquiry into privacy and media intrusion in October 1992.

12.21 **The Calcutt Review** concluded in January 1993 that press self-regulation under the PCC had not been effective.<sup>13</sup> The Commission failed to command the confidence of the press and the public. It did not hold the balance fairly between the press and the individual. It was not the truly independent body which it should have been. In essence, the Commission was “a body set up by the industry, financed by the industry, dominated by the industry, operating a code of practice devised by the industry and which is over-favourable to the industry.”<sup>14</sup> The Calcutt Review stated that the following changes had to be made to rectify the situation:<sup>15</sup>

- (a) an independent person of high standing would need to be invited, by agreement between the Government and the industry, to appoint an Appointments Commission;
- (b) that person would need to appoint an independent Appointments Commission;
- (c) the independent Appointments Commission would need to appoint the PCC;
- (d) the remit of the PCC would need to make it plain that the Commission has no function positively to promote press freedom;
- (e) the code of practice would need to be drawn up by the Commission itself;
- (f) the Commission would need to be prepared to receive third party complaints more widely; and
- (g) the Commission would need to be prepared to initiate its own inquiries where there was a *prima facie* breach of the code but where no complaint had been made.

12.22 Since the Calcutt Review concluded that the PCC would not be willing to make and would not make these changes, it recommended that a

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<sup>13</sup> David Calcutt, *Review of Press Self-Regulation* (London: HMSO, Cm 2135, 1993).

<sup>14</sup> Above, para 5.26.

<sup>15</sup> Above, para 5.30.

statutory press complaints tribunal on the model of that described in the Calcutt Report be set up. The tribunal should be accessible to those of limited means and its procedures should be simple and speedy. In relation to its functions and powers, the tribunal should be able to:

- draw up and keep under review a code of practice;
- restrain publication of material in breach of the code unless the publisher could show that he had a good arguable defence;
- receive complaints (including third party complaints) of alleged breaches of the code;
- inquire into those complaints;
- initiate its own investigations without a complaint;
- require a response to its inquiries;
- attempt conciliation;
- hold hearings;
- rule on alleged breaches of the code;
- give guidance;
- warn;
- require the printing of apologies, corrections and replies;
- enforce publication of its adjudications;
- award compensation;
- impose fines;
- award costs;
- review its own procedures; and
- publish reports.<sup>16</sup>

12.23 The Calcutt Review further recommended that the chairman of the tribunal should be a judge or senior lawyer. He should sit with two assessors drawn from a panel which might be appointed by the responsible departmental minister. It would be desirable for at least one of the assessors at each adjudication to have experience of the press at a senior level.

12.24 Soley's Private Member's Bill reached its Committee stage but could not get a Third Reading when the Government opposed the Bill and decided to wait for the report of the National Heritage Committee. The **National Heritage Committee** agreed that the PCC was not an effective regulator but rejected the need for a statutory press complaints tribunal. Instead, the Committee recommended that a voluntary Press Commission be set up with powers to order the publication of corrections and adjudications and to award compensation and impose fines. The Committee further recommended that a statutory Press Ombudsman be appointed by the Lord Chancellor to consider appeal cases, with statutory power to impose fines and order compensation.<sup>17</sup>

12.25 In its **White Paper on Privacy and Media Intrusion** published in 1995, the UK Government rejected the idea of setting up a statutory complaints tribunal or a statutory Press Ombudsman on the grounds that the imposition of statutory controls might open the way for regulating content,

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<sup>16</sup> Above, para. 6.5.

<sup>17</sup> National Heritage Committee, *Privacy and Media Intrusion* (London: HMSO, 294-I, 1993).

thereby laying the Government open to charges of press censorship. It believed that it would not be right in this field to delegate decisions about when a statutory remedy should be granted to a regulator such as a tribunal.<sup>18</sup>

12.26 Since 1995, the **Press Complaints Commission** has taken a number of initiatives to strengthen self-regulation. It now consists of nine lay members (including the Chairman) and seven editor members. The Chairman of its Code Committee, who is a senior industry figure, is an *ex-officio* member of the Commission.<sup>19</sup> The PCC has a director and 11 staff. The director is in charge of the day-to-day running of the secretariat and acts as a consultant at, but has no decision-making role in, Commission and Code Committee meetings.<sup>20</sup>

12.27 The **PCC Chairman** is selected by the Press Standards Board of Finance, which is the Commission's financing body set up by the industry. The Chairman must not be engaged in or, otherwise than by his office as Chairman, connected with or interested in the business of publishing newspapers, periodicals or magazines. The lay members of the PCC are appointed by an **Appointments Commission** consisting of five persons. The Chairman of the Appointments Commission is the Chairman of the PCC. The other members are the Chairman of the Press Standards Board of Finance and three other lay persons nominated by the PCC Chairman. Hence, out of the five members of the Appointments Commission, one is an industry representative, one is a lay person appointed by the industry, and three are lay persons indirectly appointed by the industry.

12.28 None of the lay members can be engaged in or, otherwise than by their membership of the Commission, connected with or interested in the business of publishing newspapers, periodicals or magazines. One of the lay members has also been appointed as the Privacy Commissioner with powers to investigate urgent complaints about privacy and bring them to the Commission for decision. Press Members must be persons experienced at senior editorial level in the press.

12.29 The **Code of Practice** administered by the PCC is written by its Code Committee, which is made up of 16 editors and a senior industry figure as chairman. The Chairman and director of the PCC are *ex-officio* members of the Committee.<sup>21</sup> The members of the Code Committee are appointed by the Appointments Commission on the basis of nominations from the five publishers' associations of the press in the UK. The Code is reviewed periodically by the Code Committee. It takes account of public and parliamentary comment as well as of reports from the PCC itself. Although the Code is drafted and reviewed by a committee of editors, the PCC takes

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<sup>18</sup> Department of National Heritage, *Privacy and Media Intrusion – The Government's Response* (London: HMSO, Cm 2918, 1995), ch 2.

<sup>19</sup> House of Commons Culture, Media and Sport Committee, *Privacy and Media Intrusion* (June, 2003), vol I, HC 458-I, at para 42.

<sup>20</sup> Email from PCC's Information Officer to the secretary of the Sub-committee on 9.9.03.

<sup>21</sup> House of Commons Culture, Media and Sport Committee, above, para 42.

the final responsibility for the Code and ratifies any changes to it. The Code gives the PCC a framework within which it can address complaints from members of the public. Since 1997, the Code has applied to both publications in a printed form, and publications on the Internet which originated from publishers who already subscribe to the Code. According to the PCC, adherence to the industry's Code of Practice has been written into the employment contracts of most editors, and of a significant number of journalists. The PCC argues that this provides the "teeth" of self-regulation that is otherwise lacking in a voluntary mechanism run by a press council. Professor Robert Pinker, the Privacy Commissioner of the PCC, states that the industry has a manifest interest in making self-regulation work. If it were to fail, they know that the Government would intervene and impose a statutory system.<sup>22</sup>

12.30 In a significant departure from the old Press Council model, the PCC now has the power to entertain **complaints** without insisting that complainants should waive their legal rights, but it does not actively pursue a complaint while it is the subject of legal proceedings. The complainants are therefore free to seek redress in the court if they are not satisfied with the outcome of the adjudication. Furthermore, third party complaints are not ruled out *a priori* but may be accepted in certain circumstances. Generally speaking, about 60% of complaints were about inaccuracy in reporting while 25% were related to private lives. Although cases of privacy intrusion are not numerous in quantitative terms, such intrusions can be deeply hurtful to the individuals affected and their innocent relatives and friends. It is interesting to note that in 2001, only 3% of the complaints were from famous (or infamous) people in the national public eye; the vast majority of the complaints were from ordinary people temporarily caught in the spotlight of media attention.

12.31 If the PCC upholds a complaint, the publication concerned will be obliged to publish the adverse finding in full and with due prominence. All the **adjudications** of the Commission are published on its website and in a quarterly bulletin distributed to all editors, Members of Parliament, and other interested parties. Since the PCC is exercising a public function which, if it did not exist, would be exercised by a statutory body, the procedures of the PCC are subject to judicial review by the Court.<sup>23</sup>

12.32 The PCC is funded by the Press Standards Board of Finance (Pressbof), which imposes a levy on the newspaper and periodical industries to finance the PCC. Some publishers have also donated space in their newspapers for advertisements about the work of the PCC.

## Criticisms of the PCC and suggestions for reform

12.33 The PCC's principal task is to seek an amicable and swift resolution in every complaint it receives. Out of the 3033 complaints received

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<sup>22</sup> R Pinker, "Human Rights and the British System of Self-Regulation" (March 1999), pp 2 - 3.  
<sup>23</sup> *R v PCC, ex p Stewart-Brady* [1997] EMLR 185; *R v PCC, ex p Anna Ford*, unrep, 29.7.01.

in 2001: 37% proved to be outside the Commission's remit;<sup>24</sup> 30% were found to involve no breach of the Code; and 31% were resolved directly or not pursued by complainants following an explanation from the publication concerned or a letter or email from the PCC. In the end, the Commission issued a full adjudication on 41 complaints, representing 1.4% of the total number of complaints received - upholding 19 and rejecting 22.<sup>25</sup>

12.34 **James Curran and Jean Seaton** commented in 1997 that the PCC did not have general support in the press and was viewed with contempt by some journalists.<sup>26</sup> Since self-regulation only works when there is consensual support for it and the self-regulating agency has sanctions, they suggest that publishers should agree by legally binding contracts to publish with due prominence the adjudications of a reconstituted Press Commission; to print apologies, corrections or replies; and to pay fines imposed in relation to exceptional offences. If publishers will not agree to binding self-regulation as in Sweden, then these powers will have to be underwritten by statute. They further suggested that press representatives should be elected by their peers from different sections of the industry, rather than appointing press representatives from editors and publishers only.<sup>27</sup>

12.35 The PCC reported that throughout the 11 years of the Commission's existence, every critical adjudication against a newspaper or magazine had been printed "in full and with due prominence".<sup>28</sup> However, **Geoffrey Robertson, QC, and Andrew Nicol, QC**, observed in 2002 that the adjudications would be published by the papers complained against, "albeit usually in small print and without much prominence".<sup>29</sup> They gave the example of *The News of the World*, which published an adjudication three months after it had been made, in small print, and surrounded by advertisements, on page 40 of the paper. So far, the PCC has not indicated what prominence is "due", nor does it monitor compliance with the requirement to publish with due prominence. The following are other problems highlighted by Robertson and Nicol:<sup>30</sup>

- (a) Its rulings are not backed by any sanctions. It does not offer to compensate any victim, nor does it require a censured editor to publish its censure with any degree of prominence.
- (b) It has not solved the "intractable problem" that tabloids are often prepared to breach the Code in the interests of increasing circulation and will continue to publish circulation-boosting stories irrespective of adverse adjudications.

<sup>24</sup> This included complaints made by third parties, matters of taste and decency, legal matters and a small number disallowed for unjustifiable delay.

<sup>25</sup> PCC, *Annual Review 2001*, pp 7-8.

<sup>26</sup> J Curran & J Seaton, *Power without Responsibility: The Press and Broadcasting in Britain* (Routledge, 5th edn, 1997), p 369. James Curran is Professor of Communications at the Goldsmiths College of the University of London, and Jean Seaton is Professor of Media History at the University of Westminster.

<sup>27</sup> Above, pp 369-370.

<sup>28</sup> "Key Benefits of the System of Self-Regulation", at <[www.pcc.org.uk/about/benefits.htm](http://www.pcc.org.uk/about/benefits.htm)> (3.1.03).

<sup>29</sup> G Robertson & A Nicol, *Media Law*, above, pp 675 & 684.

<sup>30</sup> G Robertson & A Nicol, *Media Law*, above, pp 676, 682-684, 706-710.

- (c) It refuses to monitor compliance with its Code nor does it monitor responses to its own adjudications.
- (d) Since the PCC refuses oral hearings and decides each case upon written submissions, unsuccessful complainants feel that they have not been given a fair hearing.
- (e) The membership of the PCC is biased in that its part-time chairman receives a large salary paid for by a levy on the companies that own the newspapers complained against.
- (f) Its adjudications are short and usually over-simple, reflecting only on editors, who do not appear discomfited by its statements that they have breached the Code.

12.36 Having described the PCC as operating “both as a shackle on the press and a fraud on the public” and asserted that the PCC is a “public relations exercise”, Robertson and Nicol conclude that there is no evidence that the PCC’s self-regulation has been any more successful than the old Press Council’s. The only difference is that while the Press Council was often vigorously condemned by the press itself, the PCC has succeeded in persuading proprietors and editors that it is in their interests to support the PCC. *Private Eye* is therefore the only print journal that refuses to recognise the PCC, on the basis that certain editor members of the Commission are themselves so morally questionable that no ethical judgment they make deserves to be recognised.<sup>31</sup>

12.37 In addition, the **National Union of Journalists** (NUJ) stated that neither the newspaper industry nor its readers had any faith in the PCC.<sup>32</sup> In the opinion of the Union, self-regulation by the PCC did not work because the PCC was a creation of the industry, working for the industry and not for the public, with no sanctions and no teeth.<sup>33</sup> In response to the *Communications White Paper* published by the Government in 2000, the NUJ recommends that “an independent media complaints body be established, whose task would be to promote high standards in the media by supporting good practice, and which would also both encourage the voluntary resolution of complaints and have the power to enforce the publication of its adjudications”.<sup>34</sup> As far as the PCC is concerned, the NUJ generally favours a body that draws its members from the public, the trade unions and other interested bodies, as opposed to simply those with a vested interest in protecting the publishers.<sup>35</sup> The NUJ also voted for a statutory right of reply to factual inaccuracies at their 1999 Annual Delegates Meeting.

12.38 The **Campaign for Press and Broadcasting Freedom** (CPBF) was also critical of the PCC. It asserted in 2001 that the PCC was “widely held” to be a body that protected proprietors rather than one which promoted

<sup>31</sup> Above, pp xix, 706 & 708-709.

<sup>32</sup> NUJ Press Release, “PCC: Insults – One at a Time, Please!”, criticising the way the PCC dealt with the Union’s complaint about the headline in *Daily Express* on 30.8.01.

<sup>33</sup> Gustaf von Dewall, above, p 203.

<sup>34</sup> NUJ, *Promoting Media Freedom and Diversity: The National Union of Journalists’ Response to the White Paper, “A New Future for Communications”* (2001), section 6.

<sup>35</sup> Email from the Servicing Officer of the NUJ Ethics Council to the secretary of the Privacy sub-committee on 10.6.02.

high standards and swift and comprehensive debate. It also criticised the PCC for lacking any power to enforce its adjudications. In its response to the *Communications White Paper*, the CPBF recommends that in addition to the Office of Communications proposed by the Government, a separate independent, democratically constituted Communications Complaints Council should be established, covering all media, including the press, which would be empowered to draw up codes of conduct and use limited statutory powers to effect the publication of its adjudications after all voluntary mechanisms have been exhausted.<sup>36</sup>

12.39 **PressWise**, a charity set up by victims of press abuse, backed by sympathetic journalists and media lawyers concerned with journalistic ethics, has described the PCC as a “flawed and ineffective body”:

*“Flawed, because no commission funded by the newspapers upon which it adjudicates, and working to a code produced by the very editors liable to censure, can possibly inspire public confidence. Ineffective, because it is powerless to impose meaningful sanctions.”*<sup>37</sup>

PressWise thinks that the PCC should comprise representatives of the general public and working journalists (not editors), and should have the power to receive and consider complaints from third parties and to award financial compensation.<sup>38</sup>

12.40 So far as we are aware, the **UK Government** has no plans to legislate in this area, or to interfere with the way the PCC operates. However, the Secretary of State for Culture, Media and Sport has suggested that the Commission should improve its performance in a number of ways:<sup>39</sup>

- (a) more proactive and pre-emptive action with greater collaboration with other media regulators;
- (b) an appeals mechanism independent of both Government and industry;
- (c) more formalised and regular independent scrutiny of the PCC’s procedures;
- (d) a more transparent and open appointment process for lay members;
- (e) a greater majority of lay members with fixed term appointments;
- (f) hearings to be held in certain cases.

12.41 The **House of Commons Culture, Media and Sport Committee** conducted an inquiry into privacy and media intrusion in 2003.

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<sup>36</sup> CPBF, *Response to the Communications White Paper*, February 2001, paras 4.1 & 4.30.

<sup>37</sup> “Policy Positions”, <[www.presswise.org.uk/policies.htm](http://www.presswise.org.uk/policies.htm)> (9.6.02).

<sup>38</sup> “Policy Positions”, <[www.presswise.org.uk/policies.htm](http://www.presswise.org.uk/policies.htm)> (9.6.02).

<sup>39</sup> House of Commons Culture, Media and Sport Committee, *Privacy and Media Intrusion* (June, 2003), vol I, HC 458-1, at <[www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmcumeds/458/458.pdf](http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmcumeds/458/458.pdf)>, at 26.



The following are some of the Committee's conclusions and recommendations:<sup>40</sup>

- (a) Lay members should be sought and appointed for fixed terms under open procedures including advertisement and competition.
- (b) Press members should be appointed for fixed terms from across the industry.
- (c) There should be an explicit presumption that press members are not there to represent the interests of their associations but to offer the benefits of their particular experience whilst acting independently as members of a quasi-judicial body.
- (d) Press members (including members of the Code Committee) who preside over persistently offending publications should be required to stand down and should be ineligible for reappointment for a period. Persistence could be defined as "three strikes and you're out".
- (e) The lay majority should be increased by at least one.
- (f) The Appointments Commission should appoint an independent Commissioner, also under the new procedures, to implement a procedural appeals process and to commission a regular external audit of the PCC's processes and practices.
- (g) The Code Committee should be re-established with a significant minority of lay members.
- (h) The text of an adjudication should be clearly and consistently set out by the offending publication to ensure its visibility and easy identification.
- (i) Any publication required to publish a formal adjudication must include a prominent reference to that adjudication on its front page.
- (j) The Press Standards Board of Finance should introduce a gearing between the calculation of the registration fee and the number of adverse adjudications received by a publication in the previous year.
- (k) The industry should consider agreeing a fixed scale of compensatory awards to be made in serious cases. If these were fixed in advance, by consensus, and were relatively modest, there would be no reason for lawyers to become involved.
- (l) The Committee strongly urges the PCC and the industry to consider complainants' costs and agree that, where justified complaints have involved particular financial burdens on the complainant (such as the acquisition of a transcript of a trial or inquest (but not legal fees)), then those costs must be met by the offending newspaper. The Committee believes this to have nothing to do with the debate over punitive or compensatory awards.
- (m) The PCC should make itself available to give evidence to the Committee at regular intervals to discuss progress on its agenda for change.

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<sup>40</sup>

Above.

## Chapter 13

### Alternatives to self-regulation

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13.1 We have seen that the press councils in other jurisdictions range from a voluntary body without any Government involvement to a statutory body with strong Government influences. Below are some of the ways by which the State may become involved in the establishment or operation of a press council or similar body:

#### **Provision of a legislative framework**

- (a) the incorporation of provisions in the Constitution requiring the establishment of a press or media council that has a constitutional status (Egypt, Ghana, Indonesia, Portugal);
- (b) the enactment of a statute providing for the creation of a statutory press council (See the examples in Chapter 11);
- (c) the introduction of legislative provisions guaranteeing the independence of the Complaints Committee (Germany);

#### **Provisions guaranteeing independence of the nomination process**

- (d) the introduction of legislative provisions guaranteeing the independence of the nomination process (Bangladesh, Denmark, Ghana, India, Lithuania, Portugal);

#### **Inclusion of members representing the interests of the State**

- (e) the involvement of the Speaker or the members of a legislative assembly in the appointment or nomination of certain members of the council (Bangladesh, Cyprus, Egypt, Ghana, India, Nepal, Portugal);
- (f) the appointment of Members of Parliament to the council (Bangladesh, India, Nepal);
- (g) the appointment of all or some members by the President (Ghana, Sri Lanka);
- (h) the appointment of one or more members by or on the recommendation of the judiciary (Denmark, Portugal, South Korea);
- (i) the appointment of government officials (eg the Director of Information, ambassador) to the council (Kenya, Sri Lanka);
- (j) the nomination or appointment of one or more members by the Government (Nepal, Portugal);
- (k) the appointment of members by the Minister for Justice on the recommendation of stakeholders (Denmark);

#### **Provision of public funds**

- (l) the provision of public funds to cover all or part of the expenses of a

council (Bangladesh, Belgium, Denmark, Egypt, Finland, Germany, Ghana, India, Indonesia, Nepal, Nigeria, Portugal, Quebec, Sri Lanka);

**State support of a code of ethics**

- (m) the endorsement of a voluntary national code of journalistic ethics by the State (Denmark, Germany);
- (n) the promulgation of a code of journalistic ethics in accordance with the enabling legislation (Bangladesh, Indonesia, Macao, Nepal, Portugal, Sri Lanka).

**Statutory provisions enforcing the rulings of the council**

- (o) the introduction of legislative provisions enforcing the rulings of the council (Denmark, Ghana, South Korea, Sri Lanka);

**Legal protection of council and its members**

- (p) the provision of legal immunity for the council and its members acting in good faith (Bangladesh, India, Macao);

**Reports of Council findings privileged under libel law**

- (q) the protection of newspaper reports of matters published under the authority of the council by rendering these reports privileged under libel law (Bangladesh, India).

13.2 It is apparent that a government has a legitimate interest in protecting the public from abuses of press freedom if self-regulation fails to achieve this objective. There is, however, no consensus as to how a Government could achieve this objective without undermining press freedom. The choice of regulatory (or self-regulatory) model is dictated by the circumstances of the jurisdiction concerned. The conduct of the press (whether it is excessive and whether self-regulation has been effective in curbing the excesses), civil society (the degree to which the public may influence press conduct), the constitutional framework (whether it guarantees press freedom and other human rights), the political system (whether there is democracy with sufficient checks and balances), and public perception of the role of the Government, are some of the factors that influence the outcome. Nonetheless, there is a growing consensus at least in Europe as to the useful roles of market regulation, industry self-regulation, co-regulation (also known as “regulated self-regulation”<sup>1</sup>) and Government regulation. An understanding of their roles in the media context could help us find the appropriate solution for Hong Kong. Before we explain the roles played by the different regulatory models, we first introduce the principle of subsidiarity, which argues for minimal Government involvement in achieving a social objective.

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<sup>1</sup> “Regulated self-regulation” has been defined as “self-regulation that fits in with a legal framework or has a basis laid down in law”. See speech by Marcelino Oreja, Member of the European Commission at the Seminar on Self-regulation in the Media, Saarbrücken, 19-21 April 1999 at <[http://europa.eu.int/comm/avpolicy/legis/key\\_doc/saarbruck\\_en.htm](http://europa.eu.int/comm/avpolicy/legis/key_doc/saarbruck_en.htm)>; and W Schulz and T Held, *Regulated Self-Regulation as a Form of Modern Government: Interim Report* (2001) – a study commissioned by the German Federal Commissioner for Cultural and Media Affairs, at <[www.rz.uni-hamburg.de/hans-bredow-institut/service/abpapiere/7selfreg.pdf](http://www.rz.uni-hamburg.de/hans-bredow-institut/service/abpapiere/7selfreg.pdf)>.

## Principle of subsidiarity

13.3 As a general principle, the degree of Government involvement should reflect the degree of market failure and the extent to which self-regulation fails to achieve the social objectives. If there is market failure and the self-regulating bodies fail to achieve the objectives efficiently, effectively and accountably, then there is a *prima facie* case for the Government to make self-regulation efficient, effective and accountable. The Government will have to review the self-regulatory mechanism and assess which regulatory option best achieves the social objectives. In its assessment, the Government should observe the principle of subsidiarity, which asserts that powerful institutions (such as the state) should not assume functions that weaker institutions (such as industry associations) can perform, but rather should offer assistance to enable the latter to regulate themselves at full capacity.<sup>2</sup> Hence, the degree of Government involvement should be the minimum necessary to achieve the social objectives. Regulatory functions should be delegated as far as possible to the self-regulating bodies. Every possible assistance should be given to make them function at full capacity.

## Co-regulation as a regulatory model

13.4 There are two dimensions to the regulation of unwarranted press intrusion, namely, (a) the degree of Government and public involvement (voluntary self-regulation *versus* Government-imposed regulation (or self-regulation) with or without public participation); and (b) the degree of legislative backing (statutory regulation *versus* non-statutory regulation). A press regulatory or complaints body may therefore be classified according to whether it is set up by the industry or imposed by the Government, whether the Government and/or members of the public are involved in its operation, and whether or not it operates within a legislative framework or has the backing of legislation. The following are examples of regulatory models that have been suggested or can be found in Hong Kong in the media context:

- (a) non-statutory self-regulation by individual media organisations on a non-contractual basis (eg, the news ombudsman appointed by *Next Magazine* in 1997 (scheme terminated a year later) and the internal ombudsman proposed by *Apple Daily* in November 1999 (proposal not implemented));
- (b) non-statutory self-regulation by a professional body without the involvement of publishers and the public (eg, the Ethics Committee of the HK Journalists Association; discussed in Chapter 7);
- (c) non-statutory self-regulation by the industry on a voluntary and non-contractual basis with public participation (eg, the Media Ethics Forum proposed by the HK Journalists Association in late 1999 (proposal not implemented));

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<sup>2</sup> The principle is one of the core principles of the European Union.

- (d) non-statutory self-regulation by individual media organisations on a contractual basis (eg, the incorporation of the Journalists' Code of Professional Ethics or any other code of ethics into the employment contracts of journalists (not adopted by the local media));
- (e) non-statutory self-regulation by the industry on a voluntary but contractual basis with public participation (eg, the HK Press Council discussed in Chapter 8);
- (f) self-regulation by the industry and profession with public participation on a statutory basis (eg, the HK Press Council Bill promoted by the HK Press Council; discussed in Chapter 8);
- (g) Government-imposed self-regulation by an independent statutory body whose press and public members are appointed by an independent appointments commission (eg, the statutory Press Council for the Protection of Privacy proposed in the Consultation Paper);
- (h) Government-imposed self-regulation by an independent statutory body whose press members are appointed by the industry and profession and whose public members are appointed by the NGOs (proposal of some respondents);
- (i) Government-imposed regulation by a judicial body with public participation (eg the Obscene Articles Tribunals under the Control of Obscene and Indecent Articles Ordinance);
- (j) Government-imposed regulation by a statutory body with public participation and Government involvement (eg the Broadcasting Authority under the Broadcasting Authority Ordinance); and
- (k) Government-imposed legal regulation without the involvement of any statutory body or Government department (eg the Judicial Proceedings (Regulation of Reports) Ordinance).

13.5 Although a broad spectrum of regulatory options is available, the public debate about the regulation of press intrusion has been dominated by the dualistic perspective of private versus Government regulation, without much discussion about the roles of the Government and a legislative framework in facilitating effective self-regulation. In practice, 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; and Government involvement may range from the provision of public funds to a voluntary body, or the provision of a legislative framework to make self-regulation more effective, to the introduction of a licensing regime for journalists.

13.6 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.<sup>3</sup> “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. Co-regulation is justified where self-regulation has failed by not addressing critical issues or not being otherwise acceptable. The purpose of the legislative measures is to provide the means for industry to self-regulate effectively. The involvement of the Government generally falls short of prescribing the code in detail in legislation. By way of example, “co-regulation” is used in the UK *Communications White Paper* to indicate:

*“situations in which the regulator would be actively involved in securing that an acceptable and effective solution is achieved. The regulator may for example set objectives which are to be achieved, or provide support for the sanctions available, while still leaving space for self-regulatory initiatives by industry, taking due account of the interests and views of other stakeholders, to meet the objectives in the most efficient way. The regulator will in any such case have scope to impose more formal regulation if the response of industry is ineffective or not forthcoming in a sufficiently timely manner.”<sup>4</sup>*

## Complementary nature of co-regulation and self-regulation

13.7 In 1998, the **Media Section of the Council of Europe** organised an information seminar on self-regulation by the media.<sup>5</sup> The seminar accepted that self-regulation was an effective and valuable tool to achieve media quality but that, nevertheless, it was not the only way to reach this goal. Self-regulation was not to be seen as a “panacea” since it also had limitations. In this respect, it was mentioned that some problems and transgressions by media professionals were better addressed by legislation.

<sup>3</sup> See generally: Office of Regulation Review, Australia, *A Guide to Regulation* (2nd edn, 1998), at <[www.pc.gov.au/orr/reguide2/](http://www.pc.gov.au/orr/reguide2/)>; Taskforce on Industry Self-Regulation, Australia, *Industry Self-Regulation in Consumer Markets* (2000), at <[www.selfregulation.gov.au/resources/asp](http://www.selfregulation.gov.au/resources/asp)>; Better Regulation Task Force, UK, *Alternatives to State Regulation* (2000), at <[www.cabinet-office.gov.uk/regulation/Publications/Index.htm](http://www.cabinet-office.gov.uk/regulation/Publications/Index.htm)>; A Ogus, *Regulation: Legal Form and Economic Theory* (1994), ch 3; The Cabinet Office Regulatory Impact Unit, UK, *A Guide to Regulatory Impact Assessment*, at <[www.cabinet-office.gov.uk/regulation/2000/riaguide/](http://www.cabinet-office.gov.uk/regulation/2000/riaguide/)> (15.1.02); National Consumer Council, UK, *Models of self-regulation – An overview of models in business and the professions* (2000), at <[www.ncc.org.uk/pubs/self.htm](http://www.ncc.org.uk/pubs/self.htm)>.

<sup>4</sup> Department for Culture, Media & Sport and Department of Trade & Industry, *Communications White Paper: A New Future for Communications* (December 2000) at <[www.communicationswhitepaper.gov.uk/](http://www.communicationswhitepaper.gov.uk/)>, para 8.11.

<sup>5</sup> Council of Europe, *Proceedings of the Information Seminar on Self-regulation by the Media* (7-8 Oct 1998) (Strasbourg: Directorate of Human Rights, 1999), DH-MM (99) 7, at <[www.humanrights.coe.int/media/](http://www.humanrights.coe.int/media/)>. About 100 people attended the seminar, representing governments, broadcasting regulatory authorities, broadcasting and print undertakings, journalists' unions, international organisations, academia and some parliaments.

For instance, legislation was considered necessary for the protection of minors or the protection of the reputation of others. In summary, it was seen that self-regulation on its own was not sufficient to address all matters and that it should therefore function in combination with other elements, in particular the law and the market, to ensure high media standards. Other ideas that emerged from the discussion at the Council of Europe seminar are as follows:

- (a) there is a clear and necessary compatibility and complementarity between legislation and self-regulation in the media field;
- (b) self-regulation should be maintained and promoted but should also prove its value;
- (c) although self-regulation which is “enforced” or “imposed” may not be considered as best practice, it is acknowledged that it can be useful under certain circumstances;
- (d) the national context of a country is important in determining the most adequate type of measures for that particular country; and
- (e) in many new democracies, codes of conduct and self-regulating bodies are being tested, but time is necessary to consolidate such systems.

13.8        The **German Presidency of the European Union and the European Commission** jointly organised an experts’ seminar on self-regulation in the media in April 1999. The conclusions drawn at that seminar assist us in understanding the inter-relationship between the press, the public and the state, as well as choosing the right model for the regulation of unwarranted press intrusion. We therefore set out in detail the most relevant conclusions of the seminar:<sup>6</sup>

- (a) Self-regulation can contribute to achieving public interest objectives and complement legislation. Freedom of speech, freedom of information, pluralism, and protecting human dignity and other rights of third parties – particularly minors, for example – are goals which self-regulation can help to achieve while overcoming any inherent tensions.
- (b) Generally speaking, two types of self-regulation have been identified, namely voluntary self-regulation where operators in a given sector agree on rules amongst themselves, and co-regulation, which is elaborated within a specific legal framework or has a basis in law. In the latter case the public authorities generally lay down a set of objectives to be achieved, but leave it to the operators and other interested parties to develop the detailed means for achieving these objectives. Both can help to ensure that operators assume their responsibilities towards the public.

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<sup>6</sup> “Conclusions of the Experts’ Seminar on Media Self-regulation held at Saarbrücken, 19 – 21 April 1999” at <[www.eu-seminar.de/index3-7.html](http://www.eu-seminar.de/index3-7.html)>.

- (c) Media self-regulation and co-regulation make for flexible responses to new legal problems, which is particularly important in view of the rapid pace of change in the media sector. Self-regulation and co-regulation also lighten the burden of Government's executive and legislative work.
- (d) Self-regulation and co-regulation can strengthen the position of media users and people affected by what is said in the media. Criticism of media content may be sufficient to persuade those responsible to take (further) measures in the interests of third parties, or to correct or compensate for errors in individual cases.
- (e) However, self-regulation cannot replace state regulation entirely in the media sector. The state retains ultimate responsibility for protecting the public interest, though the manner in which it does so varies according to each country's legal traditions. This does not mean that the state must necessarily be involved, directly or indirectly, in the activities of self-regulation authorities, or that any particular self-regulation model must be used, but it does mean the public authorities have a duty to step in when self-regulation authorities fail to take sufficient account of compelling public interest considerations.
- (f) The long-term success and authority of self-regulation and co-regulation will depend on whether they are effective in protecting the relevant public interests. For this:
  - (i) the criteria used to evaluate media content, decision-making procedures and the penalties available must be in accordance with national legal systems and should, at the very least, be generally acceptable to society in order to be effective. They must also be clear and transparent so that the outcomes are foreseeable. It is particularly important that evaluation criteria and procedural rules for the regulatory process are known, or at least knowable, to a broad cross-section of people so that, in practice as well as in theory, anyone is able to take matters to the relevant bodies;
  - (ii) self-regulatory or co-regulatory measures must be suited to the purpose of defending the public interest. In particular, effective protection must be provided for natural and legal persons whose interests are harmed by what is said in the media. This effectiveness criterion does not affect people's right to defend their interests by recourse to the law, in accordance with the legal traditions of the country in question.
- (g) It is important for media operators, user associations, self-regulation and co-regulation bodies to, *inter alia*: (i) promote awareness amongst users of media self-regulation and of the social and legal importance of obtaining redress by making



complaints; (ii) raise public awareness of: the criteria for describing and assessing media content; decision-making procedures; and penalties that can be imposed; (iii) co-operate in an atmosphere of trust with the relevant state authorities in accordance with the different national legal traditions, in order to provide effective protection for the public interest.

- (h) It is important for Member States to: (i) promote awareness amongst media users of the social and legal significance of media self-regulation and co-regulation and raise public awareness of: the criteria for describing and assessing media content; decision-making procedures; and the penalties that can be imposed; (ii) examine and develop the legal framework for self-regulation and co-regulation in the light of current developments in the media sector; (iii) give careful consideration to the benefits of self-regulation or co-regulation when deciding whether new problems in the media sector require state intervention; and (iv) support the media industry, user associations, self-regulation and co-regulation bodies.

13.9 From **Germany's point of view**, self-regulation performs a crucial function in answering the question as to the extent to which regulatory measures by the state are necessary. The better voluntary self-regulation works, the less state regulations are required. The political discussion of possible detailed regulations by Parliament has in various cases considerably heightened the awareness of the professional groups concerned of their self-regulatory abilities. The Federal Government Commissioner for Cultural Affairs and Media says:

*"In Germany, a general principle of the state distancing itself from the media also arises out of the need to particularly justify state involvement in media freedoms and out of the prohibition of censorship which generally prohibits the state from exercising a direct influence on media contents. The view is aired in the constitutional and political discussion that this principle of the state distancing itself suggests regulatory models where the state restricts itself to imposing general rules or defining particularly important interests, whilst it is left to the self-regulation mechanisms of the professional groups concerned to ensure adherence to rules in individual cases or the concrete form taken by the protection of legal interests. The state may then limit itself to regulating the effectiveness of the self-regulation mechanism in general terms."*<sup>7</sup>

13.10 **Kaarle Nordenstreng** points out that the mass media are part and parcel of the legacy of Enlightenment and human rights, whereby they should be free: free from coercion by the power holders and free for pursuit of

<sup>7</sup> "Media Self-Regulation in the Federal Republic of Germany – A Report by the Federal Government Commissioner for Cultural Affairs and Media" (Bonn, 1999), at <[www.eu-seminar.de/index3-1en.html](http://www.eu-seminar.de/index3-1en.html)>, p 5.

truth and exercise of creativity. However, no social institution can be absolutely free, and even the freest media are always tied to some social forces. The question is not whether media are free or controlled, but what are the mechanisms of social “control” and accountability.<sup>8</sup> Noting that the media may be regulated by law, the market and the media themselves, Nordenstreng remarks that these are not mutually exclusive categories, and in most countries today they coexist. Thus, media self-regulation is always accompanied by some degree of legal regulation – not to censor but to guarantee that minimum standards of democratic order and human rights are respected. Accordingly, self-regulation is always accompanied by legal and market regulation. **Tiina Laitila** shares the same view as Nordenstreng, noting that self-regulatory mechanisms, legal regulations and the free market are interconnected; none of them controlling the practice of journalism alone in any society. In democratic states the emphasis usually lies on self- and market regulation, but most often the state calls the tune to a certain degree.<sup>9</sup>

13.11        **The National Consumer Council in the UK** has made some observations concerning the relationship between self-regulation and legal regulation in general. Although they are not made in the context of press self-regulation, they suggest that self-regulation and legal regulation are not irreconcilable and may combine to produce a legislative self-regulatory framework that is effective in resolving the problem of press intrusion. The Consumer Council observes that the best UK and overseas examples of self-regulation at work seem to be those where there is a legislative framework within which private initiatives can take place. It notes that self-regulation works best within a legislative framework; and the fear of unwelcome statutory regulation has been the driving force behind many – perhaps most – self-regulatory schemes. The Consumer Council stresses that self-regulation and statutory regulation are not black-and-white opposites. The right balance has to be found between the two. For self-regulation to work effectively, there may be a need for a concept of co-regulation which is underpinned by statutory regulation. A self-regulatory code which is recognised by statute can be especially useful where the statute provides that it is binding on members of the profession or industry, irrespective of trade association membership.<sup>10</sup>

13.12        **Conclusion** – We find the discussion of the complementary roles of market regulation, industry self-regulation and Government regulation helpful in understanding the role of our Government in dealing with press intrusion. We are not here dealing with a black-and-white issue with only two options open to us: either a voluntary self-regulating press council without any Government involvement, or a Government-appointed press body with powers to impose hefty fines on newspapers found to have breached a statutory code. Our study in Chapters 11 and 12 shows that there are many variations in between.

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<sup>8</sup> K Nordenstreng, “European Landscape of Media Self-Regulation” in Organisation for Security & Co-operation in Europe, *Freedom and Responsibility Yearbook 1998/99* (Vienna, 1999), above, p 182. Nordenstreng is Professor and Chair of the Department of Journalism and Mass Communication at the University of Tampere in Finland.

<sup>9</sup> T Laitila, “Codes of Ethics in Europe” in K Nordenstreng (ed), *Reports on Media Ethics in Europe* (University of Tampere Publications Series B 41/1995), p 27.

<sup>10</sup> National Consumer Council UK, *Models of self-regulation*, above, pp 47 – 49.

13.13 In the absence of a regulatory regime for journalists and publishers, there is a need for an effective press complaints body to provide relief to victims of unwarranted press intrusion in Hong Kong. Since voluntary self-regulation has not been effective and direct Government intervention in the print media is inappropriate, our task is to identify a co-regulatory model which can supplement market regulation and industry self-regulation with the least Government involvement. Although we believe that the Government has a role to play in making self-regulation effective, any press complaints body must be independent and not dominated or controlled by the Government. Bearing these observations in mind, we examine in the next chapter whether the provision of a legislative framework can facilitate effective press self-regulation without undermining press freedom.

## **Chapter 14**

### **Press self-regulation within a legislative framework to protect individuals from unwarranted press intrusion**

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#### **Need for protection from unwarranted press intrusion**

14.1 Unwarranted press intrusion has become a common phenomenon in recent years. All the opinion polls conducted after the publication of the Consultation Paper showed that media intrusion was serious in Hong Kong. The fact that the majority of the industry supports the creation of the HK Press Council with a special emphasis on the protection of privacy also provides evidence that press intrusion is a problem that needs to be addressed. However, only a very small proportion of victims have been able to obtain a remedy from the Council.<sup>1</sup>

14.2 Although “freedom of speech, of the press and of publication” is guaranteed by Article 27 of the Basic Law, it has to be reconciled with the freedom from “arbitrary or unlawful search of, or intrusion into, a resident’s home or other premises” and the “freedom and privacy of communication” under Articles 29 and 30 of the Law. The exercise of freedom of expression under Article 19 of the ICCPR also carries with it “special duties and responsibilities”. It may be subject to such restrictions as are provided by law and are necessary for respect of the right to privacy under Article 17 of the Covenant. Under Article 17, 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 ICCPR and the Basic Law.

#### **Tripartite relationship between the press, the Government and the public**

14.3 Dr Kwan Kai-man, Assistant Professor of the Department of Religion and Philosophy at HK Baptist University, observed that some people merely consider the relationship between the media and the Government and forget that what really exists is a triangular relationship between the media,

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<sup>1</sup> See Chapter 4, paras 4.2 – 4.12.

the Government and the public.<sup>2</sup> He explained that academics and media practitioners, whose minds are deeply imbued with liberal ideas, would readily include the public under the wing of the media. However, the media and the public are different entities. The media is not necessarily supportive of the public, and for many ordinary citizens, the media could be another form of authority bullying them. The saying “power corrupts, and absolute power corrupts absolutely” is applicable not only to the Government but also to the media. He pointed out that many people have yet to be fully aware that there may be a conflict between the media and the people. In the face of media excesses which inflict serious harm on members of the public who are incapable of defending themselves, the intervention of the Government is not necessarily unreasonable. We share Dr Kwan’s views. Ordinary citizens are placed at a special disadvantage when their rights are infringed by newspapers they do not own.

14.4 Kaarle Nordenstreng also observes that there is a trend in the West to put the emphasis on ordinary people as the main subject in communication – as consumers, citizens and “owners” of the right to freedom of information – instead of journalists and media proprietors. In a way, people are moving from the audience to the arena. For self-regulation this means that the main function shifts from protecting media professionals to ordinary citizens. This does not mean that the idea of media self-regulation is diluted. On the contrary, taking the role of the audience and citizen more seriously turns self-regulation closer to what it is supposed to be in the theories of democracy.<sup>3</sup> A news ombudsman says that there is:

*“... no reason why the press – with all its influence and power over the lives and minds of the people – should not be subject to the same kind of scrutiny as is focused on other powerful segments of the community: the Government, military, business, arts, religion, finance and all the rest.”<sup>4</sup>*

14.5 For ordinary citizens, freedom from unwarranted press intrusion may be as important as freedom of the press. Press freedom should not be abused to the detriment of the lawful rights and freedoms of citizens. While those who choose to submit themselves to public attention should be aware of the possible consequences, the privacy interests of those who are caught up in the unwanted glare of media attention should be protected by measures that do not violate press freedom and are consistent with the duties and responsibilities of the press. It is not surprising that a survey commissioned by the HKPC in 2002 indicated that 85% of respondents agreed that Hong Kong needs an independent press complaints body, and 72% considered that the most desirable way to establish such a body would be for both the press and the public to join hands in setting it up.

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<sup>2</sup> Submission from Dr Kwan Kai Man entitled “Which is More Important: Press Freedom or Media-Monitoring? – Comments on the Press Council Debate” (1999).

<sup>3</sup> K Nordenstreng, “European Landscape of Media Self-Regulation”, above, pp 182 – 184.

<sup>4</sup> A C Nauman, “News Ombudsmanship: Its History and Rationale” (1994) at <<http://www5.inf.net/ono/nauman2.html>>.

14.6 Since news-gathering activities and news reports have an impact on the private lives of members of the public, the public has a stake in seeing that any press intrusion is warranted under the ICCPR. It has been argued that the press should be allowed to regulate its conduct without outside interference. However, in the absence of a licensing system, anyone can become a journalist without acquiring any professional qualifications. The journalists' associations cannot control the membership of the profession, nor can they impose any professional standards on members of the profession. The press industry is also free to employ anyone to perform the duties of a journalist. Subject to general laws, a journalist is free to decide what to investigate, how to investigate, and how a story should be reported. We therefore consider that it is necessary and in the public interest to regulate unwarranted press intrusion while retaining the important functions of a free press.

## Public support for legislative measures

14.7 It is revealing that the preponderance of public opinion is in favour of setting up the Press Council for the Protection of Privacy proposed by the Sub-committee, or at least a statutory press council that is not appointed by the Government.<sup>5</sup>

- (a) 61% of respondents in a survey conducted by the HK Policy Research Institute agreed with the Sub-committee's proposal to set up a PCPP. Those who disagreed amounted to only 21%.
- (b) 60% of respondents in a survey commissioned by *Apple Daily* and conducted by the HK Institute of Asia-Pacific Studies agreed with the Sub-committee's proposal to set up a PCPP. Only 24% of respondents disagreed.
- (c) 53% of respondents in a survey commissioned by HKU Journalism & Media Studies Centre "strongly agree" or "quite agree" with the proposal. Those who replied "not quite agree" or "strongly disagree" amounted to 21% and 4% respectively.
- (d) 73% of respondents in a survey conducted by Society for Truth and Light supported the proposal to establish a PCPP.
- (e) 57% of respondents in a survey conducted by the Hon Bernard Chan supported the creation of the Press Council proposed by the Sub-committee. Those who objected amounted to 43%.
- (f) The most preferred option of respondents in a survey conducted by Cooperation Scheme of School and Social Work was that the industry should form a voluntary trade organisation to monitor the media, but with the statutory authority to punish or reprimand newspapers found to have breached a code of ethics.

14.8 In addition, 56% of the media professionals who responded to a survey conducted by the four journalists' associations "agreed" or "strongly agreed" that Hong Kong should have a non-governmental statutory

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<sup>5</sup> See Chapter 2.

monitoring body in Hong Kong. Those who “disagreed” or “strongly disagreed” amounted to only 24%. In an Asian Executives Poll conducted by the *Far Eastern Economic Review* in 1999, 65% of business executives polled in Hong Kong responded that press freedom was important to economic growth, but 50% also stated that the Government should have “limited control” over the media.<sup>6</sup>

14.9 The four major journalists’ associations submitted that Hong Kong should not subject the print media to a special regime of law, arguing that any departure from that tradition would result in more legislation affecting the press and the coverage of news. Although journalists are not currently licensed and the Registration of Local Newspapers Ordinance (Cap 268) is the only legislation applicable exclusively to the print media, there are many legislative provisions in existence that accord privileges to, or impose restrictions on the print and broadcast media. Examples of provisions according privileges to the media can be found in: (a) the Copyright Ordinance;<sup>7</sup> (b) the Defamation Ordinance;<sup>8</sup> (c) the Interpretation and General Clauses Ordinance;<sup>9</sup> and (d) the Personal Data (Privacy) Ordinance<sup>10</sup>, while examples of provisions restricting press freedom can be found in: (a) the Control of Obscene and Indecent Articles Ordinance; (b) the Crimes Ordinance;<sup>11</sup> (c) the Criminal Procedure Ordinance;<sup>12</sup> (d) the Judicial Proceedings (Regulation of Reports) Ordinance; and (e) the Juvenile Offenders Ordinance.<sup>13</sup>

## **Creating an independent self-regulating body by statute to achieve effective self-regulation**

14.10 To the extent that it is agreed that unwarranted press intrusion should be regulated, we must ensure that regulation (or self-regulation) is effective. A self-regulating body cannot be effective if it does not cover the entire industry or does not have the necessary sanctions or resources at its disposal. The victims should have a proportionate remedy against any defaulting newspapers or magazines. Since self-regulation by the journalistic profession and the press industry have proved to be ineffective so far, and the options which do not require public intervention are either impracticable or undesirable, some form of public institutional involvement and support is necessary to supplement pure self-regulation if we are to rectify the problems of press intrusion.

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<sup>6</sup> *Far Eastern Economic Review*, 22.4.99, p 26.

<sup>7</sup> Cap 528, s 39 (fair dealing with a work for the purpose of reporting current events).

<sup>8</sup> Cap 21, s 13 (newspaper report of court proceedings privileged); s 14 (qualified privilege of newspapers); and s 18 (order of judge required for prosecution of newspaper proprietor).

<sup>9</sup> Cap 1, Part XII (safeguards concerning the search and seizure of journalistic material).

<sup>10</sup> Cap 486, s 61 (exemptions for the news media).

<sup>11</sup> Cap 200, ss 156 & 157 (anonymity of complainants).

<sup>12</sup> Cap 221, s 9P (restrictions on reports of bail proceedings).

<sup>13</sup> Cap 226, s 20A (restrictions on reports of proceedings in juvenile courts and power of other courts to prohibit certain reports).

14.11 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. It is required if the major players refuse to join a self-regulatory scheme and cannot be induced to do so.<sup>14</sup> 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. The Government is under an obligation to ensure that the press does not abuse its freedom to the detriment of an individual's right to privacy. When the market and voluntary measures cannot provide an effective remedy, the Administration and the legislature, representing the interests of the public, should step in and define the parameters of self-regulation within which the public can be protected from unwarranted press intrusion.<sup>15</sup>

14.12 As a matter of principle, we prefer the minimal regulatory option that can resolve the problem and provide the highest net benefit to society with the least Government involvement. 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. Its ambit would, however, be narrower than the HKPC because its mandate is restricted to the protection of privacy only. Provided that there are sufficient safeguards and the sanctions are sufficient but not excessive, the creation of such an independent self-regulating body would not undermine freedom of the press.

14.13 Having a self-regulating body that has a statutory basis does not necessarily invite or lead to Government interference. Whether the statutory body is subject to Government domination or control depends on whether the legislative framework allows the Government to interfere with press freedom

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<sup>14</sup> Pär-Arne Jigenius, the Press Ombudsman in Sweden, comments: "The system of self-regulation cannot work if, let's say only 60 percent of the press supports the system, and the remaining 40 percent ignore the ethical rules. Then the government has to institute laws to make the non-observant press respect at least a minimum of ethical rules." P-A Jigenius, "The Role of a Press Council in Cases of Defamation or Invasion of Privacy by Print Media Journalists" in Council of Europe, *Proceedings of the Information Seminar on Self-regulation by the Media (7-8 Oct 1998)*, above, p 20 at 26.

<sup>15</sup> For the complementary role of the Government, see Chapter 13.



or not. A statutory body is still an independent self-regulating body if its activities are not dominated or controlled by the Government or other third parties.<sup>16</sup> The provision of a legislative framework for a self-regulating body to operate independently should not be a measure that enables the Government to interfere with press freedom. Provided that the statute contains sufficient safeguards guaranteeing the independence of the statutory body, the Government would not have any role to play in the nomination of members, the formulation of standards, the adjudication of complaints, and the day-to-day operation of the body. A statutory body can enjoy a high degree of independence and need not become a “Government tool”. Once the legislation is passed, the role of the legislature and the Administration should be confined to that of reviewing the effectiveness of the self-regulating body and ensuring that it is adequately funded to achieve its objectives. Hence, it is a question of statutory self-regulation *versus* voluntary self-regulation, rather than a question of Government regulation *versus* self-regulation.

14.14 There are indeed many statutory bodies with varying degrees of independence. Examples are the Boundary and Election Commission, the Equal Opportunities Commission, the Estate Agents Authority, the Medical Council, the Obscene Articles Tribunals, the Ombudsman, the Privacy Commissioner, the Solicitors Disciplinary Tribunals, the Barristers Disciplinary Tribunals, and the courts of law. By virtue of the Legal Practitioners Ordinance (Cap 159), the Solicitors Disciplinary Tribunals and the Barristers Disciplinary Tribunals are given statutory powers to inquire into the conduct of solicitors and barristers respectively. The Legal Practitioners Ordinance has not enabled the Government to interfere with the independence of the legal profession. Likewise, all judicial organs are established by statute, but there is little suggestion that the legislation provides an opportunity for the Government to interfere with the administration of justice. Government interference is not a necessary and concomitant consequence of the establishment of a statutory body.

14.15 The Hong Kong section of JUSTICE argued that the Barristers Disciplinary Tribunals and Solicitors Disciplinary Tribunals were established with the concurrence of the Bar Association and the Law Society and were not imposed upon the profession by the Government. However, if the measures voluntarily adopted by a profession have not been effective in protecting the public from inappropriate conduct by its members, then the wishes of the profession may have to give way to the public interest in establishing an effective self-regulating body by law.

14.16 The Broadcasting Authority Ordinance provides an example of how freedom of expression is reconciled with other rights and freedoms within the context of a statutory body. In addition to its lay chairman, there are not less than eight but not more than eleven members on the Authority, with only three of them being public officers. Although the ordinance does not prohibit the appointment of public officers to the Authority’s Complaints Committee and Codes of Practice Committee, these two committees consist entirely of

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<sup>16</sup> J Ukrow, *Self-Regulation in the Media Sector and European Community Law* (Saarbrücken: Institute of European Media Law, 1999), <[www.eu-seminar.de/index3-3en.html](http://www.eu-seminar.de/index3-3en.html)>, pp 15-19.

lay members in practice. There was a controversy when the Authority ruled that complaints about the RTHK programme *Headliner* broadcast on 13 October 2001 were justified on the grounds that the programme was partial, and balance had not been sought in presenting viewpoints on matters of public importance. However, the Government had not interfered with the ruling and the complaints procedure is, by and large, independent.

14.17 We must, however, make it clear that we are not proposing that the regulatory approach in the Broadcasting Authority Ordinance should be adopted to regulate intrusion by the print media. The regulatory framework provided by the ordinance, though it can be justified in the context of the broadcast media, cannot be directly transplanted to the press industry. The appointment of lay members by the Chief Executive, the presence of public officers on the Authority, and the provision of administrative support by a Government department do not sit well with press freedom in the context of the print media. Nonetheless, the precedent of the Broadcasting Authority's complaints procedure suggests that press freedom and statutory regulation may be reconcilable. Provided that adequate safeguards are built into the legislative framework, the regulatory goals can be achieved without any material risk of abuse or interference by any body.

### **Suggested risk of the legislature extending the reach of the legislation to matters other than privacy**

14.18 During the consultation period, a number of those who responded favourably to the PCPP proposal argued that its remit should be extended to include over-graphic depiction of sex and violence. On the other hand, many media opponents of the proposal fear that the establishment of a watchdog on press intrusion would serve as a Trojan horse, almost inevitably leading to an expansion of its role into that of a censorship body.<sup>17</sup> The Hon Margaret Ng, for example, argued that once the mechanism was set up, there would be nothing to prevent its expansion into other areas of taste and morals, or standards of reporting.

14.19 These commentators' concerns were heightened by the fact that the legislature was not directly elected through universal suffrage. The HK Journalists Association, for example, expressed concern that the legislature did not represent the interests of the general public and feared that this group of "highly unaccountable legislators" would pass Government proposals irrespective of their merits. They considered that the Legislative Council could not be trusted with a law of this sensitivity until every legislator was directly elected through universal suffrage. The Frontier also pointed out that the Legislative Council was not yet returned by universal suffrage and Hong Kong was not yet a fully democratic society. It expressed the view that with two-thirds of the legislators returned by "an undemocratic election", public opinion,

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<sup>17</sup> The draft HK Press Council Bill, for instance, proposes that the HKPC be empowered to deal with complaints that allege "the pandering to prurience, indecency, and sensationalism in the publication of a news article or article involving violence, sex-related crime or suicide".

as represented in the legislature, could only be a minority in the Legislative Council.

14.20 We do not believe that these comments provide a valid basis for rejecting legislative measures to facilitate effective self-regulation. The risk that the legislature may choose to amend the legislation to widen its ambit at some future date is inherent in the law-making process. It would be perverse to rule out legislation protecting the privacy rights of citizens under the ICCPR on the speculative possibility that that legislation might be perverted at some future date.

14.21 More importantly, the Legislative Council must function within the parameters of the Basic Law and the ICCPR. Apart from guaranteeing freedom of speech and of the press, Article 39 of the Basic Law provides that any restrictions on the rights and freedoms enjoyed by Hong Kong residents must not contravene the ICCPR. Irrespective of whether it is elected by universal suffrage, the Legislative Council may not pass any legislation that contravenes the Basic Law or the ICCPR. Any legislative proposals restricting the right to freedom of speech and of the press that appear to be incompatible with the Basic Law or the Covenant would be subject to the most careful scrutiny of the legislature, the judiciary, the media and the electorate. And any provisions found to be in contravention of the Basic Law would ultimately be held by the Court to be of no legal effect.

14.22 By virtue of Article 2(3) of the ICCPR, the HKSAR Government is under an obligation to ensure that:

- (a) any person whose rights or freedoms recognised in the Covenant are violated must have an effective remedy;
- (b) any person claiming such a remedy must have his right thereto determined by “competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy”; and
- (c) the competent authorities must enforce such remedies when granted.

14.23 The so-called “democratic deficit” arguments should not be used as an excuse for not providing legal protection to Hong Kong people against unlawful or arbitrary interference with their privacy by the press. 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 Article 39 of the Basic Law as well as Article 17 of the ICCPR, 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. Indeed, pursuant to a reservation made upon ratification of the Covenant in 1976, Article 25(b) need not be applied to Hong Kong “in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong.”<sup>18</sup> It could not have been in contemplation that the right to privacy in Hong Kong under Article 17 would also therefore be elided.

14.24 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.

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Article 21 (right to participate in public life) of the HK Bill of Rights also does not require the establishment of an elected Executive or Legislative Council in Hong Kong: HK Bill of Rights Ordinance (Cap 383), s 13. Note, however, that para 2 of Article 68 of the Basic Law of the HKSAR provides that “The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.”

## **A statutory but independent and self-regulating body**

14.25 It is important to recognise that the statutory complaints body can be an independent and self-regulating body. As long as there are provisions in the legislation ensuring that the constitution and operation of the self-regulating body are independent of the Government, the creation of such a body need not provide an opportunity for the Government to interfere with press freedom. Any subsequent amendments proposed would be subject to the scrutiny of the legislature and the Court; and any attempts made by the self-regulating body to act in excess of its statutory authority would be subject to judicial review. An independent self-regulating body would not lead to press censorship or a Government-controlled press merely because it has a statutory basis. Even if the independent body is funded by public revenue, this need not in any way undermine its integrity if its autonomy is guaranteed by the statute.

14.26 However, 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.

14.27 Establishing a statutory body to deal with complaints about press intrusion may influence the way the press conducts their business. However, legislative measures are necessary only because there is inadequate protection against unwarranted press intrusion. To the extent that legal protection from unwarranted press intrusion is directed solely against the abuses of press freedom in relation to privacy, the establishment of such an independent statutory body is a legitimate aim under the ICCPR and the Basic Law. Press freedom would not be undermined if the measures are proportionate, the sanctions are not excessive, and there are safeguards against interference and abuse. We explain how these requirements can be met in Chapter 15.

14.28 Bearing in mind our comments in Chapter 8 on the objects of the statutory HK Press Council under the proposed HK Press Council Bill, we are not in favour of the proposed statutory body having the defence of press freedom as one of its objects. However, although the defence of press freedom *per se* should not be an avowed object, the statutory body is expected to give full consideration to the values and demands of press freedom in determining whether an alleged infringement is warranted or not.

14.29 We make no recommendation as to what the precise name of the proposed statutory body should be. We consider, however, that the body should be called a “commission” rather than a “council” to avoid any confusion with the existing HK Press Council, which has a wider remit than the body we propose. The name should also make it clear that the new body

deals with press intrusion, involving both privacy and the press. Names which appear to us to satisfy these criteria include:

- (a) the Press Commission for the Protection of Privacy;
- (b) the Privacy Commission for the Press; or
- (c) the Press (Privacy) Commission.<sup>19</sup>

For the sake of convenience, the proposed statutory body is referred to hereafter in this report as “the Commission”.

#### **Recommendation 5**

**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”).**

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Whether it may be called the Press Privacy Complaints Commission depends on whether the adjudication of complaints is its primary function.

## Chapter 15

### **A statutory but self-regulating body to protect the public from unwarranted press intrusion**

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#### **Guiding principles**

15.1 Our recommendations on the composition, functions and powers of the proposed statutory commission (“the Commission”) are based on the following principles:

- (a) Although the self-regulatory scheme must be effective in protecting the privacy of individuals from undue interference by the press, it must not restrain or deter the press from seeking or publishing information about matters of public concern.
- (b) The scheme must be able to command the respect and confidence of both the press and the public.
- (c) There must be extensive consultation and involvement with all stakeholders in the design of the scheme.
- (d) The scheme must operate independently of the Government, the journalistic profession, the press industry and other outside influences, though journalists, publishers and members of the public should be represented on the self-regulating body. There must be safeguards protecting the proposed Commission from any undue influence from the Executive, the civil service and public officers.
- (e) The scheme should govern all printed newspapers and magazines published in the territory.
- (f) The appointment of members to the self-regulating body must be transparent and the Government must not be involved in the nomination process.
- (g) The press members should represent the press industry and the journalistic profession, while the lay members should represent the public and victims of press intrusion.
- (h) The mechanism for the nomination of press members should be flexible and adaptable to changes.

- (i) The scheme must be based on clear and intelligible procedures and a code of conduct.
- (j) The complaints procedures should be accessible, quick, simple and well-publicised.
- (k) The procedures and code must not contravene the requirements of the International Covenant on Civil and Political Rights.
- (l) Any adjudication process must observe the rules of natural justice.
- (m) The adjudicating body must be independent to ensure the impartiality of its decisions.
- (n) There must be adequate and meaningful sanctions for non-compliance.
- (o) There must be safeguards against the Commission abusing its authority. In particular, any newspaper or magazine dissatisfied with the decision of the adjudicating body should have a right of appeal.
- (p) Compliance with the code must be monitored through statistics and research. Performance indicators should be developed and implemented to measure the scheme's effectiveness.
- (q) There must be a degree of public accountability, such as an annual report detailing the numbers, handling and outcomes of complaints.
- (r) The scheme must have adequate resources and be funded in such a way that the objectives are not compromised.

## **Scope of coverage**

15.2 As illustrated by the experience of the HK Press Council and voluntary press councils in other parts of the world, the extent to which industry participants are willing to join a press council will affect its ability to provide effective self-regulation. It is therefore necessary that the whole industry, that is, 100 per cent of industry participants, is covered by the scheme run by the proposed Commission. This would not only afford protection to all victims of press intrusion, but would also enable local newspapers to compete on a level-playing field where one publisher would not be able to gain a competitive advantage over another by introducing lower ethical thresholds. By the same token, all magazines should be brought within the purview of the self-regulating body. It is impossible to provide adequate protection if privacy intrusion by magazines is left unregulated.



15.3 Since all newspapers and magazines published in Hong Kong for sale or free distribution (excluding learned journals and business reports) are required to be registered under the Registration of Local Newspapers Ordinance (Cap 268), we have decided that all newspapers and magazines registered under the Ordinance should fall within the purview of the Commission.

#### **Recommendation 6**

**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.**

### **Internet newspapers**

15.4 We received comments that privacy intrusion by Internet newspapers should also be subject to regulation. There are four major types of Internet newspapers:

- (a) An Internet version of a printed newspaper. The Internet version is the same as the printed version. The newspaper registry does not require these Internet newspapers to be registered.
- (b) An Internet newspaper published by a newspaper company that also publishes a printed newspaper. However, the Internet version is different from the printed version.
- (c) An Internet newspaper published by a company that does not publish a printed newspaper.
- (d) News bulletins or journals on the Internet, which are not published on a regular basis.

15.5 The Registration of Local Newspapers Ordinance provides for the registration of newspapers that are “printed or produced in Hong Kong”. Since the Ordinance does not draw a distinction between printed newspapers and electronic newspapers, and there are no provisions specifically exempting electronic newspapers from registration, the practice of the newspaper registry has been to accept registration of an Internet newspaper if it is not an exact duplicate of a printed newspaper and the Internet newspaper is willing to comply with the legal requirements. As at September 2002, there were 11 Internet newspapers registered under the Ordinance.

15.6 In view of the fact that the newspaper registry already accepts registration of Internet newspapers, there are no strong reasons why these newspapers should be excluded from the self-regulatory scheme. Internet newspapers also have privacy risks. The readership of an Internet newspaper may be more than that of a local newspaper if the hits offshore are taken into account. However, we do not recommend that non-registered news publications on the Internet should be subject to the jurisdiction of the proposed Commission for the following reasons:

- (a) The major public concern is privacy intrusion by printed newspapers on sale on the newsstands. Complaints about privacy intrusion by Internet news publications have been rare.
- (b) News items might be published on the Internet within or without Hong Kong. The publisher could avoid regulation by moving off-shore or arranging for the news items published by another company off-shore.
- (c) It is difficult to define an Internet newspaper for the purposes of regulation.
- (d) The sheer volume of publications on the Internet which have a news element in them render effective regulation difficult if not impossible.
- (e) A news item can be updated or revised at short intervals and may be removed at any time.
- (f) Generally speaking, a privacy-invasive article in a popular newspaper has a more serious impact on the victim than would be the case if the same article is published on the Internet unless the victim has a region-wide reputation.
- (g) Unlike the publication of a printed newspaper which requires substantial investment by a company, any private individual can be a publisher on the Internet at a very low cost without the need to set up a commercial entity.

15.7 Nevertheless, it would be open to the Commission to extend, on a voluntary basis with the agreement of the publisher concerned, any of the Commission's code of conduct to: (a) the Internet version of a printed newspaper whether the Internet publication is registered or not; and (b) Internet publications that originate from the publisher of a printed newspaper.<sup>1</sup> Publishers of Internet newspapers should be encouraged to participate in the self-regulatory scheme.

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<sup>1</sup> See the experience of the Australian PC and the UK PCC, above. The Turkish PC, the New Zealand PC and the Council for the Mass Media in Finland also deal with publications on the Internet, while the German PC is also responsible for the editorial content of the online publications of the publishing houses. The media lawyers at the International Bar Association conference in October 2002 proposed that in any claim arising from the content of an Internet site posting, it shall be a complete defence to liability if within 24 hours of receiving a complaint as to the content, the Internet content provider posts a notice that a complaint has been made and provides a link to the text of the complaint on its site.

## Membership

15.8 **Press Members** – One of our guiding principles is that journalists, publishers and members of the public should be represented on the proposed Commission. Members of the press should be represented because they could supply the necessary expertise in journalism, which may be lacking in lay members. Their presence would ensure that decisions reached by the Commission are sound and command the respect of the press. Their presence will also help assure the industry that press freedom will be fully respected in the formulation of the code and the adjudication of complaints.

15.9 The major players in the press industry are frontline journalists, editors, newspaper publishers and magazine publishers. A number of seats should be reserved for journalists because newspapers are likely to nominate senior editors rather than frontline journalists to the Commission. It is also essential to engage all journalists' associations having an interest in media ethics in the self-regulation process. We have therefore decided that press members should consist of members representing the journalists' associations, newspaper publishers and magazine publishers.

15.10 We further consider that journalism academics should be represented on the Commission, as it is they who teach students to become journalists and provide professional and ethics training to working journalists. Any journalism academic appointed to the Commission should be counted as a press member for the following reasons:

- (a) the particular skills and expertise which journalism academics would bring to the Commission are closely related to those of working journalists;
- (b) the interests of journalism academics and working journalists broadly coincide, and a journalism academic is likely to avoid doing anything which would upset the industry or adversely affect the career prospects of his students.

In addition, the distinction between academics and working journalists is further blurred in some cases by the fact that journalism academics may also undertake part-time work for one or more newspapers.

15.11 **Public Members** – Press members may have a commonality of interests with the newspapers alleged to have acted contrary to professional ethics. In order to convince the public that the Commission is not an institution which exclusively serves the interests of journalists and publishers, it is essential that members representing the public and victims of press intrusion are appointed to the Commission as well.<sup>2</sup> Without lay membership, there is the double danger of either the press sitting as the sole judge in its

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<sup>2</sup> More than half of the respondents in the survey commissioned by the HKPC expressed the view that the following persons should be represented on an independent press complaints body in addition to newsmen: academics (83%); members of the public (81%); professionals (75%); legislators (67%); government officials (57%); and judges (54%).

own court, or of a newspaper being judged entirely by its rivals whose findings might be motivated by hopes of winning a commercial advantage.<sup>3</sup> Including both press and public members would therefore increase the credibility, objectivity and legitimacy of the Commission, and would ensure that the Commission has moral as well as statutory authority that can command the respect and confidence of both the public and the press.

15.12 Since it would be helpful to have a person with judicial experience sitting on the Commission, we suggest that at least one of the Public Members should be a retired judge. Further, to ensure that the Commission would not be dominated by press interests, the number of press members should not exceed the number of public members.

#### **Recommendation 7**

**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”).<sup>4</sup>**

<sup>3</sup>

I Beales, *Imperfect Freedom*, above, p 9.

<sup>4</sup>

At its widest, persons connected with the press could include: (a) owners of newspaper and magazine publishing companies; (b) persons engaged in the public relations profession; (c) academics in journalism and communication; (d) the owners or employees of a printing company; and (e) other persons doing business with a newspaper or magazine publishing company. A narrower formulation would be to exclude only those who are professionally or financially associated with the press industry or journalism. This would exclude only those with a professional or financial connection with the media that would call in question their impartiality or objectivity as members of the Commission.

## **Recommendation 8**

**We recommend that the legislation should provide that the number of Press Members must not exceed the number of Public Members.**

15.13 Since the existing HK Press Council is an independent body not forming part of the press industry, individuals who have served on the Council as public members and have not engaged in the journalistic profession could be nominated to the proposed Commission as public members.

## **Nomination of Commission members**

15.14 Although the Legislative Council and the overwhelming majority of media professionals opposed the establishment of a “government-appointed” press council, a survey commissioned by *Apple Daily* and conducted by the HK Institute of Asia-Pacific Studies showed that the percentage of respondents agreeing that the PCPP proposed by the Sub-committee should be formed by an appointments commission (indirectly) appointed by the Chief Executive was the same as that of those who disagreed (ie 39% and 38% respectively). Over 60% of respondents in a survey conducted by the Society for Truth and Light also considered that some members of the statutory body could be appointed by the Government, though 70% of these respondents considered that no more than half of the members should be so appointed. It is interesting to note that 57% of respondents in a survey commissioned by the HK Press Council in 2002 considered that Government officials should also be represented on an independent press complaints body.

15.15 The Consultation Paper stressed the importance of keeping the Government at arm’s length in the appointment process. Instead of recommending that the members should be appointed by the Chief Executive direct, the Sub-committee recommended that the Public Members should be appointed by a three-member appointments commission, which would in turn be appointed by an independent person chosen by the Chief Executive in consultation with the press industry. We believe that this recommendation, which was modelled on that suggested in the UK *Calcutt Review*, would be workable and would be sufficient to keep the Government at arms’ length. However, since the appointment process would be initiated by a person appointed by the Chief Executive, the proposal has been perceived by some as giving the Chief Executive an opportunity to influence the nominations.<sup>5</sup> We have therefore looked for models in which the Chief Executive is not involved in the nomination process. Following such a study, we find the

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<sup>5</sup> See the responses summarised in Chapter 1.

methods of appointment to the HK Arts Development Council,<sup>6</sup> the Medical Council<sup>7</sup> and the Dogs and Cats Classification Board<sup>8</sup> instructive.

15.16 As far as the Press Members are concerned, we consider that they should be nominated by representatives of the journalistic profession, the press industry and the journalism teaching profession. In relation to the nomination of Public Members, since no single person or group can represent the community at large, one option would be to form a committee which is not appointed directly or indirectly by the Chief Executive to make the appointments. This option is simple and convenient but it would be difficult to find the right person to form the appointments committee in the first place. Even if we can find such a person to initiate the process, it would be difficult for him to decide who should be appointed as members of the appointments committee. To illustrate the difficulties involved, we set out below a few options as to how the Public Members could be nominated. The Public Members could, for example, be nominated by:

- (a) a committee appointed by the Legislative Council, or the directly elected members of the Legislative Council;
- (b) a committee appointed by the chairmen of the District Councils;
- (c) a committee consisting of the representatives of the publishers' and journalists' associations; or
- (d) the Chief Justice or one or more judges appointed by the Chief Justice.

15.17 In determining the best option for the nomination of Public Members, we adhere to the principle that the nomination process must be independent of both the press and the establishment. None of the options above are consistent with this principle. To involve legislators and politicians directly in the nomination process would run the risk of politicising the

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<sup>6</sup> Apart from the Secretary for Home Affairs, the Director of Education and the Director of Leisure and Cultural Services, the HK Arts Development Council consists of a Chairman, a Vice-Chairman and not more than 22 other members who may include up to 10 persons nominated by organisations or groups of organisations specified by the Chief Executive in the Gazette which are representative of the following interests: literary arts, music, dance, drama, visual arts, film arts, arts administration, arts education, arts criticism and Chinese opera. Each such organisation or group of organisations may nominate not more than one person for each of the interests represented by it, and each such person is, in the opinion of the Chief Executive, experienced in the interest for which he has been nominated. Hong Kong Arts Development Council Ordinance (Cap 472), s 3.

<sup>7</sup> The Medical Council consists of 24 doctors and four lay members. The 24 doctors are returned in the following manner: (a) two nominated by the Director of Health; (b) two nominated by the University of HK; (c) two nominated by the Chinese University of HK; (d) two nominated by the Hospital Authority; (e) two nominated by the Academy of Medicine; (f) seven members of the HK Medical Association elected by the Council members of the Association; and (g) seven doctors elected by all doctors registered in Parts I and III of the register of medical practitioners. Medical Registration Ordinance (Cap 161), s 3(2).

<sup>8</sup> The 11 members of the Board are returned in the following manner: (a) not more than two are nominated by at least one tertiary educational institution in HK; (b) not more than two nominated by at least one animal welfare association in HK; (c) not more than two nominated by at least one professional organisation of veterinary surgeons in HK; (d) not more than two who in the opinion of the Director of Agriculture, Fisheries and Conservation represent the interests of persons carrying on the business of dog breeding in HK; (e) one nominated by the Commissioner of Police; and (f) not more than two recommended by the Director of Agriculture, Fisheries and Conservation. See Dogs and Cats Ordinance (Cap 167), s 13.

process. Similarly, if elements of the press are allowed input, the proposed Commission would be perceived as controlled by the press. Further, although it would be helpful to ask the judiciary to nominate a retired judge to the Commission, it would be inappropriate to ask the judiciary to step into the political arena by appointing all the Public Members. In view of these difficulties, we suggest that the Public Members (other than the retired judge or judges) should be nominated by professional bodies and NGOs which have a professional, academic or real interest in press standards or have some experience in dispute resolution. By NGOs which have “a real interest” in press standards, we aim to include NGOs which would generally be regarded as representing the interests of real or potential victims of press intrusion.

#### **Recommendation 9**

**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.**

## **Nomination of press members**

### ***Considerations affecting the design of the nomination procedure***

15.18 The following are some of the considerations that we have in mind when considering how the Press Members should be nominated:

- (a) Press Members must represent the local press, ie publishers, editors and journalists.
- (b) The proposed Commission must not be dominated or controlled by a single sector of the press. However, publications that have a

high readership should be guaranteed a seat to reflect their impact in the market. The Commission would be ineffective if the widely read newspapers are not represented on it.

- (c) The Commission must not be dominated or controlled by publications that are not in the mainstream. However, a mechanism should be put in place to ensure that newspapers with a low readership should also be represented on the Commission. If newspapers with a low readership would also be subject to regulation, it is only fair that they should not be ruled out from the nomination process.
- (d) The appropriate measurement for determining how the seats for newspaper and magazine members should be divided among the publications should be their readership in Hong Kong, rather than their circulation. The reasons are:
  - the degree of harm caused to the victim depends on the readership of the publication concerned;
  - many publications do not disclose their circulation figures. There is no legal requirement for a newspaper to disclose its circulation in its annual reports;
  - the circulation figures of many publications are not audited by the HK Audit Bureau of Circulations or otherwise verified by an independent third party;
  - circulation figures are not the appropriate criteria because they may include undistributed or unsold copies;
  - a publication may print more copies than the market requires to attract more advertising revenue;
  - statistics on newspaper readership could be readily available by conducting a public survey without the need to compel all newspapers to retain an independent third party for auditing purposes and then to disclose their audited circulation figures.
- (e) It is necessary to conduct a readership survey if we are to use readership as the basis for determining eligibility for newspaper or magazine membership. The readership survey should focus on printed newspapers and magazines only and exclude their Internet counterparts because the readership of Internet publications is not comparable with that of printed publications in terms of impact per reader. Most people spend much less time reading Internet news, often focusing on headlines and summaries instead of articles, though some may visit the sites several times a day.
- (f) The survey currently conducted by ACNielsen for the media and advertising industries does not include horse-racing newspapers and all newspapers distributed for free, but these newspapers should also be covered by the self-regulatory regime because they also have potential for privacy intrusion. At present, only publications that cater to the needs of ACNielsen's subscribers



and are agreed by the Media and Research Committee of the Association of Accredited Advertising Agents of HK are included in the survey. Other publications are monitored only upon request. In addition, the findings will not be published if the readership does not exceed 1% of the population.

- (g) The number of members on the Commission should not be so many as to render meaningful discussion impossible. In this connection, we note that both the HKPC Executive Committee and the UK Press Complaints Commission have 17 members.
- (h) Although all newspapers would have a right to participate in the nomination process, one or more newspapers might refuse to exercise that right and distance themselves from the process. These newspapers would not be compelled to participate because the Commission would have jurisdiction over all newspapers even though some are unwilling to join. However, staying outside the process would mean that these newspapers could not exercise any influence over the establishment and operation of the Commission. Nonetheless, it is necessary to have a fall-back provision enabling a vacancy to be filled in the event that a newspaper refuses to take up a seat reserved for it; a newspaper, magazine or journalists' association fails to send a representative to a nomination committee; or a nomination committee fails to make a nomination to the Commission.
- (i) The HKNEA, HKJA, HKFJ and HKPPA should have a right to participate in the process. However, the legislation should take into account that the number of journalists' associations interested in upholding and promoting the ethical standards of the press may vary in the future.

### ***Newspaper and magazine readership***

15.19 Before considering the various options by which newspaper and magazine members may be nominated, we set out below the findings of a survey on the average issue readership of daily newspapers and weekly magazines in 2001 conducted by ACNielsen:<sup>9</sup>

#### **Average Issue Readership – Daily Newspapers<sup>10</sup>**

<sup>9</sup> 2001 ACNielsen HK Media Index Year-End Report (survey period: Jan – Dec 2001; base: all population aged 15 or above). The ACNielsen HK Media Index selects its list of newspapers and magazines upon the following principles: (a) all publications should have market presence; (b) all titles should cater to the needs of ACNielsen's subscribers; and (c) all publications are agreed by the 4A's Media and Research Committee: above, at 4. Publications with an average issue readership less than 1% of the total population are not reported. An "Average Issue Readership" of a publication has read, flipped through or looked at any issue of the publication in the last issue period.

<sup>10</sup> Note that the average number of newspapers read by a local resident each day is said to be 1.2: 戴胡子, "港人閱報減少", *Ming Pao Daily News*, 4.4.02.

<i>Oriental Daily News</i>	1,930,000	(34%)
<i>Apple Daily</i>	1,453,000	(26%)
<i>The Sun</i>	544,000	(10%)
<i>South China Morning Post</i>	314,000	(6%)
<i>Ming Pao Daily News</i>	268,000	(5%)
<i>Sing Pao Daily News</i>	199,000	(4%)
<i>Sing Tao Daily</i>	125,000	(2%)
<i>HK Daily News</i>	109,000	(2%)
<i>HK Economic Times</i>	97,000	(2%)

#### Average Issue Readership – Weekly Magazines

<i>Next Magazine</i>	478,000	(9%)
<i>Sudden Weekly</i>	347,000	(6%)
<i>Easy Finder</i>	324,000	(6%)
<i>Eastweek</i>	277,000	(5%)
<i>East Touch</i>	175,000	(3%)
<i>Express Weekly</i>	171,000	(3%)
<i>TVB Weekly</i>	157,000	(3%)
<i>Monday / New Monday</i>	154,000	(3%)
<i>Eat &amp; Travel Weekly</i>	115,000	(2%)
<i>Weekend Weekly</i>	95,000	(2%)
<i>Ming Pao Weekly</i>	91,000	(2%)
<i>YES</i>	85,000	(2%)
<i>PC Market</i>	63,000	(1%)

The situation in 2002/03 was similar in respect of the newspaper market, with *Oriental Daily News*, *Apple Daily* and *The Sun* having 40%, 27% and 10% of the readership market share respectively, or 77% in total.<sup>11</sup>

15.20 The ACNielsen surveys do not cover all local newspapers and magazines. As at 30 September 2002, there were 50 registered newspapers publishing at least five times a week (of which 11 were published on the Internet) and 738 registered magazines publishing less than five times a week.

	Chinese	English	Japanese	Bilingual	Trilingual	Others	Total
Newspaper	25	13	5	6	0	1	50
Magazine	506	109	5	106	9	3	738

#### ***Options for the nomination of newspaper and magazine members***

15.21 We have considered the following means by which newspaper and magazine members may be nominated, but each of them has its difficulties:

<sup>11</sup> "Next Media emerges as leader in bitter HK newspaper wars", *South China Morning Post*, 13.6.03, citing ACNielsen, Bloomberg, as the source.

- (a) **Nomination by the HKNEA, HKJA, HKFJ and HKPPA** – This option is not favoured, because journalists’ associations do not represent the interests of newspaper and magazine publishers.
- (b) **Nomination by the Newspaper Society** - This option is not advisable because *Oriental Daily News*, *Apple Daily*, *The Sun*, *Sing Pao Daily News*, the *HK Economic Journal*, *Metro* and horse-racing newspapers are not members of the Newspaper Society. The Society also does not represent magazines.
- (c) **Nomination by all registered newspapers and magazines** - This option is unlikely to be acceptable because there are around 50 newspapers and over 700 periodicals in Hong Kong, some of which are not active or do not have a significant circulation or readership. It would also be unfair to the mass circulation newspapers if all local newspapers and periodicals were given an equal right to participate in the nomination process. Furthermore, since the registration fee is minimal, people might be tempted to set up “sham newspapers” with a view to influencing the outcome of the nomination.
- (d) **Nomination by all registered newspapers** – The advantage is that all registered newspapers would have a right to participate in the process regardless of their circulation. However, out of the 50 newspapers that published at least five times a week in September 2002: (i) eleven were published on the Internet;<sup>12</sup> (ii) four were Japanese dailies; (iii) three were news agency bulletins; (iv) one Chinese-language newspaper was not well known to the public;<sup>13</sup> (v) five were horse-racing newspapers; (vi) eight English-language newspapers were not widely read in Hong Kong;<sup>14</sup> (vii) one of the bilingual newspapers was the *Pilipino Star Ngayon*; and (viii) one was published in a language other than Chinese, English and Japanese. If these 34 newspapers are excluded, there will only be 16 newspapers left, all of which are generally regarded as mainstream newspapers in Hong Kong. In other words, if all newspapers have a right to make nominations, then the mainstream newspapers would be in the minority and would probably be under-represented in the Commission. Another consideration is that it is easy to publish an Internet newspaper and have it registered. The Commission may be dominated by Internet newspapers if no distinction is drawn between Internet newspapers and printed newspapers.

<sup>12</sup> Finet Newswires; Culturecom News; Cyber Daily 報; etnet.com.hk; hk6.com; hkstock.com; Infocast Financial Newswire; irasia.com; Quamnet.com; scmp.com & singtao.com.

<sup>13</sup> *Everyday News* (天天綜合報).

<sup>14</sup> The eight newspapers were: *The Asian Wall Street Journal*; *The Braille Post*; *The Financial Times*; *HK Shipping News International*; *International Herald Tribune*; *Target Cause Book*; *Target Intelligence Report*; and *USA Today International*.

- (e) **Allocate the seats for newspaper members in proportion to the market shares of the newspapers** - Under this option, a newspaper that has, say, 30% of the newspaper market would be entitled to nominate three members if there are ten seats in total. Adopting this option would result in the two major press groups dominating the seats reserved for Press Members. Newspapers with low circulation, particularly those with a circulation under 10%, would be under-represented on the Commission.
- (f) **Any newspaper with a circulation of more than a specified number of copies, or whose circulated copies exceed a prescribed percentage of the total circulation of all local newspapers, may nominate one member** - The disadvantage of this option is that it is difficult to prescribe the number of copies or the percentage of total circulation over which a newspaper is entitled to nominate one member. Setting it too high would result in many newspapers being deprived of the right to nominate a member, while setting it too low would result in too many members. Another disadvantage is that the number of newspaper members would fluctuate from year to year.
- (g) **Each of the, say, ten most widely circulated newspapers may nominate one member** - The advantage of this option is that the number of newspaper members is fixed and the entitlement to a seat is linked to circulation. The popular newspapers would also be guaranteed a seat and the Commission would not be dominated by small newspapers. However, it suffers from the drawback that many low circulation newspapers would be excluded from the nomination process.
- (h) **All the newspaper members may be nominated by a committee comprising the proprietors (or chief editors) of, say, the 20 most widely circulated newspapers in Hong Kong** - The advantage of this option is that all the newspapers on sale on the newsstands (including all newspaper members of the HKPC) would be covered. However, mass circulation newspapers such as *Oriental Daily News* and *Apple Daily* would become a minority in the committee. There is therefore a risk of large newspapers being under-represented or not represented on the Commission, resulting in the Commission dominated by medium and small newspapers.
- (i) **Categorise all newspapers into small, medium and large newspapers according to their circulation and then reserve a specified number of seats for each category** - This option has the advantage of ensuring that small, medium and large newspapers are represented on the Commission, whether in equal numbers or not. However, it is difficult to obtain circulation figures that are reliable. There is no legal requirement for local newspapers to submit their circulation figures for auditing by an

independent third party. As at April 2002, only seven local newspapers and 25 paid magazines are members of the HK Audit Bureau of Circulations.<sup>15</sup> In our view, readership is more relevant than circulation to the popularity of a newspaper and, hence, the actual or possible impact of an intrusion on the victim.

We now examine the nomination of newspaper members, magazine members and journalist members separately in the following paragraphs.

## **Nomination of newspaper members**

15.22 Having rejected these various options, we set out below a few options that we believe are worthy of consideration, assuming that there will be six or seven newspaper members in total. Since the local press is volatile, we proceed on the basis that the Commission will be established by a two-stage process, with the first stage reflecting the current position and the second stage adaptable to changes in the future. As far as newspaper members are concerned, since the current newspaper survey does not cover all registered newspapers, the nomination of newspaper members for the first Commission is bound to be arbitrary to a certain degree. However, the nomination of newspaper members for the second Commission would not face the same problems because the first Commission could commission a comprehensive survey to find out the readership of all newspapers. Any defects in the nomination of newspaper members for the first Commission would disappear in the second term. We first set out the options for the first Commission followed by those for the second and subsequent Commissions.

### ***The first Commission***

#### **Option A1**

- (a) Two members nominated by *Oriental Daily News* and *Apple Daily* respectively;
- (b) three or four members nominated by 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*;
- (c) one member nominated by newspapers other than the newspapers mentioned in (a) and (b) above.

#### **Option A2**

- (a) Two members respectively nominated by the two most widely read newspapers identified in the latest ACNielsen HK Media Index Year-End Report ("the latest ACNielsen Report");

<sup>15</sup>

The HKABC provides an independent system of validation of circulation figures in Hong Kong. Its website is at <[www.hkabc.com.hk](http://www.hkabc.com.hk)>. The eight newspaper members as at 17.12.2003 are: *Apple Daily*, *HK Economic Times*, *Ming Pao Daily News*, *Sing Pao Daily News*, *SCMP*, *South China Sunday Morning Post*, *The Asian Wall Street Journal* and *USA Today International-Asia*.

- (b) two or three members nominated by newspapers having a readership of 1% or more in the latest ACNielsen Report, excluding the two newspapers in (a) above;<sup>16</sup>
- (c) two newspaper members nominated by newspapers other than those in (a) and (b) above.

### **Option A3**

- (a) Two members nominated by *Oriental Daily News* and *Apple Daily* respectively;
- (b) four or five members nominated by the 14 newspapers listed in Option A1 above.

## ***The second or subsequent Commission***

### **Option B1**

- (a) Two members respectively nominated by the two most widely read printed newspapers in Hong Kong as identified in the latest 12-month readership survey commissioned by the Commission (“the readership survey”);
- (b) three or four members nominated by the 14 printed newspapers ranking third to sixteenth in the readership survey, or by the printed newspapers holding such rankings in the readership survey as are agreed with the press industry;
- (c) one member nominated by newspapers other than those in (a) and (b) above.

### **Option B2**

- (a) Two members respectively nominated by the two most widely read printed newspapers in Hong Kong as identified in the readership survey;
- (b) two or three members nominated by the eight printed newspapers ranking third to tenth in the readership survey, or by the printed newspapers holding such rankings in the readership survey as are agreed with the press industry;
- (c) two members nominated by newspapers other than those in (a) and (b) above.

### **Option B3**

- (a) Two members respectively nominated by the two most widely read printed newspapers in Hong Kong as identified in the readership survey;
- (b) four or five members nominated by the 18 printed newspapers ranking third to twentieth in the readership survey.

### **Option B4**

- (a) Any printed newspaper that has a readership of, say, 20% or more of the population over a specified age, say, 15, is entitled to nominate one member;

<sup>16</sup>

Using the 2001 Report as an example, the newspapers concerned would be: *The Sun*; *South China Morning Post*; *Ming Pao Daily News*; *Sing Pao Daily News*; *Sing Tao Daily*; *HK Daily News*; and *HK Economic Times*.

- (b) the remaining newspaper members are nominated by printed newspapers having a readership of not less than, say, 0.2%, but not more than 20% of the population over the specified age.

15.23        **First Commission** - We consider that every printed newspaper should have at least an opportunity to become a newspaper member or be involved in the nomination process, irrespective of its readership. Furthermore, the chances of a newspaper becoming a newspaper member should relate to its readership in Hong Kong: the higher the readership, the higher the chances of the newspaper becoming a member. Applying these principles, we consider that Option A1 is the more desirable of the three options for the nomination of the newspaper members of the first Commission:

- (a) *Oriental Daily News* and *Apple Daily*, generally regarded as the two most widely read newspapers in Hong Kong, should each be entitled to nominate one member;
- (b) mainstream newspapers (other than *Oriental Daily News* and *Apple Daily*) should have a greater say in the nomination process;
- (c) the ACNielsen survey cannot be used as a basis for determining which newspapers are in the mainstream because horse-racing newspapers and certain mainstream newspapers are not covered by the survey;
- (d) the 14 newspapers listed in the option represents our best attempt at identifying the current mainstream newspapers;
- (e) newspapers not in the mainstream or which have a low readership should nevertheless have an opportunity to participate in the nomination process.

15.24        **Subsequent Commissions** - Of the four options for the nomination of the newspaper members of the second or subsequent Commission, we prefer Option B1 for the following reasons:

- (a) each of the two most widely read newspapers should be entitled to nominate one member;
- (b) newspapers having a significant readership should have a greater say in the nomination process than those having a low readership;
- (c) newspapers that have a low readership should also be involved in the nomination process;
- (d) it is better to rely on rankings instead of percentages or an absolute cut-off to determine whether a printed newspaper is widely read or has a significant readership.

## **Recommendation 10**

**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;**
- (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.**

15.25 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);
  - (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**

15.26 We need a nomination procedure different from that for the nomination of newspaper members because: (a) there are over 700 magazines in Hong Kong; (b) many magazines do not cover news; and (c) the readership of magazines is less than that of newspapers.

### **Recommendation 11**

#### **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.**

15.27 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**

15.28 We have considered the suggestion that the journalist members be returned by direct election by all journalists in Hong Kong. This option is impractical because any person can practise as a journalist without receiving any education or training in journalism and without becoming a member of a journalists' association. However, since the HKNEA, HKJA, HKFJ and HKPPA have shown a keen interest in promoting and upholding the professional and ethical standards of journalists, we are in favour of granting these four associations the right to nominate the journalist members at least for the first Commission even though they do not represent all journalists in Hong Kong.

### **Recommendation 12**

**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.**

## **Nomination of academic members**

15.29 We consider that the academic member or members of the Commission should be nominated by the schools, departments or faculties of journalism at the tertiary institutions of Hong Kong. We express no preference as to whether those nominations should be made by the individual heads of the schools, etc, or whether all journalism academics should take part in the nomination process. That, it seems to us, is a matter for the Administration to decide, in consultation with the schools themselves, in the course of drafting the legislation.

### **Recommendation 13**

**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.

## **Nomination of public members**

15.30 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.

### **Recommendation 14**

**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.**

15.31 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;<sup>17</sup> 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

<sup>17</sup>

Cf Chief Executive Election Ordinance (Cap 569), Schedule, Part 3 (religious subsector).

Commerce, the Chinese General Chamber of Commerce, the Business & Professionals Federation of HK, and the HK Women Professionals & Entrepreneurs Association.

15.32 The professional bodies and NGOs included in this list are not subject to the influence or control of the Government. The list also reflects comments made in response to our consultation paper and broadly corresponds with the public membership of the voluntary HKPC. We acknowledge that our proposal is complicated but we believe it is the best option to replace the simpler mechanism proposed in the Consultation Paper which was not well received. An alternative would be to restrict our proposal to the initial appointments to the Commission, and to give full discretion to the Public Members of the Commission to decide on subsequent public membership appointments to the Commission. This option is simpler and less rigid but does not guarantee that the future public membership of the Commission will be well balanced and reflect sufficiently diverse interests.

## **Privacy Commissioner for Personal Data**

15.33 The Consultation Paper provisionally recommended that the Privacy Commissioner should be designated as an *ex-officio* member of the statutory body. Although the Privacy Commissioner supported this idea, we have decided not to adopt this proposal because the press may not be comfortable in having a public officer appointed by the Chief Executive as a member of the self-regulating body. Nonetheless, to ensure that the proposed Commission could have access to the Privacy Commissioner's expertise without the Commissioner himself becoming a member, we consider that the proposed Commission should be able to invite the Privacy Commissioner or his representative to attend its meetings as a consultant and to tender advice as appropriate when invited.

### **Recommendation 15**

**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.**

15.34 With a bottom-up nomination process in place, the number of Press and Public Members would be fixed by the legislation. There would be no scope for an increase in the number of members at the discretion of the Commission, unless the legislation also provides that the Commission or its Press or Public Members may co-opt a limited number of Press or Public Members. If so, the additional Press or Public Members should be co-opted by the existing Press or Public Members, as the case may be.

## Disqualification from membership

15.35 To guarantee the independence of the Commission and to ensure that its members are not subject to any political influence, any person who is part of the Government (including the political system and the civil service) should be disqualified from being nominated for membership of the Commission or from membership of the Commission. Further, we are of the view that members of any national, regional or municipal legislature of any place outside Hong Kong should be excluded from the Commission. Judges should also be disqualified because, as we shall see, a publisher aggrieved by an adverse decision of the Commission would have a right of appeal to the Court. However, members of the public who serve on a public or quasi-governmental body on a voluntary basis, receiving no emoluments other than an honorarium, should not be excluded.<sup>18</sup>

15.36 Disqualified persons should also include those who have been convicted of a serious criminal offence. This could be defined by reference either to: (a) the maximum penalty prescribed by law; (b) the sentence actually imposed by the Court; (c) specific offences identified as justifying exclusion from the Commission; or (d) categories of offences which are directly relevant to the office of a Commission member, irrespective of penalty. We are in favour of option (d), and consider this should include convictions for offences involving fraud, dishonesty, bribery or corruption.<sup>19</sup> Since the disqualifying convictions would relate to offences which are serious, we do not think there should be any time limit on the disqualifying convictions, nor should the convictions be confined only to those in Hong Kong.

### **Recommendation 16**

**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**

<sup>18</sup> "Public officer" is defined in section 3 of the Interpretation and General Clauses Ordinance (Cap 1) as meaning "any person holding an office of emolument under the Government, whether such office be permanent or temporary".

<sup>19</sup> See, for example, Estate Agents Ordinance (Cap 511), s 21(3)(d).



- (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.**

## **Nominal appointment by the Chief Executive**

15.37 To avoid the Government's playing any role in the constitution of the Commission, we consider that the Chief Executive should be under a statutory duty to act in accordance with the recommendations of those who are responsible for the nomination of Commission members so that failure of the Chief Executive to appoint those nominated would entitle an interested person to apply to the Court in judicial review proceedings for an order of mandamus to enforce the exercise of that statutory duty.<sup>20</sup>

### **Recommendation 17**

**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.**

## **Chairman**

15.38 The majority of the press councils we have looked at in other jurisdictions are chaired by a public member. As far as the HKPC is concerned, the Chairman is a Public Member nominated by the Press Members but elected by the full Council. The Vice-Chairman is also a Public Member elected by all Council Members, but he need not be nominated by the Press Members. We consider that the Chairman of the Commission should always be a Public Member to ensure that the Commission would neither be controlled by the press nor be perceived to be a body as such. However, we have no objection to a Press Member being the Vice-Chairman if the Commission considers him to be a suitable candidate.<sup>21</sup>

<sup>20</sup> Cf Hong Kong Court of Final Appeal Ordinance (Cap 484), s 6(1), which provides: "The Chief Justice shall be appointed by the Chief Executive acting in accordance with the recommendation of the Judicial Officers Recommendation Commission."

<sup>21</sup> We shall recommend in the section on the procedure of the Commission that the person presiding at a Commission meeting must always be a Public Member.

### **Recommendation 18**

**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.**

## **Summary of the proposals on Commission membership**

15.39 Below is a table summarising our proposals on the membership of the proposed Commission:

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.

Notes : (a) The number of Press Members should not exceed the number of Public Members. (b) The readership survey should be commissioned by the Commission and conducted by a reputable market research organisation.

## Press code on privacy-related matters

15.40 We consider that the proposed Commission should administer a code of conduct on privacy-related matters to inform journalists of the standards they should strive to attain, and to enable the public to judge the performance of the press in relation to privacy by these standards. The scope of the code need not be coextensive with the privacy torts proposed in our *Civil Liability Report*. The code may afford wider protection than that afforded by the law of torts, and the customs, mores and views of the community should be taken into account in drafting the code. There are many ways by which the code could be drafted. It could, for instance, be drafted by:

- the Administration;
- a code committee appointed by the Administration in consultation with the industry and profession;
- the journalists' associations;
- the publishers' associations;
- the proposed Commission itself; or
- a code committee consisting of press or public members, or both, appointed by the proposed Commission.

In the UK, the Code of Practice administered by the Press Complaints Commission is drafted by a Code Committee consisting of senior editors appointed by its Appointments Commission. However, the Code has to be ratified by the Commission. The House of Commons Culture, Media and Sport Committee recently recommended that the Code Committee should be re-established with a significant minority of lay members.<sup>22</sup>

15.41 Since the Administration is subject to the scrutiny of the press, it should not be involved in the drafting or approval process. We are also not in favour of a statutory code in the form of subsidiary legislation, which requires the approval or endorsement of the Legislative Council. Unless the code in

<sup>22</sup> House of Commons Culture, Media and Sport Committee, *Privacy and Media Intrusion* (June, 2003), vol I, HC 458-1, at para 67(vi).

force is far from satisfactory and fails to meet public expectations, neither the Administration nor the legislature should have any say in the contents of the code. The self-regulating body should have a basis in law, but the code it administers should not form part of the legislation.<sup>23</sup>

15.42 As a matter of principle, all those engaged in the practice of journalism should have the right to provide input to the self-regulatory standards in relation to privacy, which describe how their journalistic freedom of expression is to be reconciled with the right to privacy. At first glance, the Journalists' Code of Professional Ethics approved by the four journalists' associations might therefore seem an appropriate starting point. However, the Code is not privacy-oriented and does not provide sufficient guidance on how press freedom should be balanced with privacy.<sup>24</sup>

15.43 Since the Press Members on the Commission would be representative of the journalistic profession and the press industry, a convenient way would be for the Press Members to draft the Code in consultation with the Public Members and other interested parties. If it is thought that the Press Members may not have all the necessary expertise for this purpose, the Code may be drafted by a Code Committee appointed by the Commission, which may include experienced journalists and journalism academics who are not Commission members but could give expert advice on media ethics. However, to ensure that the standards are acceptable to the press and the public, the Code should in any event require the ratification of the full Commission.

#### **Recommendation 19**

##### **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;**

<sup>23</sup> Although the Code would not form part of the legislation, a breach of the Code may or may not have legal consequences, such as a fine, an award of compensation or an injunction. We examine the desirability of attaching legal consequences to breaches of the Press Privacy Code when we discuss the powers of the Commission below.

<sup>24</sup> Cf Press Code of the German Press Council, the Code of Practice of the UK Press Complaints Commission, the Code on Fairness and Privacy of the UK Broadcasting Standards Commission, and the BBC Producers' Guidelines.

- (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 20**

**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.**

15.44 Press intrusion affects voluntary and involuntary public figures alike.<sup>25</sup> However, involuntary public figures who are ordinary citizens temporarily caught in the spotlight of media attention are particularly vulnerable to press intrusion. We therefore consider that the Code should provide guidelines as to how press freedom should be reconciled with the privacy interests of involuntary public figures.

#### **Recommendation 21**

**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.**

15.45 The following are examples of persons who are generally regarded as particularly vulnerable to press intrusion:

<sup>25</sup>

See Chapters 4 and 5 above.

- (a) victims of crime and domestic violence;
- (b) victims of accidents and tragedies;
- (c) relatives and close friends of a deceased person;
- (d) persons who survive a suicide attempt;
- (e) persons who have a physical or mental health problem;
- (f) persons who have a physical or mental disability;
- (g) persons seeking treatment or being treated in hospitals;
- (h) persons who have family or financial problems;
- (i) persons attending funerals or church services;
- (j) persons visiting mortuaries for the purpose of identifying the deceased;
- (k) consenting adults with alternative sexual preferences;
- (l) children and young people studying at school; and
- (m) innocent parties who are related to any of the above persons.

## Factual errors about an individual

15.46      **Accuracy of personal information as a core principle in the protection of privacy** – All journalistic codes require that information about facts and events be presented accurately. The freedom to impart information under Article 19 of the ICCPR is the freedom to communicate information, not misinformation. Lord Hobhouse said:

*“There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed.”*<sup>26</sup>

15.47      The Inter-American Court of Human Rights is of the view that the right of reply or correction under Article 14 of the American Convention on Human Rights is closely related to the right to freedom of thought and expression, which is subject to restrictions necessary to ensure “respect for the rights and reputations of others”.<sup>27</sup> Article 14 of the Convention provides that anyone injured by “inaccurate or offensive statements or ideas” disseminated to the public by a medium of communication has the right to reply or make a correction using the same outlet, under such conditions as the law may establish.

<sup>26</sup>

*Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609; [1999] UKHL 45, p 41.

<sup>27</sup>

*Enforceability of the Right to Reply or Correction*, Advisory Opinion OC-7/86, Inter-Am Ct HR (Ser A) No 7 (1986), para 23.

15.48 One of the ethical principles for journalism, which the Council of Europe believes should be applied by the profession throughout Europe, is the right to a correction of false or erroneous facts published in the news media. The principle states:

*“At the request of the persons concerned, the news media must correct, automatically and speedily, and with all relevant information provided, any news item or opinion conveyed by them which is false or erroneous. National legislation should provide for appropriate sanctions and, where applicable, compensation.”*<sup>28</sup>

15.49 The Parliamentary Assembly of the Council of Europe has also recommended in its Resolution on the Right to Privacy that legislation guaranteeing the right to privacy should contain the following guideline:

*“when editors have published information that proves to be false, they should be required to publish equally prominent corrections at the request of those concerned”.*<sup>29</sup>

15.50 The Consultation Paper noted that there were instances where newspapers had published inaccurate information about an individual.<sup>30</sup> There was a “phenomenon” of a newspaper taking a photograph of an innocent person and then publishing it as if it were a picture of the victim.<sup>31</sup> For example, a press photographer who has not taken any photographs of a juvenile offender might take a photograph of another juvenile on the street as a substitute if the newspaper decides to treat the news as a top story.<sup>32</sup> There is also the possibility of a newspaper fabricating news about a victim to make the story more interesting to read. For example, a man whose genitals had been seriously injured by his mentally ill wife complained that *Apple Daily*’s report that the tragedy was due to his having an extra-marital affair was entirely without basis. The full names and dates of birth of both the man and his wife were disclosed in a report published on the front page of the newspaper. The man alleged that the report had caused him grave injury, and the graphics and lurid description of the event in the report had added insult to injury.<sup>33</sup>

15.51 A member of the public has provided the Sub-committee with evidence that a journalist had said that the policy of a popular magazine in the handling of public complaints was to vilify the person complained against, and

<sup>28</sup> Parliamentary Assembly of Council of Europe Recommendation 1003 (1993) on the Ethics of Journalism, para 26, at <<http://stars.coe.fr/ta/ta93/ERES1003.HTM>>. See also para 1 of Resolution (74) 26 of the Committee of Ministers on the Right of Reply, which states: “In relation to information concerning individuals published in any medium, the individual concerned shall have an effective possibility for the correction, without undue delay, of incorrect facts relating to him which he has a justified interest in having corrected, such corrections being given, as far as possible, the same prominence as the original publication.”

<sup>29</sup> Resolution 1165 (1998) adopted by the Parliamentary Assembly on 26.6.98, para 14 (iii).

<sup>30</sup> See also the examples of inaccuracy cited in the footnote to para 4.11(i) above.

<sup>31</sup> 戴胡子, “傳媒欺善怕惡”, *Ming Pao Daily News*, 29.4.99, G6.

<sup>32</sup> Above. See also findings of the HKPC on the complaint dated 30.11.00.

<sup>33</sup> *Apple Daily*, 10.1.01, A1. See the findings of the HKPC on the complaint dated 18.1.01.

that the magazine would use the facts selectively to achieve that purpose without regard to any negative consequences that such a biased or misleading report could bring to that person. The journalist said he was caught in the middle because, on the one hand, he knew that such a report was unfair and damaging to the person complained against but, on the other hand, his boss said that an article following up a complaint should identify someone as a villain. In *Kam Sea Hang Osmaan v Privacy Commissioner for Personal Data*, the complainant alleged that a large part of what had been written about him in an article in *Next Magazine* was “complete fabrication”.<sup>34</sup> In a separate complaint to the HKJA, the same complainant further alleged that the journalist concerned had admitted to him that most of the quotes in the article were not extracted from her notes but were the result of a “collective production” instead.<sup>35</sup>

15.52 The damaging effect of inaccurate and exaggerated media reports about doctors has been noted by the Vice-Chairman of the Association of Licentiates of the Medical Council.<sup>36</sup> He said as a result of these reports, a number of doctors had ceased practice, changed to another profession or emigrated overseas. A doctor distressed by an exaggerated report even took his life. In the survey of media practitioners commissioned by the four journalists’ associations in 1999, 59% of the respondents replied that “untrue and exaggerated reports” were a major problem. The survey commissioned by *Apple Daily* in the same year also revealed that 44% of the respondents did not believe in what local newspapers reported.<sup>37</sup>

15.53 However, the HKJA argues that accuracy of personal information is “well outside” the privacy reference of the Law Reform Commission. At present, the HKPC may reject complaints about inaccuracy in reporting, particularly when they are made against a non-member newspaper.<sup>38</sup> We agree that the proposed Commission should not act as an arbiter of taste or opinion, whether the opinion is about a private individual, a legal person or a public authority. However, accuracy of facts about an individual is not only related to privacy but is a core principle in the protection of privacy.

15.54 It will be recalled that we recommended in our *Report on Reform of the Law Relating to the Protection of Personal Data* that “all data representing information or opinion, *whether true or not*, which facilitate directly or indirectly the identification of the data subject to whom it relates be regulated by law”.<sup>39</sup> One of the key elements of privacy is the ability of an individual to control the release or use of information about himself, whether the information is true or not. Inaccurate facts about an individual affect his private life by influencing decision-makers to his detriment. The European

<sup>34</sup> AAB No 29/2001 (date of judgment: 30.1.02), para 3; discussed in Chapter 9.

<sup>35</sup> HKJA, “對金思行投訴壹週刊所作裁決” (date of complaint: 29.12.00), at <[www.freeway.org.hk/hkja/ethics/index.htm](http://www.freeway.org.hk/hkja/ethics/index.htm)> (ruling that the Association could not determine whether the article contained fabrications), para 4.

<sup>36</sup> 吳歷山, “醫療事故與傳媒報導”, *HK Economic Journal*, 30.10.99, p 19.

<sup>37</sup> See also the discussion of *Kam Sea Hang Osmaan v Privacy Commissioner* in Chapter 9.

<sup>38</sup> Eg, complaint received by the HKPC on 26.10.01.

<sup>39</sup> (1994), para 8.17.



Court of Human Rights has held that respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. In the view of the Court:

*“even the publication of items which are true and describe real events may under certain circumstances be prohibited: the obligation to respect the privacy of others or the duty to respect the confidentiality of certain commercial information are examples. In addition, a correct statement can be and often is qualified by additional remarks, by value judgments, by suppositions or even insinuations. It must also be recognised that an isolated incident may deserve closer scrutiny before being made public; otherwise an accurate description of one such incident can give the false impression that the incident is evidence of a general practice.”*<sup>40</sup>

*“[Article 10 of the European Convention on Human Rights] protects journalists’ right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide ‘reliable and precise’ information in accordance with the ethics of journalism”,*<sup>41</sup>

*“[B]oth the storing by a public authority of information relating to an individual’s private life and the use of it and the refusal to allow an opportunity for it to be refuted amount to interference with the right to respect for private life secured in Article 8 § 1 of the [European Convention]”.*<sup>42</sup>

15.55 The views of the European Court are consistent with the Council of Europe’s Convention on Privacy 1981,<sup>43</sup> which lays down the principle that personal data undergoing automatic processing must be “accurate and, where necessary, kept up to date”.<sup>44</sup> The European Union Data Protection Directive in 1995 further provides that “every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified”.<sup>45</sup> Although Member States may provide for exemptions or

<sup>40</sup> *Markt Intern v Germany* (1989) 12 EHRR 161, para 35.

<sup>41</sup> *Fressoz v France*, No 29183/95 (21.1.99), para 54.

<sup>42</sup> *Rotaru v Romania*, No 28341/95 (4.5.00), para 46.

<sup>43</sup> Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

<sup>44</sup> *Amann v Switzerland*, No 27798/95 (4.5.00) para 43. The purpose of the Convention is to secure for every individual “respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him”. The Data Quality Principle in the *OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data 1980* also provides that personal data should be “accurate, complete and kept up-to-date”: para 8. The Explanatory Memorandum to the Guidelines notes that there has been a tendency to broaden the traditional concept of privacy (“the right to be left alone”) and to identify a more complex synthesis of interests which may be termed privacy and individual liberties. The Data Quality Principle is one of the eight basic principles setting out the minimum standards of protection of privacy and individual liberties with regard to personal data.

<sup>45</sup> Article 6(1)(d).

derogations from the general rules on the lawfulness of the processing of personal data (including the Data Quality Principle) for the processing of personal data carried out solely for journalistic purposes if they are necessary to reconcile the right to privacy with the rules governing freedom of expression,<sup>46</sup>

*“the right to reply and the possibility to have false information corrected, the professional obligations of journalists and the special self-regulatory procedures attached to them, together with the law protecting honour ... must be taken into consideration when evaluating how privacy is protected in relation to the media.”<sup>47</sup>*

15.56 In Australia, the Privacy Act 1988 expressly defines “personal information” as meaning information or an opinion “whether true or not” about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.<sup>48</sup> Privacy Principle 12 of the Australian Privacy Charter 1994 also requires that personal information should be relevant to each purpose for which it is used or disclosed, and should be accurate, complete and up-to-date at that time.

15.57 In the General Comment made in relation to the right to privacy under the ICCPR, the UN Human Rights Committee specifically requires that personal information stored in automatic data files must be accurate:

*“Every individual should ... be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.”<sup>49</sup>*

15.58 In our view, 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. In light of the above observations, we are satisfied that accuracy of facts about an individual is a core principle in the protection of privacy. However, we have to address the argument that the Personal Data (Privacy) Ordinance (“PD(P)O”) already provides an effective remedy for inaccuracy of personal data, which renders a further remedy by a self-regulating body unnecessary.

15.59 **Limitations of the PD(P)O in providing an adequate remedy for inaccurate media reports** – By way of background, we recommended in our *Report on Reform of the Law Relating to the Protection of Personal Data*

<sup>46</sup> EU Data Protection Directive, Article 9.

<sup>47</sup> “Data Protection Law and the Media”, Recommendation 1/97, adopted by the Working Party on the Protection of Individuals with regard to the Processing of Personal Data set up by the EU Directive, at <[http://europa.eu.int/comm/internal\\_market/en/dataprot/wpdocs/wp1en.htm](http://europa.eu.int/comm/internal_market/en/dataprot/wpdocs/wp1en.htm)>.

<sup>48</sup> Section 6(1).

<sup>49</sup> General Comment 16 (1988), para 10.

that: (a) the Data Quality Principle should apply without qualification to the media; and (b) the media should be required to take all practicable steps to disseminate a correction where inaccurate data have been published.<sup>50</sup> The PD(P)O implements recommendation (a) by not exempting the media from its requirements to ensure the accuracy of personal data provided for in DPP 2(1), which as we note above, apply no less to deliberate as to inadvertent inaccuracies.<sup>51</sup> The requirements of the PD(P)O to disseminate corrections of inaccurate personal data are provided for in DPP 2(1) and section 23(1). However, the way DPP 2 and section 23 are drafted may not give full effect to recommendation (b) in our *Data Protection Report*.

15.60 DPP 2 provides that where personal data disclosed to a third party were inaccurate at the time of the disclosure and are materially inaccurate having regard to the purpose for which the data *are, or are to be, used* by the third party, all practicable steps must be taken to ensure that the third party is informed that the data are inaccurate, and that the third party is provided with such particulars as will enable him to rectify the data having regard to that purpose. DPP 2 does not normally assist an individual where inaccurate data about him have been published in the news section of a newspaper. News reports containing personal data are published in a newspaper for the general information or immediate consumption of its readers. It is difficult for a data subject to argue that his data in a previous issue are still being used by the readers for that purpose.

15.61 Section 23(1) of the PD(P)O facilitates the correction of inaccurate personal data a copy of which has been supplied by the data user to the data subject in accordance with a data access request made by the latter. It provides, *inter alia*, that if inaccurate personal data supplied to the data subject in accordance with his data access request have been disclosed to a third party and the data user has no reason to believe that the third party has ceased using those data for the purpose for which the data were disclosed to the third party, then the data user must, on the request of the data subject that the necessary correction be made to the data, take all practicable steps to supply the third party with a copy of those corrected data, accompanied by a notice stating the reasons for the correction. To the extent that a news report in a newspaper is published for the general information or immediate consumption of its readers, it is difficult for a data subject to contend that the readers are still using the inaccurate data in a previous issue for that purpose after the day of publication.<sup>52</sup>

15.62 Furthermore, section 66(1) of the PD(P)O enables an individual to claim compensation from a newspaper if the individual suffers damage by reason of a breach of DPP 2 by the newspaper. However, a newspaper that has published inaccurate data in breach of DPP 2 has a defence if the personal data accurately recorded data that had been received or obtained by

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<sup>50</sup> (1994), para 18.50.

<sup>51</sup> See the discussion of DPP 2(1) in Chapter 9.

<sup>52</sup> However, it is arguable that DPP 2 and s 23 apply to Internet newspapers that store back issues for continuing use by their subscribers.

the newspaper from a third party.<sup>53</sup> This defence provides the media with a shield not available to it in defamation actions. It would seem that such is the case even though the data were “materially inaccurate” having regard to the purpose for which the data are to be used by readers,<sup>54</sup> the newspaper did not take such care as was reasonably required to avoid the breach,<sup>55</sup> and failure to take such care amounts to a breach of journalistic ethics.

15.63 Newspapers are offered for sale in the market to anyone who is willing to pay the price. In contrast to banks or credit reference agencies which disclose personal data to known parties who have a continuing relationship with the banks or agencies, a newspaper publisher does not know the identities of those who have read the newspaper, let alone the identities of those who are still using the data in question after the day of publication. The application of DPP 2 and section 23(1) to factual errors reported in the press is therefore problematic. So far, there is no evidence that any newspaper has been asked to publish a correction for a breach of DPP 2. Apparently, DPP 2 and section 23(1) do not provide a right to the dissemination of a correction in the media. This is unsatisfactory bearing in mind that the news media is exempt from the Individual Participation Principle in DPP 6, which provides for the right of access to, and correction of, data held by the data user, prior to publication. We agree that there is a need to exempt the news media from the application of DPP 6 prior to publication of data, but as pointed out by the Working Party set up under the European Union Data Protection Directive:

*“Limits to the right of access and rectification prior to publication could be proportionate [to the aim of protecting freedom of expression] only in so far as individuals enjoy the right to reply or obtain rectification of false information after publication.”<sup>56</sup>*

15.64 **Conclusion** – To the extent that the news media is exempt from DPP 6 and section 18(1)(b) of the PD(P)O prior to publication,<sup>57</sup> and the remedies afforded by DPP 2 and section 23 do not seem to have created a right to the dissemination of a correction in the newspaper concerned after publication, the proposed Commission should provide a mechanism through which inaccuracies (including fabrications) and distortions, whether deliberate or inadvertent, about an individual that have been published in a newspaper can be corrected in a subsequent issue.<sup>58</sup> 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. We have therefore decided that the Press Privacy Code should include provisions dealing with inaccurate (including fabricated) or misleading

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<sup>53</sup> Cap 486, s 66(3)(b).

<sup>54</sup> Cf DPP 2(1)(c).

<sup>55</sup> Cf Cap 486, s 66(3)(a).

<sup>56</sup> “Data Protection Law and the Media”, Recommendation 1/97, adopted by the EU Data Protection Working Party, above, at the Conclusions.

<sup>57</sup> Cap 486, s 61.

<sup>58</sup> The Codes of Practice enforced by the Broadcasting Authority already contain provisions on accuracy. Inaccurate, in relation to personal data, is defined in s 2(1) of the PD(P)O (Cap 486) as meaning that the data are “incorrect, misleading, incomplete or obsolete”.

information about an individual published in the press, whether the information was published deliberately or inadvertently.

15.65 However, we acknowledge that it is impractical to require one hundred per cent accuracy in news reports by imposing a duty on the media to check all data before publication and to correct any inaccuracies (including fabrications) or distortions discovered after publication. In line with DPP 2 which only covers inaccuracies that are material having regard to the purpose for which the data are or are to be used by the third party,<sup>59</sup> only significant inaccuracies (including fabrications) and distortions should be subject to rectification by way of a correction in the newspaper concerned.

15.66 An added advantage of enabling the proposed Commission to adjudicate on these complaints is the potential reduction in the number of libel claims in the courts. With a cheap and speedy alternative means of redress provided by the Commission, an individual whose reputation is adversely affected by a false statement in a newspaper report is less likely to feel the need to seek damages in the courts, which is currently the individual's sole option. This possible settlement outside the courts would reduce costs for both the public and newspapers. Further, since legal aid is not available for libel actions, the Commission would offer an effective remedy to defamed persons who are not wealthy enough to file a libel suit against a newspaper. More importantly, if a swift remedy is available to victims shortly after the impugned report, they would be able to avoid some of the consequences that publication could bring. To take *Chu v Apple Daily*<sup>60</sup> as an example, although the victim had a remedy in defamation for being wrongly named as the solicitor suspected of absconding with clients' money, she would not have suffered serious depressive illness and given birth prematurely if the matter had been settled amicably shortly after publication.

## **Recommendation 22**

**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**

<sup>59</sup> See para 9.8 above.

<sup>60</sup> *Chu v Apple Daily* [2001] 1375 HKCU 1; discussed in para 5.7 above.

**and, as far as possible, with a prominence equal to that given to the original publication.**

## **Power to deal with complaints about alleged breaches of the Code**

15.67 A Press Privacy Code in itself provides no relief unless a mechanism is put in place to deal with complaints alleging breaches of the Code. However, the Commission should always encourage the parties to resolve a complaint by conciliation instead of formal adjudication whenever practical.<sup>61</sup>

### **Recommendation 23**

**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.**

15.68 Bearing in mind the experience of other press councils such as the UK Press Complaints Commission, we believe that a significant proportion of complaints could be settled by the publisher offering a remedy to the complainant without the need for formal adjudication.

## **Complaints against publishers, not journalists**

15.69 Newspaper proprietors have ultimate control over the activities of their newspapers. Ownership of a newspaper entitles them to interfere with the editorial process and to exercise personal control in the day-to-day running of their newspapers. However, a proprietor may not abide by the standards of the journalistic profession and may instruct his editors to act

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<sup>61</sup> We suggest in the latter part of this chapter that the Commission should be free to regulate its own procedure, including the power to specify the grounds on which the Commission may refuse to undertake or continue an investigation.

contrary to media ethics. An editor who refuses to comply with his orders may be dismissed.<sup>62</sup>

15.70 Press intrusion may also be effected on the instruction of an editor without any involvement of the proprietor. An editor may instruct a journalist to act in a way that is unethical by the standards of the profession. More importantly, it is the editors who decide what materials and pictures should go into a newspaper and in what manner they should be presented. In the news-gathering process, journalists may lawfully acquire private facts about individuals in the news; and press photographers may lawfully take photographs which identify these individuals. However, the decisions as to how a news story should be presented, how a vulnerable person should be described in the article, whether pictures of that person should be included, and, if so, which pictures should be used and to what extent his identity should be protected, always lie in the hands of editors. In addition, there is a risk of an editor fabricating facts on the basis of the information collected by a frontline journalist.<sup>63</sup>

15.71 Nevertheless, provided that newspaper publishers are held accountable, it is not necessary for the proposed Commission to have jurisdiction over the proprietors, editors and journalists. Under our proposals below, neither editors nor journalists would be fined or ordered to pay compensation to the complainants; and the obligation to publish the findings and corrections would fall on the offending newspapers, not the editors or journalists concerned. We have therefore decided that all complaints should be treated as being against the publishers, and only publishers should be held accountable for any breaches of the Code. A newspaper at fault may of course discipline the editor or journalist concerned. The findings of the Commission may also highlight the extent to which an editor or journalist is responsible.

#### **Recommendation 24**

**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.**

<sup>62</sup> 甄美玲, “「打工仔」、專業操守與新聞自由”, paper presented at the conference on Media Ethics in the Information Age jointly organised by School of Communication of HK Baptist University and the Centre for Asian Studies of Chu Hai College, 11-12 Nov 2000, pp 2-3; 馬松柏, 香港報壇回憶錄, (HK: Commercial Press, 2001), pp 15-17. See also *Secretary for Justice v The Oriental Press Group* [1998] 2 HKLRD 123, 174-175.

<sup>63</sup> In *Kam Sea Hang Osmaan v Privacy Commissioner*, AAB No 29/2001, para 3, the Administrative Appeals Board heard that a journalist of *Next Magazine* apologised to the complainant and told him that the impugned article had been changed by “someone” at some stage before publication.

## **Power to initiate own investigations and accept third party complaints**

15.72        **Power to initiate an investigation** – The Consultation Paper proposed that the statutory body may investigate on its own initiative. The HK Journalists Association commented that this involved an exercise of discretion which would open the door to political favouritism. The Association feared that anti-Government newspapers might suddenly find themselves facing a mysterious number of investigations.

15.73        We note that the Sex Discrimination Ordinance, the Disability Discrimination Ordinance and the Family Status Discrimination Ordinance empower the Equal Opportunities Commission to conduct a formal investigation for any purpose connected with the carrying out of its functions “if it thinks fit”.<sup>64</sup> The Ombudsman may also conduct an investigation, even if no complaint has been made to him, provided that he is satisfied that any person may have sustained injustice in consequence of maladministration.<sup>65</sup> Likewise, the Privacy Commissioner may initiate an investigation in accordance with section 38(b) of the PD(P)O if he has reasonable grounds to believe that an act might constitute a breach of a data protection principle. This power cannot be exercised against a news organisation, but is useful where a data subject does not know that his personal data have been collected or processed in breach of a data protection principle.<sup>66</sup>

15.74        **Power to accept third party complaints** – The Consultation Paper also proposed that the statutory body may receive third party complaints. The HK Journalists Association argued that this proposal was contrary to the spirit of putting the victim at the centre of the process. In their view, a press council should accept complaints only from the victim or those who have a close relationship with the victim, such as the next of kin of someone who has died.

15.75        The Sex Discrimination Ordinance, the Disability Discrimination Ordinance and the Family Status Discrimination Ordinance allow any person to lodge a complaint on behalf of another person or other persons aggrieved by an unlawful act under the respective ordinance provided that the complaint is lodged with the consent of the class members.<sup>67</sup> The PD(P)O enables a “relevant person” to complain to the Privacy Commissioner on behalf of an individual about a breach of a data protection principle relating to the personal data of that individual. A “relevant person” includes the parent of a minor and a person appointed by the Court to manage the affairs of an individual who is incapable of managing his own affairs.<sup>68</sup>

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<sup>64</sup> Cap 480, s 70; Cap 487, s 66; and Cap 527, s 48.

<sup>65</sup> The Ombudsman Ordinance (Cap 397), s 7(1).

<sup>66</sup> A case in point is that of the old customer records of a mobile phone company being found dumped in the street outside one of the company’s offices. Hundreds, if not thousands, of data subjects were involved but none of them were aware that their data had been processed in breach of the data protection principles.

<sup>67</sup> Cap 480, sub leg B, s 3; Cap 487, sub leg B, s 3; Cap 527, sub leg A, s 3.

<sup>68</sup> Cap 486, ss 37 & 2(1).



15.76        **Other jurisdictions** – Many press councils or similar bodies may initiate an investigation without a complaint, such as those in Austria, Bangladesh, Cyprus, Denmark, Estonia, Finland, Germany, India, Norway, South Korea, Sri Lanka, Sweden and Taiwan. Examples of those that may accept third party complaints can be found in Australia, Austria, Cyprus, Denmark, Finland, Germany, India, Italy, New Zealand, Quebec, Sweden, Taiwan and the United Kingdom. As far as Commonwealth jurisdictions are concerned, the delegates at the five regional seminars on press self-regulation organised by the Commonwealth Press Union in 2001/02 seemed open minded about initiating investigations.<sup>69</sup> In Hong Kong, as many as 57% of the media practitioners who were in favour of setting up a statutory monitoring body when responding to the survey commissioned by the four journalists' associations also agreed that the statutory body should be able to initiate its own investigations. Those who disagreed amounted to only 17%.

15.77        **No investigation unless in the public interest** – We consider that, subject to certain safeguards discussed below with respect to the victims' identities, the proposed Commission should be able to initiate an investigation or investigate a third party complaint as long as the investigation can be justified on the grounds of public interest. Allowing investigations in these circumstances can help prevent future intrusions and protect those who are not aware that their right to privacy has been unjustifiably infringed. Merely giving the Commission a power to initiate an investigation is not sufficient because many press intrusions cannot be detected by reading the newspapers or magazines and may not come to light if they are not reported in the press.

15.78        To ensure that the Commission would take all relevant factors into account, we further consider that the legislation should list the factors that the Commission should take into account in determining whether an investigation can be justified on the grounds of public interest. Those 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, eg, whether or not the victim is a public figure, a child, a tourist, a victim of crime, a person who has survived a suicide attempt, a bereaved person, or an innocent third party to a news story;
- (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, eg, whether or not the victim is injured, physically handicapped, mentally retarded or mentally disordered;

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I Beales, *Imperfect Freedom*, above, at 29.

- (g) whether the victim has notice of the intrusion, eg, whether or not the victim is visually impaired, illiterate, unconscious, or affected by drugs, and whether he can read the language in which the publication is published;
- (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;
- (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.

15.79 We have reservations about restricting those who may make a third party complaint to a narrow range of persons, such as the victim's immediate relatives. It is difficult to lay down hard and fast rules as to who has the right to make a complaint on behalf of the victim. There are bound to be cases outside the contemplation of the legislature. There are always instances where neither the victim nor his immediate relatives are aware of the breach, but the circumstances in which the breach arises warrant an investigation if the breach is brought to the attention of the Commission. We therefore consider that as long as the Commission can investigate a third party complaint only if the investigation can be justified on the grounds of public interest, it is unnecessary to limit the range of persons who may make a third party complaint. However, the Commission may set up a screening committee with the participation of both press and public members to screen out frivolous and vexatious complaints.

15.80 **Need to protect identities of victims** – There are, however, victims who do not wish their plight or private lives to be subjected to further publicity by the Commission adjudicating on the privacy intrusion. An investigation against the wishes of the victim is an intrusion in itself. Unless an overriding interest is at stake, a victim should not be prejudiced a second time by the Commission undertaking an investigation against his wishes. It is therefore necessary to balance the need for the Commission to conduct an investigation on public interest grounds, and the need to respect the wishes of the victim, including any wish that his privacy be maintained.

15.81 The Privacy Commissioner's power to conduct an investigation under the PD(P)O is not conditional on the data subject raising no objection to the investigation. As long as the Commissioner reasonably believes that an act may constitute a breach of a data protection principle, he is not obliged to seek the consent of the data subject before he can initiate an investigation. However, the Commissioner is under a duty to maintain secrecy in respect of all matters that come to his knowledge. Any report published by the Commissioner, which sets out the result of his investigation, must also be so framed as to prevent the identity of the data subject being ascertained from it.

15.82 To ensure that the victims' wishes are respected, the Commission may be required to ascertain from the victim that he would wish to raise no objection before determining whether to carry out an investigation. However, this requirement is impracticable, not only because the Commission may not be able to find out the whereabouts of the victim, but also because the Commission would be put in a difficult position if the infringement involves more than one victim and the victims are divided as to whether the Commission should investigate. In addition, there would always be instances where an infringement is so outrageous that the Commission is justified in carrying out an investigation even though the victim (or some of the victims) would raise objection, or have not had an opportunity to express a view on that matter.

15.83 Nonetheless, we agree that there is a genuine need to protect victims from further publicity. We will therefore make a separate recommendation in the latter part of this chapter that the reports of the Commission should not disclose the identities of victims unless the victim concerned agrees otherwise.

#### **Recommendation 25**

**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.**

### **Circumstances under which the Commission may refuse to undertake or continue an investigation**

15.84 The Consultation Paper proposed that the statutory body should be able to decide not to undertake or continue an investigation into a complaint if:

- (a) the subject matter of the complaint is trivial;
- (b) the complaint is frivolous or vexatious;
- (c) the complaint has previously initiated an investigation as a result of which the statutory body was of the opinion that there had been no breach of the Code; or
- (d) any investigation or further investigation is for any other reason unwarranted.

15.85 We consider that the proposed Commission should have the authority to reject complaints or refuse to continue an investigation on

grounds specified by the Commission instead of the statute. The self-regulating Commission should be left to set down the relevant criteria as part of its prerogative to regulate its own procedure. However, the Commission should be under an obligation to inform the complainant in writing of the reasons for making such a decision.

## **No requirement to waive legal rights**

15.86 One respondent commented that the complainant should be asked to sign a waiver agreeing not to take any legal action in respect of the subject matter giving rise to the complaint before his complaint is taken up by the statutory body. She argued that it is unfair to the media if they have to face the prospect of an inquiry and a legal action on the same set of facts.

15.87 The object of a legal waiver is to prevent the complainant from seeking double remedies, using the cheaper route to enhance his chance of obtaining financial benefits in a court. The press councils in Australia, Bangladesh, Canada, Finland, Germany, India, Israel, New Zealand, Norway and South Africa do not deal with a complaint if legal action in respect of the subject matter of the complaint is pending.

15.88 Both the Younger Committee and the now defunct UK Press Council were in favour of a legal waiver. They argued that without a waiver:

- (a) newspapers might refuse to co-operate in the complaints proceedings which involved disclosing their defence to a legal action;
- (b) the Press Council might be used as a stalking horse for an action;
- (c) a favourable adjudication might be cited in support of a legal action;
- (d) the complaints process would become lengthier, legalistic and costly; and
- (e) newspapers and editors would be subject to double jeopardy as they would have to defend their case twice on the same sets of facts.<sup>70</sup>

15.89 However, the practice of the UK Press Council was criticised by the Annan Committee on the Future of Broadcasting, which concluded that the waiver was an unjustifiable interference with individual rights. The Committee considered that complainants should not have to choose between public vindication and legal redress. They were entitled in some cases to both. The Committee was also sceptical about the argument of “double jeopardy”, particularly in view of the likely costs of legal action. Some members of the Committee even had doubts about the legality of the waiver in depriving citizens of their right of access to the courts.<sup>71</sup>

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<sup>70</sup> Summarised in *Report of the Committee on Privacy and Related Matters* (London: HMSO, Cm 1102, 1990), paras 15.26 – 15.27.

<sup>71</sup> *Report of the Committee on the Future of Broadcasting* (Cmnd 6733, 1977), ch 6, para 18.

15.90 The third Royal Commission on the Press in the UK considered that the Press Council was not an alternative to the courts and should be able to adjudicate on complaints despite the possibility of legal action. It commented that the Council's insistence on asking complainants to waive their legal rights gave the impression that the Council was more concerned to protect newspapers from the public than to raise newspaper standards in the interests of the public. The Royal Commission therefore asked the Council to review the waiver requirement with a view to its abolition.<sup>72</sup>

15.91 Geoffrey Robertson, QC, had this to say in 1983:

*"The principal objection to the 'legal waiver' is that questions of legal liability are irrelevant to the task of maintaining professional standards. The role of the Press Council is to adjudicate the question of whether standards have been breached in particular cases, and not to exact punishment or financial compensation for the consequences of that breach. ... Its insistence on a legal waiver in cases which do not involve allegations of crime or revelation of sources is usually unnecessary."*<sup>73</sup>

15.92 The Calcutt Committee remarked in 1990 that the attitude adopted by the Press Council was old-fashioned because the trend in dispute resolution was to expose one's hand for the sake of speed and lower costs. If a newspaper had a reasonable defence, a complainant might withdraw his complaint. If the newspaper had a weak case, it would agree to an early settlement.<sup>74</sup> Robertson and Nicol echo this view, saying that it is plainly wrong in principle that a complainant should be obliged to surrender a legal right to damages before obtaining an adjudication as to whether an ethical standard has been breached.<sup>75</sup> The UK Press Complaints Commission now has a discretion to accept a complaint without insisting that the complainant should waive his legal rights, but the Commission may postpone adjudication if the complaint relates to a matter that is or may be the subject of litigation. The byelaws of the HK Press Council do not require a legal waiver.

15.93 Professor Pinker of the UK PCC suggests that the problem be dealt with by the press council requesting complainants not to pursue a legal action concurrently with a complaint. The prospect of a press council itself becoming involved in a legal action as a third party is thereby diminished. Complainants are then free to take legal action after a complaint has been dealt with by a press council, though this is unlikely to be common having regard to the experience of many countries.<sup>76</sup>

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<sup>72</sup> Royal Commission on the Press, Cmnd 6810 (1977), paras 48, 20.43 – 20.49.

<sup>73</sup> G Robertson, *People Against the Press*, above, p 30.

<sup>74</sup> *Report of the Committee on Privacy and Related Matters*, above, para 15.30.

<sup>75</sup> G Robertson & A Nicol, *Media Law*, (London: Sweet & Maxwell, 4<sup>th</sup> edn, 2002), p 683.

<sup>76</sup> R Pinker, "Press Freedom and Press Regulation – Current Trends in their European Context", text of speech given at the "Modern Media and the EU: the cases of Cyprus and the UK" seminar in Nicosia, Cyprus on 5.2.02, at <[www.pcc.org.uk/press/detail.asp?id=56](http://www.pcc.org.uk/press/detail.asp?id=56)>.

15.94 The Sub-committee expressed the view that it would be unfair to victims of press intrusion to elect between lodging a complaint with the self-regulating body and bringing a legal action in a court of law. They considered that only if the Council has authority to award compensation and grant an injunction should the signing of a waiver be made a condition precedent to the investigation of complaints. The Consultation Paper therefore proposed that a complainant should not be required to sign a waiver agreeing not to take any civil proceedings in respect of the subject matter giving rise to the complaint before his complaint can be investigated by the statutory body.

15.95 We acknowledge that a ruling by the proposed Commission that is favourable to the complainant would assist him in meeting the merits test laid down by the Legal Aid Department. There is, however, no risk of double jeopardy because, under our new proposals, the Commission would have neither the power to award compensation against a newspaper, nor a power to impose a fine. Our case against a waiver is therefore even stronger than when the proposal was first put forward in the Consultation Paper. Furthermore, the fact that an offending newspaper has published a critical adjudication would reduce any damages that would otherwise be awarded by the court if the newspaper lost an action for libel or invasion of privacy. We are therefore 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.

15.96 Although the Commission should not ask for a legal waiver, we still need to examine whether it should be able to refuse investigation if legal proceedings are pending. There are at least two options open to us:

Option 1 – The complainants are free to bring legal proceedings in respect of any matter alleged in the complaint at any stage. However, the Commission has a discretion not to accept a complaint or postpone adjudication if legal proceedings are pending.

Option 2 – The Commission shall not consider a complaint if proceedings are pending in any court of law in respect of any matter alleged in the complaint. The Commission shall also cease to deal with a complaint if any matter alleged in the complaint becomes the subject matter of any legal proceedings. However, the complainants are free to seek legal redress if they are not satisfied with the decisions of the Commission.

15.97 Instead of laying down hard and fast rules for the Commission to follow, we prefer giving the Commission a discretion to reject a complaint if legal proceedings in respect of any matter alleged in the complaint are pending, or postpone adjudication pending the outcome of any such legal proceedings. The Commission should have the power to make a decision having regard to all the circumstances of the case, including whether the proceedings are brought by the complainant or the newspaper concerned. The Commission should generally decline to accept a complaint if legal proceedings are pending, but there might be exceptional circumstances where

it should conduct an investigation before such proceedings are completed. Should the law provides that the Commission cannot deal with a complaint whenever legal proceedings are pending, then a newspaper can avoid the adjudication of the Commission simply by threatening libel action against the complainant. Laying down strict rules runs the risk of the Commission not being flexible enough to deal with exceptional circumstances.

#### **Recommendation 26**

**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.**

### **Complaints Committee**

15.98 In addition to a Screening Committee, the proposed Commission may set up a Complaints Committee to investigate complaints and examine the evidence in detail. There are at least four possibilities as to how the Complaints Committee should function:

Option 1 – The Complaints Committee has delegated authority to adjudicate complaints without any supervision by the Commission. It has full authority to decide on the complaints on the basis of its findings. If this option were adopted, the work of the Commission would focus on standards setting, reports, budgets, education, research and the making of general comments.

Option 2 – The Complaints Committee has delegated authority to adjudicate complaints independently but an aggrieved party may apply to the full Commission for a review of the Committee's decision.

Option 3 – The Complaints Committee has delegated authority to release adjudications, subject to the right of either party to appeal to the full Commission before publication. Particularly difficult or important cases could be referred to the full Commission when the Complaints Committee considers it desirable.<sup>77</sup>

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This is the model recommended by the Calcutt Committee: *Report of the Committee on Privacy and Related Matters* (London: HMSO, Cm 1102, 1990), para 15.25.

Option 4 – The purpose of the Complaints Committee is to advise the Commission whether there has been a breach of the Code and, if so, to make recommendations to the Commission, which would then adjudicate on the complaint.

15.99 Option 4 is the model adopted by the HK Press Council, except that the adjudications are made by the Executive Committee of the Council instead of the full Council. Option 2 provides for a right of review after adjudication while Option 3 provides for a right of appeal before publication. A right of appeal entitles an aggrieved party to challenge the decision on questions of fact as well as matters of principle, while a review does not normally concern findings of fact. A variant of Options 2 and 3 is to set up a separate appeal or review body but that would seem to be too cumbersome. Option 1 does not provide for a right of review or appeal but has a greater separation of powers in that the rule-making function and the adjudication authority would be exercised separately by the Commission and the Complaints Committee respectively.

15.100 We believe that this is something that could be left to the self-regulating body to decide. There are, indeed, other possibilities and the Commission should be free to choose the model they prefer. However, one would expect that the Complaints Committee would be chaired by a Public Member and the Public Members on the Committee would be in the majority no matter which model is preferred.

#### **Recommendation 27**

**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.**

### **Duty to declare interests**

15.101 Paragraph 9 of the Byelaws of the HKPC provides that any member of the Screening Committee or Executive Committee who is a director, partner, editor or employee of the respondent shall neither be involved in the consideration of a complaint, nor attend and vote in any meeting of the Screening Committee or Executive Committee deciding whether or not there is a *prima facie* case against the respondent.

15.102 We consider that the proposed Commission should avoid direct conflict of interests by ensuring that no Press Member participates in the adjudication of a complaint against his own newspaper or magazine. Press Members involved in the adjudication process should be independent in relation to the newspaper or magazine alleged to have breached the Code.



There should therefore be provisions requiring Commission members to declare their interest when a conflict arises.

**Recommendation 28**

**We recommend that the legislation should require Commission members to declare their interests in specified circumstances.**

## **Right to regulate its own procedure**

15.103 We consider that the Commission, being a self-regulating body, should be free to regulate its procedure, subject to certain restrictions such as those on legal representation stated in this report. Furthermore, the rules of law relating to the admissibility of evidence should not apply to the complaint proceedings because these proceedings should be informal and the Commission should have flexibility in dealing with complaints without being unduly bound by legal formality.<sup>78</sup> The Commission would not be able to compel a newspaper or magazine to co-operate with its investigation, but the failure of a newspaper or magazine to so co-operate would not preclude the Commission from arriving at an adverse finding.

**Recommendation 29**

**Subject to other recommendations in this report, we recommend that 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 30**

**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**

<sup>78</sup>

The Complaints Committee of the Broadcasting Authority may also receive such evidence as it thinks fit: Broadcasting Authority Ordinance (Cap 391), s 11(6).

**(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.**

15.104 Since the members of the Commission would be expected to offer the benefits of their particular experience to the Commission rather than to represent the interests of the bodies that nominated them, they should vote as individuals and not as representatives of these bodies.

### **Recommendation 31**

**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.**

## **No power to compel journalists to disclose sources**

15.105 We have considered whether a journalist should be protected from being required by the Commission to disclose his source of information when the Commission is investigating a complaint about inaccuracy or privacy intrusion. Under section 44(2) of the PD(P)O, where a complaint received by the Privacy Commissioner relates to personal data held by a news organisation for journalistic purposes, and a journalist summoned by the Commissioner refuses to comply with a requirement to furnish the Commissioner with information on the ground that doing so would disclose the identity of the individual from whom the personal data were collected, the Commissioner may apply to the Court for an order directing the journalist to comply with that requirement. The Court may make the order if: (a) the alleged contravention is of “sufficient gravity” to warrant the journalist complying with the requirement; (b) the investigation would be “substantially prejudiced” if the requirement were not complied with; and (c) it is in the public interest, having regard to the benefit likely to accrue to that investigation, that the requirement be complied with.

15.106 There is a well-settled rule of practice that a defendant at the pre-trial stage of an action for libel published in the news media should not be forced to disclose his source of information.<sup>79</sup> This rule is founded upon the public interest in the free flow of information. The European Court of Human Rights held that Article 10 of the European Convention on Human Rights

<sup>79</sup>

*Eastweek Publisher v John Sham* [1994] HKCA 307.

includes the right of journalists not to disclose the source of their information.<sup>80</sup>

15.107 The Committee of Ministers of the Council of Europe has also adopted a recommendation on the right of journalists not to disclose their sources of information.<sup>81</sup> The recommendation states that the right must not be subject to restrictions other than those mentioned in Article 10(2) of the Convention, and an authority may only order a disclosure if there exists an overriding requirement in the public interest and if the circumstances are of a sufficiently vital and serious nature. In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person through an allegedly false statement of facts, the journalist might be able to establish the truth of the statement by disclosing the source of his information. Principle 4 of the Recommendation states that in such proceedings, “authorities should consider, for the purpose of establishing the truth or otherwise of the allegation, all [alternative] evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist”.

15.108 In contrast to the position of the plaintiff in a libel action, a person complaining to the proposed Commission about an inaccurate newspaper report would have the burden of proving the falsity or inaccuracy of a statement; the newspaper would not be required to prove that the statement was true or accurate. However, it is sometimes difficult to prove inaccuracy if a journalist refuses to disclose the source of information. In the absence of a power compelling the journalist concerned to disclose the source, the Commission may not be able to decide whether a complaint is valid. Nevertheless, we have reservations about adopting provisions similar to section 44(2) of the PD(P)O:

- (a) In contrast to the Privacy Commissioner, the proposed Commission would not have the power to summon a person and require him to furnish any information and to produce any document which is relevant to an investigation.
- (b) The right of journalists not to disclose their source implies that the Commission should consider all other available evidence, instead of requiring journalists to disclose their source, unless the legitimate interest in the disclosure outweighs the public interest in the non-disclosure.
- (c) Introducing a procedure along the lines of section 44(2) of the PD(P)O would necessitate the involvement of lawyers and court procedures and would render the procedure of the Commission legalistic, complicated and expensive.

15.109 We acknowledge that the absence of a power to compel a journalist to give evidence and to disclose his source of information might

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<sup>80</sup> *Goodwin v UK* (1996) 22 EHRR 123, para 39.

<sup>81</sup> Recommendation No R(2000) 7, adopted by the Committee of Ministers on 8.3.00.

render the Commission unable to make findings of fact. In these cases, the Commission's findings could state that the publisher has refused to substantiate the claim made in its newspaper, or that the Commission has difficulty forming a view as to the veracity of the evidence because the newspaper has refused to disclose the source of its information.

## **Duty to give reasons in writing**

15.110 In order to enable the parties to decide for themselves whether the Commission has dealt with a complaint lawfully and fairly, the Commission should be obliged to state the grounds on which its decisions are made in dealing with the complaints.<sup>82</sup> If the Commission does not give reasons and communicate them to the parties, then the party affected would not be able to judge whether the decision is fair and reasonable, and the decision may be challenged on the ground of procedural impropriety. As we will recommend that a newspaper or magazine aggrieved by the Commission's decision against it should have a right of appeal, a failure to give reasons would also preclude the newspapers and magazines exercising that right effectively.

### **Recommendation 32**

**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.**

## **No power to award compensation**

15.111 It has been argued that successful complainants should be able to claim compensation from the offending newspapers if the former have experienced genuine hardship, including the need to relocate or consult a professional, as a result of a breach of the Press Privacy Code. Where a newspaper has boosted its circulation and advertising revenue with a story that breaches the Code, it is only fair that the paper should be asked to make amends from its profits. It is also an effective way of reminding editors and journalists of their responsibilities and of the legitimate interests of innocent victims. However, we have decided that the proposed Commission should not have the power to award compensation for the following reasons:

- (a) 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 Commission had the power to award compensation

<sup>82</sup> There is no general or primary obligation upon domestic tribunals to give reasons: *Dr Kwan Chee Keung v Medical Council of HK* [1999] 1 HKC 226, 233 (CA).

against a newspaper for breach of the Code, it would have the effect of widening the scope of the privacy torts proposed in our report on *Civil Liability for Invasion of Privacy*.

- (b) Commission members who are not lawyers would have difficulties in developing the principles governing the award of compensation. The members may make reference to the law of damages in developing these principles, but the issues involved are complicated and difficult to understand.
- (c) If individuals were entitled to claim compensation by making a complaint to the Commission, then the Commission would be required to decide not only whether there has been a breach of the Code, but also whether the breach has caused any harm to the complainant, and, if so, how the compensation should be assessed. Since the Commission would require the assistance of lawyers and expert witnesses to resolve these issues, the complaints procedure would become formal, lengthy and costly.
- (d) If the complainant wants to seek recompense from the 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.<sup>83</sup>

### **Recommendation 33**

**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.**

## **No power to impose a fine**

15.112 The Sub-committee recommended in the Consultation Paper that the statutory body may impose a fine on a newspaper found to be in serious breach of the Code. They suggested that the maximum fine should be \$500,000 for a first offence and \$1,000,000 for a second or subsequent offence. Since the amount of fine imposed by the statutory body would be commensurate with the seriousness of the breach having regard to the harm, offence or risk that the intrusive conduct may bring, the Consultation Paper anticipated that the amount of fine actually imposed would be very small if the newspaper concerned has limited circulation and influence. Although the general public support this proposal, many of those who have sent in their

<sup>83</sup> Alternatively, the press industry may subscribe to an arbitration service, funded by proprietors, for the resolution of some disputes, whereby, if successful, complainants could recover compensation up to a modest limit. See *Working Group Report on Practice and Procedure in Defamation* (Chairman: Lord Justice Neill), July 1991, section XVIII 18-20.

submissions are against it. We first set out the findings of the opinion polls on this issue:

- (a) 60% of respondents in a survey commissioned by *Apple Daily* agreed that a PCPP with power to impose sanctions be created, and 55% thought that the level of fines suggested by the sub-committee was either “appropriate” or “too light”;
- (b) 53% of respondents in a survey conducted by the HKU Journalism & Media Studies Centre and the HKU Social Sciences Research Centre agreed that the proposal that a Press Council with the authority to impose a fine be set up;
- (c) nearly 70% of respondents in a survey conducted by the Society for Truth and Light supported the proposal that offending newspapers should be liable to a maximum fine of \$500,000 for a first offence;
- (d) the regulatory option most preferred by respondents in a survey conducted by the Cooperation Scheme of School and Social Work was for the industry to form a media monitor which has statutory power to punish media organisations found to have breached a code of conduct; and
- (e) 73% of the respondents in a survey commissioned by the HK Press Council in January 2002 considered that the HKPC should have the power to fine newspapers found to have breached a code of ethics.

15.113 The Parliamentary Assembly of the Council of Europe declares that “economic penalties should be envisaged for publishing groups which systematically invade people’s privacy” when drafting legislation guaranteeing the right to privacy.<sup>84</sup> The following overseas bodies may impose financial sanctions on offending newspapers:

- (a) In Denmark, an offending media organisation that fails to comply with an order to publish the decision of the Danish Press Council is punishable with a fine.
- (b) The Press Council of Nepal may make recommendations to the Government to withdraw any official concessions or subsidies granted to a newspaper which breaches the Code of Conduct repeatedly.
- (c) The High Authority for the Mass Media in Portugal may impose a fine on a media organisation for breach of the Authority’s regulatory requirements.
- (d) The Swedish Press Council may require a newspaper or periodical to pay an administrative fee if it has violated good journalistic practice. The administrative fees are used to finance the operations of the Council and its Press Ombudsman.
- (e) The Ethics Committee of the Media Council of Tanzania may order “token payment of damages and costs” against an offending media

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<sup>84</sup>

Resolution 1165 (1998), Guideline (iv).

organisation, for example, to defray the costs incurred by the complainant in filing the complaint.

15.114 However, some respondents submitted that financial sanctions for breaches of the Press Privacy Code would be onerous and could have a chilling effect on press freedom in that the risk of a fine may prompt journalists to take a more cautious approach when covering news. Further, a massive newspaper with a wide circulation and huge advertising revenue is unlikely to be deterred by a fine. Although the maximum fine may be pitched at a level that has a punitive and deterrent effect on massive newspapers and a small newspaper would receive a lower penalty on the ground that the harm caused by the unwanted publicity would be correspondingly lower, the mere threat of a fine would have an undesirable impact on small newspapers, which is disproportionate to the risk of harm caused by them. The following observations made by the Press Council of India are also pertinent:

*“A power to impose meaningful sanctions raises a number of issues, including, (a) the onus of proof; (b) the standard of proof; (c) the right to and cost of legal representation; and (d) whether review and/or appeal would be available. The effect of any or all of these issues may militate against the basic premise, that the Press Council provide[s] a democratic and efficient and inexpensive facility for hearing of the complaints, and that the consequent inevitability would [be that the Press Council would], in effect, become courts, exercising judicial power and well known problems of access, cost, formality and delay would equally apply, thus defeating the basic purpose of the Press Council.”<sup>85</sup>*

15.115 After considering the views of the respondents and the various arguments advanced, we conclude that the proposed Commission should not have the power to impose a fine for the following reasons:

- (a) The overwhelming majority of press councils in other jurisdictions do not have the power to impose fines.
- (b) It is likely that the Commission can achieve its object without the power to fine. Most publishers and editors are anxious to avoid adverse adjudications and the shaming and castigation that may follow. The publication of a critical adjudication or a prompt correction would generally provide sufficient redress.
- (c) The primary concern of most victims is not to punish the offending newspapers but to obtain a prompt correction or a finding that could vindicate their claims, whether in private or in public. The recognition of the victims’ rights and sense of grievance is no less important than the punishment of an offending newspaper.

<sup>85</sup>

Quoted in “Organisational History of Press Council of India” at <[www.nic.in/pci/History.html](http://www.nic.in/pci/History.html)> (26.6.00), at pp 8-9.

- (d) If our civil liability proposals have been implemented, a victim who is adamant in punishing the newspaper may claim exemplary damages by bringing civil proceedings for invasion of privacy.
- (e) Although a fine may prevent flagrant or persistent breaches of the Code, it 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.
- (f) A newspaper with strong financial backing is unlikely to be deterred by a fine; it would factor the risk of paying a fine into its decision-making process.
- (g) The Commission would be a quasi-judicial body that has an investigative role, not a tribunal presided over by a judge.
- (h) 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. Rules of evidence would have to be introduced and legal representation must be allowed with greater use of oral hearings than written evidence. Newspapers would also be more likely to appeal against any adjudications that carried a financial penalty. 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.
- (i) There would be a risk of some newspapers using the fine as a weapon against a rival newspaper.

#### **Recommendation 34**

**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.**

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

15.116 It is interesting to note that the Inter-American Court of Human Rights agreed that the State has a role to play in maintaining the professional ethics of journalists:



*“The Court ... recognizes the need for the establishment of a code that would assure the professional responsibility and ethics of journalists and impose penalties for infringements of such a code. The Court also believes that it may be entirely proper for a State to delegate, by law, authority to impose sanctions for infringements of the code of professional responsibility and ethics. But, when dealing with journalists, the restrictions contained in Article 13(2) and the character of the profession ... must be taken into account.”*<sup>86</sup>

15.117 The Consultation Paper proposed that the statutory body should be able to reprimand an offending newspaper and require it to publish an apology, a correction and/or the statutory body's findings and decision. In determining the most appropriate form of sanction for breaches of the Press Privacy Code, we have taken into consideration the argument that victims of media intrusion are primarily interested in obtaining a finding from an authority that vindicates their sense of grievance. The primary concern of victims seeking redress from a self-regulating body is not monetary recompense or a fine on the newspapers, but a public recognition that they have been mistreated and an apology from the newspaper, whether the apology is published or not.

15.118 The power of publicity is the commonest form of sanction imposed by press councils in other jurisdictions, irrespective of whether the council is established by the industry or by statute. It is a powerful sanction because it puts the offending newspaper under public scrutiny by giving notice that it does not live up to the ethical standards that the industry and the public expect. Many jurisdictions in Europe also have right of reply laws, which grant an individual who has been the subject of an incorrect or damaging statement in the press the statutory right to publish a reply free of charge.<sup>87</sup> The American Convention on Human Rights even expressly provides for the right of a person who has been injured by “inaccurate or offensive statements or ideas” disseminated by a medium of communication to reply or make a correction using the same outlet.<sup>88</sup>

15.119 Some respondents argued that a statutory press complaints body would become an instrument to control the press and public opinion if it has the power to order the publication of its findings and decisions. In our view, the requirement to publish is a proportionate response to a serious invasion of privacy by the press. While the press has the right to be wrong when covering news, such a right carries with it the responsibility to provide a proportionate remedy after publication if someone has been wronged by the coverage. If the interests of an individual have been prejudiced by a

<sup>86</sup> *Re Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Inter-Am Ct HR (Ser A) No 5 (1985) at <[www1.umn.edu/humanrts/iachr/b\\_11\\_4e.htm](http://www1.umn.edu/humanrts/iachr/b_11_4e.htm)>, para 80. The Inter-American Court of Human Rights was established under the American Convention on Human Rights. Article 13(2) of the American Convention is similar to Article 19(3) of the ICCPR.

<sup>87</sup> Eg, Austria, Denmark, Estonia, France, Germany, Hungary, Malta, the Netherlands, Norway, Portugal and Spain. See generally, ARTICLE 19, *Press Law and Practice – A Comparative Study of Press Freedom in European and Other Democracies* (1993) and C J Hamelink, above.

<sup>88</sup> Article 14(1).

newspaper breaching the Code, it is only fair that the newspaper should make recompense by making the truth or the Commission's findings known to its readers.<sup>89</sup> It is worth noting that the Commission would not be given any power to censor a newspaper prior to publication. The newspaper's only obligation would be to publish the Commission's findings and decision, or carry a correction, after publication. This obligation is consistent with the public's right to know and the "special duties and responsibilities" of the press under Article 19 of the ICCPR.<sup>90</sup> Any newspaper aggrieved by the Commission's decision could assert its right to freedom of expression by publishing its views side by side with the findings and decision.<sup>91</sup> We therefore conclude that in addition to the power to advise, warn or reprimand, the Commission should also have the power to require an offending newspaper to publish a correction or its findings and decision promptly and with due prominence.

15.120 However, many voluntary press councils have difficulties in persuading offending newspapers to publish a correction or the findings and decisions promptly and with a prominence equal to that given to the original offending articles. We therefore consider it necessary to enable the Commission to give directions to an offending newspaper as to the required time, manner, form and place of publication of a correction or of the Commission's findings and decision. Deciding these matters at the time of adjudication would avoid any subsequent arguments as to what constituted publication "promptly" and with "due prominence". An offending newspaper would be in no doubt as to the requirements, while compliance could be readily monitored by the Commission.

### **Recommendation 35**

**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;**

<sup>89</sup> Our report on *Civil Liability for Invasion of Privacy* recommended that the conduct of the defendant after an actionable invasion of privacy (including publicity for, and the adequacy and manner of, any apology or offer of amends made by the defendant) should be taken into account by the Court in determining the quantum of damages awarded against the defendant.

<sup>90</sup> See Council of Europe Parliamentary Assembly, Resolution 1165(1998), para 14(iii); quoted in para 3.46 above.

<sup>91</sup> The newspaper may also appeal against the decision. See the section on Appeals below.

- (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.

## No power to order an apology

15.121 We recommend above that the Commission should first attempt conciliation before making a ruling. In conciliating a complaint, the newspaper in question could offer a private or published apology as redress. Any private or published apology made by the newspaper would be taken into account by the Commission in determining the most appropriate sanction. A question arises as to whether the Commission should also be empowered to order an offending newspaper to tender a private apology or publish an apology against its will.

15.122 Before examining the arguments for and against such a power, we first point out that there are laws in Hong Kong compelling a person to make an apology. Under the Broadcasting Ordinance enacted in 2000, the Broadcasting Authority may, by notice in writing, direct a television broadcaster to include in its licensed service "a correction or apology, or both, in a form approved by the Broadcasting Authority, in such manner (including within such period and within such time of day) as is specified in the notice" if the Authority finds that the broadcaster has contravened a provision in a code of practice, a requirement under the Ordinance, a licence condition, or a direction or order of the Authority.<sup>92</sup> The Broadcasting Authority Ordinance as amended in 2000 also provides that the Authority may, in similar circumstances, direct a sound or television broadcaster to include in "a sound broadcasting service specified in the notice", a correction or apology, or both, again in a form approved by the Authority and in such manner as is specified in the notice.<sup>93</sup>

15.123 A compulsory apology may also be required under the Disability Discrimination Ordinance. Under that ordinance, the Court may order the respondent to perform "any reasonable act or course of conduct to redress any loss or damage suffered by the claimant".<sup>94</sup> The Court of Final Appeal in *Ma Bik Yung v Ko Kuen*<sup>95</sup> held that a court may order an apology if the making

<sup>92</sup> Cap 562, s 30 (licensee to include correction or apology in television programme service). The licensee may announce that it is broadcasting the correction or apology pursuant to a direction of the Authority.

<sup>93</sup> Cap 391, s 25A (licensee to include correction or apology in sound broadcasting service).

<sup>94</sup> Cap 487, s 72(4)(b). See also Sex Discrimination Ordinance (Cap 480), s 76(3A)(b). Note that the Privacy Commissioner may serve a notice on a data user, directing him to "take such steps as are specified in the notice" to remedy a contravention under the PD(P)O, which includes a breach of the Data Quality Principle under DPP 2: Cap 486, s 50(1).

<sup>95</sup> [2001] HKCFA 46, para 35.

of an apology is a reasonable act for the defendant to perform. It further held that an order made against an unwilling defendant for him to make an apology for unlawful conduct under the Disability Discrimination Ordinance does not necessarily infringe his guaranteed rights and freedoms. The questions whether (a) freedom of thought and conscience would be infringed or (b) the freedom to manifest one's belief or freedom of expression would be infringed and if so, whether the prescribed restrictions are applicable, depend on the circumstances of each case. Whether an unwilling defendant's apology, albeit insincere, has the effect of redressing the plaintiff's loss and damage to some extent also depends on the circumstances of each case. Nonetheless, such an order should not be lightly made against an unwilling defendant.<sup>96</sup>

15.124 We agree that the proposed Commission should be empowered to order an offending newspaper to publish its findings and decision, but doubt if it is necessary to empower the Commission with the authority to order a private or published apology. An order to publish the Commission's findings and decision is an effective alternative to an order for apology. Making public a decision that is critical of the newspaper would stimulate public debate and vindicate the victim's claim. It would also be open to the Commission to recommend in its decision that the newspaper should publish an apology or tender a private apology to the victim. A newspaper which is unwilling to apologise as recommended would put itself in a poor light.

15.125 Some victims may be disappointed if the Commission would have neither the power to order an offending newspaper to pay a fine or compensation nor the power to order the publication of an apology. They may view the obligation to publish the findings and decisions as being too weak for a persistent offender. However, a "forced apology" made by an unwilling or insincere newspaper is not an apology in the real sense. Removing this power from the Commission would avoid its being challenged on the ground that it has made an order incompatible with Article 19 of the ICCPR. We have therefore decided not to include an order for apology in the range of sanctions available to the Commission.

### **Recommendation 36**

**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.**

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[2001] HKCFA 46, paras 47-53.

## Enforcement of adjudications

15.126 We have seen that many voluntary press councils suffer from the drawback of not being able to enforce their adjudications. The HK Press Council also faces the problem of some newspapers failing to publish a correction or reply promptly or with due prominence. Its Chairman was reported to have made the following comments:

*“You caused me [the victim] a great deal of harm by splashing a wrongful report over the newspaper. I am not asking you to pay compensation, nor am I asking you to tender an apology. I am only asking you to publish a correction or my reply. But the overwhelming majority of the newspapers ignore these requests. Some published it a month later, in 50 Chinese characters, at a corner of the newspaper. What kind of response is this?”<sup>97</sup>*

15.127 We should mention that JUSTICE (HK) was against the proposal that the statutory body be empowered to order a newspaper to publish an apology, correction or its decision and findings. They pointed out that the US Supreme Court had held that the power to compel speech came close to the power to censor speech and must be forbidden.<sup>98</sup> They cited with approval the view of an American jurist that entrusting Government with the power to assure media access entailed three dangers:

- (a) the danger of deterring those items of coverage that will trigger duties of affording access at the media’s expense;
- (b) the danger of inviting manipulation of the media by whichever bureaucrats are entrusted to assure access; and
- (c) the danger of escalating from access regulation to much more dubious exercises of governmental control.<sup>99</sup>

15.128 It should, however, be noted that although the US Supreme Court has held “right of reply” statutes unconstitutional in relation to the press, it has also expressly stated that a “right of retraction” statute is not necessarily forbidden.<sup>100</sup> Indeed, the publication of a correction or apology is a remedy at least for defamation in some jurisdictions. For example, under the Defamation Act 1996 in the UK, where the court disposes of the claim under the summary procedure in the Act, it may order that the defendant publish or cause to be published “a suitable correction and apology”. The content of any correction and apology, and the time, manner, form and place of publication,

<sup>97</sup> “陳坤耀：民主派記協為反對而反對”，*HK Economic Journal*, 19.11.01.

<sup>98</sup> *Miami Herald Publishing Co v Tornillo* (1974) 418 US 241, a decision which had upheld editorial rights over rights of access by invalidating a Florida statute that compelled newspapers to publish the replies of political candidates whom they had attacked.

<sup>99</sup> L H Tribe, *American Constitutional Law* (New York: The Foundation Press, 1988, 2<sup>nd</sup> edn), p 1002, citing Bollinger, “Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media,” 75 Mich L Rev 1, 29-31 (1976).

<sup>100</sup> *Miami Herald Publishing Co v Tornillo* (1974) 418 US 241 at 258 per Brennan and Rehnquist JJ (“the Court’s opinion ... addresses only ‘right of reply’ statutes and implies no view upon the constitutionality of ‘retraction’ statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction.”).

are for the parties to agree. But if they cannot agree on the content, the court may direct the defendant to publish or cause to be published a summary of its judgment; and if they cannot agree on the time, manner, form or place of publication, the court may direct the defendant to take such reasonable and practicable steps as it considers appropriate.<sup>101</sup>

15.129 The Defamation Act 1992 of New Zealand also makes provision for the publication of corrections. The Act provides that in any proceedings for defamation, the Court may recommend that the defendant publish or cause to be published a correction of the matter complained of.<sup>102</sup> Further, the NZ Court of Appeal has held that the Court has jurisdiction to grant a mandatory injunction ordering publication of a correction or retraction of defamatory statements whenever it is required by justice. It expressed the view that the freedom to impart information under the NZ Bill of Rights may well be supported by a jurisdiction to compel the publication of corrective statements when the plaintiff has established actionable defamation.<sup>103</sup>

15.130 There does not seem to be a general power for the local courts in defamation proceedings to order the defendant to publish a correction or apology, nor has the Defamation Ordinance been reformed along the lines of the UK Defamation Act 1996.<sup>104</sup> However, correction as a remedy for inaccurate or misleading statements assists the dissemination of correct information and advances the interests protected by Article 19 of the ICCPR. It vindicates an individual's right without imposing more than a negligible burden on the newspaper, and without dragging the newspaper into litigation that might render it liable for damages.<sup>105</sup>

15.131 To ensure that the self-regulatory scheme is effective, the proposed Commission should be able to enforce its rulings by applying to the Court for an order requiring the defaulting newspaper to publish a correction or the Commission's findings and decision.<sup>106</sup> Without any enforcement power, a maverick newspaper could flout the Press Privacy Code and persistently refuse to comply with the rulings, thus damaging the Commission's standing and defeating the object of the statute. The alternative to a court order is that suggested in the Consultation Paper and endorsed by the Bar Association, that is, to empower the Commission to impose a fine on a defaulting newspaper and to make the fine recoverable as a civil debt in the court. This suggestion is consistent with the approach of the Broadcasting Ordinance, which provides that the Broadcasting Authority may

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<sup>101</sup> See Defamation Act 1996 (UK), ss 8 and 9.

<sup>102</sup> Defamation Act 1992 (New Zealand), ss 26 and 27. In recommending the publication of a correction, the Court may specify the content and the time of publication and the prominence to be given to the correction. Where the defendant complies with the recommendation, the proceedings will be deemed to be finally determined so far as they relate to that defendant.

<sup>103</sup> *TV3 Network v Eveready New Zealand* [1993] 3 NZLR 435.

<sup>104</sup> *Gatley on Libel and Slander* (London: Sweet & Maxwell, 1998), §9.1.

<sup>105</sup> J G Fleming, "Retraction and Reply: Alternative Remedies for Defamation" (1978) 12 UBC L Rev 15, at 30-31; *TV3 Network v Eveready New Zealand* [1993] 3 NZLR 435. See also Resolution 1165 (1998) adopted by the Parliamentary Assembly of the Council of Europe, para 14 (iii), and Article 14 of the American Convention on Human Rights discussed in Ch 3.

<sup>106</sup> Cf Companies Ordinance (Cap 32), s 306 and Securities and Futures Commission Ordinance (Cap 24), s 55.

require a licensed broadcaster to pay a financial penalty if the latter has contravened a direction of the Authority, including a direction to include a correction or apology in the licensed service.<sup>107</sup> The Danish Press Council may also impose a fine in similar circumstances. However, having regard to our comments on the desirability of imposing financial penalties for breaches of the Press Privacy Code stated above, and in the absence of any evidence showing that publicity in itself is not sufficient to deter press intrusion, we have reservations vesting the Commission with such a power.

#### **Recommendation 37**

**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.**

### **Right of publisher to appeal against adjudication**

15.132 Article 14 of the ICCPR provides that “in the determination ... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” A publisher’s obligation to comply with the order to publish a correction or the Commission’s findings and decision is an “obligation in a suit at law”. We must therefore ensure that the complaint proceedings would comply with the procedural requirements of Article 14, or that the Commission’s decisions are subject to the appellate jurisdiction of a court.

15.133 To avoid the proceedings of the Commission becoming formal and complicated, we consider that the Commission’s decisions should be subject to the supervision of the Court of Appeal. Provided that the Commission is subject to the supervision of a judicial body that has full jurisdiction and complies with the requirements of Article 14, it is unnecessary for the complaint proceedings of the Commission to fully comply with the Article.<sup>108</sup> 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. These arrangements were not proposed in the Consultation Paper, but are in line with the disciplinary

<sup>107</sup>  
<sup>108</sup>

Cap 562, ss 28-30. The financial penalty may be recovered by the Authority as a civil debt.  
*Tse Wai Chun v Solicitors Disciplinary Tribunal* CACV 3174/2001 (date of judgment: 11.9.02).

proceedings of other professions<sup>109</sup> and consistent with the self-regulatory nature of the Commission, which deals with alleged breaches of the Code as disputes between the Commission and publishers rather than between complainants and publishers.

15.134 Although the complainants would not have a right of appeal, their interests would not be prejudiced because any order made by the Commission would be against the publisher, not the complainant. Without being required to waive his legal rights when lodging a complaint, a complainant who is dissatisfied with the outcome would be free to pursue his remedies in court if he has a cause of action recognised by the law. Further, having the Court of Appeal involved in the complaints procedure would facilitate oversight by senior judges, thus adding an element of judicial accountability into the self-regulatory scheme.<sup>110</sup>

### **Recommendation 38**

**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.**

15.135 The actions of the Commission, being a public body exercising statutory powers, would be subject to control by judicial review. Aggrieved complainants and disgruntled publishers may therefore apply for judicial review on the ground that the Commission strayed outside the purposes defined by the statute (“illegality”); the decision of the Commission was procedurally unfair (“procedural impropriety”); or the power under which the Commission acted has been improperly exercised (“irrationality”). Hence, although a complainant may not appeal against a Commission’s decision, he may impugn the decision by applying for judicial review on one of these grounds.

<sup>109</sup> Eg Legal Practitioners Ordinance (Cap 159), ss 13 & 37B; Surveyors Registration Ordinance (Cap 417), s 28; Dentists Registration Ordinance (Cap 156), s 23; Planners Registration Ordinance (Cap 418), s 28; Social Workers Registration Ordinance (Cap 505), s 33; and Nurses Registration Ordinance (Cap 164), s 22.

<sup>110</sup> It would be difficult for a publisher to displace the Commission’s findings or decision unless he can show that something was clearly wrong either (a) in the conduct of the proceedings, or (b) in the legal principles applied, or (c) that the Commission’s findings were sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence had been misread. *Dr Kwan Chee Keung v Medical Council of HK* [1999] 1 HKC 226, 230. See also *Tong Pon Wah v HK Society of Accountants* [1998] 3 HKC 82, 94 (the appellate court would not second-guess the professional judgment of a disciplinary committee except where it can be seen that it has plainly misread the evidence and come to a conclusion which is contrary to the evidence or is otherwise plainly wrong).



## **No right to legal representation except with permission**

15.136 The Consultation Paper proposed that the parties should not be represented by lawyers in any hearings before the statutory body or its Complaints Committee unless the statutory body or the Committee decides otherwise. This proposal has been criticised by some respondents for depriving the parties of a right to legal representation.

15.137 Under our proposals in this report, the rules of evidence would not apply to the complaint proceedings of the Commission.. The proceedings would also be inquisitorial in nature, as opposed to the adversarial nature of civil proceedings in a court. The experience of the Privacy Commissioner, the HKPC and the press councils in other jurisdictions suggests that most, if not all, complaints could be dealt with on paper without any oral hearing.<sup>111</sup> For example, the UK Press Complaints Commission decides all cases on written submissions and does not entertain oral hearings.<sup>112</sup> The role of legal practitioners in the proceedings of the proposed Commission would therefore be small, and the question as to whether a party should be represented by a legal practitioner would arise only in exceptional cases.

15.138 There are at least three options open to us in respect of legal representation:

Option 1 – Lawyers are allowed to represent the parties at any hearing before the Commission or its Complaints Committee as of right.

Option 2 – The parties do not have the right to legal representation, nor does the Commission have any discretion to allow legal representation for either party. However, a legally qualified employee or officer of the publisher complained against would not be barred from appearing before the Commission.

Option 3 – The parties do not have the right to legal representation. However, the Commission would have a discretion to allow either or both parties to be legally represented if it thinks fit.

15.139 Although Option 1 gives complainants and publishers an equal right to legal representation, few complainants would have the financial resources to be able to take advantage of this right. Instead, giving legal practitioners the right of audience at Commission hearings could result in many cases in an unrepresented complainant facing a legally represented publisher. There is a risk that this would have an inhibiting effect on complainants. Providing for an equal right to legal representation would in practice give an unfair advantage to the press.

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<sup>111</sup> Lack of an oral hearing does not risk fairness: *R v Secretary of State for the Environment, Transport and the Regions* (2002) Times Law Reports, 17.5.02.

<sup>112</sup> J Clarke-Williams & L Skinner, *A Practical Guide to Libel and Slander* (Butterworths, 2003), para 31.02.

15.140 We are therefore inclined not to give the parties a right to legal representation. The right to legal representation provided for in Article 14 of the ICCPR and Article 11 of the HK Bill of Rights is restricted to criminal proceedings only.<sup>113</sup> Legal representation in disciplinary proceedings is necessary where the outcome of a hearing can have a serious effect on one of the parties, as when the professional standing of a party or his ability to earn a living is at stake.<sup>114</sup> However, journalists would not be held liable for breaches of the Press Privacy Code; nor would a publisher be held liable to pay a fine, compensation or legal costs. The most serious sanction that could be imposed by the Commission would be the requirement that the offending publisher publish the Commission's findings and decision.

15.141 Similar to the position in the Small Claims Tribunal and the Labour Tribunal,<sup>115</sup> we envisage that publishers' legally qualified employees or officers would be free to appear before the Commission, even though publishers would not be allowed to be legally represented. As most publishers have in-house lawyers and aggrieved publishers would have the right to appeal to the Court of Appeal (before which counsel have a right of audience), we do not believe that the absence of a right to legal representation at Commission hearings would have a significant impact on publishers.

15.142 However, if a publisher could be represented by his legally qualified employee or officer, the complainant who does not enjoy the right to legal representation would be placed at a disadvantage. An absolute ban on legal representation would also deprive the parties and the Commission of the benefits of legal assistance in difficult or complex cases. Furthermore, there may be instances where a party has no objection to the other party being represented by a legal practitioner, or where both parties could afford legal representation and wish to be represented by legal practitioners. It would be unfair to the parties if legal representation were denied in these circumstances, particularly when the Commission also agrees that the proceedings would benefit from legal assistance.

15.143 We are therefore in favour of Option 3, which would give the Commission a discretion to allow legal representation. This is in line with the approach adopted in the Personal Data (Privacy) Ordinance (Cap 486) and the Ombudsman Ordinance (Cap 397),<sup>116</sup> and we are not aware of any dissatisfaction in relation to these provisions. The Privacy Commissioner, for example, usually allows a party to be represented by a legal practitioner if the party requests it. Option 3 ensures that complaints could be dealt with swiftly and in an informal manner, but the Commission would be given some flexibility in allowing legal representation in appropriate cases. However, we

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<sup>113</sup> *R v HK Polytechnic, ex parte Jenny Chua Yee-yen*, (1992) 2 HKPLR 34, 41.

<sup>114</sup> Eg, a medical practitioner whose conduct is the subject of an inquiry conducted by the Medical Council is entitled to be legally represented throughout the inquiry.

<sup>115</sup> Small Claims Tribunal Ordinance (Cap 338), s 19; *Ho Ka Man v Hutchison Telecommunications (HK) Ltd*, HCSA 26/2003 (date of judgment: 23.6.03); Labour Tribunal Ordinance (Cap 25), s 23; *Century City Holdings Ltd v Siu Tat-yin* [1995] 1 HKLR 297.

<sup>116</sup> Cap 486, s 43(3) and Cap 397, s 12(4). Legal practitioners do not have any right of audience before the Privacy Commissioner at any hearing for the purposes of an investigation under the PD(P)O, though they may appear before the Commissioner if he thinks fit.

think the Commission should draw up guidelines setting out the considerations that should be taken into account in determining the appropriateness of legal representation. These considerations might include:<sup>117</sup>

- (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.

We believe that our proposal offers the advantages of legal representation in appropriate circumstances, while not disadvantaging complainants.

#### **Recommendation 39**

**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.**

### **Duty to publish findings, decisions and annual reports**

15.144 To ensure transparency and to provide practical guidance as to what conduct would or would not constitute a breach of the Press Privacy Code, the Commission should be required to publish its findings and decision after it has adjudicated on a complaint. Making public such information would:

- (a) ensure consistency of decisions;

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Cf *R v HK Polytechnic, ex parte Jenny Chua Yee-yen*, (1992) 2 HKPLR 34, 42-44.

- (b) ensure that the Commission would not arrive at its decisions arbitrarily;
- (c) enable the decisions of the Commission to be assessed;
- (d) enable the public to judge for themselves whether there is any undue interference from third parties;
- (e) promote media literacy education; and
- (f) provide useful research and training materials for students and practitioners.

#### **Recommendation 40**

**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.**

15.145 In addition to the duty to publish promptly its findings and decisions, the Commission should also be required to publish an annual report and table it before the Legislative Council. Such a requirement would increase transparency, strengthen accountability and facilitate public scrutiny. Drawing the attention of the legislators to the activities and effectiveness of the Commission would move them to examine whether the Commission has met the desired objectives, whether public funds have been well spent, and whether its Code, functions and powers are appropriate.

15.146 The annual report should not merely give a general description of the Commission's activities, but should also state the number of complaints it has received, accepted, rejected, not investigated, upheld, and ruled against in the past year; classify the complaints on the basis of the Code; analyse the complaints dealt with or rejected by the Commission; state what

decisions have been made in upheld complaints; report whether the offending publishers have complied with its decisions; and make such observations and recommendations as it thinks fit.

#### **Recommendation 41**

**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.**

### **Anonymity for alleged victims**

15.147 In order to encourage victims of unwarranted press intrusion to seek redress from the Commission, and to protect their private lives from being interfered with a second time by the Commission and the media disclosing their identities, we decide that the identities of all alleged victims of breaches of the Press Privacy Code should be protected from disclosure unless the victim concerned agrees otherwise.

#### **Recommendation 42**

**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.**

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

15.148 An offending publisher aggrieved by the Commission's findings or decision might sue the Commission and its members for libel. Any journalist or editor implicated in the findings may also wish to take libel action. To ensure that the statutory body and its members can perform their functions without fear of litigation, the Consultation Paper proposed that the statutory body and its members and employees should be immune from legal actions in respect of anything done by it or any of its member or employee in good faith in the exercise of the powers conferred or functions imposed by the statute. However, the HKPPA argued that a press council, whether it has legal status or not, should not be immune from libel actions. It submitted that a council,

which adjudicates privacy complaints in a fair and just manner, should not find it necessary to seek immunity. If the council could criticise with impunity, it would not exercise care in passing judgment on the press. The draft Bill produced by the HK Press Council seeks to grant immunity to Council members and employees but not the Council itself.<sup>118</sup> The HKJA was against the HKPC's proposal, apparently overlooking the fact that the immunity would not be extended to the Council itself.<sup>119</sup>

15.149 The position of the HKJA and HKPPA appears to be at odds with that in the Joint Statement issued by the HKNEA, HKJA, HKFJ and HKPPA on 19 September 1999, which said:<sup>120</sup>

*“At present the media’s self-regulation is not as effective as it should be. One main reason is that the law of defamation confers no qualified privilege on journalists’ professional bodies regarding their comments on the ethical standard of individual news organisations. Journalists who are dedicated to upholding media ethics dare not speak out. News organisations which support a high ethical standard dare not report on such matters. Thus, society is deprived of the opportunity to come to a consensus on the moral standard of the press. The Sub-committee should tackle the real cause of the problem by suggesting the reform of the law on defamation rather than the creation of a new mechanism such as the Council, which might lead to government interference.”*

15.150 At the meeting of the LegCo Panel on Home Affairs held on 26 April 1999, a representative of the HKPPA informed the Panel that a newspaper might threaten to take legal action against individual officers of the Association if the latter suggested that the newspaper had acted in breach of professional ethics. He said that legal costs were a financial burden on the HKPPA, given that their membership was small and they did not have the resources to defend legal actions taken by large newspapers.<sup>121</sup> The Chairperson of the HKJA concurred by saying that adverse comments by a journalist about a newspaper might result in the newspaper taking legal action against him. The legislators at the meeting expressed concern over the chilling effect that such threats of legal action could have on the freedom to criticise the press.

15.151 The HKJA has stated that their decisions on complaints about media ethics have never resulted in legal action against them.<sup>122</sup> The Convenor of the Press Freedom Sub-Committee of the Association has also

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<sup>118</sup> Clause 13(11) of the draft Bill.

<sup>119</sup> HKJA Executive Committee, “HKJA says no to statutory press council”, 12.9.01, the paragraphs under the title of “A misguided quest for immunity”.

<sup>120</sup> At <[www.democracy.org.hk/EN/sep1999/fp\\_03.htm](http://www.democracy.org.hk/EN/sep1999/fp_03.htm)>, para 5.

<sup>121</sup> Minutes of special meeting of LegCo Panel on Home Affairs held on 25.11.98, LC Paper No CB(2)1400/98-99, para 20.

<sup>122</sup> HKJA Executive Committee, “HKJA says no to statutory press council”, 12.9.01.

said that his Sub-Committee has not been sued by any press agencies.<sup>123</sup> However, the *HK Economic Journal* reported on 15 September 1999 that both HKJA and HKPPA were being sued by *Oriental Daily News* for libel. The action against HKJA related to a statement issued by the Association about *Oriental Daily News* sending paparazzi to follow Mr Justice Godfrey, while the action against HKPPA related to a statement issued by the Association about a press photographer being attacked when covering the contempt of court proceedings involving *Oriental Daily News*. The article further reported that *Oriental Daily News* was also seeking compensation from RTHK and its presenter for criticising the newspaper for discriminating against disabled persons and new immigrants.

15.152 At an international privacy conference held in September 1999, Mr Kevin Lau, chief writer of *Ming Pao Daily News* and former Vice-Chairman of the HKJA, was reported as saying that there was no effective self-regulation in Hong Kong mainly because the journalists' associations might be sued for libel if they criticised the conduct of media organisations. He added that the HKJA and HKPPA had faced threats of libel action, and there were similar cases pending at that time.<sup>124</sup> Dr Paul S N Lee, Director of the School of Journalism and Communication at the Chinese University of HK, has also stated that his colleague received a letter from a firm of solicitors after criticising a newspaper. He pointed out that although the action would have failed if it had proceeded to trial, his colleague eventually decided not to write similar articles in future because he did not want to spend time and money on litigation.<sup>125</sup> More recently, Mr Yau Shing-mu, Executive Chief Editor of *HK Economic Times*, pointed out the reservations which staff in the press industry have about criticising other media organisations for fear of legal action.<sup>126</sup> And in November 2001, Mr Kevin Lau stated that:

*"in the past few years, journalists, editors, columnists, journalists' associations, and even presenters of phone-in radio programmes have been sued for libel for criticising the media, and the legal expenses of such a lawsuit easily runs up to over a million dollars, thus creating an atmosphere in which no one is willing to openly criticise the media."*<sup>127</sup>

15.153 Threats to sue media critics for libel were reported to have been made by the owner of HKCyber.com ("Cyber Daily", a news website). HKCyber.com had been criticised for uploading to its website a video clipping showing an undercover journalist having sex with a prostitute who was unaware that the entire process was being recorded by a hidden camera.

<sup>123</sup> Minutes of meeting of the LegCo Panel on Home Affairs held on 14.12.01, LC Paper No CB(2)860/01-02, para 60.

<sup>124</sup> "劉進圖說發表批評傳媒操守言論 / 易被財雄勢大傳媒機構控誹謗罪", *HK Economic Journal*, 15.9.99.

<sup>125</sup> P Lee, "報業評議會矯枉過正", *Apple Daily*, 16.9.99. See also *Oriental Daily Publisher v Ming Pao Holdings*, HCA 5612/1995 (date of judgment: 15.9.99) (concerning an article written by Dr Lui Tai Lok commenting on the ethical standards of the Oriental Press Group).

<sup>126</sup> Minutes of meeting of the LegCo Panel on Home Affairs held on 14.12.01, LC Paper No CB(2)860/01-02, para 52.

<sup>127</sup> Kevin C T Lau, "修改誹謗法 / 解報評會爭議", *Ming Pao Daily News*, 17.11.01. Mr Lau is in favour of amending the Defamation Ordinance so that reports of the statements made by the HKPC and other journalists' associations are protected by statutory qualified privilege.

The Chairman of HKCyber.com was reported as saying that the stories in the “strange stories” section of HKCyber.com were not news, and that criticisms made on the basis that those items were news might be defamatory. He was also reported as saying that he was then discussing with his lawyer about bringing libel actions against individual media organisations, including HK Commercial Broadcasting Co Ltd.<sup>128</sup>

15.154 Libel actions involving the media can be protracted and expensive. In *Eastern Express Publisher Ltd v Mo Man Ching*, RTHK and a presenter of the television programme *Media Watch* were sued for libel after the latter had commented on the actions of a press group and the “trend” of the media threatening legal actions against each other. Although the Court of Final Appeal found in favour of the defendants by holding that the comment that the press group appeared to want to frighten people into silence was a comment which an honest person could have made,<sup>129</sup> the legal costs incurred by the defendants in defending the action were said to total about nine million dollars. The programme in question was broadcast in March 1995, but the case came to an end only in November 1999.

15.155 Professor Chan Yuen-ying, Director of the HKU Journalism and Media Studies Centre, objected to the creation of a statutory press council. She referred to a libel action brought by the Oriental Press Group against Commercial Radio for allowing a caller to criticise the Group’s newspapers on live radio, and said that the numerous libel actions initiated by the Oriental Press Group against allegedly defamatory critics did not bode well for the kind of self-discipline most journalists believed to be a better alternative to a statutory press council. She added that self-discipline would thrive only in a climate which fostered discussion and debate among colleagues. “No one will speak his or her mind if words honestly spoken can easily land one in a legal stew.”<sup>130</sup>

15.156 It is common for the members of a statutory body (as opposed to the statutory body itself) to enjoy legal immunity under the enabling legislation. Examples of such statutory bodies include the Barristers Disciplinary Tribunals,<sup>131</sup> the Solicitors Disciplinary Tribunals,<sup>132</sup> the Broadcasting Authority,<sup>133</sup> the Consumer Council,<sup>134</sup> the Equal Opportunities Commission,<sup>135</sup> the tribunal appointed under the Estates Agents Ordinance,<sup>136</sup> the Obscene Articles Tribunal,<sup>137</sup> the Office of the Ombudsman,<sup>138</sup> and the Securities and Futures Commission.<sup>139</sup>

<sup>128</sup> *Apple Daily*, 11.12.00, A 10.

<sup>129</sup> *Eastern Express Publisher v Mo Man Ching* [1999] HKCFA 71. The imputation of one of the two statements in question was “not only that the plaintiff was prone to threaten legal proceedings whenever it was mentioned, even incidentally, but also that the plaintiff appeared to want to frighten people into keeping their mouths shut”: 1998 HKC LEXIS 79, p 17.

<sup>130</sup> Y Y Chan, “The Problem Lies in Generalities”, *South China Morning Post*, 17.3.00. She suggests that the libel law be reformed so as to foster robust public debate.

<sup>131</sup> Legal Practitioners Ordinance (Cap 159), s 36(3).

<sup>132</sup> Legal Practitioners Ordinance (Cap 159), s 11(3).

<sup>133</sup> Broadcasting Authority Ordinance (Cap 391), s 16.

<sup>134</sup> Consumer Council Ordinance (Cap 216), s 19.

<sup>135</sup> Sex Discrimination Ordinance (Cap 480), s 68.

<sup>136</sup> Estate Agents Ordinance (Cap 511), s 54.

<sup>137</sup> Control of Obscene and Indecent Articles (Cap 390), s 9.



15.157 At a press conference in November 2001, the Chairman of the HKPC said that he could speak freely when he was the Chairman of Consumer Council because all members of the Consumer Council were immune from legal liability, but he needed to be more careful when he spoke as Chairman of the Press Council because he then had no such immunity. He said litigation not only involved considerable time and money, but also caused distress to the person being sued. At the end of the interview, he “especially reminded” the reporters which of his statements could not be reported, and how certain of his statements should be reported.<sup>140</sup> The chilling effect caused by threats of legal action is illustrated by the fact that the HKPC does not normally name the offending newspapers in its adjudications if they are not members of the Council. In May 2003, the HKPC issued a press release condemning *Next Magazine* for publishing a report about a Form Four female student in breach of journalistic ethics. As a result, the magazine sued the Council for libel.<sup>141</sup>

15.158 We consider that members of the proposed Commission should be protected from legal liability so that they can adjudicate complaints and publish their findings and decisions without fear of legal liability. They should be able to speak and write freely when forming a view on a complaint, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed. Individuals serving on the Commission would reasonably expect to be criticised, but it would be unreasonable to expose them to legal liability for this voluntary work undertaken in good faith for the public good. 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. Even though the impugned conduct were true or believed to be true, the uncertainty of establishing that truth in court, and the expense of having to do so, would tend to deter criticism.

15.159 We recommend that, without prejudice to a person’s right to compensation from the Commission itself, the members and employees of the Commission should enjoy personal immunity from civil suits for any acts or omissions done by them in good faith in the exercise of their powers or the performance of their functions. Under this proposal, acts done by a member or employee in bad faith or with malice would not be protected, nor would unlawful acts committed in excess of authority be immune. Further, any person who suffered damage as a result of an unlawful act committed by the Commission would still be able to seek recovery from the Commission itself whether or not the act was done in good faith. Hence, if the Commission has issued an adjudication that is defamatory of a newspaper, then the Commission would have to defend itself in court if that newspaper brings a libel action against it. Likewise, the Commission would be liable for damages if, say, someone is injured because the Commission is negligent in

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<sup>138</sup> The Ombudsman Ordinance (Cap 397), s 18A.

<sup>139</sup> Securities and Futures Commission Ordinance (Cap 24), s 56.

<sup>140</sup> “陳坤耀：民主派記協為反對而反對”，*HK Economic Journal*, 19.11.01.

<sup>141</sup> HCA 3741/2003. See the report in *Sing Tao Daily*, 10.10.03.

maintaining its premises. The scope of the immunity recommended in this report is therefore narrower than that proposed in the Consultation Paper and is the same as that proposed by the HKPC. It is unnecessary to confer immunity on complainants because the communication of a grievance to the Commission, which would have the authority to inquire into the matter and grant redress, would be privileged at common law if it is made in good faith and not for the purpose of defaming the publisher complained against.<sup>142</sup>

#### **Recommendation 43**

**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.**

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

15.160 We have recommended earlier in this chapter that the Commission should have the power to require a newspaper or magazine which is found to have breached the Press Privacy Code to publish the Commission's findings and decision. In our view, however, publicity for the Commission's work should go further. There are cogent reasons for wishing to encourage dissemination of the Commission's findings and decisions by newspapers and magazines other than the offending publication itself. Wider dissemination would:

- (a) inform the public of the Commission's work and allow public scrutiny and evaluation of that work;
- (b) promote awareness of, and compliance with, acceptable media standards; and
- (c) provide a palliative effect for victims.

15.161 Attempts to enhance publicity for the Commission's findings and decisions will be hampered, however, if there is a risk that a newspaper aggrieved by the Commission's findings may bring a libel action against a media organisation which publishes those findings. We consider in this section:

<sup>142</sup>

See *Gatley on Libel and Slander* (Sweet & Maxwell, 9th edn, 1998), para 14.52.

- (a) whether media reports of the findings and decisions of the Commission and other information published by the Commission should be protected by the statutory defence of qualified privilege under section 14 of the Defamation Ordinance (Cap 21); and
- (b) if so, whether the defence should be subject to the defendant (ie, the person who has published the Commission's statements) giving the defamed person (usually the publisher or journalist criticised by the Commission) an opportunity to publish a reasonable letter or statement by way of explanation or contradiction.

15.162 The defence of qualified privilege under section 14 protects the publication in a newspaper, or the broadcasting, of any such report or other matter as is stipulated in the Schedule to the Ordinance unless the publication is proved to have been made with malice.<sup>143</sup> It does not protect the publication of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit.<sup>144</sup>

15.163 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 (or any official report, notice or other matter issued for the information of the public by the Commission):<sup>145</sup>

- (a) The Commission would be a statutory body performing public functions in the interests of the public. The public's right to know of its findings and decisions should not be fettered by a fear of libel action.
- (b) The ethical standards of the news media and the proper duties and functions of the news media are matters of public interest.<sup>146</sup> The public have an interest in ensuring that the press does not abuse press freedom to the detriment of individual privacy. It would be contrary to the general interest of society if the press were hampered in discharging its duty to keep the public informed of the

<sup>143</sup> That is, the defendant misused the occasion for some purpose other than that for which the occasion is privileged, as when the motive which actuates the defendant is not to discharge the relevant duty, but to give vent to his personal spite or ill will towards the person he defames.

<sup>144</sup> Defamation Ordinance (Cap 21), s 14(1) and (3). The defence of fair comment (also known as the defence of honest comment on a matter of public interest) is concerned with the protection of comment not imputations of fact. It does not cover any defamatory statements of fact issued by the Commission.

<sup>145</sup> All members of the HKPC, including the HKNEA, the HKFJ and all its newspaper members, are in favour of extending the defence of qualified privilege to media reports of the HKPC's findings and decisions. Only 25% of the respondents in the survey commissioned by HKPC considered that granting qualified privilege to such reports would have a negative impact on press freedom. Another 49% considered that it would have no impact, while 26% considered that it would have a positive impact.

<sup>146</sup> *Oriental Daily Publisher v Ming Pao Holdings*, HCA 5612/1995 (date of judgment: 15.9.99).

Commission's findings and decisions by constant fear of libel actions.

- (c) The proposal is in line with the principles underlying the defence of qualified privilege both at common law and under section 14 of the Defamation Ordinance.
- (d) 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.

15.164 We have accordingly concluded that media reports of certain statements made by the Commission should be entitled to qualified privilege in libel proceedings. The question remains as to whether or not the availability of the defence should be conditional upon the defendant having published, if the plaintiff so requested, a reasonable letter or statement by way of explanation or contradiction. Statements that are privileged without any obligation on the defendant to publish an explanation or contradiction when requested are specified in Part I of the Schedule to the Defamation Ordinance, whereas those that are privileged subject to explanation or contradiction are specified in Part II thereof. The defendant who has published a Part II statement cannot be forced to publish an explanation or contradiction, but if he refuses to do so and is sued for libel, he cannot rely on the statutory defence.

15.165 Part II of the Schedule covers a fair and accurate report of,

- (a) the findings or decision of an association, "*being a finding or decision relating to a person who is a member of or is subject by virtue of any contract to the control of the association*";
- (b) the proceedings at a meeting *bona fide* and lawfully held for a lawful purpose and held for the furtherance or discussion of any matter of public concern;
- (c) the proceedings at a public meeting or sitting of a statutory body, an inquiry or a tribunal;
- (d) the proceedings at a general meeting of a public company;
- (e) a notice issued by a Government department;
- (f) any notice or other matter issued for the information of the public by the Consumer Council; or

- (g) a report made or published by the Ombudsman.<sup>147</sup>

15.166 We consider that similar protection should be extended to media reports of the Commission's findings and decisions, as well as official reports, notices and other matters issued for the information of the public by the Commission. In other words, the defence of qualified privilege should be made available in libel proceedings to a media organisation which has published a fair and accurate report of any such Commission material without malice, provided that that media organisation has complied with any request from the plaintiff in those libel proceedings to publish a reasonable letter or statement by way of explanation or contradiction. The justifications for including these media reports in Part II of the Schedule include the following:

- (a) The right to require the defendant to publish a reasonable letter or statement by way of explanation or contradiction acts as a safeguard against abuse.
- (b) The right of reply allows the person defamed (usually the offending publisher or the journalist concerned) to clarify the position and contain any unjustified damage to his reputation.<sup>148</sup>
- (c) If the person defamed is to be deprived by law of the right to legal redress, it is only fair that he should be afforded an opportunity to reply.
- (d) The right would increase the flow of information to the public and enable both sides of the debate to be put before the public, who are entitled to know both sides of the story.

We should emphasise that the protection afforded by our proposal would not extend to the initial publication by the Commission.

15.167 There have been comments that the qualified privilege should not be extended to reports of statements directed against non-members of an association. Although this reflects the current position under the Defamation Ordinance,<sup>149</sup> we see no policy objection to extending the privilege to reports of statements about non-members if all the requirements under section 14 in relation to reports specified in Part II of the Schedule to the Ordinance are satisfied, ie, (a) the subject is a matter of public concern; (b) its publication is for the public benefit; (c) the report is fair and accurate; (d) its publication is not actuated by malice; and (e) the aggrieved non-member has an opportunity to reply if his reputation is damaged by the report.

15.168 It is noteworthy that the Committee on Defamation chaired by Mr Justice Faulks considered that the proceedings of the UK Press Council, the

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<sup>147</sup> All proceedings of the Solicitors Disciplinary Tribunals and Barristers Disciplinary Tribunals are also privileged: Legal Practitioners Ordinance (Cap 159), ss 11(4) and 36(4).

<sup>148</sup> E C S Wade, "Defamation" (1950) 66 LQR 348, at 351-2 ("a correction or explanation may go a long way towards meeting any slur which may have been cast upon the plaintiff by a reporter").

<sup>149</sup> Cap 21, Schedule, para 8.

BBC Complaints Committee and the IBA Broadcasting Panel had an obvious public interest and proposed that “fair and accurate reports of the adjudications, official reports, statements or notices” issued by these bodies should be privileged subject to explanation or contradiction.<sup>150</sup> The Law Reform Commission of British Columbia also recommended that “a fair and accurate report of any finding, decision, or notice” issued by a press council in Canada should be protected by statutory qualified privilege subject to a right of reply.<sup>151</sup> The Defamation Act 1996 in the UK now provides that the category of statements that are privileged subject to explanation or contradiction includes a fair and accurate report of any finding or decision of “*an association formed for the purpose of promoting or safeguarding the interests of any ... industry or profession, or of the persons carrying on or engaged in any ... industry or profession, and empowered by its constitution to exercise control over or adjudicate upon matters connected with that ... industry or profession, or the actions or conduct of those persons*”, without further requiring that the finding or decision be related to a person who is a member of, or is subject by virtue of any contract to the control of, the association.<sup>152</sup>

#### **Recommendation 44**

**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.**

## **Education and research**

15.169 In addition to drafting a code and adjudicating complaints, the Commission should also play a role in education and research. Both the Privacy Commissioner and the Equal Opportunities Commission are required to play such a role under the relevant legislation.<sup>153</sup> Consideration should also be given to enabling the Commission to maintain contacts with, or participate in the activities of, such international or regional bodies as the World Association of Press Councils, the Commonwealth Press Union and the Alliance of Independent Press Councils of Europe.

<sup>150</sup> *Report of the Committee on Defamation* (London: HMSO, Cmnd 5909, 1975) (Chairman: The Hon Mr Justice Faulks), para 231. Cf Defamation Act 1996 (UK), Sch 1, paras 14 & 15.

<sup>151</sup> Law Reform Commission of British Columbia, *Report on Defamation* (No 83, 1985), pp 40-44.

<sup>152</sup> Defamation Act 1996, Sch 1, para 14(b). See also Lord Chancellor's Department, *Consultation Paper: Defamation Act (1999)*, at <[www.lcd.gov.uk/consult/civ-just/defactfr.htm](http://www.lcd.gov.uk/consult/civ-just/defactfr.htm)>, in relation to para 15 of the Act. Cf Defamation Ordinance (Cap 21), sch, para 8.

<sup>153</sup> PD(P)O (Cap 486), s 8(1), and Sex Discrimination Ordinance (Cap 480), s 65.

#### **Recommendation 45**

**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.**

## **Funding**

15.170 We consider that the Commission should be provided with sufficient funds to enable it to carry out its functions efficiently and effectively. It must have the financial ability to bring and defend legal proceedings arising in the course of its operations. The Commission could become involved in legal proceedings in several ways:

- (a) the Commission would have to apply to the Court for an order if a publisher failed to comply with the Commission's requirement to publish a correction or its findings and decision;
- (b) an aggrieved publisher would be able to appeal against the ruling, in which case the Commission would have to defend its position in the Court of Appeal;
- (c) the proceedings of the Commission would be subject to judicial review; and
- (d) a publisher or journalist who has been criticised by the Commission or its Chairman might bring a libel action against the Commission.

Even if the Commission wins a case, it could usually recover only about 70% of the legal costs from the defendant. Without sufficient funding, the Commission could not obtain all the legal services necessary to support its normal operation.

#### **Recommendation 46**

**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.**

#### ***Possible sources of funding***

15.171 The source of funding was a topic discussed at the seminars on press self-regulation organised by the Commonwealth Press Union in 2001/02. Ian Beales summarised the discussions as follows.<sup>154</sup>

*“It has been a central tenet of many self-regulatory systems that the integrity of the independent system is most secure if the industry itself meets the cost. It gives the industry ownership and a moral authority it might not otherwise command. Where this is impossible, the second-best solution would be to have mixed funding – with substantial support from independent donors. The logic of this was widely recognised at the seminars. However, there was not universal acceptance of the view that self-regulation is inevitably compromised by receiving state funding, as in hybrid systems.*

*In Francophone countries such as Cameroon, for example, the view was that cash from the state was simply the people’s money redistributed, and was not tainted if no conditions were attached. In India, it was accepted custom that the press council, headed by a supreme court judge, should be publicly funded. Other countries, such as Malaysia, believed the integrity of a regulatory system could be protected from charges of state-dominance if the money was voted directly by parliament from the consolidated fund, rather than from ministerial budgets. In all these cases, delegations saw no inherent incompatibility or untoward cosiness and no risk that the press watchdog might be cynically seen as being tamed by being fed by the state.”*

15.172 The Commission could be funded by general revenue or a levy on newspapers and magazines, or both. The amount of levy could be based on the circulation or readership of newspapers and magazines. Since the

<sup>154</sup>

I Beales, *Imperfect Freedom*, above, at 30.



Commission would have a small staff, it is expected that its running costs would not be high. However, the legal costs to be borne by the Commission in bringing and defending legal actions could be substantial and may fluctuate from year to year. There is therefore a concern that the levy would overburden the press if they were required to bear both the running costs and the legal costs of the Commission.

15.173 It should first be recognised that a levy is in the nature of a tax. A substantial levy has a negative impact on the costs, price, circulation, readership and profits of newspapers. Imposing too high a levy would stifle press freedom and discourage people from starting a newspaper.<sup>155</sup> In determining whether a law imposing a levy of customs duty on imported newspapers was constitutional or not, the Supreme Court of India held that the tests for determining the legality of a statute taxing newspapers is whether there is a “distinct and noticeable burdensomeness, clearly and directly attributable to the tax”:

*“What may ... have to be observed in levying a tax on newspaper industry is that it should not be an overburden on newspapers which constitute the Fourth Estate of the country. Nor should it single out newspaper industry for harsh treatment. A wise administrator should realise that the imposition of a tax like the customs duty on new newsprint is an imposition on knowledge and would virtually amount to a burden imposed on a man for being literate and for being conscious of his duty as a citizen to inform himself about the world around him.”<sup>156</sup>*

15.174 We agree that any levy on newspapers must not be so high as to become a burden for persons who wish to exercise freedom of expression by publishing a newspaper. There are a number of ways in which the financial burden imposed by funding the Commission could be minimised. The first option would be to provide the Commission with immunity from all legal actions so that it would only be involved in enforcement, judicial review and appeal proceedings. We are not in favour of this option because it would be unfair to bar a person from pursuing a claim against the Commission (as opposed to its members and staff) for a wrongful act committed by it. In addition, the legal costs of the enforcement, judicial review and appeal proceedings could still be substantial.

15.175 Another option would be for the Government to provide legal services for the Commission through the Department of Justice, thus avoiding the need for the Commission to incur legal expenses by retaining lawyers in the private sector. This option is viable but undesirable because the involvement of Government lawyers would be seen by some as providing an opportunity for the Government to interfere with the operation of the

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<sup>155</sup> The annual fee payable by a registered newspaper is only \$785: Newspapers Registration and Distribution Regulations (Cap 268, sub leg B), s 12(2).

<sup>156</sup> *Indian Express Newspapers (Bombay) Private Ltd v Union of India* (1985) SCR (2) 287, 341-342.

Commission. In any event, the Commission would still be liable to pay damages and the legal costs of the other party if it lost a case.

15.176 The third option would be for the Government to set up a fund to meet the legal expenses of the Commission, using the Consumer Legal Action Fund administered by the Consumer Council as a precedent.<sup>157</sup> The Consumer Legal Action Fund was set up in 1994 with an initial sum of \$10 million granted by the Government. It is self-financed with income from bank interest, application fees, costs recovered from defendants in successful cases, and a contribution of 10% of the damages received by the assisted consumers. However, the aim of the fund is to assist consumers to seek legal redress in cases involving significant public interest, not to assist the Consumer Council to defend legal actions brought against it. The legal costs incurred by the Consumer Council in defending legal actions are paid out of general revenue.

15.177 The Equal Opportunities Commission also has the power to provide assistance to persons who wish to take legal proceedings under the anti-discrimination legislation. However, no trust fund has been set up for this purpose. The Commission's legal expenses are met from its general income, whether the expenses are incurred for the purposes of providing legal assistance to persons who wish to institute proceedings under the legislation, or for defending legal actions brought against the Commission.<sup>158</sup> In the case of the Law Society and the Bar Association, they are liable to pay the legal expenses incurred in connection with any disciplinary proceedings, but if they cannot recover the expenses from the solicitor or barrister concerned, they may seek recovery from the Government out of general revenue.<sup>159</sup>

### **Running costs**

15.178 We consider that the running costs of the Commission, including any costs arising from the provision of ongoing legal advice to the Commission (but excluding any litigation costs), should be borne by the industry because the need to establish such a body arises out of the industry's own conduct. Where the activities of an industry result in social costs borne by society, it would seem only reasonable that members of that industry should bear the costs of the self-regulating body set up to protect the public's interests.

### **Education and research costs**

15.179 The Commission should also have adequate resources to promote education and undertake research. It will be recalled that the

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<sup>157</sup> See "Report of the Consumer Legal Action Fund" in *Consumer Council Annual Report 2000-2001*, pp 96-100.

<sup>158</sup> The Chairperson of the EOC has commented that the increase in the number of claims had put pressure on its budget: *HK Economic Journal*, 20.2.01.

<sup>159</sup> Legal Practitioners Ordinance (Cap 159), ss 25 & 39.

Legislative Council has passed a resolution urging the Administration to promote education on media literacy across the board. Although there are divergent views as to whether a statutory body should be set up to regulate press intrusion, there is a consensus in the community that the Administration should encourage the elaboration and the development of media literacy programmes for children and adults. We therefore consider that the costs of education and research should be borne by public revenue.

### ***Legal costs and damages***

15.180 There is also a strong case for meeting the Commission's legal costs (other than any costs arising from the provision of ongoing legal advice to the Commission) and any damages payable by the Commission from the public coffers:

- (a) The establishment of the Commission would be in the public interest and for the general welfare of all Hong Kong people. The Commission should have full support in protecting the public from unwarranted press intrusion.
- (b) It is not in the interests of the public that the Commission should be inhibited from exercising its powers and judgement fully, fairly and firmly by concerns as to the possible adverse financial consequences of its actions.
- (c) Public interest bodies such as the Privacy Commissioner's Office, the Equal Opportunities Commission and the Consumer Council are all funded by public revenue. The Law Society and Bar Association also receive financial backing from the Government in recovering the legal expenses incurred in connection with their disciplinary proceedings.
- (d) Many press councils or similar bodies in other jurisdictions receive financial assistance from the state, including those in Bangladesh, Belgium, Denmark, Egypt, Finland, Germany, Ghana, India, Indonesia, Nepal, Nigeria, Portugal, Quebec and Sri Lanka.

#### **Recommendation 47**

##### **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.

## Comparison with proposals in the Consultation Paper

15.181 The table below highlights the major differences between the proposals in this report and those in the Consultation Paper.

	<b>Proposals of the Privacy Sub-committee in the Consultation Paper</b>	<b>Proposals of the Law Reform Commission in this Report</b>
<b>Name</b>	Press Council for the Protection of Privacy	It should be called a Commission to distinguish it from the HKPC.
<b>Responsibility for breaches of the Code</b>	Newspaper and magazine proprietors, publishers and editors are held responsible.	Only newspaper and magazine publishers are held responsible.
<b>Method by which the members are appointed</b>	All members are appointed by an independent Appointments Commission, the members of which (including the chairman) are appointed by an independent person invited by the Chief Executive in consultation with the press industry.	The press members are nominated by the press industry and the journalistic profession, while the public members are nominated by professional bodies, NGOs and the Chief Justice. The Chief Executive must appoint those nominated unless there is procedural impropriety.
<b>Nomination of press members</b>	Any individuals, organisations or associations, whether they are related to the press or not, are entitled to make nominations.	Newspaper members are nominated by newspaper publishers; magazine members are nominated by magazine publishers; journalist members are nominated by journalists' associations; academic members are nominated by the heads of journalism or the journalism academics at tertiary institutions.

	<b>Proposals of the Privacy Sub-committee in the Consultation Paper</b>	<b>Proposals of the Law Reform Commission in this Report</b>
<b>Chairman</b>	The Chairman is appointed by the Appointments Commission and must be a retired judge or a senior lawyer.	The Chairman is elected by the Commission from its public members.
<b>Role of the Chief Executive</b>	The appointment process is initiated by the Chief Executive appointing an independent person to appoint an Appointments Commission.	Neither the Chief Executive nor the Administration would be involved in the nomination process.
<b><i>Ex officio</i> Member</b>	The Privacy Commissioner is an <i>ex officio</i> member of the Council.	There is no <i>ex-officio</i> member. However, the Privacy Commissioner may be invited to attend meetings.
<b>Sanctions</b>	The Council may: (a) declare that the newspaper or magazine has acted in breach of the Code; (b) reprimand the newspaper or magazine; (c) require the newspaper or magazine to publish an apology, a correction and the findings; and (d) publish the findings in a local newspaper.	The Commission does not have the power to order an offending newspaper or magazine to publish an apology. However, it may advise, warn or reprimand, require the publication of a correction or its findings and decision, and give directions as to the time, manner, form and place of the publication.
<b>Financial penalty</b>	The Council may impose a heavy fine if the breach is serious.	The Commission does not have the power to impose a fine.
<b>Enforcement</b>	Any newspaper or magazine which failed to publish an apology, a correction or the findings as required by the Council is liable to a fine.	A defaulting newspaper or magazine is not liable to a fine, though the Commission may apply to the Court for an order requiring it to publish a correction or the findings and decision.
<b>Right of appeal</b>	Any person aggrieved by any decision of the Council may appeal to the Court of Appeal.	Only an aggrieved newspaper or magazine may appeal to the Court of Appeal. The respondent is the Commission, not the complainant. Complainants do not have a right of appeal.
<b>Legal immunity</b>	The Council and its members and staff are immune from legal actions in respect of anything done in good faith in the exercise of its powers or the discharge of its functions.	Only the members and employees of the Commission are entitled to immunity. The Commission itself is not immune.
<b>Funding</b>	The Council is funded by a levy on all newspapers and magazines.	The running costs (incl costs of ongoing legal advice) are funded by the industry. Legal costs, damages and the costs of education and research are funded by public revenue.

## Comparison with the HK Press Council

15.182 The table below highlights the major differences between the existing HK Press Council and the statutory self-regulating body proposed in this report.

	<b>The Hong Kong Press Council set up by the industry</b>	<b>The statutory self-regulating body proposed by the Law Reform Commission</b>
<b>Founder</b>	Newspaper Society of Hong Kong	Legislature
<b>Legal status</b>	A private company limited by guarantee	A public body with a statutory basis
<b>Constitution</b>	The Memorandum and Articles of Association adopted by the Council members; may be amended by special resolution at a General Meeting	The enabling statute enacted by the legislature; may be amended only by an amendment ordinance
<b>Jurisdiction</b>	Only has jurisdiction over 10 “medium newspapers”; but no jurisdiction over “large newspapers”, “small newspapers” and magazines	Has jurisdiction over all newspapers and magazines registered under the Registration of Local Newspapers Ordinance
<b>Selection of press members</b>	A newspaper or journalists’ association becomes a press member only if admitted by the members of the Executive Committee. The Executive Committee is not obliged to give reasons for rejecting an application.	Each Category I newspaper is entitled to nominate one newspaper member
		A specified number of newspaper members are nominated by Category II newspapers
		At least one newspaper member is nominated by Category III newspapers
		At least one magazine member is nominated by popular magazines
		Journalist members are nominated by the HKNEA, HKJA, HKFJ and HKPPA
		At least one academic member is nominated by the heads of journalism or the journalism academics at tertiary institutions
<b>Selection of public members</b>	Invited and admitted by the Executive Committee	Nominated by the Chief Justice and the professional bodies and NGOs specified in the statute
<b>Composition</b>	No members representing “large” newspapers	Including members representing newspapers that have the highest readership
	Ten members representing 10 “medium” newspapers	Including members representing other newspapers that have a significant readership

	<b>The Hong Kong Press Council set up by the industry</b>	<b>The statutory self-regulating body proposed by the Law Reform Commission</b>
	No members representing “small” newspapers	Including at least one member representing newspapers that do not have a significant readership
	No members representing magazines	Including at least one member representing popular magazines
	Two members representing the HKNEA and HKFJ, plus one news executive	Including members representing all professional journalists’ associations in HK, including the HKNEA, HKJA, HKFJ and HKPPA
	No members representing the HKJA and HKPPA	
	Three members are journalism academics from the Chinese University and Baptist University	Including at least one member representing journalism academics at all the tertiary institutions in HK
	Thirteen public members, excluding journalism academics and the news executive	Including members representing the public and victims of press intrusion
<b>Public members</b>	Include “persons of eminent attainment, rank or situation” and “persons in the journalist, legal, education or other professions”	May not have any connections with the journalistic profession and the press industry; includes at least one retired judge
<b>Journalism academics</b>	Counted as public members	Counted as press members
<b>Journalists</b>	May be admitted as public members	May become press members but not public members
<b>Percentage of press and public members</b>	Public members must not be less than 50% of all Council members.	Number of press members should not exceed that of public members.
<b>Chairman</b>	A “public member” nominated by press members and elected by all members	A public member elected by all Commission members but may be nominated by press or public members
<b>Vice-Chairman</b>	A “public member” nominated by public or press members and elected by all members	May be a press or public member
<b>Disqualification from press membership</b>	A press member may be expelled if he fails to comply with the Articles, the Bye-laws or the Code.	Press membership is not contingent on observance of the Press Privacy Code. The Commission has no authority to remove a Press Member.
<b>Disqualification from public membership</b>	A public member may be expelled if he fails to comply with the Articles, the Bye-laws or the Code; Executive Committee may also remove a public member if the Committee considers that it is in the Council’s interests to do so.	Public members may be disqualified only under limited circumstances specified in the statute. The Commission has no authority to remove a Public Member.

	<b>The Hong Kong Press Council set up by the industry</b>	<b>The statutory self-regulating body proposed by the Law Reform Commission</b>
<b>Requirement to vote as individuals</b>	Press members, being the authorised representatives of the newspapers or journalists' associations, are not required to vote as individuals.	Express requirement that all members must vote as individuals and not as representatives of the bodies that nominated them.
<b>Executive Committee</b>	First members nominated by subscribers to the Articles of Association; thereafter elected by ordinary resolutions at an AGM; no requirement as to percentage of press or public members on the Committee	No Executive Committee but the Commission may set up Complaints Committee
<b>Removal of Executive Committee members</b>	An Executive Committee member may be removed by special resolution of the Council before expiration of his office.	A Commission member may not be removed at the instance of the Commission.
<b>Code of ethics or practice</b>	The Journalists' Code of Professional Ethics agreed by the four journalists' associations or any other code adopted by the Council	A press code on privacy-related matters which is ratified by the Commission but may be drafted by the press members or a Code Committee appointed by the Commission
<b>Nature of complaints</b>	Deals with complaints about privacy intrusion or articles of a prurient, indecent or sensational nature; may reject complaints about inaccurate newspaper reports	Deals with complaints about unjustifiable infringements of privacy perpetrated by the print media, including inaccurate or misleading reports about an individual.
<b>Own investigations and third party complaints</b>	Does not initiate investigations and may reject third party complaints.	The Commission may initiate an investigation or investigate a third party complaint if the investigation can be justified on the grounds of public interest.
<b>Sanctions</b>	Executive Committee may reprimand the respondent or its editor or employee and direct it to publish the Council's decision or summary of findings, give a written apology and publish an apology.	The Commission may advise, warn or reprimand the publisher, require it to publish a correction or its findings and decision, and give directions as to the time, manner, form and place of the publication, but has no power to order an apology.
<b>Enforcement of sanctions</b>	No power to enforce directives issued by Executive Committee but failure to observe the Articles, Bye-laws or Code, or "any conduct unworthy of a member" may render a newspaper liable to expulsion	The Commission may apply to the Court for an order requiring the defaulting publisher to take specified action and to bear the costs of the application incurred by the Commission.
<b>Appeals against adjudications</b>	Adjudications of the HKPC are final.	A publisher may appeal to the Court of Appeal against an adverse adjudication.



	<b>The Hong Kong Press Council set up by the industry</b>	<b>The statutory self-regulating body proposed by the Law Reform Commission</b>
<b>Judicial review</b>	Decisions of the HKPC are not subject to judicial review.	Decisions of the Commission are subject to judicial review.
<b>Duty to publish findings and decisions</b>	HKPC is not obliged to publish its findings and decisions, nor is it obliged to give reasons for its decisions.	The Commission is under a statutory duty to publish its findings and decisions, and the reasons therefor.
<b>Legal immunity</b>	The Council and its members and employees are not immune from legal actions.	Commission members and employees (but not the Commission itself) are immune from legal actions for any act done in good faith.
<b>Defence of qualified privilege</b>	Media reports of Council findings and decisions are not protected by the statutory defence of qualified privilege	Media reports of Commission findings and decisions are protected by qualified privilege under section 14 of the Defamation Ordinance subject to explanation or contradiction
<b>Funding</b>	Funded by private donations and fees paid by press members as determined by the Executive Committee	Legal costs, damages and costs of education and research funded by public revenue; running costs (incl costs of ongoing legal advice) borne by the industry.

## Chapter 16

### Anonymity for juveniles concerned in criminal proceedings

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16.1 Article 16 of the UN Convention on the Rights of the Child provides that no child may be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence and that the child has the right to the protection of the law against such interference. Article 40 further recognises the right of every child (or minor) alleged as, accused of, or recognised as having committed an offence to be treated “in a manner consistent with the promotion of the child's sense of dignity and worth”, which takes into account “the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society”. To this end, a child should have his privacy “fully respected at all stages of the proceedings”.

16.2 Rule 8 of the UN Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) specifically provides that the juvenile's right to privacy must be respected at all stages in order to avoid harm being caused to him by undue publicity or by the process of labelling: “In principle, no information that may lead to the identification of a juvenile offender shall be published.”<sup>1</sup> The commentary on Rule 8 elaborates:

*“Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as ‘delinquent’ or ‘criminal’. Rule 8 stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted). The interest of the individual should be protected and upheld, at least in principle ...”*

16.3 The Committee of Ministers of the Council of Europe has recommended that the legislation and practice of their members states be reviewed with a view to reinforcing the legal position of minors throughout the proceedings by recognising, *inter alia*, the right of juveniles to respect for their private lives.<sup>2</sup>

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<sup>1</sup> Adopted by General Assembly resolution 40/33 of 29 Nov 1985, at <[http://www.unhchr.ch/html/menu3/b/h\\_comp48.htm](http://www.unhchr.ch/html/menu3/b/h_comp48.htm)>.

<sup>2</sup> Recommendation No R(87)20 on Social Reactions to Juvenile Delinquency; adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies; para 8.

16.4 The public's need to be apprised of the problems arising from juvenile delinquency can be satisfied without prejudicing the privacy interests of juvenile offenders. As a matter of principle, the interest of a juvenile offender in rehabilitation is paramount unless he poses a serious threat to the safety of others.

16.5 Under section 20A(1) of the Juvenile Offenders Ordinance (Cap 226), the identities of children and young persons under the age of 16 who are concerned in the proceedings of a juvenile court are protected from disclosure by the press.<sup>3</sup> However, the identities of those who are tried in a court other than a juvenile court may be disclosed in the media with impunity unless the court directs that no person shall publish any particulars calculated to lead to their identification.

16.6 The restrictions on the reporting of proceedings in a juvenile court are therefore mandatory unless lifting such restrictions is in the interests of justice. There are no restrictions on the reporting of other proceedings, whether criminal or civil, involving a child or a young person unless the court exercises its discretion in accordance with section 20(A)(3). The position in the UK is similar to Hong Kong.<sup>4</sup> However, clause 7(1) of the Code of Practice of the UK Press Complaints Commission imposes a standard higher than that prescribed in the legislation. It provides that the press must not, "even where the law does not prohibit it", identify children under the age of 16 who are involved in cases concerning sexual offences, whether as victims or as witnesses. This prohibition is not subject to a public interest defence. The HK Journalists' Code does not have any provisions protecting children in sex cases. We quote three recent cases for illustration purposes:

- (a) A newspaper reported that a 15-year-old student had grabbed a young girl's waist and touched her breasts. He pleaded guilty to a charge of indecent assault. The paper disclosed his full name and published a picture of him using a sheet of paper to cover his face when he attended trial at the magistrate's court.<sup>5</sup>
- (b) A newspaper reported that a 15-year-old student had allegedly delivered a baby in the bathroom at her home and then used a knife to stab the baby. She was later charged with attempted murder. The paper disclosed her full name and the name of the building and the housing estate in which she resided. It also

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<sup>3</sup> A Juvenile Court has power to hear and determine any offences, other than homicide, committed by a child under the age of 16. It has exclusive jurisdiction over summary offences committed by such a child. However, for indictable offences, the jurisdiction of a Juvenile Court is concurrent with that of the High Court. The court may dispense with the requirements of s 20A(1) if it is in the interests of justice so to do: s 20A(2).

<sup>4</sup> See Children and Young Persons Act 1933 UK, s 49 (as amended by the Youth Justice and Criminal Evidence Act 1999, s 48) (restrictions on the reporting of youth court proceedings); Youth Justice and Criminal Evidence Act 1999 UK, s 45 (power to restrict reporting of criminal proceedings involving persons under 18).

<sup>5</sup> *Ming Pao Daily News*, 20.6.02.

published a picture of the student hiding her face in her father's arms.<sup>6</sup>

- (c) A magazine reported that a well-known businessman had been blackmailed by several defendants after a 13-year-old girl assisted the businessman to masturbate inside a karaoke room. The girl and two other defendants pleaded guilty to the charges. The full name of the girl appeared several times in the article.<sup>7</sup>

16.7 The Consultation Paper noted that disclosing the identities of juvenile offenders would impede their rehabilitation by exposing them to the glare of publicity. However, it also recognised that juveniles might be charged with serious crimes such as murder, manslaughter, rape and inflicting grievous bodily harm with intent. The need to protect the identities of juvenile offenders and witnesses in criminal proceedings involves issues other than privacy. After expressing the view that the age of the juvenile and the nature of the offence are relevant factors in determining whether the publication of the identity of the juvenile should be prohibited, the Sub-committee formed the preliminary view that the protection afforded by section 20A(1) of the Juvenile Offenders Ordinance should be extended to children under 16 who are concerned in proceedings other than those in a juvenile court.<sup>8</sup>

16.8 The HK Christian Service agreed with this suggestion. They expressed the view that media coverage of court proceedings that involve teenagers had much room for improvement. Newspapers often gave the story prominent treatment, and included photographs. Even if the second Chinese character of the individuals' names were not published, those who know them would still be able to identify them. Disclosing in the media the identities of teenagers involved in legal proceedings would not only expose them to the glare of publicity but would also stigmatise them for life. What was worse, this might have an adverse effect on their rehabilitation and healthy development in the future. No other respondents have commented on this issue, although a few respondents have emphasised that a child's right to privacy must be respected.

16.9 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.

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<sup>6</sup> *Sing Pao Daily News*, 20.6.02, A 2.

<sup>7</sup> *Next Magazine*, No 668, Book A, p 54.

<sup>8</sup> LRCHK Privacy Sub-committee, *The Regulation of Media Intrusion* (1999), paras 2.48 to 2.56.

**Recommendation 48**

**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.**

# Chapter 17

## Summary of recommendations

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### **Recommendation 1 – Victims of crime** (para 4.30)

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 2 – Patients in hospitals** (para 4.39)

- (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.
- (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 3 – Regulating intrusion by the broadcast media** (para 6.9)

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 4 – Code of practice under the PD(P)O** (para 9.28)

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 5 – An independent and self-regulating press commission for the protection of privacy** (para 14.29)

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 6 – Coverage of the Commission** (para 15.3)

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 7 – Composition of the Commission** (para 15.12)

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 8 – Number of press and public members** (para 15.12)

The legislation should provide that the number of Press Members must not exceed the number of Public Members.

**Recommendation 9 – Nomination of Commission members** (para 15.17)

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 10 – Nomination of newspaper members** (para 15.24)

- (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.
- (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 11 – Nomination of magazine members** (para 15.26)

- (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.
- (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 12 – Nomination of journalist members** (para 15.28)

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 13 – Nomination of academic members** (para 15.29)

- (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.
- (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 14 – Nomination of public members** (para 15.30)

- (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.
- (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 15 – Privacy Commissioner for Personal Data** (para 15.33)

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 16 – Disqualification from membership** (para 15.36)

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 17 – Nominal appointment by the Chief Executive** (para 15.37)

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 18 – Chairman of the Commission** (para 15.38)

The legislation should provide that the Chairman of the Commission must be a Public Member elected by all members of the Commission.

**Recommendation 19 – Press Privacy Code** (para 15.43)

- (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.
- (d) The press and the public should be consulted during the drafting and review processes.

**Recommendation 20 – Contents of the Press Privacy Code** (para 15.43)

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 21 – Guidelines for the protection of vulnerable persons** (para 15.44)

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 22 – Factual errors about an individual** (para 15.66)

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 23 – Power to deal with complaints** (para 15.67)

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 24 – Complaints against publishers, not journalists** (para 15.71)

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 25 – Power to initiate investigations and accept third party complaints** (para 15.83)

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 26 – No legal waiver required** (para 15.97)

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 27 – Complaints Committee** (para 15.100)

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 28 – Requirement to declare interests** (para 15.102)

The legislation should require Commission members to declare their interests in specified circumstances.

**Recommendation 29 – Procedure of the Commission** (para 15.103)

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 30 – Person presiding at Commission meetings** (para 15.103)

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 31 – Members voting as individuals** (para 15.104)

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 32 – Duty to give reasons in writing** (para 15.110)

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 33 – No power to award compensation** (para 15.111)

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 34 – No power to impose a fine** (para 15.115)

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 35 – Power to advise, warn, reprimand and require the publication of a correction or the findings and decision of the Commission** (para 15.120)

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 36 – No power to order an apology** (para 15.125)

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 37 – Enforcement of adjudications** (para 15.131)

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 38 – Right of appeal** (para 15.134)

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 39 – No right to legal representation except with permission** (para 15.143)

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 40 – Duty to publish findings and decisions** (para 15.144)

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 41 – Duty to publish annual reports** (para 15.146)

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 42 – Anonymity for alleged victims of breaches of the Code** (para 15.147)

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 43 – Legal immunity for Commission members and employees but not the Commission itself** (para 15.159)

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 44 – Media reports of findings and decisions protected by qualified privilege subject to explanation or contradiction** (para 15.168)

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 45 – Education and research** (para 15.169)

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 46 – Funding** (para 15.170)

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 47 – Sources of funding** (para 15.180)

- (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.
- (f) Any levy must not be unduly onerous for existing newspapers and magazines, or act as a barrier to new entrants.

**Recommendation 48 – Anonymity for juveniles concerned in criminal proceedings** (para 16.9)

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.

## **List of persons who have made a submission to the Privacy Sub-committee**

### **Political and social organisations**

1. Against Child Abuse Ltd
2. American Chamber of Commerce
3. Association for the Advancement of Feminism
4. The Boys' & Girls' Clubs Association of Hong Kong
5. Breakthrough
6. Central and Western Provisional District Board
7. Citizens Party
8. Cooperation Scheme of School and Social Work
9. Democratic Alliance for Betterment of Hong Kong
10. Democratic Party
11. Heung Yee Kuk New Territories
12. Hong Kong & Kowloon Trades Union Council
13. Hong Kong Association for School Discipline and Counselling Teachers
14. Hong Kong Christian Service
15. Hong Kong Council of Social Services
16. Hong Kong Democratic Foundation
17. Hong Kong Federation of Women
18. Hong Kong Performing Artistes Guild
19. Hong Kong Policy Research Institute
20. Hong Kong Professional Teachers' Union
21. Hong Kong Psychological Society
22. Hong Kong Women Professionals & Entrepreneurs Association
23. Justice & Peace Commission of the Hong Kong Catholic Diocese
24. Kwun Tong Provisional District Board
25. Liberal Party
26. New Life Psychiatric Rehabilitation Association
27. Samaritan Befrienders Hong Kong
28. Sha Tin Provisional District Board
29. Society for Truth and Light
30. The Frontier
31. Joint submission by the following bodies: (a) Campaign Against Information about Sex and Violence; (b) Society for Truth and Light; (c) The Boys' and Girls' Clubs Association of HK; (d) HK Association for School Discipline and Counselling Teachers; (e) Co-operation Scheme of School and Social Work; (f) Parent-Teacher Associations' Federation of Wong Tai Sin District; and (g) Committee on Home-School Co-operation

### **Government and related organisations**

32. Broadcasting Authority
33. Department of Health
34. Hospital Authority
35. Legal Aid Department
36. Office of the Privacy Commissioner for Personal Data
37. Prosecutions Division, Department of Justice

### **Legal profession**

38. Amnesty International Hong Kong, Lawyers' Group
39. Hong Kong Bar Association
40. JUSTICE (Hong Kong section of the International Commission of Jurists)
41. Law Society of Hong Kong
42. Floyd ABRAMS, attorney at law
43. Anne S Y CHEUNG, Assistant Professor, Department of Law, HKU
44. Paula SCULLY, Chairperson, Guardianship Board
45. Stephen J WILLIAMS, attorney at law

### **Journalism academics**

46. School of Journalism & Communication at the Chinese University of HK, and School of Communication at HK Baptist University (Joint submission)
47. Joseph CHAN Man, School of Journalism and Communication, Chinese University of HK
48. Tim HAMLETT, Department of Journalism, HK Baptist University
49. Joyce Yee-man NIP, Department of Journalism, HK Baptist University

### **Media organisations**

50. Apple Daily
51. Hong Kong Commercial Broadcasting Co Ltd
52. Metro Broadcast Corporation Ltd
53. Next Magazine Publishing Ltd
54. Radio Television Hong Kong, Public Affairs Television Division, Media Watch
55. South China Morning Post
56. Television Broadcasts Ltd

### **Media associations**

57. Foreign Correspondents' Club
58. Hong Kong Chinese Press Association
59. Hong Kong Federation of Journalists
60. Hong Kong Journalists Association
61. Hong Kong News Executives' Association
62. Hong Kong Press Council
63. Hong Kong Press Photographers Association
64. Newspaper Society of Hong Kong
65. RTHK Programme Staff Union
66. The Society of Publishers in Asia
67. United States Society of Professional Journalists

### **Private citizens**

68. Dr KWAN Kai Man, Assistant Professor, Department of Religion and Philosophy, HK Baptist University
69. Ms Mary W M LEE, clinical psychologist & organisational psychologist
70. Dr LEUNG, medical practitioner
71. Mr LEUNG Ting Kwok
72. Dr Angela NG Wing-ying, medical practitioner
73. Mr Kevin SINCLAIR, journalist
74. Ms SO Wai-kuen
75. Mr TING Fung-kwan
76. Mr John WALDEN
77. Dr WAN Yiu-ming
78. Mr S WONG
79. Mr WONG Lam-sang
80. Mr WU Wai Hung



## ***Prima facie* examples of unwarranted media intrusion in Hong Kong**

1. This Annex contains details of press reports or conduct which in the Commission's view present a *prima facie* case of unwarranted media intrusion. We do not suggest that in each case the collection or disclosure of information was unwarranted, but only that on the face of the published article we consider there is *prima facie* ground for complaint. We have not had the benefit of interviewing the "victim" in these cases, nor of hearing from the journalists themselves, and in those circumstances we present these cases only as *prima facie* examples of unwarranted intrusion.

2. In selecting the cases included in this Annex, we have applied the standards of the media codes applied by press councils and similar bodies in other jurisdictions. There is no international privacy code for the media, so we have applied the standards of individual codes as criteria in identifying those cases which in our view present a *prima facie* case of unwarranted intrusion. We have included relevant extracts from these codes to make clear the basis for our selection of cases. These extracts are included as a headnote to the particular category of case to which they are most relevant, but readers should bear in mind that those criteria may be relevant to more than one category. Similarly, the same case may feature in more than one category where it involves the collection and/or disclosure of one or more types of information relating to one or more persons.

3. The privacy provisions quoted here do not necessarily represent accepted journalistic "best practice," nor do they cover all the privacy concerns to which we have referred in this report. Different press councils have different views as to the appropriate standards and how detailed such provisions should be. Nonetheless, we believe that the privacy provision we have quoted in this Annex broadly reflect the standards which the public should reasonably expect from the journalistic profession in Hong Kong.

4. As we explained at paragraph 4.7 of our report, the vast majority of the cases included in this Annex are from the three best-selling newspapers in Hong Kong, namely, *Oriental Daily News*, *Apple Daily* and *The Sun*. A small number of cases involving other newspapers or magazines have also been included, usually because these have been referred to by respondents to our consultation paper. The cases collected in this Annex are classified into the following categories:

- (A) victims of crime, domestic violence and accidents (A1 – A59);
- (B) innocent parties (B1 – B14);
- (C) persons attempting suicide and related parties (C1 – C21);
- (D) patients in hospitals and related parties (D1 – D33);
- (E) persons attending funerals (E1 – E8);
- (F) surviving relatives and pictures showing the body or image of a deceased person (F1 – F15);
- (G) plaintiffs in personal injury actions (G1 – G7);
- (H) plaintiffs in actions for sexual harassment (H1 – H4);
- (I) children (I 1 – I 18);
- (J) persons having a mental or physical illness(J1 – J38);

- (K) disclosure of private information about an individual (K1 – K13);
- (L) trespass (L1 – L6);
- (M) following, harassment and use of hidden camera (M1 – M19);
- (N) cases involving *Ming Pao* and *Sing Pao* (N1 – N15).

Category N is included merely to illustrate that personal privacy may also be invaded by other mainstream newspapers.

5. Out of these 300 or so cases, we have singled out seven cases in the following paragraphs to enable the reader to understand the nature of the problem without going through the whole annex. As stated above, these cases are presented as *prima facie* examples of media intrusion in Hong Kong.

- (a) *Apple Daily* reported an incest case in which a 26-year-old woman was alleged to have been raped by her 31-year-old brother. It disclosed the name of the district in which the family lived and the fact that the victim was the seventh child of the family. The victim's mother was 62 years old and had separated from her father six years before. Her father, who had a mistress on the mainland, made a living by selling bean curd. The family had six sons and two daughters. The fourth to sixth child (who were sons) and the seventh and eighth child (who were daughters) were addicted to drugs. All these five children (including the victim) had had mental problems and had had to consult doctors. The fourth child had threatened to kill the whole family, and the mother had had to take refuge at the home of her second child. The paper further disclosed that the victim had worked in a karaoke bar and had a three-year-old daughter who was born out of wedlock. The victim had stayed with her mother after her partner had developed a relationship with another woman. The paper published a picture of the victim's mother sitting inside a car and facing the camera. Only her eyes were obscured. (*Apple Daily*, 19.6.00, A 16) The victim's name was not disclosed but the information revealed in the report was likely to render her identifiable to those who knew her family.
- (b) A woman was robbed, forced to strip naked, and then held hostage by a man as he tried to escape arrest by the police. *Apple Daily* published on its front page five pictures taken at the scene. Three pictures showed the victim naked, with her hands tied behind her back, while being held hostage at knife-point on the street. Only her eyes, breasts and private parts were obscured. The paper disclosed the victim's surname, age, nationality and full address. It revealed that she was earning a living as a prostitute at that address, and that the man had attempted to rape her before the police arrived. (*Apple Daily*, 8.10.02, A 1) The coverage in *Oriental Daily News* was similar. (*ODN*, 8.10.02, A 1) The woman, as a victim of crime, was entitled to privacy protection even though the incident occurred in a public place and her full name was not disclosed in the report.
- (c) *The Sun* reported that a 53-year-old man, D (mentioning his full name) had been convicted of rape. The facts revealed that D was married but had been cohabiting with the victim for two years prior to the offence. The victim told the court that she would have consented to having sex with D if he had not used violence. D had a wife and three children. The paper published a picture of D's wife taken near the court. (*The Sun*, 11.1.01, A 11)
- (d) *The Sun* reported that a 16-year-old girl had been taken to hospital after cutting her wrist. It revealed that she had been suffering from brain cancer

for 10 years. She had had to undergo electrotherapy, which had caused her to lose her hair. She was not enrolled at a school and was reported to have indulged in drinking, smoking and singing. The paper disclosed the girl's full name and published a picture of her and her mother taken in hospital, apparently without their being aware of the photographer's presence. The girl was not wearing a wig and the effect of the electrotherapy on her hair was visible in the picture. The paper also published a picture of the girl and her friends taken on a previous occasion. No attempt was made to protect the girl from being identified from the pictures. (*The Sun*, 31.3.00, A 4) *Apple Daily* and *Oriental Daily News* also covered this story. Although the girl's identity was not directly revealed, both papers took and published a picture of the girl lying in a hospital bed. (*Apple Daily*, 30.3.00, A 4 and *ODN*, 30.3.00, A 19).

- (e) *Oriental Daily News* published on its front page, three pictures of a woman lying in a private ward in Zhuhai. The woman was a socialite in Hong Kong and her name and age were disclosed in the report. The paper revealed that she had had renal failure, had been receiving renal dialysis, and had undergone a renal transplant operation about ten days before. The woman's expression in the pictures suggested that the pictures were taken against her wishes. The report stated that the journalist was told to leave when the woman's relatives discovered his presence. One of the pictures was 20 cm x 15 cm in size and was republished in the same newspaper the next day. (*ODN*, 4.1.03, A 1 and *ODN*, 5.1.03, A 20) The woman died a few months later. Issues arising from this case include intrusion upon the solitude or seclusion of a patient who was receiving treatment in a private ward, unwarranted public disclosure of medical data about the patient, unauthorised taking of photographs showing the likeness of the patient inside the ward, and unauthorised and unwarranted public disclosure of the photographs.
- (f) *Oriental Daily News* reported that a 32-year-old music teacher had jumped to his death from the 14<sup>th</sup> floor of a building. It disclosed the name of the street in which he lived, the first and third Chinese character of his name and the fact that he had been suffering from depression. The paper published a picture of his body, lying prostrate with his brains splashed over the pavement. Also published were a picture of his elder sister talking to a policeman and a picture of the building with a red arrow pointing downward. (*ODN*, 1.8.00, A 19). The jurisprudence on the privacy interests of surviving relatives is collected in Annex 3.
- (g) *Cyber Daily*, a news website, had uploaded footage about the life of a prostitute to the "strange stories" section of its website. Included in its report was an eight-minute video clipping showing the different ways in which an undercover reporter had had sex with a prostitute. The prostitute was not aware that the entire process had been recorded by a hidden camera carried with the reporter, and her face was not obscured in the clipping. M, the Chairman of the Group that owned the Internet newspaper, said they were merely reporting the truth. He was reported as saying on *Media Watch* (a Commercial Radio programme) that the stories in the "strange stories" section of the newspaper were not news, and that it would be defamatory to criticise on the basis that the story was news. After the programme, M argued that their "special correspondent" was not a journalist and that the clipping was a documentary about prostitutes, similar to the documentaries in *National Geographic* and the Discovery Channel. The head of the "strange stories" section alleged that their only fault was that they had not obscured the

prostitute's face in the clipping. This case involves both the *unfair collection* of private information by privacy-invasive means and the *unauthorised and unwarranted public disclosure* of private information. (Source: *Apple Daily*, 6.12.00, A 11 and 11.12.00, A 10)

6. Unless stated otherwise, all the persons whose pictures are referred to in the cases below were identifiable and their facial features were not concealed or obscured. The eyes of the individuals concerned may be obscured in some of the cases cited in the annex, but this may not be sufficient to protect their identities from being ascertained by their friends, relatives and acquaintances.<sup>1</sup> For a better understanding of the significance of the cases, please refer to Chapter 4 of this report and Chapter 2 of the Consultation Paper.

## **Victims of crime, domestic violence and accidents**

***"Members of the public caught up in newsworthy events should not be exploited. A victim or bereaved person has the right to refuse or terminate an interview or photographic session at any time." – Australian Press Council's Code of Privacy Standards, para 7(2).***

***"When covering crime, court cases and accidents, the journalist shall consider whether the identification of the parties involved is necessary and what suffering it may cause to them. Victims and juvenile offenders shall not be identified as a general rule." – Estonian Press Council's Code of Ethics, para 4.8.***

***"(a) Media people must not identify victims of sexual assaults or publish material likely to contribute to their identification even when free by law to do so. (b) Media should not identify children under the age of 16 either as victims or witnesses in cases alleging sexual offences." - General Media Code of Ethics and Practice of Fiji's Media Council, para 8.***

***"25. Care must be observed in the publication of photographs. A picture cannot be used in a misleading way or in connection with something offensive to the party concerned. Particular care must be taken in publishing pictures of victims of accidents or crime. 26. The publication of a name or other identifying facts when dealing with crime can only be justified on the grounds that considerable public interest is served by this. The identity of a person should generally not be disclosed before court proceedings unless the nature of the crime or the position of the party concerned provide strong reasons for this." - Guidelines for Good Journalistic Practice applied by the Council for Mass Media in Finland, paras 25 and 26.***

***"(1) The publication of names and photographs of ... victims in reports on accidents, crimes, investigations and court cases is in general not justifiable. The public's right to information must always be weighed up against the***

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<sup>1</sup> About 3,200 citizens and a group of NGOs representing children, social workers, parents, the teaching profession and the religious sector, took out a full-page advertisement "strongly condemning" the way some newspapers covered sexual offences. They stated that publishing the photos of the victims of sexual offences (even though the photos had been marked with squares) would render the identities of the victims ascertainable and cause the victims to fear that they could be identified by others. They urged newspapers to respect the victims' dignity and privacy and to refrain from publishing their photos. (*Sing Tao Daily*, 16.11.00, A17)

*personal rights of those involved. The need for sensation cannot justify the public's right to be informed. (2) Victims of accidents or crimes have a right to special protection of their name. It is not necessary to identify the victim in order to better understand the report of the accident or crime. Exceptions can be justified if the person concerned is famous or if there are special accompanying circumstances.” – German Press Council’s Press Code, Guideline 8.1(1) & (2).*

*“The threshold of acceptability in reports on accidents and catastrophes is exceeded when the suffering of the victims and their dependants is not respected. Victims of misfortune must not be made to suffer a second time by their portrayal in the media.” – German Press Council’s Press Code, Guideline 11.3.*

*“2. Photojournalists should show concern about the feelings of victims and their families when photographing accidents and their aftermath, so as to avoid and/or minimize the damage to and impact on the feelings of the victims and their families. 3. Photojournalists should respect the privacy of people being photographed. 4. Photojournalists – including photographers and picture editors – should handle with caution pictures that are gory, violent, disgusting and pornographic. ...” – Journalists’ Code of Professional Ethics in Hong Kong, Guidelines for Practice, Photojournalism, paras 2, 3 and 4.*

*“9. Always show the greatest possible consideration for victims of crime and accidents. Carefully check names and pictures for publication out of consideration for the victims and their relatives. ... 15. Give careful thought to the harmful consequences that might follow for persons if their names are published. Refrain from publishing names unless it is obviously in the public interest. 16. If a person’s name is not to be stated, refrain from publishing a picture or particulars of occupation, title, age, nationality, sex, etc, which would enable the person in question to be identified. 17. Bear in mind that the entire responsibility for publication of names and pictures rests with the publisher of the material.” – Swedish Press Council’s Code of Ethics, paras 9, 15, 16 & 17.*

*“In cases involving personal grief or shock, enquiries must be carried out and approaches made with sympathy and discretion. Publication must be handled sensitively at such times but this should not be interpreted as restricting the right to report judicial proceedings.” – UK Press Complaints Commission’s Code of Practice, clause 5.*

*“[Unless it can be demonstrated to be in the public interest,] (i) Journalists must not generally obtain or seek to obtain information or pictures through misrepresentation or subterfuge. (ii) Documents or photographs should be removed only with the consent of the owner. (iii) Subterfuge can be justified only in the public interest and only when material cannot be obtained by any other means.” – UK Press Complaints Commission’s Code of Practice, clause 11.*

*“The press must not identify victims of sexual assault or publish material likely to contribute to such identification unless there is adequate justification and, by law, they are free to do so.” – UK Press Complaints Commission’s Code of Practice, clause 12.*

- A1 *HK Economic Times* reported that some consulate officers and the foreign media were surprised at the local press publishing the residential addresses of victims of theft. (*HK Economic Times*, 26.8.99) Examples of reports disclosing the residential addresses of victims of burglaries can be found in: (a) *The Sun*, 4.12.00, A 3; (b) *Apple Daily*, 4.12.00, A 1; (c) *The Sun*, 29.12.00, A 8; (d) *Apple Daily*, 30.12.00, A 2; (e) *Apple Daily*, 7.1.01, A 1; and (f) *Apple Daily*, 2.10.01, A 13.
- A2 *Oriental Daily News* reported that a 33-year-old man attacked his 27-year-old girlfriend with a knife. In addition to publishing two pictures showing the facial features of the man and the victim (except their eyes), the paper published a picture of the victim using both hands to hide her face when being moved to a stretcher. She was then wearing pantyhose with a mini-skirt. That part of her underpants covering her bottom and private parts was exposed in the picture. The first and third Chinese characters of both parties' names were disclosed. (*ODN*, 23.12.99, A 16)
- A3 *Apple Daily* reported that three Italian men had attempted to rape a drunken 42-year-old German woman inside her car in HK. They did not succeed as the woman vomited continuously and was so frightened that she became incontinent. She was admitted to hospital and the paper published a picture of the woman lying on a stretcher. The woman is clearly identifiable in the picture. The headline of the story read: "German girl met 'Three Wolves'; not raped because incontinent". (*Apple Daily* 17.1.00, A 10)
- A4 *Oriental Daily News* reported that a man was tried for attacking his former girlfriend with a knife. The report revealed that the victim had had a sexual relationship with him for several months. She later decided to leave him because of his gambling. The nationality and full name of the victim were disclosed. The paper published a picture of the victim trying unsuccessfully to use a bag to hide her face from the cameras outside the court. (*ODN*, 22.1.00, A 15)
- A5 A woman was tried for theft in the magistrates' court. *Oriental Daily News* reported that the woman had posed as a prostitute and rented a room in a guesthouse after striking a deal with the victim. After collecting the fee from the victim in the room, she claimed that she was in fact an undercover policewoman. She then took his personal belongings and demanded money from him. The victim acceded to her request for fear she would tell his family. The paper published the transliteration of the victim's English name. The fact that he was a mildly retarded security guard was also disclosed. The paper further published a picture of the victim walking down the stairs of the court building. His 78-year-old father, who was walking behind the victim, was also included in the picture. The victim used his hand to hide his face but his father was identifiable in the picture. (*ODN*, 15.2.00, A 19)
- A6 *Apple Daily* reported that an inebriated 63-year-old man had assaulted his 62-year-old wife when the latter tried to stop him from drinking alcohol. The man stopped hitting his wife only when she fell from her bed. The article revealed that the couple were living on social security assistance. The wife told the journalist that she was often treated as a "human sandbag" by her husband. The paper published two pictures, one of the man and one of his wife lying in a hospital bed. Her face and eyes were swollen in the picture. (*Apple Daily*, 17.2.00, A 13)

- A7 A member of the public complained that the ambulancemen stood back for a few seconds to allow press photographers to take “a few horrific close-ups” of the gravely injured victims of a traffic accident before they were carried away from the scene. (“Shocked by press access to accident victims”, *SCMP*, 23.2.00) See also “Ban press vultures”, *SCMP*, 25.2.00; “Disgusted by photographers”, *SCMP*, 9.3.00; “Behaviour was unacceptable”, *SCMP*, 6.12.00; “Basic human decency ignored in relentless search for photos”, *SMCP*, 14.12.00; and 葉侶嘉, “攝影記者殺人事件”, *Sing Pao*, 22.10.02, C 11.
- A8 *Oriental Daily News* reported that a man had pleaded guilty to criminal intimidation. The facts revealed that the victim was a prostitute working in Shamshuipo. After having sex with the victim, the defendant threatened to kill her with a knife if she did not refund the “service fees”. The paper published a picture of the victim walking in the street. (*ODN*, 17.3.00)
- A9 *Oriental Daily News* reported that a woman, D, was tried for robbery. The victim, who was a florist, gave evidence that D had walked into her shop and then pointed a syringe at her neck, threatening to inject the blood inside the syringe into her body if she refused to let D have her Rolex diamond watch. D had also told the victim that she was a lesbian and the blood was infected with HIV. The victim received a blood test afterwards but the result was not yet known at the time of the trial. The victim said she was worried that she would contract AIDS as a result. D admitted that she was a drug addict. The report disclosed the full name of the victim and the name of her shop in Tuen Mun. It also published a picture of the victim, with her full name disclosed in the caption. The headline of the report read: “Drug addict suspected of using HIV-infected syringe to rob fake Rolex diamond watch / Discovered to be fake only when presented to pawnshop / Owner of florist afraid of contracting an incurable disease”. (*ODN*, 24.3.00, A19) See also *Apple Daily*, 24.3.00, A 20.
- A10 *Apple Daily* reported that two women and a man were tried for blackmail and theft. The facts revealed that they had placed advertisements in a newspaper, offering massage or sex services by sending young girls to the callers’ addresses. On arrival at the callers’ premises, the girls would extort money from the callers and threaten to cause them bodily harm if they did not pay. The full names of two victims were disclosed in the report. One of them was a waiter in a restaurant, M, living in a named district. The paper published a picture of M, together with his name in the caption. (*Apple Daily*, 13.4.00, A 18)
- A11 *The Sun* reported that a man, M, was told by gang members that his 18-year-old son had lost an off-course wager in a football match and that they would cut his son’s ears unless he paid them \$50,000. M asked the police for assistance. The son was still missing at the time of the report. The paper disclosed the full name of the father, the first and third Chinese characters of the son’s name, and the name of the estate in which they lived. It also published a picture of the father standing at his front door. (*The Sun*, 14.4.00, A 1)
- A12 *Oriental Daily News* reported that a 41-year-old man, H, had assaulted his 44-year-old wife, W. The article revealed that H had been suspected of killing W’s brother in South America. The paper further reported that H had a mistress on the mainland, as well as an extra-marital affair in Hong Kong. He had also transmitted venereal disease to W, and had threatened to set the

whole family on fire if W refused to give him money. The first and third Chinese characters of the names of both H and W were disclosed. The paper published a picture showing W talking to a policeman. Another picture showed H being arrested. Only their eyes were obscured in the pictures. (ODN, 20.4.00, A 24)

- A13 *The Sun* reported that a man, H, had strangled his 41-year-old wife, W, on suspicion that she had stolen his watch. The article revealed that H was a habitual gambler and often lost money when gambling in Macao. He also had a mistress who was married. He did not sleep with W in the same room and had not given her any household money in the past four years. H had applied for a divorce. The paper disclosed the surname of H, the first and third Chinese characters of W's name, the occupation of H and W, and the name of the village in which they lived. It also published a picture showing W sitting in a wheelchair, waiting for treatment inside a hospital. (*The Sun*, 29.4.00, A 13) See also *Apple Daily*, 29.4.00, A 10.
- A14 *Apple Daily* reported that a primary school student injured her hand with the needle of a syringe when she tried to snatch the syringe from her classmate who had picked it up from the staircase of a public housing estate. It was suggested that the syringe might have been used by a drug addict. The doctor had advised the student to receive a blood test six months later to examine whether the syringe had transmitted hepatitis or AIDS to her. The paper published a picture of the student and her mother sitting in the waiting area of a hospital. Only the eyes of the student were obscured. (*Apple Daily*, 3.5.00, A 13)
- A15 *The Sun* reported that a 46-year-old man, H, had held a knife to his wife's neck, alleging that his wife, W, was a wanton woman and had been caught red-handed in bed. He invited the journalists to take pictures of W and to reveal the truth about her in the press. The name of the building in which they lived was disclosed. The paper published a picture of H using his arm to strangle W while holding a knife in his hand. Although W's face was blocked by her hair, her identity was indirectly revealed in the report as no attempt was made to conceal H's face. (*The Sun*, 25.5.00, A 2)
- A16 *Apple Daily* reported that a 250 pound 24-year-old girl (whose surname was given) had been seen sitting at the edge of a pier. A social worker called the police for assistance. When the press photographers took pictures, the girl shouted: "Please stop taking pictures. I am already in this shape. No one will ever want to make friends with me." She later fell into the sea but was rescued by firemen. The paper published a picture of her falling into the sea, and a picture showing that her hands were tied to a stretcher. (*Apple Daily*, 9.7.00, A 6)
- A17 *Apple Daily* reported that the 9-year-old son of an actress had been kidnapped by three men for nine days. The kidnappers were arrested when the family paid the ransom. The report disclosed the Christian name of the child and revealed that he was studying at a well-known primary school in a named district. Subsequent to the event, many artistes and socialites urged the press not to publish their children's pictures. The paper published on its front page a picture of the actress and her son taken on a previous occasion. (*Apple Daily*, 13.7.00, A 1) The next day, the paper disclosed the Chinese name of the child in addition to his Christian name. It also published on its front page another picture of the child sitting in his parents' arms, which had



been taken on a previous occasion. (*Apple Daily*, 14.7.00, A 1) One month after the arrest of the kidnappers, the actress issued a public statement, saying that she had refused to comment on the kidnapping case because it was not an event for gossip columns and the defendants had yet to be tried. She stated that her silence, however, had attracted the curiosity of the press and had led to many reports that were inaccurate and sensational. The actress also denied having the ability to buy a luxurious unit in Tai Po as alleged by one newspaper. She said the inaccurate reports had seriously impaired the safety of her whole family. She hoped the press could allow her family to return to normal life. *Apple Daily* added that *The Sun* had reported on 14.8.00 that the actress intended to purchase a luxury house in a named estate in Tai Po which was worth about eighteen million dollars. (*Apple Daily*, 15.8.00, A 2)

- A18 *The Sun* reported that a 14-year-old girl had been sitting on a window sill of her home with her legs hanging in the air. She held a knife in her right hand while her left hand was holding a comic book. The girl alleged that she had been raped by six men on her birthday in early April after she had drunk a can of beer. She was later diagnosed as having a sexually transmitted disease. The paper disclosed the last Chinese character of her name. It further revealed that her home was on the fourth floor of a building situated at a named street in Tai Kok Tsui. The paper published on its front page two pictures of the girl sitting on a window sill. It also published a picture of the girl sitting on a hospital bed. Only the eyes of the girl were obscured in the pictures. A picture of the exterior of the building in which the girl lived was also published. (*The Sun*, 20.7.00, A 1)
- A19 *The Sun* reported that a male patient had sexually assaulted a nurse at Lady Youde Hospital by fondling her breasts. In a side-story, a reporter asked three nurses in that hospital whether or not they had been sexually harassed by male patients. The paper published the pictures of these three nurses taken inside the hospital. The captions of one of these pictures read: "Nurse C was a bit upset when she said: 'I have been [sexually harassed]. I reported these incidents to my seniors, but they usually did not follow up the complaints.' No wonder she looked so helpless." Only the eyes of that nurse were obscured in the picture. (*The Sun*, 29.7.00, A 10)
- A20 *The Sun* reported that a 25-year-old woman had been indecently assaulted by a man as she was about to leave her shop. The man used an "electric gun" to render her semi-conscious and then struck her breasts and private parts with the gun. The paper revealed that the victim was the owner of a fashion shop in a named street in Hunghom. It published a picture of the victim standing outside a fashion shop. Although her head was covered with a cloth and her eyes were obscured, her bag and clothing as well as the shop's signboards were included in the picture. Also published was a picture of a policeman inside the shop. (*The Sun*, 11.8.00, A 4)
- A21 *Apple Daily* reported that the genitals of a 70-year-old man (surname disclosed) had been seized by his 47-year-old wife. He later found that his urine was tainted with blood. The article revealed that in recent months his wife refused to have sex with him and often returned home late. He suspected that she was having an extra-marital affair. She had seized his genitals after complaining that he had made repeated calls to her friends and relatives to find out her whereabouts. The paper published a picture of the

man alighting from an ambulance. (*Apple Daily*, 13.8.00, A 11) See also *The Sun*, 13.8.00, A 8.

- A22 *Oriental Daily News* reported that a 54-year-old married female cleaner was verbally abused on a named street in Tsuen Wan by a man when she was walking home from her work at a snooker centre around four o'clock in the morning. When she passed another named street, the man struck her on the head with a bottle and carried her off to a public toilet at a nearby park. Subsequently, the man forced her to have oral sex with him and put a comb into her vagina after he had ordered her to take off all her clothes. The paper published a picture of the woman sitting next to a policeman. Although her face was obscured, her hairstyle, figure and clothing were shown in the picture. (ODN 14.8.00, A 22)
- A23 *Apple Daily* reported that a drug addict pricked the arm of a 37-year-old woman (surname given) with a syringe when he bumped into her in a market in Sau Mau Ping. The woman was later sent to hospital. It was not clear whether she had contracted HIV. The paper published a picture of the woman. (*Apple Daily*, 5.9.00, A 11) *Oriental Daily News* also published a picture of the woman crying. (ODN, 5.9.00, A 12)
- A24 After sentencing a defendant for incest, the prosecutor complained to the court that a journalist had disguised himself as a social worker from the Social Welfare Department and called at the 13-year-old victim's home to try to interview her. The victim and her mother were not at home but there were a few children inside the flat at that time. The journalist had also asked the victim's neighbours for information. The court reminded the press that it had made an order protecting the identity of the victim and that the press should respect her privacy and that of her family. (*HK Economic Times* and *HK iMail*, 21.9.00) See also *The Sun*, 9.9.00, A 2 (reporting that the court in a case involving charges of rape and indecent assault urged the media not to harass the victims (aged 13 to 14) and their families again).
- A25 *Apple Daily* reported that five defendants were tried for false imprisonment and blackmail. The defendants were alleged to have tricked a man into having sex with a girl and then told him that she was under 16. The defendants threatened to report the victim to the police if he did not pay them money. The age and full name of the victim and the fact that he was unemployed were disclosed. A picture of the victim was also published. (*Apple Daily*, 26.9.00, A 18)
- A26 *Apple Daily* reported that an 84-year-old man, M, complained that a 38-year-old prostitute had stolen money from him while he was staying with her. A prostitute said that M visited the brothel in Temple Street one to two times each month, paying one hundred dollars each time. The paper published a picture of M. The prostitute involved was also in the picture. The eyes of the prostitute were obscured but no attempt was made to protect M's identity. (*Apple Daily*, 4.10.00, A 9)
- A27 *The Sun* reported that a man attempted to rape a 23-year-old woman when she was walking along a named road in Tuen Mun heading toward a named housing estate after she went off duty at 7:04 pm. The paper published a picture of the victim accompanied by a policewoman. She was then wearing a windbreaker with a hood over her head. Her face was hidden by the hood

but her clothing and shoes were included in the picture. (*The Sun*, 1.11.00, A 4) See also ODN, 1.11.00, A 22.

- A28 *Oriental Daily News* reported that a university professor (full name given) was accused of repeatedly abusing his wife, W, and daughter. The university was going to decide whether or not he should be dismissed. The paper disclosed the full name of W. The paper published a picture of W at the door of her office. (ODN, 27.6.00, A 20) A few months later, *Apple Daily* reported that the university had resolved to dismiss the professor after finding that he had abused W and his daughter "on many occasions" and that W had been seriously hurt as a result. The full name of W was disclosed. The paper published a picture of the professor and W taken on a previous occasion. (*Apple Daily*, 7.11.00, A 2)
- A29 *Oriental Daily News* reported that a 53-year-old construction casual worker, H, grabbed the neck of his 42-year-old wife, W, after the latter refused to give him money. It revealed that W had been battered by H in the past. W was a helper in a home for the elderly in a named district. The surnames of the couple and the name of the street in which they lived were disclosed. The paper published a picture of H talking to a policeman. Another picture showed W in tears inside an ambulance. H's eyes were obscured but no attempts had been made to protect W's identity. (ODN, 14.11.00, A 22)
- A30 *Oriental Daily News* reported that a 44-year-old lesbian, D, was charged with false imprisonment and blackmail. The victim was confined to a wheelchair. She admitted that she had had a lesbian affair with D since mid-1999. At the material time, D pointed a knife at her and asked her to transfer money to D's account. The full names of D and the victim were disclosed in the reports over three days. The issue on November 21 published a picture of the victim sitting in a wheelchair outside the court building, endeavouring to hide her face. (ODN, 21.11.00, A 10; 23.11.00 A 10; 1.12.00 A 10)
- A31 *The Sun* reported that a nude man, armed with a knife, had broken into the flat of a 30-year-old woman and attempted to rape her. The man left after the woman succeeded in seizing the knife and shouted for help. The article revealed that the victim had an attractive figure, knew some Cantonese and spoke good English. It further disclosed that she was living on her own in a four-storey old Chinese building in a named street in Central District. A picture showing the exterior of the ground and first floors of the building was published. (*The Sun*, 1.12.00, A 4)
- A32 *The Sun* reported that a 43-year-old cook, who had just been laid off by his employer, battered his wife after the latter had been pestering him for money to pay the monthly mortgage. The couple had two daughters and one son living in a named building in Western District. One of their daughters said that her father was a gambler and often battered her mother. The first and third Chinese characters of the names of both the man and his wife were disclosed. The paper published two pictures showing the man and his wife waiting in a hospital. The man's eyes were obscured but the wife's were not. (*The Sun*, 2.12.00, A 4)
- A33 *Oriental Daily News* reported that a 37-year-old man, D, was tried for assault occasioning actual bodily harm. The facts revealed that the 42-year-old victim had been having sex with a prostitute in his home when D arrived with another man and struck the victim with his fist and an ashtray. D was

acquitted at the trial because the evidence given by the victim was inconsistent. The victim's full name and address (except the flat number) were disclosed. The paper published a picture of the victim using his hands to hide his face from the cameras. The victim's full name also appeared in the caption. (ODN, 2.12.00, A 12) *Apple Daily* also disclosed the victim's age, full name and address (excluding the floor and flat numbers). The paper published a picture of the victim using his arms and overcoat to protect his face from the cameras. His full name was also disclosed in the caption. (*Apple Daily*, 2.12.00, A 11)

- A34 *The Sun* reported that the house occupied by the widow of a former judge had been burgled. The paper reported that the house was in a named estate in a named road. A picture of the estate was also published. The paper used a red circle on the picture to identify the exact location of the house. Another diagram showed the location of the nine closed circuit television cameras installed at the boundary of the estate. (*The Sun*, 4.12.00, A 3)
- A35 *Apple Daily* also covered the above story. It used a red arrow to point out in a picture of the estate the exact location of the house. Apart from disclosing the full address of her residence, the paper also disclosed the exact addresses of eight prominent figures whose residences in the Peak had been recently burgled. The full names of almost all these persons were disclosed. The paper reported in a side-story that reports in the local press disclosing the addresses of prominent figures in the business and public sectors had been used by illegal immigrants as a source of information when they planned to commit crimes in Hong Kong. One illegal immigrant who had been arrested on a previous occasion was found to have in his possession magazines that contained articles and diagrams about luxury apartments in Hong Kong. (*Apple Daily*, 4.12.00, A 1)
- A36 *The Sun* reported that two rented houses in a named housing estate in Sai Kung had been burgled. The paper disclosed the full addresses of the two houses and the fact that they were owned by a named consultant of the Chief Executive of the HKSAR. It further reported that the consultant was residing in another house in the same estate. The full address of that house was also given in the report. The paper published a picture of the exterior of the consultant's residence. The location of the closed circuit television installed on the fence at the boundary of the estate was identified in that picture. (*The Sun*, 21.12.00, A 8)
- A37 *The Sun* reported that a woman bit the penis of her 45-year-old husband while they were having sex in their home. The victim, who was an evening-shift taxi-driver, said his wife suspected him of having a mistress. The paper disclosed the first and third Chinese characters of the victim's name and the name of the street in which he lived. The paper published a picture of the woman being sent to hospital and a picture of the victim leaving hospital after receiving treatment. Only the eyes of the victim and woman were obscured. (*The Sun*, 24.12.00, A 8)
- A38 *The Sun* reported that the house of the 38-year-old female managing director of a toy factory had been burgled. The full address of her house was disclosed. Also disclosed were the first and third Chinese characters of her name, as well as one of the two Chinese characters of the factory's name. The paper published a picture showing the woman standing at the main

entrance of the house. Also published was a picture of the exterior of the house. The paper identified in that picture, the exact locations of the alarm bell, closed circuit television, and the ultra-red alarm devices that had been fitted onto the house. (*The Sun*, 29.12.00, A 8)

- A39 *The Sun* reported that a 26-year-old woman accused a 63-year-old man, D, of sexually assaulting her. D was a member of staff at a jewellery shop owned by his daughter, F. At the trial, the victim gave evidence that F had asked her not to mind being sexually assaulted by others, and had told the victim that F herself had also been sexually assaulted in the past. The name of the jewellery shop and the full names of both D and F were disclosed. The paper published a picture of F using her handbag to hide her face outside the magistrates' court. The caption read: "Female boss F (mentioning her name in full) was alleged to have admitted that she had been sexually assaulted by others." (*The Sun*, 3.1.01, A 4) This story was also covered in the *Oriental Daily News*. D's name and the transliteration of F's English name were disclosed. The headline read: "Sales representative suspected to have been sexually assaulted by boss' father / Defendant's daughter alleged she had also been sexually abused". The paper published a full-size picture of F waiting outside the court. (*ODN*, 3.1.01, A 13)
- A40 *Apple Daily* reported that a 56-year-old woman was believed to have bitten the scrotum of her husband and then used a knife to cut off one of his testicles when they were having sex. The woman had also used a dumbbell to hit her 26-year-old elder son as the latter tried to rescue his father. The husband was a bonesetter practising at a named street. The full names of the woman, her husband and her elder son and the birthdays of the husband and wife were disclosed. The name of the building in which they lived were also revealed. The headline read: "Ferocious woman bit off her husband's testicles". (*Apple Daily* 10.1.01, A 1) Subsequently, the victim complained to the HK Press Council that the report had created mistrust among his relatives; affected his occupation as a Chinese herbalist; and caused him great distress. The Council ruled that *Apple Daily* had infringed the privacy of the victim and his family members and requested it to publish an apology to the complainants. *Apple Daily* published an apology on 12.7.01.
- A41 *Apple Daily* reported that a 60-year-old watchman had threatened to kill his 42-year-old wife with a knife if she did not give him money. The man was a gambler who gave no more than a few hundred dollars to his wife as household money. The names of the building and estate in which the family lived and the surnames of the husband and wife were disclosed. The paper published a picture of the wife waiting for treatment in a hospital with her daughter sitting beside her. (*Apple Daily*, 17.1.01, A 11)
- A42 *Apple Daily* reported the results of a study conducted by an NGO about the relationship between overseas maids and their employers. One of the pictures published in the paper was that of an overseas maid. The caption stated that she had been sexually assaulted by a member of her employer's family and that she often did not have enough food to eat. The full name of the maid was disclosed. (*Apple Daily*, 22.1.01, A 2)
- A43 *Apple Daily* reported that a 44-year-old naked man ran into the street after his flat exploded and caught fire. The man was seriously burnt in the accident. It was believed that the explosion was caused by inflammable liquid inside the flat. The full name of the man was disclosed. The paper published on its

front page, a picture of the naked man in the street. He was then holding a transparent plastic bag in an attempt to cover up his private parts. Only his private parts were obscured in the picture. (*Apple Daily*, 5.2.01, A 1)

- A44 *Oriental Daily News* reported that a 49-year-old woman, F, had threatened to jump from the deck of the shopping centre in a named estate. It revealed that F had been sexually molested by her adopted father when she was 14. F's adopted mother had asked her not to report this to the police. F was married but had left her husband who was a gambler. The first and third Chinese characters of F's name, her date of birth, and the name of the estate in which she lived were disclosed. The paper published a picture of F accompanied by a policewoman. Only her eyes were obscured in the picture. Also published was a picture of her flat. (*Oriental Daily News*, 16.2.01, A 24) *The Sun* reported that F asked the press photographers not to take pictures after she had been subdued by firemen. It revealed that she had been raped by her adopted father. (*The Sun*, 16.2.01, A 12)
- A45 *Apple Daily* reported that the left arm of a 41-year-old woman, F, was pricked by a syringe when a man, who appeared to be a drug addict, walked past her. She called for an ambulance when her friend told her that syringes used by drug addicts might be infected with HIV. F owned a shop in the market of a named housing estate. The paper published a picture of F getting off from an ambulance. (*Apple Daily*, 13.3.01, A 13)
- A46 *Oriental Daily News* reported that a 27-year-old man, M, had been arrested for battering and detaining his 32-year-old girlfriend, F, inside his flat. M's neighbours said that M was unemployed and had been living on social security assistance. They also said that M was a drug addict and had a tendency to commit violence. They often heard people fighting inside his flat. The paper published a picture of F. The first and third Chinese characters of F's name were disclosed. (*ODN*, 20.3.01, A 22) *The Sun* also published two pictures of F. (*The Sun*, 20.3.01, A 3)
- A47 *Apple Daily* reported that a 27-year-old man took a taxi to hospital after he discovered that his penis was bleeding, allegedly when masturbating in a public toilet in Temple Street. The paper published a picture of the man putting one hand inside his trousers to cover his private parts while he was waiting for treatment in a wheelchair inside hospital. There were blood stains on his trousers. Only his eyes were obscured in the picture. (*Apple Daily*, 4.9.01, A 13)
- A48 *Oriental Daily News* reported that a 38-year-old man, D, was sentenced to six years' imprisonment for causing grievous bodily harm with intent. The facts revealed that D had followed his 28-year-old separated wife, W, to the flat of her new boyfriend and then used a knife to stab her face, neck and breasts. The paper published a picture of W leaving the court in the company of her boyfriend. The scars in W's cheeks, mouth, nose and neck were visible. The full name of W was disclosed in the report. (*ODN*, 12.10.01)
- A49 *Oriental Daily News* reported that a 61-year-old man, M, used a cleaver to hit his 21-year-old son after the latter had had a row with his 48-year-old mother. F, the girlfriend of M's son, was also living with the family. F had complained that M had entered her room naked and then molested her in an attempt to rape her. She struggled and eventually escaped into the toilet. The surname of F and the first and third Chinese characters of both M and his son

were disclosed in the report. The name of the building in which they lived was also disclosed. The paper published a picture of F feeding M's son in a ward. Only their eyes were obscured in the picture. (ODN, 26.10.01, A 1)

- A50 *The Sun* reported that a 54-year-old woman, W, used a knife to stab the private parts of her 58-year-old husband, H, after complaining that he had a mistress. H's scrotum was wounded as a result. W was sent to the psychiatric unit of a hospital after the incident. The paper disclosed H's occupation, the first and third Chinese characters of the names of H, W and their son, and the name of the building in which they lived. The paper published a picture of H sitting in a wheelchair with an oxygen mask on his mouth. (*The Sun*, 2.11.01, A 19)
- A51 *Oriental Daily News* reported that a 41-year-old man, D, had been convicted of common assault. The facts revealed that D had used his fist to strike his mother's face after they had an argument over the use of their television. As a result, his mother's face was bruised and swollen. The paper published two pictures showing D and his mother respectively. (ODN, 17.11.01, A 12)
- A52 *Oriental Daily News* reported that a 78-year-old woman had called the police when she found her 76-year-old husband, H, lying naked and unconscious in his bed. His wallet, mobile phone and two gold chains were missing. He was certified dead when the paramedics arrived. The police found that H had an address book containing the telephone numbers of about 40 women who were suspected to be prostitutes. It was believed that H died while having sex with a prostitute and the prostitute snatched his belongings when she left. H's full name and address were disclosed in the report. The paper published a picture of H's son with H's wife. (ODN, 3.12.01, A 22) *The Sun* also published a picture of H's 78-year-old wife walking down the stairs of a building. (*The Sun*, 3.12.01, A 6)
- A53 *The Sun* reported that a 29-year-old woman, D, was tried for one count of blackmail and five counts of theft. The facts revealed that the victim had had sex with D at his home. An accomplice of D subsequently told the victim over the phone that they belonged to a powerful Vietnamese gang and that they would visit his home if he did not give them money. The victim paid them \$40,000. The article revealed that the victim was a 33-year-old student studying third year law at a named university. It further disclosed his full name and the fact that he was married to a 39-year-old Japanese who was working as a Customer Relations Officer. D had used the same tactics to obtain \$10,000 from another victim whose full name was also revealed in the report. (*The Sun*, 15.12.01, A 6) See also *Apple Daily*, 15.12.01, A 10.
- A54 *Apple Daily* reported that a 22-year-old woman, F, noticed that a female pickpocket had used a needle to prick the backpack of a KCR passenger and then used a cutter to cut open the backpack in order to steal its contents. When the pickpocket realised that F had seen her actions, she told F that she would be her next target. After the pickpocket had left the train, F felt pain in her buttocks and later found over 10 needle pricks in her buttocks. On her way to hospital, F repeatedly asked a paramedic whether she would have AIDS. The paper published a picture of F trying unsuccessfully to use a blanket to hide her face. (*Apple Daily*, 25.12.01, A 13)
- A55 *Apple Daily* reported that a 32-year-old former policeman had been charged with four counts of fraud and two counts of conspiracy to defraud. The

prosecution alleged that the defendant had defrauded six male applicants for “public relations jobs” by asking them to pay a deposit and rentals in advance. The paper disclosed the transliteration of the English names of the six victims. The headline of the story read: “Six strong men who fancied becoming gigolos defrauded of money”. (*Apple Daily*, 28.12.01, A 9)

- A56 While the police were trying to subdue a suicidal woman who claimed to have AIDS, she bit a policewoman on the arm. *Apple Daily* reported that the policewoman had had to receive detailed evaluation before she could find out whether she had contracted AIDS. It disclosed the surname of the policewoman, the name of the police unit to which she belonged and the fact that she was still single. It also published her picture. The article in *Oriental Daily News* disclosed the age and the first and third Chinese characters of the policewoman’s name. It also published her picture. (*Apple Daily*, 18.1.02, A 15; *ODN*, 18.1.02, A 10) See also *ODN*, 13.3.01, A 20 (policeman pricked by a syringe used by a suspect).
- A57 A 47-year-old woman was tried for using a pair of scissors to injure the penis of her 31-year-old boyfriend while the two were sleeping together. *Apple Daily* disclosed the age, full name and occupation of the victim. It also published a picture of the victim lying in a hospital bed using a napkin to cover his private parts. The victim’s private parts were obscured in the picture but it could be seen that there were blood stains on his thigh. He was not identifiable in the picture as he was covering his face with his hand. (*Apple Daily*, 9.10.02, A 9) *Oriental Daily News* also disclosed the victim’s name and age. It published a picture similar to that published in *Apple Daily*, and a picture of the victim and the woman taken on a previous occasion. (*ODN*, 9.10.02, A 15) See also *The Sun*, 9.10.02, A 1.
- A58 *Eastweek* published on its front cover a picture of the naked upper body of a starlet, taken some time before by an unknown person. Her appearance suggested that the picture had been taken against her will. Only her eyes and nipples were obscured. The same picture was also published on an inside page of the magazine. The starlet was not named in the article but many were able to ascertain her identity after reading the picture and article. That issue sold out on the first day of publication. (*Eastweek*, 30.10.02) The publication of the picture was roundly condemned by the community. (See, for example, the full-page advertisement placed in *Sing Tao Daily*, 2.11.02, A13.) But *Three Weekly* published the same picture three days later. The starlet’s body was covered up but her eyes were not obscured in that picture. (*Three Weekly*, No 160, 2.11.02)
- A59 See also the two cases at paragraph 5(a) and (b) above. Colour pictures of victims of rape or indecent assault also appeared in the following newspapers: *Apple Daily*, 4.10.00, A12; *Apple Daily*, 5.1.01, A13; *Apple Daily*, 6.1.01, A11; *Apple Daily*, 14.1.01, A11; *Apple Daily*, 7.4.01, A13; *The Sun*, 11.5.01, A15; and *Apple Daily*, 3.7.01, A19. The victims’ faces were not shown in the pictures but their figures, clothes, hairstyle, shoes, handbags and/or bracelets were included. See footnote 1 of Annex 2 above.



## **Innocent parties**

***“Unless otherwise restricted by law or court order, open court hearings are matters of public record and can be reported by the press. Such reports need to be fair and balanced. They should not identify relatives or friends of people accused or convicted of crime unless the reference to them is necessary for the full, fair and accurate reporting of the crime or subsequent legal proceedings.” – Australian Press Council’s Code of Privacy Standards, para 7(3).***

***“Media organizations should generally avoid identifying relations of persons convicted or accused of crime unless the connection is directly relevant to the matter reported.” – General Media Code of Ethics and Practice of Fiji’s Media Council, para 12.***

***“The press shall respect the private life and intimate sphere of persons. If, however, the private behaviour of a person touches upon public interests, then it may be reported upon. Care must be taken to ensure that the personal rights of uninvolved persons are not violated.” – German Press Council’s Press Code, Figure 8.***

***“In the case of dependants and other people who are affected who have nothing to do with the accident or the crime, the publication of the names and pictures is in general impermissible.” – German Press Council’s Press Code, Guideline 8.1(3).***

***“A journalist respects the right of secrecy of every people and he cannot publish news on his private life, unless they are transparent and of relevant public’s interest ... . Relation’s names of people involved in such daily events cannot be published, unless they are of relevant public’s interest; they can be neither made known in case of danger of people’s safety, nor they can publish other elements, that can make clear people’s identity (photos, images).” – Charter of Duties of Journalists adopted by the National Federation of the Italian Press and National Council Order of Journalists in Rome.***

***“[Unless the report can be demonstrated to be in the public interest,] (i) The press must avoid identifying relatives or friends of persons convicted or accused of crime without their consent. (ii) Particular regard should be paid to the potentially vulnerable position of children who are witnesses to, or victims of, crime. This should not be interpreted as restricting the right to report judicial proceedings.” – UK Press Complaints Commission’s Code of Practice, clause 10.***

B1     A man had been tried for armed robbery in the High Court three years before. His cousin, M, had been pursued by journalists after pictures of him turning up for the hearing had been published in the press. M begged the press not to pursue him because he had been unable to find a job since the publication of the pictures. M also said that his child had been discriminated by his classmates after the identity of M had been disclosed by the press. (*Asia Weekly*, Sept 6 – 12, 1999, p18)

B2     *The Sun* reported that a 28-year-old teacher had jumped to his death from the fourth floor of a secondary school. He had been married for only two

months. The paper published a wedding picture of the teacher and his wife. (*The Sun*, 16.2.00, A 1)

- B3 *The Sun* reported that a 29-year-old teacher had been found not guilty of sexually assaulting a 14-year-old Form Two female student, but the judge had also stated that she did not believe the teacher's evidence. The defendant's fiancée was sitting in the public gallery during the trial. The paper published a picture of the defendant's fiancée outside the court, trying unsuccessfully to hide her face. Only her eyes were obscured in the picture. (*The Sun*, 9.8.00, A 1)
- B4 *Apple Daily* reported that a 23-year-old private tutor was believed to have been murdered in a village house in Tai Po. The police were trying to track down a man who had been seen at the house prior to the incident. One day after the body was discovered, the police visited the scene with a young woman, F. A source said F knew the man wanted by the police. The paper published a picture of F leaving the scene in the company of two policemen. Although the policemen held up a sheet of paper in front of F's face, the picture nevertheless showed part of her face. (*Apple Daily*, 27.8.00, A 6) A relative of F complained to the Privacy sub-committee that F was distressed by the paper's conduct and had feared for her safety subsequent to the publication of that picture, which also appeared on the paper's website.
- B5 *The Sun* reported that three defendants had been found guilty of killing a woman, F. The article reported that F had been cohabiting with a drug addict, M, who had been sentenced to prison twice and fined for possessing prohibited drugs. Shortly after the killing, M was found to be living with his new girlfriend in a named housing estate. M was reluctant to tell the journalist about his past. He had not yet decided whether to tell his current girlfriend about the events. He said he had just found a job in a chain store in Tsuen Wan selling spectacles. Hoping that he could lead a normal life, M begged the journalist to leave him alone and not to give him further trouble. The age and full name of M were disclosed. The paper published M's picture, and a picture of his new girlfriend. The caption stated that she was pregnant. (*The Sun*, 22.11.00, A 2) *Oriental Daily News* reported that M had quit his job at the spectacles' shop to avoid pursuit by the press. It published pictures of M and his new girlfriend. Only her eyes were obscured in the picture. (*ODN*, 22.11.00, A 2)
- B6 *The Sun* reported that a 44-year-old woman, F, had been having an affair with a 50-year-old married man, M. One day, M's wife confronted F at her place of work and a scuffle ensued. The article revealed that F's husband was 63 years old and had Parkinson's disease and diabetes. The first and third Chinese characters of the names of all parties were disclosed. The paper published a picture of F's husband visiting a police station. (*The Sun*, 14.3.01, A 8)
- B7 *The Sun* reported that two young men, D1 and D2, had been found guilty of conspiracy to commit burglary. The facts revealed that D1 had asked D2 to lend him money but the latter refused to assist. D1 then suggested that D2 burgle his flat when D1's father and elder brother were not at home. D2 subsequently stole property worth \$150,000 from D1's flat. The court stated that D1's conduct had tarnished the reputation of his father and elder brother because both of them worked in the Police Force. The full name of D1's father was disclosed in addition to that of D1. The paper published a picture

of D1's parents leaving the court. D1's father had covered his head by a sweater, and D1's mother had tried unsuccessfully to do the same. (*The Sun*, 11.4.01, A 15)

- B8 A policeman was shot dead after responding to a call for assistance. The deceased had a fiancée, F, who was pregnant and expecting a baby in a few months' time. F's mother complained to *The Sun* that she had been pursued by the press and put under great pressure. She said the journalists had been hiding behind the fire door near her flat and had confronted her on the street. To escape from the press, she sometimes stayed in a hostel or travelled to the Mainland. She later placed an advertisement in the press stating that she had ceased to have any relationship with her children and asking the media to stop hounding her. She said the notice was actually a sham to avoid the attentions of the press. (*The Sun*, 13.6.01, D 1)
- B9 *Apple Daily* reported that a 48-year-old man who had died of a heart attack while working in a construction site had a mistress on the mainland and had owed loan sharks a huge debt. The paper published a picture of his wife on the way to hospital with her friends. Also published was the man's likeness on his identity card. (*Apple Daily*, 3.7.01, A 10)
- B10 *Apple Daily* reported that a 28-year-old man, M, had used a cane to beat a former legislator when the latter was leaving the court after attending a trial. M had been arrested but released on bail pending police investigation. The article revealed that M was unemployed and had to live on the earnings of his wife. His wife was a salesman in a mobile phone shop in a shopping centre in Yuen Long. She declined to be interviewed by the journalists. The paper published pictures of M's wife, one of which showed her inside the phone shop. (*Apple Daily*, 5.8.01, A 17)
- B11 *The Sun* reported that a 25-year-old man (full name given) had been sentenced to ten years' imprisonment for indecent assault and stealing bras in various places in Ngau Tau Kok. The man had a wife and two children. His wife worked in a bookstore run by her parents-in-law. The paper published a picture of his wife inside her store. Only her eyes and nose were obscured. (*The Sun*, 9.9.01, D 3)
- B12 *The Sun* reported that a 72-year-old man, D, had been convicted of indecent assault. The prosecution alleged that D had caressed the breasts of a 16-year-old mentally retarded girl and had removed her underwear. The paper published a picture of D leaving the court in the company of a woman. The caption stated that the woman (surname given) was cohabiting with him. (*The Sun*, 31.10.01, A 12)
- B13 *Apple Daily* reported that the parents of a 51-year-old former legislator, D, went to visit him at the Correctional Services Department's Lai Chi Kok Reception Centre in the company of a relative and D's girlfriend. D's mother became distressed when press photographers took pictures and asked them to desist. The paper published a picture of D's mother, pointing her finger at someone outside the picture. D's father, girlfriend and relative were also included in the picture. (*Apple Daily*, 23.12.01, A 2) See also *The Sun*, 23.12.01, A 6 and *ODN*, 23.12.01, A 23.
- B14 See also the case at paragraph 5(c) above.

## Persons attempting suicides and related parties

***“Suicides or attempted suicides should not be mentioned unless an obvious public interest requires or justifies press coverage, and in such a case the mention should be as considerate as possible.” – The National Code of Conduct adopted by the Danish Parliament with the acceptance of the National Union of Journalists, para B2.***

***“The news value of a suicide or attempted suicide is to be questioned rigorously.” – Estonian Press Council’s Code of Ethics, para 4.5.***

***“Reporting on suicide cases require restraint. This particularly applies to the publication of names and the detailed description of the circumstances. Exceptions are only justifiable if the case is taken from current history and for which there is a public interest.” – German Press Council’s Press Code, Guideline 8.4.***

***“Exercise great caution in publishing notices concerning suicide and attempted suicide, particularly out of consideration for the feelings of relatives and in view of what has been said [in para 7] concerning the privacy of the individual.” – Swedish Press Council’s Code of Ethics, para 8.***

***“Sensational coverage of suicides should be assiduously avoided, particularly when a celebrity is involved. The coverage should be minimized to the extent possible. ... Every effort should be made to avoid overstatement. Photographs of the deceased, of the method used and of the scene of the suicide are to be avoided. Front page headlines are never the ideal location for suicide reports. ... [Summary of what not to do:] Don’t publish photographs or suicide notes. Don’t report specific details of the method used. Don’t give simplistic reasons. Don’t glorify or sensationalize suicide. Don’t use religious or cultural stereotypes. Don’t apportion blame.” – WHO Department of Health, “Preventing Suicide – A Resource for Media Professionals”, WHO/MNH/MBD/00.2 (Geneva: World Health Organisation, 2000), pp 7 & 8.***

- C1     *The Sun* reported that a 12-year-old Primary Six student had threatened to commit suicide by jumping from a 12<sup>th</sup> floor balcony. She was later brought to a safe place. The name of her school and the first and third Chinese characters of her name were disclosed. The paper published a picture of the student on the balcony. (*The Sun*, 24.1.00, A 3)
- C2     *The Sun* reported that a woman, W, had threatened to jump from the 19<sup>th</sup> floor of a building. W was rescued by firemen. The paper disclosed W’s age, the first and third Chinese characters of her name, and the name of the building in which she lived. The paper revealed that she had delusions and published on its front page several pictures of the woman standing on the edge of the building’s 19<sup>th</sup> floor, and a picture of her husband. (*The Sun*, 2.3.00, A 1)
- C3     *Apple Daily* reported that a 28-year-old woman discovered that her 40-year-old boyfriend with whom she had been cohabiting, had resumed contacts with his former girlfriend. One night, she asked him to marry her

or else their relationship should end. The man could not make up his mind and attempted to kill himself by drinking alcohol with sleeping pills. The surname and occupation of his girlfriend and the name of the building in which they cohabited were disclosed. The paper published a picture of the man's girlfriend. (*Apple Daily*, 28.4.00, A 11)

- C4 *The Sun* reported that an unemployed young man cut his wrist after his 19-year-old girlfriend had told him that she would leave if he did not look for a job. It revealed that the man had cohabited with the girl for several months. The man had quit school after completing Form Two. He had never had a permanent job. His girlfriend, whose family name was given, was described as a "beer-girl". The paper published a picture of the man's girlfriend. (*The Sun*, 15.6.00, A 14)
- C5 *Apple Daily* reported that a 44-year-old man, M, attempted to kill himself outside an office of the Social Welfare Department by drinking detergent. It revealed that M had heart disease. His investment in a pub in Shenzhen had suffered a loss. He had applied to the Department for assistance. The paper published a picture of M leaning against a hospital bed. (*Apple Daily*, 21.6.00, A 13)
- C6 *Apple Daily* reported that a 39-year-old nursing assistant had swallowed thirty sleeping pills. She disclosed that she had been deserted by her husband and boyfriends and had been unemployed for three months. Her full name, which was exactly the same as that of a former movie star, was disclosed in the report and included in the headline. The paper published a picture of the woman lying in a hospital bed. (*Apple Daily*, 20.7.00, A 13)
- C7 *The Sun* reported that a gay couple who had had an intimate relationship for many years had had an argument which had led to one of them, M, cutting his own wrist with a knife. The first and third Chinese characters of the couple's names were disclosed in the report. The occupation and address of M were also revealed. The paper published a picture of M sitting on a chair. His hands were wrapped with bandages. (*The Sun*, 23.11.00, A 16)
- C8 *Apple Daily* reported that a woman, F, was found to have attempted to kill herself by burning charcoal inside her boyfriend M's flat. The article revealed that F had been cohabiting with M, but the latter was unwilling to marry her. F's surname and the address of M (except the flat number) were disclosed. The paper published a picture of F lying in a hospital bed with her eyes closed and a tube attached to her nose. Also published was F's likeness in her identity card. (*Apple Daily*, 12.12.00, A 15)
- C9 *Apple Daily* reported that a 42-year-old woman (full name given) had attempted to kill herself by cutting her wrist and burning charcoal inside her car. It revealed that the woman was the wife of a named superintendent who had been having an affair with a policewoman for several years. The policewoman's Christian name was disclosed. The paper reported that she once worked in the traffic division of the Kowloon West Region. It published a picture of the woman lying on a stretcher, wearing an oxygen mask. Also published was a picture of her husband in police uniform. (*Apple Daily*, 27.12.00, A 2)
- C10 *Apple Daily* reported that a 26-year-old man, M, had attempted to kill himself by drinking brandy and releasing coal gas inside the kitchen. M, who

worked as a long haul driver, had not too long before been rejected by his girlfriend on the mainland whose family was wealthier than his. The paper further revealed that M's father had neurasthenia and lost the ability to work shortly after marriage. M's father had led a life of debauchery after recovery. M had a 24-year-old brother who had dropped out of school because of schizophrenia. M's mother was a Buddhist, who had borne the responsibility of raising the whole family. The family name of M and the full name of his mother were disclosed in the report. The paper published a picture of M being taken to hospital in a wheelchair. (*Apple Daily*, 28.1.01, A 7)

- C11 *The Sun* reported that a 32-year-old man was found lying unconscious after burning charcoal inside his room. The man was in financial difficulty after having been unemployed for more than a year. His wife had left him, taking his 3-year-old daughter with her. The first and third Chinese characters of the man's name were disclosed in the report. The paper published a picture of the man being taken to hospital. Also published were a passport size picture of the man and a picture of the man's wife holding his daughter, both taken on a previous occasion. Only the eyes of his wife and daughter were obscured. (*The Sun*, 14.2.01, A 2)
- C12 *The Sun* reported that an 18-year-old student had attempted to kill herself by taking an overdose of painkillers and burning charcoal inside her kitchen after she had broken up with her boyfriend. The third Chinese character of her name and the name of the estate in which she lived were disclosed. The paper published a picture of the student lying in a hospital bed. (*The Sun*, 11.5.01, A 17)
- C13 *Oriental Daily News* reported that a 38-year-old woman (surname given) had taken an overdose of sleeping pills after she had had an argument with her husband. Her 7-year-old son called his grandfather for assistance. The family was living in a named estate in Siu Sai Wan. The third Chinese character of the child's name was also disclosed. The paper published a picture of the son walking with a paramedic. Also published was a picture of the woman lying in a hospital bed. Only her eyes were obscured in the picture. (*ODN*, 31.7.01, A 15)
- C14 *The Sun* reported that a 40-year-old man, M had attempted to kill himself by taking drugs for diabetics and burning charcoal in a hut in Pokfulam after disagreements with his wife. The full names of M and his wife were disclosed. The paper disclosed that M was an officer of a named government department earning a salary of \$17,000, and that both he and his mother had diabetes. It published a picture of M's wife and a picture of M lying in a hospital bed with his hand covering his nose and mouth. (*The Sun*, 2.8.01, A 4 and 3.8.01, A 12) See also *ODN*, 2.8.01, A 18 and *Apple Daily*, 3.8.01, A 6.
- C15 *Oriental Daily News* reported that a 52-year-old man, H, took 40 sleeping pills after his 31-year-old wife, W, had rushed out of her room telling him that she had taken over 150 sleeping pills. The article revealed that H had met W in a nightclub in Wanchai. H was then a pianist and W a singer. Recently, W had confessed that she had been unfaithful to H. The surnames of H and W, the stage name of W, their current occupation and the name of the estate in which they lived were disclosed in the report. The paper published a picture of the couple wearing wedding clothes. Also

published were a picture of H on his way to hospital and a picture of W lying in a hospital bed. Only the eyes of H and W were obscured in the pictures. (ODN, 21.8.01, A 22) See also *Apple Daily*, 21.8.01, A 8.

- C16 *Apple Daily* reported that a 35-year-old woman, W, had threatened to kill herself and her 6-year-old son by jumping from the 26<sup>th</sup> floor of a building. She decided not to jump when the firemen arrived. A day later, she took 150 sleeping pills, drank half a bottle of disinfectant, and used a fruit knife to cut her wrist. The article revealed that W was unemployed and was living with her son in a named village in Sheung Shui. The surnames of W and her son were disclosed. The paper published a picture of W with her son after she had been rescued by the firemen. Another picture showed W sitting in a wheelchair being pushed by a paramedic with her son following behind. (*Apple Daily*, 25.8.01, A 3)
- C17 *Oriental Daily News* reported that a 37-year-old estate agent (surname given) had taken six sleeping pills, drunk five cans of beer, and used a fruit knife to cut her wrist. The paper published two pictures of herself which the woman had hung inside her flat. She was almost naked in one of the two pictures. The paper also published a picture showing her sitting in a wheelchair being pushed by a paramedic. (ODN, 4.9.01, A 18) See also *The Sun*, 4.9.01, A 11.
- C18 *The Sun* reported that two lesbians, X and Y, had attempted suicide by burning charcoal inside their room. They had met each other in a drug addiction treatment centre and had been cohabiting for two years. Y had worked as a prostitute and had borrowed from loan sharks to purchase drugs. Both X and Y wanted to turn over a new leaf after the suicide attempt. The paper published two pictures of X and Y lying on stretchers. Also published were two love letters; one written by X and the other by Y. The article disclosed their ages, their full address, and the first and third Chinese characters of their names. Their Christian names and full names in English were also disclosed in the letter from X to Y. (*The Sun*, 2.10.01, A 8) See also *Apple Daily*, 2.10.01, A 4.
- C19 *The Sun* reported that a 37-year-old man, H, had threatened to kill himself by jumping from the window of his flat on the 18<sup>th</sup> floor of a named building. The paper revealed that H had had mental problems and had complained about noises in his ears. The full names of H and his wife, W, were disclosed. The last Chinese characters of their four children were also given. The paper published on its front page a picture of H lying in a hospital bed with W weeping beside him. Also published was a picture of W holding her colostomy bag. Another picture showed three of their children. Only their eyes were obscured in the picture. (*The Sun*, 1.11.01, A 1) *The Sun* reported the next day that H had been suffering from depressive disorder and had already been sent to the Castle Peak Hospital. The paper published a family photograph of H. Only the eyes of the four children were obscured. (*The Sun*, 2.11.01, A 7) See also *Oriental Daily News*, 1.11.01, A 22 and *Apple Daily*, 1.11.01 A 11. The age and full name of H's eldest son were disclosed in *Apple Daily's* report.
- C20 *Apple Daily* reported that a male teacher had threatened to jump from the 21<sup>st</sup> floor of a building. The paper disclosed his age, surname and the fact that he was an English teacher at a named school in a named district. It was suspected that he threatened suicide because he had negative equity

and family problems. The paper published a picture of the teacher standing outside the railing of the 21<sup>st</sup> floor with his back to the camera. (*Apple Daily*, 19.1.02, A 4)

C21 The identities of the following persons who had attempted suicide were also disclosed in press reports:

1. An 18-year-old Form Five graduate (surname given). A recognisable picture of her being rescued from the sea was published. (*Apple Daily*, 23.4.00, A 9)
2. A 39-year-old woman whose full name was given. The report disclosed that she was a Buddhist nun at a named monastery. Her picture was also published. (*Apple Daily*, 29.5.00, A 13)
3. A 52-year-old woman (the first and third Chinese characters of her name given). The report disclosed that she was the wife of a named divisional commander of the Fire Services Department and that she had liver disease. A picture of the woman was also published. (*The Sun*, 4.1.01, A 8) See also *Apple Daily*, 4.1.01, A 16.
4. A 22-year-old Thai maid (name disclosed). A picture of her standing at the edge of a flyover was published. (*Apple Daily*, 11.1.01, A 15)
5. A 63-year-old man whose address and the first and third Chinese characters of his name were given. A close-up picture of him taken on his way to hospital was also published. (*The Sun*, 1.3.01, A 11)
6. An elderly woman living in a public housing estate, whose photo was published. (*Apple Daily*, 13.7.01, A 4)
7. A 38-year-old woman (surname given) who had attempted suicide with her boyfriend. The report disclosed that she was a hostess at a nightclub and published her picture. (*Apple Daily*, 21.7.01, A 4)
8. An 18-year-old Form Five student who had jumped from the 35<sup>th</sup> floor of a building. The report published a picture of the student and disclosed the last Chinese character of her name. (*Apple Daily*, 31.7.01, A 1; *Apple Daily*, 2.8.01, A 6; and *Apple Daily*, 3.8.01, A 9)
9. A 32-year-old man who had attempted to take his life in his factory after running up substantial debts. A picture of him waiting for rescue in the factory was published. (*Apple Daily*, 29.12.01, A 13)
10. See also the case at paragraph 5(d) above.

## Patients in hospitals and related parties

***“[W]hatever might be the right of the press, tabloids, or newsreel companies to take and use pictures of persons in public places, certainly any right of privacy ought to protect a person from publication of a picture taken without consent while ill or in bed for treatment and recuperation.” – 86 ALR3d 374 at 378.***

***“A portrayal is inappropriately sensational if in the report the person is reduced to an object, to a mere thing. This is particularly the case if reports about a dying or physically or mentally suffering person are to such an extent that they go beyond the public interest and the information interest of the reader.” – German Press Council’s Press Code, Guideline 11.1.***

***“No attempt should be made to enter wards or other places of treatment in hospitals without clear and informed authorisation from the medical staff and***



***the individuals concerned or those acting on their behalf.” – UK Broadcasting Standards Commission’s Code on Fairness and Privacy, para 29.***

***“The use of hidden microphones and cameras for the filming or recording of individuals who are unaware of it is acceptable only when it is clear that the material so acquired is essential to establish the credibility and authority of a story where this cannot or is unlikely to be achieved using 'open' filming or recording techniques, and where the story itself is equally clearly of important public interest. ...” – UK Independent Television Commission, Programme Code, section 2.4.***

***“[Unless it can be demonstrated to be in the public interest,] (i) Journalists or photographers making enquiries at hospitals or similar institutions must identify themselves to a responsible executive and obtain permission before entering non-public areas. (ii) The restrictions on intruding into privacy are particularly relevant to enquiries about individuals in hospitals or similar institutions.” – UK Press Complaints Commission’s Code of Practice, clause 9.***

***“[Unless it can be demonstrated to be in the public interest,] (i) Journalists must not generally obtain or seek to obtain information or pictures through misrepresentation or subterfuge. ... (iii) Subterfuge can be justified only in the public interest and only when material cannot be obtained by any other means.” – UK Press Complaints Commission’s Code of Practice, clause 11.***

**(a) Patients in local hospitals and related parties**

- D1 *Apple Daily* reported that a 34-year-old man, M, had attempted to kill himself by burning charcoal inside a refuse room. The article revealed that M lived in a named estate in Ma On Shan and was the youngest of seven children. His surname was disclosed in the report. The paper published a picture of M lying in a hospital bed. (*Apple Daily*, 11.4.00, A 11)
- D2 *Apple Daily* reported that an 89-year-old former actor-cum-director, M, had been receiving treatment for pneumonia, renal failure and senile dementia in hospital. The journalist asked M’s daughter if he could take a picture of M. She refused, but the paper republished a picture published on the previous day which showed M sleeping in bed with a tube attached to his nostril. (*Apple Daily*, 26.4.00, C 5; *Apple Daily*, 27.4.00, C 2; *ODN*, 27.4.00, C 9; *Apple Daily*, 28.4.00, C 14) M passed away on 23.5.00.
- D3 *Apple Daily* reported that a formerly wealthy woman who had lost several million dollars in her business had attempted to commit suicide by taking sleeping pills with alcohol. Her son persuaded her to see a doctor by taking painkillers himself. Both the mother and the son were taken to hospital. Their surnames and the name of the estate in which they lived were disclosed. The paper published a picture of the mother sleeping in a hospital bed. Another picture, taken inside the corridor of a hospital, showed her son trying to hide his face from the camera. (*Apple Daily*, 10.6.00, A 9) *The Sun* also disclosed that the woman once had as much as four hundred million dollars but at the time of the incident she could not even afford to pay the monthly mortgage. The first and third Chinese characters of the names of both the woman and her son were disclosed. The report further disclosed that they were living in a named estate in Ma On Shan. The paper published a picture of the woman sleeping in a hospital bed. Only her eyes were

obscured. Another picture showed her son at the hospital, turning his head away from the camera. (*The Sun*, 10.6.00, A 4)

- D4 *The Sun* reported that a 44-year-old woman, W, was tried for pouring corrosive acid over her husband H's face when the latter was sleeping. The facts revealed that H was married but had a mistress in Hong Kong. The full names of W, H and H's mistress were disclosed. The paper published a picture of H lying in a hospital bed. (*The Sun*, 21.6.00, A 8)
- D5 *Apple Daily* reported that a girl who weighed over two hundred pounds had fallen into the sea. She was taken to hospital after being rescued by firemen. The last Chinese character of her name was disclosed. The paper published a picture of the girl lying in a hospital bed. (*Apple Daily*, 10.7.00, A 13)
- D6 *Apple Daily* reported that a 37-year-old man, M, who was working inside a lift in a construction site, had sustained serious injury when the lift suddenly fell nine floors. M was almost totally paralysed as a result of the accident. His wife had been looking after him since then. Two years later, M negotiated the terms of a settlement with the contractor concerned. Accompanying the report was a picture of M lying in a hospital bed, with his wife standing at his bedside. (*Apple Daily*, 18.7.00, A 19) *Oriental Daily News* reported the next day that the parties had sought the court's approval of the terms of the settlement. At the end of the trial, M's counsel told the court that several journalists had visited M at the hospital and taken pictures which were later published in the newspapers concerned. One of these pictures was republished in *Apple Daily*, causing emotional distress to M's wife. Upon hearing the submission, the judge stated that such photography was a kind of harassment that was "absolutely unreasonable". He commented that the conduct of *Apple Daily* had fallen substantially below the standard expected of a responsible newspaper. (*ODN*, 19.7.00, A 10)
- D7 *Apple Daily* reported that a female artiste (name given) had been hospitalised at the orthopaedic and wound surgery department of Queen Mary Hospital. She was staying in a six-bedroom ward. There was a curtain at the side of her bed to protect her from being disturbed by others. A journalist had come to her bedside and taken out a camera. The journalist refused to leave and took pictures against her wishes. The report hinted that she had been admitted to the hospital for plastic surgery to her "lower parts". Two pictures of the artiste lying in a hospital bed were published in the paper. (*Apple Daily*, 27.7.00, C 7)
- D8 *Apple Daily* reported that a 13-year-old boy (full name given) who had had an aneurysm had fainted and suffered from nose bleeding when his blood vessels burst. He was later sent to hospital in a critical condition. The paper published a picture of the boy lying in a hospital bed with many tubes placed on his nose, mouth and body. Another picture showed his parents praying in the waiting area of the hospital. (*Apple Daily*, 5.9.00, A 8)
- D9 *The Sun* reported that a woman and her six months old son had been scalded by boiling soup when she slipped and fell to the ground in the kitchen together with her son. As a result, fifty per cent of the child's skin was burnt. The child was still in a critical condition two days after the accident. The paper published two pictures taken inside the hospital. One showed that the head and hands of the child were wrapped with bandages. This picture was taken

inside the Intensive Care Unit. The other showed the mother sleeping in a hospital bed. (*The Sun*, 16.10.00, A 8)

- D10 *Apple Daily* reported that the face and left ear of a 29-year-old woman had been chopped by her 46-year-old husband when the woman returned home one night. It was believed that the husband did not like her working as a dancing hostess at a nightclub. The paper published on the front page a picture of the woman lying in a hospital bed. Her nose, ears and left temple were covered with dressings. (*Apple Daily*, 5.11.00, A 1; the picture was republished in *Apple Daily*, 27.2.01, A 9) *Apple Daily* reported the next day that the woman had come from the mainland to meet her husband only to find out that he was sick, could not walk freely and had been living on social security assistance. Although the woman had the opportunity to work as a waitress in a restaurant, she preferred to work as a dancing hostess so that she could earn more money. One day, the couple had an argument and her husband struck her face and ears with a boning knife. The family names of the couple and the name of the building in which they lived were disclosed. The paper republished the picture published the day before. Also published was a portrait of the woman. (*Apple Daily*, 6.11.00, A 13) *The Sun* disclosed the full name of the victim and published a picture of her lying in a hospital bed. Also published were two pictures taken on previous occasions. One was the victim's portrait and the other showed the victim and her husband. Only her husband's eyes were obscured. (*The Sun*, 6.11.00, A 2)
- D11 *The Sun* reported that the testicles of a 56-year-old Chinese herbalist (surname disclosed) had been cut off by his wife. It further revealed that the wife suspected that the man had a mistress on the mainland. The paper published a picture of the man lying in a hospital bed. He was then wearing a bandage round his forehead and had dressings on his face. Also published were two pictures of his younger son and his wife's sister, both taken in the hospital. (*The Sun*, 11.1.01, A 4) *Oriental Daily News* also published a picture of the herbalist taken in hospital. His face was obscured in the picture. The age and full name of the herbalist were disclosed in the report. Also published was a picture of the herbalist's sister-in-law taken inside the hospital. Her eyes were obscured. (*ODN*, 11.1.01, A 20)
- D12 *Apple Daily* reported that M, a named artiste, had caught a cold which had developed into bronchitis and pneumonia and a fever of 104 degrees. It further revealed that M had been suffering from enterogastritis and had had a sebaceous cyst in his left ear removed. The hospital in which M was receiving treatment had requested journalists not to disturb him. The paper published a picture of M sleeping in a hospital bed. He was then wearing an oxygen mask. (*Apple Daily*, 11.1.01, C 2) *Apple Daily* reported the next day that M's condition had not improved. A spokesman from a television company told the press that M did not want others to disturb him. The paper republished the same picture. (*Apple Daily*, 13.1.01, C 7)
- D13 *Oriental Daily News* reported that a 35-year-old man (full name given), who was the separated husband of a named actress, was reported to have taken an overdose of drugs. The article revealed that the man was in financial difficulty and had owed someone \$800,000. Since more than 20 journalists had arrived at the hospital, the hospital staff shielded his bed by screens and stationed two security guards at the entrance to his ward. The paper published a picture of the man sleeping in a hospital bed. (*ODN*, 13.2.01, A

- 16) *Apple Daily* and *The Sun* also disclosed the full names of the man and the actress. *Apple Daily* reported that the hospital did not allow the journalists to enter the ward so as to prevent the man from being disturbed. The man had also refused to accept any press interviews. Both papers published a picture of the man sleeping in a hospital bed. (*Apple Daily*, 13.2.01, C 14; *The Sun*, 13.2.01, A 8)
- D14 A 44-year-old man was seriously burnt after his girlfriend had set his flat on fire by igniting kerosene she had brought to his flat. His girlfriend died in the blaze. *Oriental Daily News* published on its front page a picture of the man lying in a hospital bed. He was wearing a "pressure coat" and his four limbs were wrapped with bandages. His private parts were exposed but obscured in the picture. It could be seen that he could hardly open his eyes. His full name was disclosed in the report. (*ODN*, 14.2.01, A 1)
- D15 *Apple Daily* reported that a husband and wife, both 39 years old, were found to have attempted suicide by burning charcoal inside their bedroom. It revealed that the couple owed a financial institution \$200,000 and could not pay off the mortgage for their flat. The full names of the couple and the name of the estate in which they lived were disclosed. The paper published photos of the husband and wife lying in hospital beds. (*Apple Daily*, 28.2.01, A9)
- D16 *Apple Daily* reported that a 77-year-old artiste had been taken to hospital after a stroke. His wife did not want press photographers taking his picture. The paper published a picture of the artiste lying in a hospital bed on two days. (*Apple Daily*, 12.3.01, C 4 and *Apple Daily*, 13.3.01, C 4)
- D17 A woman complained to the HK Journalists Association that a journalist from *The Sun* had entered the ward in which a patient, M, was hospitalised without M's consent. She also accused the journalist of interviewing M and taking M's picture while falsely representing herself as an officer from the Social Welfare Department. The pictures were published in the paper the next day. The woman further complained that the journalist had neglected the risk of infection by using her hand to touch M's wound. *The Sun* declined to reply to the HKJA's enquiry but the journalist concerned had denied those allegations. However, the hospital administration confirmed that the journalist had neither the consent of the patient nor that of the officer-in-charge of the ward before interviewing the patient, and that the journalist had not put on the designated overcoat and mask during the visit. (*The Sun*, 20.3.01; *The Journalist*, Nov 2001, p 27)
- D18 *Apple Daily* reported that a 24-year-old woman had attempted to kill herself by cutting her wrist and taking poisonous drugs after her husband refused to cease gambling. The surnames of the woman and her husband and the name of the building in which they lived were disclosed. The paper published a picture of the woman lying in a hospital bed with her eyes closed. (*Apple Daily*, 27.5.01, A 9)
- D19 *Apple Daily* reported that a 41-year-old woman had attempted to hang herself inside her flat. The article revealed that her husband had been battering her after she had discovered that he had rented a flat in Hong Kong with his employer to house their mistresses when the latter came to Hong Kong from the mainland on two-way permits. The paper published a picture of the woman lying in a hospital bed. (*Apple Daily*, 10.8.01, A 2)

- D20 *Oriental Daily News* reported that two male transvestites, X and Y (aged 32 and 30 respectively), had quarrelled with three men in the street after the latter had sneered at them. A scuffle ensued in which X was injured. X and Y were described as “sisters” in the report. The paper published a picture of X sleeping in a hospital bed. Next to it was a picture of a woman leaving hospital after visiting X. The caption described that woman as X’s “sister”. (ODN, 11.11.01, A 14)
- D21 A 26-year-old woman, F, came to Hong Kong from the mainland on a two-way permit to visit her 34-year-old boyfriend, M. M had suggested that their relationship should come to an end. F then used a cutter to cut M’s private parts. M later had an operation on his private parts and was recovering in hospital. *Apple Daily* published a picture taken inside the ward showing that M was pulling up his blanket to protect his face from the camera. *Oriental Daily News* and *The Sun* also published a picture of M lying in a hospital bed. His eyes were obscured in the two pictures. The full name of M and the address at which the offence was committed were disclosed in all three reports. (*Apple Daily*, 11.11.01, A 8; ODN, 11.11.01, A 14; *The Sun*, 11.11.01, A 4)
- D22 Pictures of the following patients taken in local hospitals have also been published in the press:
1. The secretary of a named legislator who had attempted to kill herself by taking sleeping pills: *Apple Daily*, 25.1.00, A 22.
  2. A 9-year-old girl who had featured in a television programme for children and had threatened to kill herself by holding a knife against her throat: *Apple Daily*, 9.3.00, A 10.
  3. A 52-year-old retired accounting manager who had fainted inside a securities company while monitoring price changes in the stock market: *The Sun*, 18.2.00, A 1.
  4. A 16-year-old girl who had to receive electrotherapy for brain cancer and had used a piece of broken glass to cut her wrist: *Apple Daily*, 30.3.00, A 4; ODN, 30.3.00, A 19 and *The Sun*, 31.3.00 (her eyes were obscured in the pictures published in *Apple Daily* and ODN but not in that published in *The Sun*).
  5. A 14-year-old boy who had just received an operation to an ulcer on his bottom: *Apple Daily*, 9.4.00, A 8.
  6. A 25-year-old woman who had stepped into the lift shaft of a residential building without checking whether the lift had descended to the ground floor: ODN, 29.4.00, A 17.
  7. A 39-year-old construction worker who had been seriously injured by a bamboo stick which had fallen from the upper floor of a building under construction: *Apple Daily*, 29.4.00, A 11.
  8. A man, father of a former “Miss Asia”, who had had a stroke, could not urinate because of prostatitis, and whose chances of recovery were very slim: *Apple Daily*, 7.5.00, C 3.
  9. A 34-year-old deaf and dumb woman who had been found drinking and crying on the deck of a residential building after having a row with a man who was also deaf and dumb: *Apple Daily*, 13.5.00, A 12.
  10. A 15-year-old daughter who had been physically abused by her father for over 10 minutes in public (eyes obscured in the picture): *Apple Daily*, 16.5.00, A 2.
  11. A 60-year-old man who had been sent to hospital for refusing to eat for about a week: *Apple Daily*, 29.5.00, A 11.

12. A 21-year-old unemployed man who had emotional problems and had jumped into the sea: *Apple Daily*, 18.6.00, A 11 and *The Sun*, 18.6.00, A 4 (man hiding part of his face underneath a blanket in the picture).
13. A 51-year-old woman who had been physically abused by her son: *ODN*, 19.6.00, A 18 (eyes obscured in the picture).
14. An 18-year-old unemployed man who was unsure about his sexual orientation and had attempted to kill himself by taking painkillers: *The Sun*, 24.6.00, A15 (eyes obscured in the picture).
15. A 78-year-old employee who had been beaten by four thieves: *The Sun*, 14.8.00, A 1.
16. A 4-year-old girl whose right foot had been injured by the front wheel of a bicycle while she was travelling in a bamboo seat fixed to the bicycle: *Apple Daily*, 16.8.00, A 14.
17. A 16-year-old girl who had used a knife to cut her wrist in front of her lesbian "boyfriend" after accusing the latter of having a new girlfriend: *ODN*, 16.8.00, A 24 (eyes obscured in the picture).
18. A 47-year-old woman whose face had been bitten by a dog: *Apple Daily*, 11.9.00, A 9 and *The Sun*, 11.9.00, A 11.
19. The mother of a named businessman who had been admitted into hospital for pneumonia: *ODN*, 14.9.00, C 14 and *ODN*, 15.9.00, C 2.
20. A 39-year-old taxi driver who had been seriously injured by a passenger: *Apple Daily*, 18.9.00, A 11.
21. A 72-year-old woman who was found unconscious after eating congee provided by a home for the elderly: *ODN*, 29.9.00, A 22 and *ODN*, 25.11.00, A 14.
22. A 21-year-old man who had used a cutter to cut his wrist after his father rejected his girlfriend: *ODN*, 7.10.00, A 18 (the man used his right hand to hide his face in the picture).
23. A 42-year-old woman who had been seriously injured in a traffic accident when taking a meal to his 11-year-old son: *The Sun*, 11.10.00, A 12.
24. A 42-year-old man whose wife had burnt his face with boiling oil: *Apple Daily*, 17.10.00, A 4.
25. A 33-year-old woman and her 3-year-old son who had been injured in a fire: *The Sun*, 1.11.00, A 9 (picture was 19 cm x 14 cm large) and *ODN*, 1.11.00, A 14 (the woman's eyes were obscured in the picture).
26. An 18-year-old woman who had fallen out of the window after her mother had refused to let her meet her boyfriend: *The Sun*, 3.11.00, A 4 (her eyes were obscured in the picture).
27. A 34-year-old woman (widow of a notorious gang leader) who had attempted to take her life after quarrelling with her son: *The Sun*, 16.11.00, A 4.
28. A 14-year-old girl who had given birth to a child: *ODN*, 20.11.00, A 16 (her eyes were obscured in the picture) and *The Sun*, 20.11.00, A 12 (the girl used a blanket to cover her head in the picture).
29. A 20-year-old woman who had been injured by a cleaver when protecting her mother from her father's attack: *Apple Daily*, 27.11.00, A 2.
30. A 78-year-old man who had been seriously injured by his daughter-in-law: *The Sun*, 28.11.00, A 4.
31. A 25-year-old pregnant woman who had been struck and kicked by a young man: *Apple Daily*, 2.12.00, A 2.
32. A police superintendent's wife who had attempted to kill herself: *Apple Daily*, 28.12.00, A 12.
33. A 21-year-old man who had been robbed by a child gang: *Apple Daily*, 28.12.00, A12.
34. A 35-year-old woman whose hand had been shredded into pieces when putting meat into a shredder: *Apple Daily*, 21.1.01, A 7.

35. A socialite who had taken an overdose of drugs: *The Sun*, 14.2.01, A 1; *ODN*, 14.2.01, A 18 & 15.2.01, C 14; *Apple Daily*, 14.2.01, A 1. (*ODN* reported that she was staying in a private ward.)
36. A 46-year-old woman who had been beaten by her son: *The Sun*, 28.2.01, A 4.
37. A 5-year-old girl whose head and right arm had been seriously injured by a dog: *Apple Daily*, 4.3.01, A 14.
38. A 25-year-old woman who had been found unconscious after drinking herbal tea: *The Sun*, 6.3.01, A 8.
39. A man who had set himself on fire at the Legislative Council building in protest against the government's economic policies: *The Sun*, 9.3.01, A 4 (the man was being treated in a secluded ward)
40. An 8-year-old child who had been injured in a traffic accident: *The Sun*, 13.3.01, A 12.
41. An 83-year-old former actor who had been suffering from diabetes and senile dementia: *Apple Daily*, 20.3.01, C 2.
42. A 21-year-old pregnant woman who had attempted to take her life after finding out that her boyfriend was dating another woman: *ODN*, 3.4.01, A 18 (her eyes were obscured in the picture).
43. A singer who had taken an overdose of sleeping pills: *Apple Daily*, 12.4.01, C 16.
44. A 24-year-old woman who had been seriously injured in an explosion: *Apple Daily*, 13.6.01, A 6.
45. A 28-year-old woman who had attempted to kill herself after she had had an argument with her husband who had returned home late from work on the mainland: *ODN*, 29.6.01, A 18 (her eyes were obscured in the picture).
46. A 14-year-old boy who had been seriously injured in a fight: *Apple Daily*, 5.7.01, A 4 (his eyes were obscured in the picture).
47. A man and his wife who had burnt charcoal inside their home: *ODN*, 7.8.01, A 16.
48. A 23-year-old teacher who had been knocked down by a car when travelling on the backseat of a motorcycle: *The Sun*, 10.8.01, A 10.
49. A 37-year-old mentally sick man who had attempted to jump to the ground from his flat: *ODN*, 1.11.01, A 22 and *Apple Daily*, 1.11.01, A 11.
50. A mini-bus driver who had been seriously injured in a traffic accident: *Apple Daily*, 26.11.01, A 1 and *ODN*, 27.11.01, A 15.
51. A 25-year-old motorcyclist who had been injured in a traffic accident: *The Sun*, 28.12.01, A 12 and *ODN*, 28.12.01, A 18.

## **(b) Patients in hospitals in Mainland China**

- D23 *Oriental Daily News* reported that a fast-food restaurant in Guangzhou had caught fire after an explosion, killing one person and injuring four others. The owner of the restaurant was seriously burnt and his 3-year-old daughter was in a critical condition. The paper published a picture of the owner lying in a hospital bed with bandages on his body. Part of his private parts were exposed and had to be obscured in the picture. Next to it was a picture of his daughter lying in a hospital bed covered in bandages save for her mouth and genitals. Her genitals were obscured in the picture. The two pictures were taken by the paper's journalist. (*ODN*, 16.5.00, A 31)
- D24 *Apple Daily* reported that a 72-year-old Hong Kong resident, M, had boasted of his sexual prowess after receiving human placental injections. Shortly after receiving the injections, M married his Filipino maid who was 37 years younger than him. It was alleged that M was later diagnosed as having liver cancer when travelling in Sichuan province with his wife. M was reported to

be in a critical condition after receiving an operation in a hospital in Chongqing. The paper published on its front page a picture of M lying bare-chested in a hospital bed. Beside it was a picture of M and his wife taken on a previous occasion. (*Apple Daily*, 4.9.00, A 1) The next day, M's wife issued a statement saying that she was "immensely annoyed" by the conduct of the press in taking and publishing pictures of M lying in the hospital bed. She said his condition had nothing to do with the human placental injections. She urged the media to let him recover in peace. (*The Sun*, 6.9.00, A 10) M's daughter was also distressed when she talked about the two newspapers that had entered the ward and had taken and published pictures of M lying in bed. (*ODN*, 6.9.00, A 17)

- D25 *Oriental Daily News* reported that two of the persons injured in an explosion in a Guangzhou restaurant were seriously burnt. The explosion was believed to have been caused by a gas leakage in the kitchen of the restaurant. The paper published a picture of a victim lying in a hospital bed, naked except for a small cloth covering his private parts. The picture was taken by the paper's journalist. (*ODN*, 28.9.00, A 42)
- D26 *Oriental Daily News* reported that a 77-year-old woman (full name given) was seriously injured when a tour bus ran off the road. The paper published a picture of the woman lying in a hospital bed on the mainland. The picture was transmitted by the paper's journalist. (*ODN*, 27.1.01, A 16)
- D27 *Oriental Daily News* reported that an explosion in a metal factory in Dongwan City killed one person and injured twenty-seven. Half of those injured were seriously burnt. The paper published a picture of a female worker lying in a hospital bed. Her left breast was exposed and had to be obscured in the picture. Also published was a picture showing the back of the naked body of a female worker who had been burnt to death in the accident. The pictures were taken by the paper's journalist. (*ODN*, 19.3.01, A 10)
- D28 *The Sun* reported that a Hong Kong resident had stabbed his wife to death and seriously wounded his servant and 5-year-old stepdaughter. Both the servant and the child were in a critical condition. The paper published on its front page, two pictures taken in a hospital in Shenzhen, showing the servant and the child lying in hospital beds. The pictures were transmitted by the paper from Shenzhen. (*The Sun*, 15.8.01, A 1) See also the pictures of the servant and child published in *Apple Daily*, 15.8.01, A 4 and *Oriental Daily News*, 15.8.01, A 22.
- D29 *Oriental Daily News* reported that an explosion had occurred in a laboratory of Guangdong Industrial University. Three persons were seriously injured in the accident. The paper published a picture of a man lying naked in a hospital bed. The caption stated that he was a teacher who had been seriously burnt. His private parts were exposed and not obscured in the picture. The picture was transmitted from Guangzhou by the paper's journalist. (*ODN*, 3.11.01, A 6)
- D30 *Apple Daily* reported that a tour bus carrying a group of Hong Kong tourists had crashed into another bus when it was travelling to Guilin. One Hong Kong resident died and seventeen were injured in the accident. Those injured were being treated in hospitals on the mainland. The paper published a picture of a Hong Kong resident being attended to by a doctor. The caption stated that the patient was in a critical condition. The picture



was transmitted by the paper's journalist. (*Apple Daily*, 30.11.01, A 4) See also the pictures published in *The Sun*. (*The Sun*, 30.11.01, A 1)

D31 A series of explosions had occurred in Zhanjiang and Jiangmen in Guangdong province. The police said that the explosions were caused by a man who had wanted to take revenge against his brother-in-law and other people with whom he had a dispute. One of the victims was the 7-year-old son of the mistress of the man's brother-in-law. The boy was seriously burnt and in a critical condition. *Apple Daily* published a picture of the boy lying in a hospital, with the lower part of his body unclothed. His private parts were obscured in the picture. (*Apple Daily*, 16.12.01, A 4; *Apple Daily's* story; source of picture not disclosed) *The Sun* and *Oriental Daily News* also published a picture of the boy lying in bed but only the upper part of his body could be seen in the picture. (*The Sun*, 16.12.01, A 4, picture transmitted by the paper from Jiangmen; *ODN*, 16.12.01, A 1, picture taken by the paper's journalist)

D32 See also the case at paragraph 5(e) above.

D33 Pictures of the following patients taken in hospitals in Mainland China have also been published in the local press:

1. A Hong Kong resident whose pelvis had been seriously injured in a traffic accident when she was travelling on a bus heading for Fuzhou: *ODN*, 25.4.00, A 1 (picture transmitted by the paper from Quanzhou).
2. A Hong Kong tourist who had been seriously injured in a traffic accident in Guangzhou: *ODN*, 22.5.00, A 19 (picture transmitted by the paper from Guangzhou).
3. A Hong Kong resident who had been injured in a traffic accident in Shenzhen: *ODN*, 7.6.00, A 37 (picture transmitted by the paper from Shenzhen).
4. A Hong Kong man's girlfriend who had been injured in a traffic accident when travelling from Shenzhen to Guangxi: *Apple Daily*, 19.6.00, A 13 (*Apple Daily's* story; source of picture undisclosed).
5. A woman who had been seriously injured in a traffic accident when travelling from Shenzhen to Guangxi: *ODN*, 19.6.00, A 22 (picture taken by a journalist of the paper's China team).
6. A Hong Kong resident who had been seriously injured in a traffic accident in Guangxi: *Apple Daily*, 15.7.00, A 9 (*Apple Daily's* story; source of picture undisclosed).
7. A 24-year-old pregnant woman in Shenzhen who had become a vegetable after being strangled by a robber in the street: *Apple Daily*, 22.11.00, A 4 (*Apple Daily's* story; source of picture undisclosed).
8. A 35-year-old woman and her three children (aged 7 to 10) in Shenzhen who had been seriously burnt in a fire set by the woman: *ODN*, 7.12.00, A 37 (woman's eyes obscured; pictures taken by the paper's journalist).
9. A 19-year-old woman who had been robbed and injured by a gang of six in Guangzhou: *ODN*, 27.2.01, A 34 (picture taken by the paper's journalist).
10. Three persons injured in a traffic accident when travelling from Shenzhen to Shantou: *The Sun*, 28.3.01, A 4 (pictures transmitted by the paper from Santao).
11. A man in Zhuhai who had been seriously wounded by an ex-employee he had dismissed: *Apple Daily*, 8.8.01, A 20 (caption stated that it was the paper's photo).
12. A Hong Kong tourist who had suffered brain damage when the bus in which he had been travelling fell into a river: *Apple Daily*, 25.9.01, A 2 (*Apple Daily's* story; source of picture undisclosed).

13. A Hong Kong tourist who had been seriously injured in a traffic accident when travelling from Shenzhen to Guilin: *ODN*, 30.11.01, A 1 (picture taken by a journalist of the paper's China section).
14. A 26-year-old "beer girl" who had been seriously wounded by two men when she was on the way to a nightclub in Shenzhen: *The Sun*, 24.12.01, A 15 (picture transmitted by the paper from Shenzhen).
15. A female law enforcement officer who had been wounded by illegal hawkers in Futian, Shenzhen: *The Sun*, 24.12.01, D 3 (picture transmitted by the paper from Shenzhen).
16. A Hong Kong resident who had been injured in a traffic accident when travelling on the highway between Shenzhen and Shantou: *Apple Daily*, 27.12.01, A 7 (*Apple Daily's* story; source of picture undisclosed).

## Persons attending funerals

***"Never publish photographs or broadcast images of funerals without the prior consent of the surviving family members ... ." (UN Handbook on Justice for Victims – On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1999), ch III, section 2.)***

***"Programme-makers should ... be sensitive to the possibility of causing additional anxiety or distress when filming or recording people who are already extremely upset or under stress, for example at funerals or in hospitals. Normally, prior consent should be obtained from the family or their agents. At funerals, programme-makers should respect their requests to withdraw. ..."* (UK Broadcasting Standards Commission, Code on Fairness and Privacy, para 29)**

- E1 M, who had donated one thousand million dollars to various charities during his lifetime, passed away in 2000. *Apple Daily* reported that a woman, F, had been grieving and weeping inside the mourning hall early in the morning. F had worked for M for several decades as a private nurse and housekeeper. F was then over 70 years old. The paper published a picture of F kneeling in front of M's picture inside the mourning hall of a funeral parlour. (*Apple Daily*, 23.1.00, A 2) *The Sun* reported that M's family had put up a notice at the reception area, stating that photography, videotaping, sound recording and interviewing were prohibited in the hall. Nonetheless, it published a picture of F grieving in a corner of the mourning hall. (*The Sun*, 23.1.00, A 3)
- E2 The 62-year-old father of F, wife of a named artiste, had passed away. *Apple Daily* published a picture of F's mother and sisters crying inside the mourning hall of a funeral parlour. (*Apple Daily*, 27.6.00, C 9)
- E3 The mother of an artiste, M, had passed away. A low profile funeral service was conducted. A notice was put up outside the mourning hall which read: "Please respect the deceased and do not take pictures." Nonetheless, *Oriental Daily News* published two pictures of the inside of the hall. One showed M kneeling down to speak to his wife. Another showed M's wife attending to her daughter. (*ODN*, 15.9.00, C 2)
- E4 *Oriental Daily News* reported that a 50-year-old father had killed his elder son after the latter had used a hammer to kill his wife and a close friend of the

family. The father jumped to his death shortly afterwards. The father and mother were survived by their younger son and daughter. Ten days later, the family held a funeral service for the father, mother and elder son at a funeral parlour. The paper published a picture of the inside of the mourning hall, and a picture of the younger son and 13-year-old daughter burning paper money for the deceased. (ODN, 11.1.01, A 20) *The Sun* also published a picture of the daughter and younger son kneeling inside the hall. The eyes of the daughter were obscured in the picture. (*The Sun*, 11.1.01, A 2)

- E5 *Apple Daily* reported that the funeral service of the younger brother of a well-known businessman was held in a funeral parlour. No death notice had been published in the press and the family wanted to keep a low profile. The deceased had practised as a doctor. The media did not know much about the background of the deceased other than the fact that he had emigrated to Australia years before but often came back to Hong Kong. The paper published on its front page two pictures showing the inside of the mourning hall. The next day, the paper published three pictures: two showed the businessman wiping away tears inside the hall; the other showed him paying respects to the deceased at the cemetery. (*Apple Daily*, 20.6.01, A 1 & *Apple Daily* 21.6.01, A 6)
- E6 *Apple Daily* reported that the brother of an artiste, F, had died of a heart attack. The paper published a picture of F's mother using a handkerchief to wipe tears from her eyes. (*Apple Daily*, 4.7.01, C 11)
- E7 *The Sun* reported that a bus had fallen into a river when travelling to a resort area on the mainland, causing the deaths of three Hong Kong residents. The funeral of the three deceased persons was held in Chengdu. The paper published two pictures of the surviving relatives crying at the side of the coffins. (*The Sun*, 26.9.01, A 16)
- E8 *Apple Daily* reported that a partner of a law firm, M (name given), had died after falling to the ground from F's shortly after F's husband had visited her flat. M left behind a wife, a son and a daughter. Journalists were denied entry to both the mourning hall and the car park of the funeral parlour. After the funeral ceremony had finished, M's relatives went to the crematorium at Cape Collinson in three vehicles. The paper published on its front page, a picture of M's wife and daughter walking together at the crematorium. Both of them wore sunglasses and covered their heads with scarves. Also published were three pictures of M's family taken through gaps in the curtains of the mourning hall in the crematorium. The M's were not wearing their scarves inside the hall. The full name of M's wife and her two children were disclosed in the report. (*Apple Daily*, 17.11.01, A 1) *Oriental Daily News* reported that as many as 50 journalists hurried forward when the vehicles carrying the relatives arrived at the crematorium. There were security guards maintaining order at the site but "several journalists" managed to dash into the hall and remained inside for a while. A conflict between those journalists and the security guards ensued and one security guard was injured in the incident. (ODN, 17.11.01, A 22) *The Sun* reported that "a large crowd" of journalists had tried to force their way into the mourning hall at the crematorium. As a result, the journalists had "bodily contact" with the security guards. A guard was sent to hospital after his canthus had been struck by someone. (*The Sun*, 17.11.01, A 4)

## Surviving relatives and pictures showing the body or image of a deceased person

***“Refrain from showing photographs or broadcasting images of deceased victims, body bags or seriously wounded victims.” (UN Handbook on Justice for Victims – On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1999), ch III, section 2.)***  
See also Annex 3 of this report.

- F1 The submission of the HK Bar Association referred to the tragic death of a named Senior Counsel and stated: “One asks with despair what news value or legitimate public interest the close-up picture in the *Apple Daily* of the deceased spread eagled on the floor of his apartment could possibly have and can imagine what untold misery and grief the picture must have caused members of his family and those close to him.”
- F2 A 17-year-old girl jumped to her death after she had complained that her boyfriend had a new lover. Pictures of her body lying prostrate on the ground and two pages of her diary containing entries for eleven days were published in *Oriental Daily News*, which disclosed the full name of the girl and two Chinese characters of her boyfriend’s name. The paper also published a picture of the couple taken in the past. Only the eyes of her boyfriend were obscured. (ODN, 4.8.99, A 18) The coverage of the story in *The Sun* was similar except that the picture of the body was published on the front page. (*The Sun*, 4.8.99, A 1)
- F3 *The Sun* reported that a 23-year-old woman had gone missing after she had gone to a village in Tai Po to give private lessons to a student. Two days later, her body was found in a bush in Tai Po. The victim was a university graduate. She had given up a high-paid job in Tsimshatsui and worked as a clerk in a company near her home so that she could look after her mother who was weak and sick. The front page of the paper published a picture of the windows of Tai Po Police Station, showing a policeman registering the female underwear (including a bra) found at the scene. The caption stated that the underwear was believed to be the victim’s. Also published was a picture of the victim’s likeness. (*The Sun*, 26.8.00, A 1)
- F4 *The Sun* reported that a 50-year-old woman who had breast cancer had asked her husband to buy some food for her. When the husband returned home he discovered that she had used a rope to hang herself. The paper published a picture showing the husband crying and holding his wife in his arms. It could be seen that the woman’s head was almost bald and the rope was still hanging from the ceiling fan while a stool had fallen onto the floor. Also published was a passport size photo of the woman that had been taken when her hair was normal. (*The Sun*, 31.8.00, A 8) See also *Oriental Daily News*, 31.8.00, A 18.
- F5 A policeman was crushed to death by a lorry that pinned him against a fire engine when he was investigating a traffic accident on a highway. The next day, *Oriental Daily News* and *The Sun* published on their front pages pictures of the policeman lying in a pool of blood. A spokesman of the Police Force said that those pictures added to the distress of the deceased’s friends and relatives. The victim’s colleagues also criticised the publication of the

pictures as disrespectful of the deceased. (*The Sun* 19.11.00, A 1; *Oriental Daily News*, 19.11.00, A 1)

- F6 In order to illustrate that some local journalists had been excessive in covering news, an editorial of *HK Daily News* cited the example of a journalist removing the white cloth from a deceased person's face so that he could take pictures of the deceased. (*HK Daily News*, 17.1.01)
- F7 *Apple Daily* reported that an 18-year-old woman (full name given) was killed in a traffic accident when she crossed a road without using the pedestrian subway. The paper published a picture of the woman receiving first aid on a stretcher. Her face was hidden by a paramedic's hand. However, her breasts were exposed to the camera. The areas around her nipples were obscured in the picture. A picture of the deceased's likeness was also published. (*Apple Daily*, 25.6.01, A 6)
- F8 *The Sun* reported that a Hong Kong resident, who was alleged to be the elder brother of former actor had died in a detention centre in Shenzhen after he had been arrested for drug trafficking. The paper published on its front page, a picture of the body lying in a coffin inside a mortuary. The body's face was exposed. (*The Sun*, 2.11.01, A 1)
- F9 A 71-year-old man died in a traffic accident while travelling in a tour bus in Guilin with a group of elderly people. The tour was organised by the deceased, who had been well respected for his voluntary services to the elderly after retirement. Both *Apple Daily* and *The Sun* published a picture of his body lying on a stretcher in a mortuary. His head and blood-stained face were exposed in the pictures. (*Apple Daily*, 1.12.01, A 8; *The Sun*, 1.12.01, A 4)
- F10 A 78-year-old woman (name given) was found dead in the staircase of a public housing estate. She was naked from the waist down. Both *The Sun* and *Oriental Daily News* published on their front pages a picture of her body being inspected by a police officer. Her belly, private parts and legs were naked and her private parts obscured in the pictures. Also published in the two newspapers was a picture of the woman's likeness taken during her lifetime. (*The Sun*, 23.12.01, A 1; *Oriental Daily News*, 23.12.01, A 1)
- F11 *The Sun* reported that three tour buses had been involved in a serious traffic accident when travelling on a highway in Guangdong province. One of the passengers killed in the accident was a 52-year-old Hong Kong resident, whose name was disclosed in the report. His body was kept in a funeral parlour, waiting for his relatives to collect. The paper published a picture of the head and upper part of his body. (*The Sun*, 27.12.01, A 2)
- F12 *The Sun* reported that a tour bus carrying tourists from Hong Kong had been involved in a serious traffic accident in Nanning, China. The paper published five close-up photos, each showing the face of a person killed in the accident. (*The Sun*, 16.2.02, A 3)
- F13 Three secondary school students had taken their lives at a holiday resort house on Cheung Chau Island. A number of newspapers that were not members of the HKPC splashed the story over the front pages with large pictures showing the bodies of the three students lying in bed. Their faces were not obscured in the pictures. A few days later, the Society for Truth and

Light criticised the way these newspapers covered the story. Apart from pointing out that the pictures were disrespectful to the deceased, the Society also reported that a school had complained that some journalists had used improper means to collect information, such as: (a) posing as policemen or social workers and tricking the deceased's classmates and relatives into giving them information and pictures; (b) falsely representing that information and pictures supplied would not be used for publication; (c) offering payment to students in return for information; (d) threatening the deceased's classmates that their likeness would be published in the newspaper if they did not co-operate; and (e) obtaining or seeking to obtain information or pictures through harassment or persistent pursuit. (*Ming Pao*, 22.3.02, C 20) The HKPC stated the publication of the pictures was an affront to the dignity of the deceased and had injured the feelings of their relatives.

- F14 A 29-year-old former starlet, F, jumped to her death from her residence in Shanghai one month after she had given birth to a baby. A week later, *Next Magazine* published a picture of her body. F's likeness was included in the picture, which appeared on both the front cover and an inside page. (*Next Magazine*, No 648, 8.8.02) The picture had been taken surreptitiously and published without the knowledge and consent of F's family members. F's mother was distressed by the photo and said it was extremely disrespectful to her deceased daughter. (Open letter from F's mother dated 13.8.02 in *HK Economic Journal*, 16.8.02, p 15) *Next Magazine* insisted that the publication was in the public interest.
- F15 Some consulate officers and the foreign media were surprised at the local press publishing pictures of the likeness of a deceased person. (*HK Economic Times*, 26.8.99) Other suicide cases reported in the press include:
1. Picture of the body of a 60-year-old man who had tuberculosis, lying on the floor with a red string tied to his neck; picture taken after he had hanged himself: *Apple Daily*, 9.5.00, A 14.
  2. Picture of the body of a 21-year-old man, hanging from a rope tied to an iron grille: *The Sun*, 7.6.00, A 8 and *Apple Daily*, 7.6.00, A 11.
  3. Picture of the body of a 41-year-old man lying on the ground after jumping from the 17<sup>th</sup> floor of a building: *Apple Daily*, 22.6.00, A 9.
  4. Picture of the body of a 45-year-old woman hanging from a rope: *The Sun*, 13.7.00, A 8 and *ODN*, 13.7.00, A 12.
  5. Picture of the body of a 40-year-old woman who had separated from her husband, lying prostrate with blood and brains spilled over the ground. A picture of the woman's husband was also published. (*The Sun*, 1.3.01, A 1)
  6. Picture of the body of a 47-year-old man hanging from a wire inside his flat, and a picture of his sister grieving outside the flat. (*Oriental Daily News*, 2.8.01, A 18; *The Sun*, 2.8.01, A 8)
  7. See also the case at paragraph 5(f) above and the pictures in the following reports which showed the body of someone who had taken his life by jumping from a building: *ODN*, 7.7.00, A 14; *The Sun*, 18.8.00, A 1; *ODN*, 12.9.00, A 1; *Apple Daily*, 12.9.00, A 13; and *The Sun*, 14.9.00, A 4.

## Plaintiffs in personal injury actions

***“The principles covering the protection of the individual also apply when information contained in public documents or other public sources is being used. The public availability of information does not necessarily imply that it can be freely published.” – Guidelines for Good Journalistic Practice applied by the Council for Mass Media in Finland, para 29.***

***“The publication of names and photographs of ... victims in reports on accidents ... and court cases is in general not justifiable. The public’s right to information must always be weighed up against the personal rights of those involved. The need for sensation cannot justify the public’s right to be informed.” – German Press Council’s Press Code, Guideline 8.1(1).***

- G1     *The Sun* reported that a 41-year-old cook had been awarded damages for injury caused when he slipped on the floor of the restaurant for which he had been working. It revealed that, as a result of the accident, his ability to have sex had been adversely affected and his relationship with his wife had deteriorated. The headline of the report read: “Injured cook lost manhood / Awarded 1.7 million dollars damages”. The full name of the plaintiff was disclosed. (*The Sun*, 4.7.00, A 16)
- G2     *Apple Daily* reported that a 30-year-old woman had been knocked down by a bus in a traffic accident three years before. She had sustained serious injuries as a result of which she had difficulty having sex and might become infertile. The headline of the report read: “Female victim who has difficulty in enjoying sex claims damages”. The full name of the woman was disclosed. (*Apple Daily*, 16.7.00, A 11)
- G3     *Oriental Daily News* reported that a 52-year-old worker had been knocked down by a motorcycle. He sued the motorcyclist for damages, claiming that as a result of the accident, he had sustained serious injuries and had become impotent. The headline read: “Traffic accident caused impotence / Roasted meat worker awarded damages of 2.5 million dollars”. The full name of the worker was disclosed in the report. (*ODN*, 19.9.00, A 12) *Apple Daily* also disclosed his full name and reported that he had sex problems and had been diagnosed as suffering from Post-Traumatic Stress Disorder. (*Apple Daily*, 19.9.00, A 6)
- G4     *The Sun* reported that a 44-year-old police sergeant, sustained back injury when he slipped on the floor while working on a police vessel. He later sued the government for damages by bringing an action in negligence. During the trial, he gave evidence that he was fifty per cent disabled and could not have sex with his wife because of his back pain. His wife had also left him for that reason. His Christian name and the transliteration of his English name were disclosed. A picture of the man walking with a cane was also published. The headline of the story read: “Unable to have sex after falling on the floor / Sergeant suing for five million dollars damages”. (*The Sun*, 19.12.00, A 16) See also *Apple Daily*, 19.12.00, A 15.
- G5     *Apple Daily* reported that a 33-year-old woman had been seriously injured in a traffic accident. She claimed damages from the driver three years later. During the trial, the woman described the injuries to her body and claimed

that as a result of the accident, she was forgetful; had nightmares; felt tired easily; was unable to sleep; had ugly scars in her abdomen; and had Post-Traumatic Stress Disorder symptoms. Her business in selling cosmetics had suffered a loss as a result. Her relationship with her boyfriend had also worsened and she had not had sex since the accident. The full name of the woman was disclosed. The headline read: "Female manicurist, who lost interest in sex, seeks compensation for thirteen million dollars". The paper published a picture of the woman standing next to her counsel outside the court. (*Apple Daily*, 6.3.01, A 6)

- G6 *Apple Daily* reported that a 17-year-old man, P, had been knocked down by a lorry three years before. P's mother sued the driver for damages of thirty million dollars. She told the court that P's brain had sustained serious injury in the accident. After the accident, P had become brutal and got angry easily. P could not walk steadily and had lost the ability to communicate. A doctor gave evidence that P had the intelligence of a 7-year-old child. Because of his behaviour, P had been described by others as an idiot and mentally disabled. P's full name was disclosed. The paper published a picture of P accompanied by his mother. (*Apple Daily*, 7.3.01, A 9)
- G7 *Apple Daily* reported that a 24-year-old man, who had been seriously injured in a traffic accident four years before, had sued his driver for damages. He alleged that his spine had been broken and the lower part of his body paralysed as a result of the accident. He also alleged that he had urological problems and had been rendered impotent. The transliteration of his English name was disclosed. The paper published a picture of the man sitting in a wheelchair. The upper part of his face was hidden by a cap. The headline of the story read: "Apprentice who had been rendered impotent sued for damages of thirty-six million dollars". (*Apple Daily*, 12.6.01, A 14)

## Plaintiffs in actions for sexual harassment

***"Never publish the identity of a sexual assault victim without his or her prior consent, regardless of whether the case is in the criminal or civil courts". (UN Handbook on Justice for Victims – On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1999), ch III, section 2.)***

- H1 Both *Apple Daily* and *Oriental Daily News* reported that a 27-year-old woman, P, had sued her former martial arts tutor for sexual harassment. P's full name and occupation were disclosed. Both papers published a picture of P walking hand in hand with her boyfriend. The couple were wearing sunglasses in the picture. Also published in the papers was a picture of the defendant walking with his wife. (*Apple Daily*, 24.11.00, A 2; *ODN*, 24.11.00, A 12)
- H2 *Oriental Daily News* reported that a 26-year-old woman, P, had sued an accounting manager of her company for sexual harassment. P alleged, *inter alia*, that the manager had intimated that she looked like a prostitute from the mainland when she tied her hair back in a pony tail. She further alleged that the manager had suggested that he could rape her in a small corner of their company premises without others finding out. P's counsel applied to the



court for an order prohibiting the media from disclosing her name and photographing her but the court refused. The age, full name and occupation of P as well as the name of her current employer were disclosed in the report. The paper published a picture of P covering her nose and mouth with her hand, which had been taken on a previous occasion. (ODN, 12.1.01, A 18) See also *Apple Daily*, 12.1.01, A 18 and *The Sun*, 12.1.01, A 21.

- H3 *Apple Daily* reported that a 48-year-old waitress, P, had brought a civil action against D, the manager of a restaurant, for sexual harassment and sex discrimination. P told the court that a few days after she first met D in 1992, he invited her to the cinema and suggested that they could have sex after office hours. P refused, and was sacked shortly afterwards. However, they worked in the same restaurant again in 1999. She alleged that D had often pinched her buttocks and had repeatedly insulted her by calling her a Shanghai whore. The full names of both parties were disclosed. Apart from publishing a picture of D, the paper also published a picture of P. The headline of the article read: "Waitress, who was called 'Shanghai whore' by another, seeks damages of two hundred thousand dollars". That picture was republished in the paper the next day. (*Apple Daily*, 13.6.01, A 16 & 14.6.01, A 16) The Equal Opportunities Commission withdrew the claim at the second day of the trial.
- H4 A victim of sexual harassment, F, filed a lawsuit with the support of the Association for the Advancement of Feminism. After the media found out the details of the case, they tried to get in touch with F and visited her home on many occasions. One newspaper, which had failed to secure a photograph of F, took photographs of her father instead. In the end, both the photograph and F's full name were published in the newspaper. F and her family members were angry and unhappy about that incident. F's relatives also phoned her family about the case, causing her family members great distress. At the trial, counsel for F applied for an order prohibiting the media from publishing her name and photographs but the judge refused the application on the ground that it was a civil case. Although the judge exhorted the media to exercise self-restraint, a group of press photographers massed outside the court, waiting for F to come out. (Letter from the Association to the Sub-committee dated 4.10.02)

## Children

***"No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence ... . The child has the right to the protection of the law against such interference ... ." – UN Convention on the Rights of the Child, Article 16.***

***"Minors shall be interviewed, as a general rule, only in the presence of or with the consent of the parent or guardian. Exceptions can be made to this rule if the interview is intended to protect the interests of the child or if the child is already under close public attention." – Estonian Press Council's Code of Ethics, para 3.6.***

***"Privacy of children should be handled with particular care. Media organizations should have solid reasons for reporting on the private lives of children. Journalists should not intrude into the privacy of children solely***

***because of the social or celebrity status of the minors' family members or guardians.” – Journalists' Code of Professional Ethics in Hong Kong, para 4.***

***“[Unless it can be demonstrated to be in the public interest,] Journalists must not interview or photograph a child under the age of 16 on subjects involving the welfare of the child or any other child in the absence of or without the consent of a parent or other adult who is responsible for the children. ... Where material about the private life of a child is published, there must be justification for publication other than the fame, notoriety or position of his or her parents or guardian.” – UK Press Complaints Commission's Code of Practice, clause 6.***

***“[Children] do not lose their rights to privacy because of the fame or notoriety of their parents or because of events in their schools. Care should be taken that a child's gullibility or trust is not abused. ...” – UK Broadcasting Standards Commission's Code of Fairness and Privacy, para 32.***

- I 1     The Society for Truth and Light referred to the story in which a 10-year-old boy had been arrested for allegedly lifting the skirt of a female student. It pointed out that although the face of the boy was obscured in the pictures published in the newspapers, his neighbours, friends and relatives would have no difficulty identifying the boy because his clothing, his father and the furniture inside his home were also included in the pictures. (燭光網絡, vol 3, no 2, Mar 2000, p 10; referring to *The Sun*, 10.3.00, A1)
  
- I 2     *Apple Daily* reported that a 12-year-old Form One student, F, had asked for help when her 43-year-old mother, W, attempted suicide inside her flat. It further disclosed that W had separated from her husband who had a mistress. A year before, F had argued with W and said: “If you want to die, then please kill yourself.” W had attempted suicide subsequently but was rescued by her neighbours. The report disclosed F's surname and the name and floor number of the building in which she lived. A picture of F entering the hospital was published. (*Apple Daily*, 11.4.00, A 2)
  
- I 3     H (name disclosed) was suspected of misappropriating sponsorship fees for the Community Chest. H's wife, W, a former celebrity, complained to the press that some journalists had been waiting for her daughter outside her school and had confronted her daughter with a newspaper carrying the rumour about her father and asked if she knew whether or not her father was in a financial crisis. W said her daughter, who was innocent, was scared and distressed. W added that these questions should not have been directed to a child. (ODN, 18.4.00, C 13)
  
- I 4     *Apple Daily* and *The Sun* reported that a 69-year-old man, H, tried to hang himself after he had received notice that his application for a larger public housing unit had been turned down by the Housing Department. His 13-year-old son lied to his mother by telling her that H had suffered injury because he had fallen to the floor. The son also asked his neighbours not to tell his mother the truth because he did not want her to be upset. The reports revealed that the son's mother suffered from mental illness. Both papers disclosed the full name of H and the first and third Chinese characters of his son's name. They also published a picture of the son in school uniform. (*Apple Daily*, 10.5.00, A 11; *The Sun*, 10.5.00, A 4)

- I 5 *Apple Daily* reported that an 8-year-old boy had sustained serious injury after accidentally falling from the 7<sup>th</sup> floor of a building. His chin and neck were wrapped with bandages after he was admitted into hospital. A journalist asked the boy questions while he was lying in bed. In answering, the boy endured the pain and nodded or turned his head despite the injuries to his chin. The paper published a picture showing the boy sleeping in a hospital bed with a tube in one of his nostrils and bandages covering his chin and neck. (*Apple Daily*, 15.6.00, A 9) Five days later, *The Sun* reported that the boy had told the reporter that it was merely an accident and not a suicide attempt as reported in the press. At this time, the boy was still suffering from a broken jaw. The paper published a picture showing the boy lying in a hospital bed with a tube connected to one of his nostrils and a bandage covering his lower jaw. (*The Sun*, 20.6.00, A 12)
- I 6 *Apple Daily* reported that a 35-year-old woman, W, had come to Hong Kong with her 10-year-old daughter, C, from mainland China. She had no friends and relatives in Hong Kong, no savings and no place to live. W thought of turning to prostitution and was reported to have slept with a man for \$400. *Apple Daily* was approached for assistance. The third Chinese character of W's name and the second and third Chinese characters of C's name were disclosed. The paper published on its front page pictures of W and C. The eyes of W and C were obscured in the pictures, but two days later the paper reported that inmates of the temporary shelter in which they had been staying had recognised W from the pictures. (*Apple Daily*, 20.2.00, A 1, and 22.2.00, A2) A few months later, *Oriental Daily News* reported that W had difficulty finding a job because her Cantonese was not good. Nevertheless, W followed the advice of her 10-year-old daughter, C, and gave up the idea of becoming a prostitute. W was then living on social security assistance. The paper disclosed the second and third Chinese characters of C's name. The paper published five pictures showing the daily routine of W and C. One picture included the exterior of a primary school. (*ODN*, 9.9.00, A 39)
- I 7 *Oriental Daily News* reported that a 9-year-old girl had kicked an 8-year-old female classmate in her private parts. As a result, the victim felt pain in her genitals. The paper disclosed the third Chinese character of the victim's name, and the fact that the school she attended was a government primary school in a named district. A picture showed the victim walking hand in hand with her mother. Only the eyes and school badge of the victim were obscured. Her mother was identifiable in the picture. (*ODN*, 15.12.00, A 20)
- I 8 *Apple Daily* reported that an 18-year-old man, M, had threatened to jump from the ninth floor of a building after a 15-year-old girl, F, had refused to have sex with him. M had broken up with his family and had moved into F's flat. F stressed that she did not have sex with M but admitted that they had hugged and kissed each other. She said M hit her when she refused to have sex with him. The paper disclosed F's nickname, occupation and address (except the unit number), as well as the last Chinese character of her name. The paper published a picture of F. (*Apple Daily*, 21.8.01, A 13)
- I 9 *Oriental Daily News* reported that a 16-year-old Form Three student, C, had attempted suicide by drinking disinfectant because of study pressure. The paper published a picture of C leaving her flat in the company of a paramedic. The headline read: "Feeling great study pressure, female student C

[mentioning her full name which was exactly the same as that of a former film star] has taken drugs". (ODN, 30.10.01, A 20)

- I 10 *Oriental Daily News* reported that a 28-year-old mother had used a cane to beat the buttocks of her 8-year-old son, C, when she found out that he had been punished by his school for fighting with a classmate. The paper revealed that C lived with his parents and his 9-year-old sister in a named building in Shun Lee Estate, and was studying in Primary Three of a primary school in Ping Shek Estate. His sister was studying Primary Four in the same school. The third Chinese character of C's name was disclosed in the report. The paper published pictures of C and her sister. C's eyes were obscured but no attempt was made to conceal his sister's identity. One of the pictures showed C's exposed bruised buttocks. (ODN, 30.11.01, A 30)
- I 11 A woman, F, gave a radio interview two months after her lawyer friend had died in tragic circumstances. During the interview, F complained that journalists had taken pictures of her 11-year-old daughter, and had used a vehicle and a motorcycle to follow her daughter as she was riding a bicycle, causing her to fall on the kerbside. F said that as a result of the accident, her daughter had bruises all over her body. (*Apple Daily*, 28.12.01, C 6)
- I 12 Other cases involving children:
1. A picture of a 6-year-old girl whose mother was mentally ill and had left the girl and her 10-month-old sister outside their home: *Apple Daily*, 4.3.00.
  2. A picture of two children, aged 11 and 12, whose mother had taken an overdose of sleeping pills after telling them that their father had a girlfriend and had deserted them: *Apple Daily*, 7.6.00, A 8 (surname of father and name of estate in which the family lived also disclosed).
  3. Disclosing the full name of a 9-year-old girl whose mother, a former artiste, was suspected of having an extra-marital affair with her colleague: *Apple Daily*, 17.6.00, C 1 & 2 and ODN, 19.6.00, C 1.
  4. A full-size picture of a 3-year-old boy who had been beaten and evicted from home and whose hands had been tied together with a piece of cloth: *Apple Daily*, 9.7.00, A 4.
  5. A picture of an 8-year-old boy and his 5-year-old sister whose father was suspected of having an extra-marital affair and whose mother had attempted suicide: *Apple Daily*, 1.8.00, A 2.
  6. Picture of a 6-year-old girl whose mother had deserted the family and father had attempted to kill himself by taking an overdose of drugs: *Apple Daily*, 10.9.01, A 18 (surname of father and name of building in which they lived were disclosed).

### **Cases provided by Against Child Abuse<sup>2</sup>**

- I 13 Shortly after Against Child Abuse (ACA) reported to the police that a child was found unattended and locked alone in a flat, many journalists arrived at the scene and took pictures of the child from the public corridor through the open door. These pictures, which showed that the child was chained to his bed, were later published in many newspapers. Both the taking and publication of the pictures were done without the knowledge and consent of

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<sup>2</sup> Letter from ACA to Sub-committee dated 15.11.02.

the child's family members. The child was identifiable to his schoolmates, relatives and neighbours, and his family was distressed as a result.

- I 14 A young woman reported to ACA that she had been sexually assaulted by a clinical psychologist. After much counselling and support from ACA, the victim agreed to report the case to the police. However, the thought of journalists pursuing her when the case was tried in court and the fear that her case would be widely reported in the press caused her to withdraw the complaint.
- I 15 After a couple reported to the police that their child had been neglected and subjected to psychological abuse by a member of the staff of a child care centre, a journalist interviewed the child without disclosing his identity and without the knowledge and consent of the parents. The child was disturbed by that encounter. The story was later reported in a newspaper with a picture of the child. The parents were infuriated by the interview and unwanted publicity. They later withdrew their complaint to the police.
- I 16 After a report had been made to the police that a mother had physically abused her daughter, many journalists waited for the child and her family members outside her school. Pictures of the school and part of her address were published in the press. As a result of the press disturbance, the child recanted and tried to put an end to the ordeal. The police could take no further action on the complaint.
- I 17 After an allegation of child abuse by a father had been reported to the police, a newspaper published a picture of the father with a detailed description of the family. No attempt was made to conceal the identity of the father in the picture. Although the child was not included in the picture, the report led to teasing by the child's classmates.
- I 18 Against Child Abuse drew the attention of the Sub-committee to the following concerns: (a) even though the picture and name of a victim of child abuse are not included, the news report sometimes includes other pictures or information that would lead to the child's identity being disclosed; (b) some journalists use unprofessional or unethical means to collect information, such as not revealing their identities when interviewing a child or related parties, interviewing a child or obtaining information about a child without the guardian and/or the child's consent, and not telling the information provider how the information would be used; (c) newspapers sometimes publish unnecessary and irrelevant information which causes embarrassment and disturbance to the child and/or the child's family; and (d) the reports may contain misleading, exaggerated and sensational captions, photos and pictures.

## **Persons having a mental or physical illness**

***"[Subject to paragraphs 2 and 3,] Member States shall prohibit ... the processing of data concerning health or sex life." – European Union Data Protection Directive, Article 8(1).***

***"... media organisations should not place any gratuitous emphasis on [the race, religion, nationality, colour, country of origin, gender, sexual orientation, marital status, disability, illness, or age of an individual or group], except***

***where it is relevant and in the public interest to report and express opinions in these areas.” – Australian Press Council’s Code of Privacy Standards, para 7(1).***

***“Other people’s confidence must not be abused. Special regard should be paid to persons who cannot be expected to realize the effects of their statements. Other people’s feelings, ignorance, or failing self-control should not be abused.” – The National Code of Conduct adopted by the Danish Parliament with the acceptance of the National Union of Journalists, para B5.***

***“Information and speculation about an individual’s mental or physical health shall not be disseminated unless the individual is willing or the information is in the public interest.” – Estonian Press Council’s Code of Ethics, para 4.6.***

***“When conducting research vis-à-vis people requiring protection, particular reticence shall be called for. In particular, this concern people who are not in full possession of their mental or physical powers or who have been exposed to an extreme emotional situation, as well as children and young people. The limited strength of mind or the special situation of these people must not be deliberately exploited in order to gain information.” – German Press Council’s Press Code, Guideline 4.2.***

***“Physical and mental illness or injuries fall within the private area of the person concerned. The press, out of consideration for those involved and their dependants, should refrain from naming and including pictures of persons in such cases, as well as avoiding deprecating remarks concerning the illness or hospital/institution, even if such remarks are to be heard among the general public. ... ” – German Press Council’s Press Code, Guideline 8.3***

***“A journalist protects rights and dignity of people with mental or physical handicap in analogy with what is confirmed by the Treviso Ethic Code (Carta di treviso) about children.” - Charter of Duties of Journalists adopted by the National Federation of the Italian Press and National Council Order of Journalists in Rome.***

#### **(a) Persons having a mental illness and related parties**

- J1     A doctor drew our attention to a case involving a former disc jockey, M, who had behaved in a bizarre way in October 1999. Some Chinese newspapers chronicled his words and deeds in detail on their entertainment pages, including the front page of *Apple Daily*. Reports that alluded to his being a homosexual and details of his private life, much of it with reference to his lover, were extensively published in the local media. The doctor said these reports constituted a serious intrusion on the privacy of M’s lover. He advised that M’s eccentric behaviour was typical of a manic/hypomanic episode and was part and parcel of the symptoms of his mental illness. He said the editors should have exercised discretion in deciding what to publish.
- J2     *The Sun* reported that a 16-year-old student had been admitted to a named hospital for mental patients. It revealed she was studying in Form Four of a named school. The third Chinese character of her name was disclosed in the report. The paper published a picture of the student sitting on a hospital bed. Only the eyes of the student were obscured. (*The Sun*, 15.2.00)

- J3 *Apple Daily* reported that a 33-year-old man, M, had threatened to jump from a building after arguing with a 32-year-old woman, F. It was suspected that F had taken advantage of the fact that M was mildly mentally retarded and agreed to have sex with him for money. M's former occupation, nickname and the first and third Chinese characters of his name were disclosed. The paper published a picture of M holding a knife in his hand to fend off the policemen. Only his eyes were obscured. (*Apple Daily*, 18.4.00, A 15)
- J4 A former starlet, F, who was known to have mental problems and had a history of drug abuse, was found unconscious after taking drugs. F's mother was reported as saying that F was very unhappy and felt betrayed by a friend when she discovered that a newspaper had published pictures taken by a journalist (whom she had treated as her friend) when the journalist was inside her home at her invitation. F's mother begged the journalists to stop pestering her. (*Apple Daily*, 21.5.00, C 1)
- J5 A former starlet, F, jumped to her death one month after she had given birth to a baby. A few days later, F's mother complained that some journalists had obtained entry to F's home by misrepresenting themselves as F's friends. Once inside, they had taken photographs. F's mother urged the media to let F retain whatever remained of her privacy. (*Sing Pao*, 4.8.02, C 4). It was also reported that the media had labelled F and three other named artistes as "Four Big Mad Persons" in 1998 (*Next Magazine*, No 648, 8.8.02, p 55). See also 何鸞 and 劉夏紅, "誰是毒瘤, 誰瘋癲", *HK Economic Journal*, 14.3.02, p 29.
- J6 *The Sun* reported that a former actress, F, had been detained for treatment in the psychiatric unit of a hospital in Vancouver for six days. A journalist of the paper successfully gained entry to the hospital and interviewed F. F did not want the journalist to take photographs of her. The journalist was asked to leave when the hospital discovered his true identity. The hospital manager was "very unhappy" about the incident. He told the journalist that F was not suitable for interviews and the ward was secluded: only relatives would be permitted and even lawyers and policemen had to be authorised before entering the ward. The paper published three pictures of F taken inside the hospital. (*The Sun*, 25.5.00, C 2 & 4) *Oriental Daily News* reported the next day that the hospital did not allow journalists to enter the hospital unless F agreed to meet them. Since F had refused to give consent, the journalists had to wait outside the hospital. The paper published two of the three pictures published in *The Sun* the day before. (*ODN*, 26.5.00, C 5)
- J7 *The Sun* reported that F in the preceding case had returned to Hong Kong in the company of her sister. The paper stated that it had obtained the transcript of a telephone conversation allegedly conducted between F and a friend which suggested that F was still mentally unstable. The full name of F's sister was disclosed in the report after the journalists had found out her name from the passenger list of the airline. The paper published three pictures of F arriving at Hong Kong airport. It also published a picture of F's sister, who had refused to answer any questions raised by the press. (*The Sun*, 1.6.00, C 2) *Apple Daily* reported that F had been receiving psychiatric treatment in Vancouver for 13 days. In order to avoid pursuit by the journalists, F did not leave her home after returning to Hong Kong. She had to take drugs to calm herself down and the idea of suicide had crossed her mind. Her friends said although she had left hospital, her mental health had not fully recovered. They said what she needed was peace and privacy.

The paper published a picture of her sister using her hand to cover her face outside F's premises. (*Apple Daily*, 2.6.00, C 21)

- J8 *Apple Daily* reported that a 32-year-old artiste, M, had been admitted into the psychiatric unit of a hospital after holding his brother under threat by pointing the end of an umbrella at his brother's chest. M's brother later visited M in hospital. The paper published a picture of M's brother at the hospital, using an umbrella to hide his face. Another picture showed M's brother covering his face with a plastic bag. (*Apple Daily*, 5.8.00, C 4)
- J9 *Oriental Daily News* reported that M in the preceding case had been found by his sister unconscious at his home. It was suspected that he had taken an overdose of drugs. He was later admitted into the Intensive Care Unit of a hospital. The paper disclosed his home address in the report. It also published a picture showing the exterior of the three-storey building in which M resided. (*ODN*, 28.8.00, A 22) A few days later, the paper reported that M had been transferred to the general ward and his younger sister had paid him a visit. It published a picture of M's younger sister using both hands to cover her face. The caption stated that she did not want to be included in the pictures because she did not want to be recognised by her classmates. (*ODN*, 1.9.00, C 28)
- J10 *The Sun* reported that a 64-year-old man, H, (family name given) had used a cane to hit his two daughters, aged 10 and 12 respectively. It revealed that H's 47-year-old wife, W, suspected that H had a mistress on the mainland. W was also reported to have mental illness. The paper disclosed the first and third Chinese characters of W's name, and the name of the building in which the family lived. It published a picture of W standing behind her 12-year-old daughter as the latter showed her bruises on her hand to the journalists. Only the eyes of the daughter were obscured. (*The Sun*, 4.9.00, A 7)
- J11 *The Sun* reported that a 68-year-old man, H, had hit his 62-year-old wife, W, after the latter refused to cook a meal for him. W told the journalist that H had consulted a doctor for mental illness. The surname of H, the first and third Chinese characters of W's name, and the name of the building in which the couple lived were disclosed in the report. The paper published a picture of W. Also published was a picture showing H and W standing at the main door of their flat. Only the eyes of H were obscured. The sub-heading of the article read: "Attacker' had mental illness". (*The Sun*, 10.11.00, A 10)
- J12 *Oriental Daily News* reported that a young man with mental problems, M, had been tied to a chair and beaten over a period of four days. The name of the building in which M resided and the first and third Chinese characters of his name were disclosed. The paper published on its front page pictures of M in hospital, displaying his injuries. Only his eyes were obscured. Also published was a picture of M's mother taken inside her home. (*ODN*, 16.11.00, A 1)
- J13 *The Sun* also covered the preceding story. It revealed that the 29-year-old M had worked as a cleaner but was sacked when he was found to be "mentally abnormal". His girlfriend was said to be a prostitute and to have contracted a sexually transmitted disease. M's full name was disclosed in the report. The paper published two pictures of M, which were taken on the same occasions as mentioned above. (*The Sun*, 16.11.00, A 3) Similar



pictures were also published on the front page of *Apple Daily* without any attempt to protect his identity. (*Apple Daily*, 16.11.00, A 1)

- J14 *The Sun* reported that a 32-year-old woman, who had been diagnosed mentally ill, had used a steel wire to cut her right wrist. She was believed to have a record of suicide attempts as her left wrist had many scars caused by knives. The paper disclosed the first and third Chinese characters of the woman's name, and the fact that she had separated from her husband. A picture showing the woman holding her son in her arms was published in the paper. Her son was not identifiable in the picture. The headline read: "Mentally sick woman cut her wrist at railway station". (*The Sun*, 20.12.00, A 6)
- J15 *Apple Daily* reported that a 34-year-old woman had jumped from the tenth floor of a building. She sustained slight injuries after landing on a canopy. The paper disclosed the woman's full name and address (except the unit number). It revealed that she had been diagnosed as suffering from schizophrenia after her divorce in 1994 and had had to consult a doctor regularly. She had been dismissed by her employer two months before when they learnt about her illness. The paper published a picture of the woman being attended to by two paramedics. (*Apple Daily*, 15.1.01, A 6)
- J16 *Oriental Daily News* reported that a 41-year-old man (surname disclosed) had used a cleaver to cut his wrist when he discovered that his friend had cheated him by selling a low quality gemstone to him. The paper revealed that the man was a transvestite and had received mental treatment at Castle Peak Hospital. The paper published pictures of the man wearing women's clothes, one showing the scars to his left wrist and another showing him adjusting his underwear. He was not facing the camera in the second picture but only his eyes were obscured in the first one. Another picture showed a corner of the room occupied by the man. (*ODN*, 8.2.01, A 19) Apart from reporting that the man was mentally ill, *Apple Daily* also reported that the 40-year-old man (surname given) liked Hello Kitty so much that he had had the name "Kitty" added to his name on his identity card. The man had a 38-year-old wife and two children aged 12 and 15. The paper published a picture of the man sitting on a sofa inside his sitting room, with a huge Hello Kitty doll at his side. His eyes were not obscured in that picture. (*Apple Daily*, 8.2.01, A 13)
- J17 A woman attempted suicide by jumping from a building. Subsequently, her family complained to the HK Press Council that a newspaper (not a member of the Council) had published a picture showing her injuries and facial features. The accompanying article had also disclosed the details of the paper's interview with her doctor and revealed that she was suffering from mental illness. The Council ruled that the publication of the picture had infringed her privacy. The name of the paper was not disclosed in the adjudication. (Date of complaint: 16.6.01)
- J18 *The Sun* reported that a 46-year-old woman had locked herself inside the toilet of her home. She weighed about two hundred pounds and had been suffering from mental illness for over ten years. The paper disclosed the first and third Chinese characters of the woman's name; the age and surname of her husband; and the name of the building in which they lived. After the police had arrived, the woman removed her clothes and began screaming and waving a miniature statue of a Buddhist deity. The paper published a

picture of the woman with bare breasts shouting in front of the toilet window. (*The Sun*, 27.6.01, A 11)

- J19 *Apple Daily* reported that an 18-year-old Form Five student, L, had been taken to hospital after being found unconscious in her flat. The article revealed that L came from a broken family and was on medication for mental illness. L was suffering from anorexia and had attempted suicide on two previous occasions. The full name of L and the name of the building in which she and her siblings lived were disclosed. The paper published a picture of L taken on a previous occasion. No attempt was made to obscure her likeness in the picture. Also published was a picture of L's father and younger sister visiting L in a hospital. L was not identifiable in the latter picture. (*Apple Daily*, 4.7.01, A 8)
- J20 *Apple Daily* reported that a 40-year-old man, M, had been pursuing a number of artistes and celebrities. M told the journalist that he had been diagnosed as having schizophrenia and had to be hospitalised at Siu Lam Psychiatric Centre. He refused to take medicine and did not make an appointment with the psychiatric unit of Kowloon Hospital. His doctor had written to the police asking them to accompany him to see a doctor. The full name of M was disclosed in the report. The paper published a picture of M and his mother taken inside their home. Only the eyes and nose of his mother were obscured. (*Apple Daily*, 7.8.01, C 11)
- J21 *Apple Daily* reported that two men, X and Y, aged 27 and 30 respectively, had attempted to take their lives together by burning charcoal in a rented room. X walked out of the room before he lost consciousness and called the police to rescue Y. Y had suffered from mental illness when his marriage ended in divorce four years before and had received treatment at a mental hospital. He was later transferred to a mid-way quarters for mental patients when his condition had improved. The surnames of both X and Y were disclosed. The paper published a picture of X talking to a policeman, and a picture of Y lying unconscious in a toilet. (*Apple Daily*, 26.9.01, A 18)
- J22 *The Sun* reported that a 40-year-old man had used a pair of scissors to cut off his glans penis. He refused to have an operation to re-connect it. The man told the press that he wanted to concentrate his mind on Buddhism. The article reported that the hospital was evaluating his mental condition. His surname and occupation were disclosed. The paper published a picture of the man leaning against a hospital bed. (*The Sun*, 20.9.01, A 22) *Oriental Daily News* and *Apple Daily* also covered the above story. *Oriental Daily News* disclosed his surname and the fact that the pronunciation of the second and third Chinese characters of his name was the same as a famous monk in ancient China, whose name was given in full. A picture of the man leaning against the bed was published in the paper. (*ODN*, 20.9.01, A 22) The article in *Apple Daily* disclosed his age and full name. It reported that his sworn-sister believed that he had mental problems. A picture of the man leaning against a hospital bed was also published. (*Apple Daily*, 20.9.01, A 24)
- J23 *Apple Daily* reported that a 19-year-old man, M, had attempted to kill himself by taking anti-schizophrenia medication prescribed for his father. The paper disclosed the name and address of the building in which the family lived. The first and third Chinese characters of M's name were also disclosed. A picture of M's father accompanying M to hospital was published. (*Apple*

*Daily*, 21.10.01, A 11) M was not identifiable in the picture but no attempt was made to protect the identity of his father.

- J24 *Apple Daily* reported that an 18-year-old man, M, had fallen to the ground when he was climbing down from the balcony of his flat on the eighth floor of a building. He was in a critical condition when admitted into hospital. M had a sister and brother, aged 17 and 13 respectively. M's brother said that M had suffered from schizophrenia when he was in Form Two. M's full name was disclosed in the report. The paper published a picture of M being attended to by a paramedic after falling to the ground. A passport-size photo of M taken on a previous occasion was also published. (*Apple Daily*, 29.10.01, A 12)
- J25 *Apple Daily* reported that a 2-year-old mildly mentally handicapped boy had died at home after he had caught a cold a few days before. The article revealed that the boy's 35-year-old mother and elder brother were both mildly mentally handicapped. His 45-year-old father was a drug addict working as a printing technician in a newspaper company. The paper published a picture of the boy, his mother, elder sister and elder brother. Only the eyes of the boy's sister and brother were obscured. (*Apple Daily*, 3.11.01, A 10)
- J26 *Apple Daily* reported that a gang of six children had thrown stones at a 23-year-old woman, F, and snatched her handbag after she had turned down their request for money and accused them of behaving as beggars. The article revealed that F had grown up in Yuen Long and was living with her parents, two younger sisters and a younger brother in a named village. F had suffered mental problems and had received treatment at Castle Peak Hospital for two months. The paper published F's picture. (*Apple Daily*, 30.12.01, A 10)
- J27 A failed tycoon, M, had attempted suicide after his business empire collapsed. In March 2002, *Eastweek* published an interview in which he revealed intimate details about his relationships with several starlets. Subsequently, M gave follow-up interviews to some newspapers, disclosing the sex lives of several tycoons who had once been his friends. The stories resulted in M being pursued round the clock by journalists who followed him to London and Paris and then back to Hong Kong. M acted eccentrically during the trip and reports and pictures published in the press suggested that he had mental problems. Intimate photographs taken at private parties attended by starlets and tycoons had also been made available and were published. Although the names of the starlets and tycoons were not disclosed, their identities were ascertainable to many readers. Shortly after M returned to Hong Kong, his parents took out newspaper advertisements apologising for their son's eccentric behaviour, which they believed stemmed from his mental problems. Later, M apologised for his behaviour and alleged that he had been hallucinating under the influence of alcohol and drugs when making up the stories reported by the press. (*SCMP*, 9.3.02, p 3) A social worker who had experience in dealing with clients having psychiatric problems said that M's conduct during the trip to Paris displayed symptoms of psychiatric illness. She advised the press not to drive him to extremes. (*The Journalist*, Aug 2002, p 16) See also the HK Press Council press release dated 16.4.02 and the joint statement published by various educational, religious and social welfare organisations in *Ming Pao*, 19.4.02, A28 & A29.

**(b) Persons having a physical illness and related parties**

- J28 *The Sun* reported that a man, M, who had caught a cold, had died shortly after drinking alcohol and then herbal tea. M had been living with a 49-year-old woman, F, in a wooden hut in a named village in Fanling. F was reported to have breast and cervical cancers, and to be living on social security assistance. The first and third characters of F's name were disclosed. The paper published a picture taken on a previous occasion, showing M and F standing side by side. Also published was a picture of the wooden hut with F standing at the entrance. (*The Sun*, 16.2.00, A 4)
- J29 *Apple Daily* reported that a 16-year-old girl had been sent to hospital after she had used a piece of broken glass to cut her wrist. The article revealed that she had been diagnosed as having brain cancer when she was 10 years old. She had to take medicine and receive electrotherapy. She could not accept the fact that she had lost her hair. She therefore wore a wig to rebuild her confidence. The third Chinese character of her name was disclosed in the report. The paper published a picture of the girl in hospital which revealed the hair on her head to be thin and sparse. Next to that picture was another picture taken before she had undergone electrotherapy. There was also a picture showing her parents looking at her wig on their dining table. Only the girl's eyes were obscured in the pictures. (*Apple Daily*, 30.3.00, A 4)
- J30 *Oriental Daily News* reported that a 27-year-old woman had lost her life after jumping into the sea. The paper revealed that her father had lung cancer and was receiving six thousand dollars social security assistance per month. The full names of both the woman and her father were disclosed in the report. Apart from publishing a picture of the woman taken on a previous occasion, the paper also published a picture of the father going to the mortuary to identify his daughter. (*ODN*, 30.5.00, A 1) *The Sun* also reported that the woman's father was divorced and had been diagnosed as having intestinal cancer more than a year before. The full name of the woman was disclosed in the report. The paper published a picture of the father in hospital. (*The Sun*, 30.5.00, A 3)
- J31 *Apple Daily* reported that the two sons of a 42-year-old man, aged 11 and 8, had saved their father's life after their boat had capsized in rough sea in Ma On Shan. Apart from reporting how the father and sons had struggled in the sea, the paper also revealed that the father had cancer and was suffering from *myasthenia gravis* (grave muscle weakness). The full name of the father was disclosed in the report. The paper published a picture of the father and his two sons at a hospital. (*Apple Daily*, 13.7.00, A 4)
- J32 *Apple Daily* reported that a 26-year-old girl had argued with her 48-year-old mother, who had fainted when she discovered that her daughter had taken sleeping pills. The article revealed the name of the building in which they lived and the fact that the mother had cancer. The paper published a picture of the girl using her hand to hide her face, and a picture of her mother being taken to hospital in a wheelchair. (*Apple Daily*, 7.8.00, A 12)
- J33 *The Sun* reported that a 42-year-old man, H, had jumped to his death from the 22<sup>nd</sup> floor of a named building. It revealed that his 38-year-old wife, W, had been suffering from an illness which meant that she could not sit or stand for long. W also had contracted herpes from H. The full name of H and the first and third Chinese characters of W's name were disclosed. Apart from

publishing a picture of H's body lying on the ground, the paper also published three pictures of W crying and being removed from the scene. A passport size picture of H was also published. (*The Sun*, 12.9.00, A 9) See also *Apple Daily*, 12.9.00, A 13.

- J34 *Apple Daily* reported that a man (surname given) had been receiving treatment at a named hospital for stomach cancer. It revealed that the man had been the assistant of a named barrister when the latter was working in a company owned by a well-known businessman. The paper published a picture of the man lying in a hospital bed. His eyes were obscured in the picture. (*Apple Daily*, 27.12.00, C 2)
- J35 *Oriental Daily News* reported that a 40-year-old woman had attempted to take her life by drinking disinfectant. The article disclosed her surname, occupation, nationality, race, the fact that she was working for the HK Jockey Club, and the block number of the quarters provided by the HK Jockey Club. It further disclosed that she was suffering from brain cancer and had a daughter living in a named country. The paper published a picture of the woman in hospital. (*ODN*, 5.1.01, A 18)
- J36 A member of the public complained to the HK Press Council that a newspaper and two magazines had disclosed that a named artiste was an AIDS carrier. He asserted that forcing the artiste to give a response by disclosing that he was an AIDS carrier was an infringement of the artiste's privacy. The Council's report does not give the names of the newspaper and magazines apart from stating that they were not members of the Council. At the request of the complainant, the Council forwarded his complaint to its members for reference. (Date of complaint: 15.2.01)
- J37 The Hong Kong Advisory Council on AIDS had complained to the HK Journalists Association about three articles in *Oriental Sunday*, show8.com (a showbusiness website) and *The Sun*, about an actor who had been suspected of having AIDS. The article in *Oriental Sunday* was published on 14.10.00 and the article on show8.com was uploaded shortly afterwards. The article in *The Sun* was published on 1.11.00. The identity of the actor was disclosed in the articles in *The Sun* and on the website. The article in *The Sun* challenged the actor to donate blood to prove his innocence but he refused. *Oriental Sunday* did not disclose his name but had given sufficient clues for readers to identify him. He was described in that article as a "very promiscuous homosexual". The HKJA sought views from the three publications but none of them had replied. Nonetheless, the Association concluded that the three articles did not follow the guidelines set out in their code of ethics. (HKJA Executive Committee decision on 13.4.01)
- J38 *Apple Daily* reported that a 41-year-old man, H, had contracted venereal disease when visiting prostitutes on the mainland. H transmitted the disease to his wife, W, who was the same age as H. The paper disclosed H's surname, which is an unusual name in Hong Kong, and the fact that the couple were living in a named estate in Tai Po. The paper published a picture of H. Only his eyes were obscured in the picture. (*Apple Daily*, 29.7.01, A 12)

## Disclosure of private information about an individual

***“News obtained by dishonest or unfair means, or the publication of which would involve a breach of confidence, should not be published unless there is an over-riding public interest.” – Australian Press Council’s Statement of Principles, Principle 4.***

***“Materials violating the privacy of an individual can only be disseminated if public interest outweighs the right to privacy.” – Estonian Press Council’s Code of Ethics, para 4.9.***

***“The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents ... .” – Basic Law of the Hong Kong SAR, Article 30.***

***“The protection of privacy includes protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.” – New Zealand Broadcasting Standards Authority’s Privacy Principles, Principle (i).***

***“Be careful in giving publicity where it can trespass upon an individual’s privacy. Refrain from such action unless it is obviously in the public interest.” – Swedish Press Council’s Code of Ethics, para 7.***

***“[Unless it can be demonstrated to be in the public interest,] Journalists must not obtain or publish material obtained by using clandestine listening devices or by intercepting private telephone conversations.” – UK Press Complaints Commission’s Code of Practice, clause 8.***

***“(i) The press must avoid prejudicial or pejorative reference to a person’s race, colour, religion, sex or sexual orientation or to any physical or mental illness or disability. (ii) It must avoid publishing details of a person’s race, colour, religion, sexual orientation, physical or mental illness or disability unless these are directly relevant to the story.” – UK Press Complaints Commission’s Code of Practice, clause 13.***

K1 *Apple Daily* reported that shortly after a woman, F, the agent of a male singer, M, had taken her life, “Show 8” made available on its website the sound recording of a telephone conversation allegedly conducted between M’s singing teacher, T, and an unknown woman. The paper published the transcript of the conversation and the address of the website. The conversation was about the relationship between F and M. T complained that this was an invasion of his privacy. (*Apple Daily*, 12.1.00, C 2 and 17.1.00, C 2) *The Sun* also reported that a website had made available the sound recording of a conversation about the relationship between F and M. The voices in the recording were said to resemble those of T and his wife. The paper published an abridged version of the transcript. The names of all parties were disclosed. (*The Sun*, 12.1.00, C 4)

K2 *The Sun* reported that a 44-year-old woman, W, had complained to the police that her 41-year-old former husband, H, had thrown a teacup at her. The case was later settled at a police station. Subsequently, W accused H of

inviting male colleagues into his room. W did not know what they were doing inside. She suspected that H was a homosexual. W said H had shaved his pubic hair when he discovered that he had venereal disease. W was living with H at the police quarters in a named district. W had two children, aged 11 and 13. The surnames of both W and H were disclosed. The paper published a picture of W. Only her eyes were obscured in the picture. It also published a family picture taken when their children were very young. The former husband was wearing police uniform in the picture. Only their eyes were obscured. (*The Sun*, 12.1.00, A 4) See also *Apple Daily*, 12.1.00, A 9.

- K3 *Oriental Daily News* reported that a magazine had obtained the cassette tapes of telephone calls allegedly made by a woman (who was said to have had a brief affair with a male film star) to an artiste and a former starlet, and made public the contents of the conversations. The artiste concerned was reported as saying that such conduct should not be tolerated. The paper summarised what had been exchanged between the parties. The names of all parties were disclosed. (*ODN*, 3.3.00, C 7)
  
- K4 *The Sun* published the transcript of a telephone conversation allegedly conducted between a former artiste, F, and her friend in Hong Kong after she had been released from a psychiatric hospital in Vancouver. It suggested that F was still mentally unstable after receiving treatment at the hospital. The paper reported that they had access to the conversation through a confidential source. (*The Sun*, 1.6.00, C 2)
  
- K5 *Apple Daily* reported that a male artiste, M, was cohabiting with a female model, F, who still maintained close ties with another man, L. The paper disclosed that L was living close to M and F in Homantin. A side story further revealed that many starlets lived in that district. The paper published a map showing the street names and exact location of the buildings in which M, F, L and four other persons lived. The full names of these seven persons were disclosed. (*Apple Daily*, 14.7.00, C 2 & C 4)
  
- K6 *The Sun* reported that a 49-year-old woman, W, had written to the Commissioner of Police, complaining about the extra-marital affair of her husband, H, a superintendent of police. In her letter, W asked the Commissioner to bring justice to her family. The article revealed that H and W had been married for 14 years. W alleged that the third-party was H's former secretary, T (mentioning her Christian name), when he had been stationed at a named Division in the New Territories. T had a child and was divorced. T had been transferred to police headquarters at the time of the article. W said she had discovered a fax from T to H in which T flirted with H. W added that H had been dating T. The report disclosed the Chinese name, Christian name and current posting of H. The paper published a copy of the fax from T to H as well as a copy of the letter from W to the Commissioner of Police. Also published were a picture of H in police uniform, and a picture of H and W taken at their wedding. (*The Sun*, 21.10.00, A 2)
  
- K7 A former undercover policeman complained to the HK Press Council that a newspaper had disclosed his personal information (including his identity card number and date of birth) when reporting his underground activities in a triad society. He asserted that the report had infringed his privacy and caused distress to him and his family members. At the request of the complainant,

the Council circulated his complaint to its members. The newspaper concerned was not a member of the Council and its name was not disclosed in the Council's report. (Date of complaint: 5.2.01)

- K8 *The Sun* reported that someone on the Internet had disclosed that a participant in the "Miss Hong Kong" contest, F (mentioning her name in full), had had an intimate relationship with a boy when she was in Form Seven at secondary school. The source said F had had an abortion in October 1997. Her boyfriend had deserted her subsequently. In the three months after the break up, F had harassed her former boyfriend's new girlfriend and attempted to kill herself. F denied those allegations. Pictures of F were published in the paper. (*The Sun*, 10.5.01, C 2; *The Sun*, 11.5.01, C 1)
- K9 After referring to the incident in which two policemen had been seriously wounded in a shooting in Waterloo Road near Yim Po Fong Street, *Apple Daily* gave the full names of ten artistes and prominent persons who were living close to the scene. The names of the buildings in which these ten persons lived and the names of the streets in which these buildings were located were also disclosed in a map published in the article. (*Apple Daily*, 24.5.01, C2)
- K10 *Apple Daily* reported that the house of an expatriate couple had been burgled. It disclosed the address and name of the estate. It further revealed that many prominent figures lived in that estate, including a judge, a legislator and a deputy of the National People's Congress. The full names of these three persons were disclosed. (*Apple Daily*, 28.5.01, A 4)
- K11 *Oriental Daily News* reported that a woman, F, had faxed a document to a government department, accusing M (an employee of the department) of cheating her and owing her fifty thousand yuan. After M had denied those allegations, F met the Hong Kong press in Shenzhen and produced a love letter purportedly written by M to F, and a tape recording of a telephone conversation allegedly conducted between M and F. The paper published pictures of M and the letter. The Chinese characters on the second page of the love letter were legible although the size of the letter had been reduced in size in the picture. M's full name and post were also disclosed. (ODN, 9.8.01, A 14) *The Sun* reported that F met M in a salon. F knew M was married but they still spent one or two days together each week. F alleged that M had borrowed money from her under the pretext that his wife was sick. The paper published an extract from the letter written by M. Also published was a transcript of a section of the telephone conversation allegedly made between M and F. The names of F and M were disclosed. (*The Sun*, 9.8.01, A 10) See also *Apple Daily*, 9.8.01, C 8.
- K12 *Apple Daily* reported that notices containing copies of the identity card and staff card of a 24-year-old artiste had been left outside a television company. The notices contained a statement asking the artiste's father to pay his debts. The full name of the artiste and the first and third Chinese characters of his father's name were disclosed in the report. A picture of the artiste taken on a previous occasion was published. (*Apple Daily*, 29.10.01, C 10)
- K13 *Oriental Sunday* published the transcript of a private telephone conversation that had been uploaded to a website. The conversation was believed to have been conducted between two named artistes who were allegedly in a



close relationship with each other. The address of the website was also disclosed in the report. (*Oriental Sunday*, No 254, 24.10.02)

## Trespass

***“The homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident’s home or other premises shall be prohibited.” (Basic Law of the Hong Kong SAR, Article 29)***

- L1 M, the son of a businessman, was shortly to be married. The couple would reside in a 3-storey house in a named street at Repulse Bay, which was still under renovation. The press photographers of a newspaper were reported to have entered the house and taken pictures inside without the authority of M’s family. The pictures were later published in the paper. (*ODN*, 26.10.00, C 14)
- L2 *Apple Daily* reported that a singer had rented a house in a named district two months before. The house was surrounded by a wall. The singer had not moved into the house because the house and its garden were still under renovation. The paper published a picture showing the exterior of the house, and two pictures taken inside the garden. (*Apple Daily*, 6.12.00, C 9)
- L3 A former legislator, who was being investigated by the ICAC, alleged that some reporters had intruded into a dormitory at the Baptist University to find out more about his girlfriend, who was then a student staying at the dormitory. (*South China Morning Post*, 15.1.01)
- L4 W, the former wife of an ex-legislator, had offered her house for sale through an estate agent. W was reported to be very upset when she found out that the potential buyers who had visited her house were in fact journalists from *Next Magazine*. She accused the journalists of invading her privacy by posing as potential buyers. (*The Sun*, 31.12.01, A 3, referring to the *Next Magazine* published on 27.12.01)
- L5 An artiste was pursued by journalists when he returned to Hong Kong from Taiwan. When he arrived at his house in Tai Po and opened the main door, the journalists forced their way into his house and took pictures inside. The artiste had to forcibly remove the photographers. (*Ming Pao*, 8.4.02, C2)
- L6 An artiste complained that a journalist had gained access to her property without her authority and a magazine had published, also without her authority, photographs taken by a journalist inside the property. (*Sing Pao*, 6.9.02, C 7)

## Following, harassment and use of hidden camera

***“A journalist shall use honest means of obtaining audio or video recordings and information, with the exception of cases where the public has a right to know information that cannot be obtained in an honest way.” – Estonian Press Council’s Code of Ethics, para 3.7.***

***“Journalists should respect the reputation and privacy of individuals. Taking into account solid editorial reasons, journalists should report on the private lives of individuals – who have not given their consent for doing so – only in ways that would not create unnecessary additional damage to the individuals. ...” – Journalists’ Code of Professional Ethics in Hong Kong, para 4.***

***“[Unless it can be demonstrated to be in the public interest,] (i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent. (ii) The use of long lens photography to take pictures of people in private places without their consent is unacceptable. Note - Private places are public or private property where there is a reasonable expectation of privacy.” – UK Press Complaints Commission’s Code of Practice, clause 3.***

***“[Unless it can be demonstrated to be in the public interest,] (i) Journalists and photographers must neither obtain nor seek to obtain information or pictures through intimidation, harassment or persistent pursuit. (ii) They must not photograph individuals in private places (as defined by the note to clause 3) without their consent; must not persist in telephoning, questioning, pursuing or photographing individuals after having been asked to desist; must not remain on their property after having been asked to leave and must not follow them.” – UK Press Complaints Commission’s Code of Practice, clause 4(i) & (ii).***

***“People in the public eye, either through the position they hold or the publicity they attract, are in a special position. However, not all matters which interest the public are in the public interest. Even when personal matters become the proper subject of enquiry, people in the public eye or their immediate family or friends do not forfeit the right to privacy, though there may be occasions where private behaviour raises broader public issues either through the nature of the behaviour itself or by the consequences of its becoming widely known. But any information broadcast should be significant as well as true. The location of a person’s home or family should not normally be revealed unless strictly relevant to the behaviour under investigation.” – UK Broadcasting Standards Commission’s Code on Fairness and Privacy, para 17.***

- M1 A public figure had been subjected to attacks after he had suggested Hong Kong people should forget June 4 in Tiananmen Square and look to the future. He complained that one magazine had published the telephone numbers of both his company and his residence and called on its readers to harass and intimidate him and his family members by making telephone calls. He alleged that he and his family had received many telephone calls thereafter, causing him and his family serious distress. (王紹爾, “自律：不再是個貶詞”, *Ming Pao*, 9.9.99)
- M2 A member of the public informed the LRC in his submission that a group of female journalists had followed a male artiste, who had been acting in a peculiar manner, into the Men’s Changing Room of Morrison Hill Public Swimming Pool on 5.11.99.

- M3 *Apple Daily* reported that H, an artiste, had married W in 1988. The report revealed that W was suspected to be involved in an extra-marital affair with her male colleague, K (Christian name given). To find out more about their relationship, a team of journalists followed W surreptitiously for the whole day on 15.6.00. The paper published two series of pictures taken on that day. The first series consisted of four pictures, taken at 10:45 am, 2:38 pm, 5:15 pm and 6:15 pm respectively, showing that W and K had been together for most of the time that day. Another series consisted of six pictures taken of W and K sitting in a car that evening. The full name of W's 10-year old daughter was also revealed in the report. (*Apple Daily*, 17.6.00, C 1 & 2) The next day, *Apple Daily* disclosed K's full name and reported that he was married and had a daughter. The paper also published two series of pictures. The first series was about the daily activities of K. It consisted of three pictures taken at 11:50 am and 12:48 pm on 12.6.00 and 1:10 am on 13.6.00 respectively. The second picture in that series was taken when K was accompanying W to see a doctor. Another series consisted of five pictures taken on 15.6.00 when W and K were together at a café. All the pictures were taken without the knowledge of the parties. Also published was a picture of an adhesive photo, which comprised nine photos taken on previous occasions. It showed that W and K were sitting close to each other for the photos. (*Apple Daily*, 18.6.00, C 1 & 2) The next day the paper revealed that W had been travelling with K in Taiwan for three days two weeks before without H knowing. W was alleged to have lied to H that she was to have a business trip with her colleagues when in fact she had joined a package tour with her colleagues, including K. H had accompanied her to the airport but did not meet K because the latter joined W after H had left. The paper published a total of 20 pictures on two pages. Four pictures showed W with K inside the departure hall on 9.6.00 shortly after H had left the airport. Seven pictures showed W and K during their stay in Taiwan, and one picture showed H with his daughter in Hong Kong when W was travelling with K in Taiwan. (*Apple Daily*, 19.6.00, C 2 & 3) The following day the paper published two pictures showing W having breakfast with K and other colleagues. The captions stated that the couple had asked the press photographers not to take pictures and video. (*Apple Daily*, 20.6.00, C 3)
- M4 *Apple Daily* reported that a male artiste, M, had been cohabiting with a female model, F (name given), for three years, but F had been going out with another man, L, when M was at work during the day. The paper published a table disclosing L's age, height, occupation, education and salary. It also published two series of pictures. The first showed F meeting L in a pub. Another series showed F with L the next day. (*Apple Daily*, 12.7.00, C 1) Two days later, *Apple Daily* revealed that L was a team leader of the Fire Services Department working in a named district and that he was living on his own in a named street in Homantin. L's full name was given in the report. The paper published two series of pictures. The first showed L and F together, with L's arm on F's waist or shoulder. Another series showed F visiting L's flat. A map with street names showing the location of the two buildings in which L and M / F respectively lived was also published. (*Apple Daily*, 14.7.00, C 2 & 4)
- M5 *Apple Daily* alleged that there was a rumour that the marriage of a legislator, M, was in crisis. M refused to respond to those allegations, but his 21-year-old son told the press that eight persons had been following his vehicle when he returned to Hong Kong from Taiwan. He said he was so frightened that his vehicle was almost involved in a traffic accident. (*Apple*

*Daily*, 16.8.00, C 1) *Oriental Daily News* also reported that M's son had accused the press of following his vehicle when he drove to the airport. He said the situation was so dangerous that the vehicles had almost collided. (*ODN*, 16.8.00, C 14)

- M6 *Apple Daily* reported that a female author, F (name and age disclosed), rarely accepted interviews and never disclosed her private life to the press. F was also unwilling to be photographed. The article revealed that F had been cohabiting with M, a doctor (family name and age given), who was already married. It also disclosed that F was living in a named street in Jardine's Lookout, giving information about the size and price of her flat. Also revealed were the names of the two hospitals in which M treated his patients, and the fact that M's father (mentioning his full name) was a Chinese herbalist practising in the Western District. The paper published three series of pictures of the couple in the car park of the building in which they cohabited. Also published was a picture of the exterior of the clinic owned by M's father. The paper published another eight pictures, including pictures of F shopping at a supermarket; F getting into M's car after shopping; and the exterior of the building in which M and F cohabited. (*Apple Daily*, 5.9.00, C 2 & 4) The next day, journalists from *Apple Daily* took pictures when M and F were leaving a restaurant in Central and waited for them near their home. M's full name was disclosed. The paper published a picture of M's marriage certificate, revealing the first and second Chinese characters of his wife's name. (*Apple Daily*, 6.9.00, C 1) Also published was a picture of M at his desk inside his private clinic. The caption stated that M had ordered the journalist to leave when the latter (who had been posing as a patient) suddenly asked questions about his marriage. (*Apple Daily*, 6.9.00, C 2)
- M7 *Apple Daily* published a photo of a named artiste, M, having dinner with his girlfriend in a secluded part of a restaurant in Happy Valley. M rebuked the press photographer when the latter took pictures without his consent. Also published was a picture of M shouting at the photographer in the street. (*Apple Daily*, 9.9.00, C 7)
- M8 *Apple Daily* reported that a 52-year-old former singer, M, left his house in Tai Po at seven o'clock on four consecutive days. Each day, he went to a named café in Tai Po Market for breakfast. The customers in the café did not know that he had been a famous pop singer in the seventies. He could therefore enjoy his tea in peace. M returned home at about nine o'clock each day. The paper published five pictures of M's daily activities, including his maid walking his dog, and M leaving the café after paying the bill. (*Apple Daily*, 10.11.00, C 2)
- M9 *Oriental Daily News* disclosed that a former actress, F, was pregnant but the identity of the father was not known to the press. F refused to be interviewed on the ground that she was no longer in show business. Nevertheless, some sections of the press followed her car. F was reported to have jumped red lights on a few occasions to escape from their pursuit. Pictures of F sitting inside her car were published in the paper. (*ODN*, 21.12.00, C 2 and *ODN*, 22.12.00, C 2)
- M10 A former legislator, M, complained that his car had been followed by two cars when he was driving from HK Island to Shatin. He claimed that when he reached Route No 3 Highway at 8 pm, a motorcycle bearing the name of *Apple Daily* overtook him and slowed down in front of his car, forcing him to

stop on the highway while he was sandwiched in by two other cars. Two press photographers then got out of one of the cars that had been following him and took pictures. M had at one moment thought that he was about to be kidnapped. M said it was extremely dangerous to force him to drive slowly and stop suddenly on a four-lane highway. (*iMail*, 16.1.01; *The Sun*, 17.1.01, A 10) In a separate interview, M said his car had been followed and intercepted on a highway by a number of motorcycles belonging to a newspaper. After his car had been forced to stop on the highway, a press photographer climbed on the hood and took pictures against his wishes while someone blocked the doors to stop him and his girlfriend leaving his car. M reported the incident to the police but they refused to take up the matter. (*Sing Tao Daily*, 21.12.01) See also the findings of the HK Press Council on Complaint of 15.1.01.

- M11 *Apple Daily* revealed that a senior government official had paid respects to his parents at a named cemetery on Hong Kong Island. It published a picture of the official and his wife kneeling down and praying in front of a gravestone. (*Apple Daily*, 19.2.01, A 6)
- M12 *Apple Daily* reported that a married woman, F (name and age given), who had completed her legal studies was working as a trainee solicitor in a named solicitors' firm. The journalists noticed that L, a partner of the firm (male, full name disclosed) frequently accompanied her to the office in the morning and then accompanied her back home in the evening. L had also been observed to be having meals with F regularly. The paper published a total of 14 pictures about the daily activities of F and L. One picture showed L outside the main entrance of a building in Sheung Wan in which F owned a flat, while a smiling F held the door for him. The other pictures included ones of F and L at a restaurant, on a street, and at the entrance to the building in Sheung Wan. (*Apple Daily*, 2.8.01, C 2) L later died in tragic circumstances. F claimed that the media had to bear the major responsibility for his death. (*Ming Pao*, 28.5.02, A2)
- M13 Journalists from *Apple Daily* had been following F's parents for two weeks after the L in the preceding case died in an accident. It was reported that F would go to the roof of her mother's flat if she wanted to sunbathe. The paper reported that one day F's mother purchased perfume at a named shop in Cameron Road. F's mother later visited a named shop that sold women's underwear. After looking for half an hour, she purchased two sets of "orthopaedic underwear". One set was F's mother's size. The other set was smaller and was believed to have been purchased for F. The two sets of underwear cost over ten thousand dollars. F's mother then purchased bread and cakes at a named coffee shop in a named street. The paper published two pictures showing a woman shopping inside the perfume shop and the underwear shop at 12:40 pm and 12:50 pm respectively. Also published was a picture of the roof of the building in which F's mother lived. The full name of F's mother and stepfather were disclosed in the report. (*Apple Daily*, 23.11.01, C 2)
- M14 An artiste, F, went to the cinema with her son, brother, nephew and mother. Journalists took pictures of them at the cinema. As they were driving home, journalists from a magazine drove in front of them to block their way. F said the journalists suddenly stopped their car and ran to the front of her car to take pictures. F complained that their conduct had put her family's safety at

risk. F's brother had an argument with the journalists after they had intercepted her car. (*The Sun*, 16.12.01, C 4; *Apple Daily*, 16.12.01, C 12)

- M15 In a radio interview, the wife of a film director said that a media organisation had installed a hidden camera at the main entrance of her house. (*Apple Daily*, 28.12.01, C 6) She had also complained that for the previous seven years the media had been following her two to three times each month. She alleged that a media organisation had sent her a letter threatening that if she did not agree to an interview she would be followed for the rest of her life. (*Ming Pao*, 28.5.02, A2)
- M16 *Oriental Daily News* reported that the mother of an actress had attended a wedding banquet hosted by her younger sister. The paper sent several journalists to cover the event. At least one of them had entered the restaurant. The bridegroom complained that the journalist had taken pictures inside the restaurant. When the journalist refused to hand over the film as requested, the bridegroom and one of his friends tried to remove the film from the camera by force. The journalist was injured as a result. The case was heard in magistracy and the bridegroom and his friend were bound over to keep the peace. The bridegroom told the magistrate that he had hit the journalist because it was his wedding and he did not want the journalist taking pictures without consent. (*ODN*, 29.12.01, A 10)
- M17 A 31-year-old transvestite who was planning to have a sex-change operation was reported as saying that he had lost his job after being stalked and photographed by journalists from *Next Magazine*. He alleged that the journalists pretended to be persons wanting to change sex. One journalist from the magazine pretended to be a customer at the hair salon where he worked and secretly took pictures of him. The journalist then followed him after work. After the magazine published an article containing pictures of the salon and the transvestite dressed as a woman, he was dismissed by his employer who was worried about being hounded by the press. (*SCMP*, 26.5.03, C 3; referring to *Next Magazine*, No 688, Book A, p 70)
- M18 *Eastweek* reported that a singer had been consulting a named doctor who specialised in tumours and treating leukaemia and cancer of the womb. (*Eastweek*, 3.9.03, Book B, p 26) The singer later admitted that she had been suffering from cervical cancer. She had been hiding this from her mother and friends until the media widely reported that she was suffering from "a serious illness". She said she had been "deeply bothered" by speculation. Distressed by the journalists waiting outside her home, the singer had felt unable to leave her home for weeks, making it impossible for her to get treatment. She pleaded with the media to give her privacy while she tried to find a cure. (*SCMP*, 6.9.03, A 1) See also, "Media ignore Anita Mui's plea for privacy", *SCMP*, 9.9.03.
- M19 See also the case at paragraph 5(g) above and the joint statement published by various educational, religious and social welfare organisations in *Ming Pao*, 19.4.02, A28 & A29..

## Cases involving *Ming Pao* and *Sing Pao*

- N1 *Ming Pao* reported that a 44-year-old woman had been rescued from a swimming pool after being found unconscious. The paper published a picture of the bare breasted woman receiving first aid on a stretcher. One of her breasts was exposed to the camera, with the nipple obscured in the picture. Her full name and occupation were disclosed in the article. (*Ming Pao*, 22.7.99, A 11) A similar picture was also published in *Oriental Daily News* on the same day.
- N2 *Ming Pao* reported that a woman had been wounded by her husband who had forced her to work in a nightclub and had suspected that she was unfaithful to him. It revealed the full name and address of the victim. (*Ming Pao*, 5.11.00, also available on the website of the newspaper)
- N3 *Ming Pao* reported that a 16-year-old girl had died of a rare disease. The paper published a picture of the girl lying on a bed with part of her chest and abdomen exposed. Part of the area over her breast was obscured while part of her underwear/pubic hair was exposed. Her full name was given in the report. (*Ming Pao*, 15.3.02, A6)
- N4 A 31-year-old woman was rescued by a fireman hanging from the roof of a burning building. *Ming Pao* published a picture of the woman in a short dress being held in the fireman's arms and lowered to the ground. Part of her underpants was exposed and her private parts had to be obscured in the picture. She was identifiable and her full name was disclosed in the article. (*Ming Pao*, 4.6.02, A 6) Other newspapers used other pictures to illustrate the story.
- N5 *Ming Pao* reported that a man had sought medical assistance from a Chinese herbalist when he contracted venereal disease. As a result of the treatment, his penis became swollen and inflamed. He also experienced pain when having sex. He later sued the doctor for damages in the Small Claims Tribunal. His occupation and the transliteration of his English name were given in the report. The paper published a picture of the man unsuccessfully attempting to use a file to protect his face from the camera. (*Ming Pao*, 27.6.02, A 11)
- N6 *Ming Pao* reported that two men had been killed and another seriously injured when a lorry exploded in Mainland China. It published a picture of a man whose face was seriously burnt, lying in bed with his eyes closed. (*Ming Pao*, 16.7.02, A 6)
- N7 *Sing Pao* reported that a 15-year-old girl, F, had threatened to jump from the balcony of her home at a named estate after her mother had stopped her from meeting a girl whom she met over the Internet. The paper disclosed the first and third Chinese characters of F's name. It further revealed that F was boyish, liked to wear men's clothes, and often used a man's name to make friends with girls on the Internet. It published a picture of F. Only her eyes were obscured in the picture. (*Sing Pao*, 2.9.02, A 6)
- N8 *Sing Pao* reported that a 45-year-old man was tried for murdering the 13-year-old son of his girlfriend, F, after F had rejected his proposal to marry him. The paper revealed that F was then a "dancing hostess" at a named

dance hall. It disclosed the full names of all parties, including those of F and F's son, and the name of the district in which F resided. A picture of F wearing a hat and a pair of sunglasses was also published. (*Sing Pao*, 11.9.02, A 10)

- N9 *Sing Pao* reported that a 43-year-old woman had threatened to set fire to herself by pouring thinner on her body after she had had an argument with her 12-year-old son who had played truant for six days. The paper disclosed the first and third Chinese characters of her name and the names of the building and estate in which she resided. It also revealed that she had been a triad member for over twenty years; had worked in many massage establishments and mahjong schools; had been imprisoned for one year for managing a vice establishment; had been rehabilitated since her release; had received seven operations for intestinal cancer; was concerned that she would not live long; had married three times but all ended in divorce; had four children in total; her 22-year-old daughter was also divorced; her 19-year-old son was imprisoned for selling counterfeited CDs; her 12-year-old son was born to her third husband; her 7-year-old son was born to her boyfriend; had attempted to take her life two months before; and was receiving social security assistance. It further reported that her 12-year-old son had been sentenced to a training centre for handling stolen goods and would have to attend a hearing for breach of a protection order. The paper published a picture of the woman. (*Sing Pao*, 28.9.02, A 6)
- N10 *Sing Pao* reported that a 60-year-old man had threatened to take his life by jumping from the 24<sup>th</sup> floor of a named building. The paper disclosed the first and third Chinese characters of his name and the fact that he had cancer. It also published a picture of the man. (*Sing Pao*, 29.9.02, A 6)
- N11 *Sing Pao* reported that a woman had locked herself up in a flat and threatened to take her own life. The paper disclosed that her name was exactly the same as a named "Miss Asia". It further revealed that she was 26 years old, cohabiting with a 28-year-old man at a named street, and suffering from mental illness. Her full name was included in the headline of the story in quotes. (*Sing Pao*, 5.10.02, A 8)
- N12 *Sing Pao* reported that a "released prisoner", M, had given evidence to a coroner's court during an inquiry into the death of an inmate at a CSD Psychiatric Treatment Centre. The paper disclosed the full name of M and published a picture of him. (*Sing Pao*, 9.10.02, A 16)
- N13 *Ming Pao* reported that a 47-year-old woman had been tried for using a pair of scissors to castrate her 31-year-old boyfriend after the latter had told her that their relationship had come to an end. The paper disclosed the age, full name and occupation of the victim. (*Ming Pao*, 9.10.02, A 10)
- N14 *Sing Pao* also reported the above story. The paper disclosed the age, full name and occupation of the victim. It also published a picture of the victim, unclothed from the waist down, using a cloth to cover his private parts while lying on a hospital bed. A picture of the victim's father was also published. (*Sing Pao*, 9.10.02, A 4)
- N15 *Sing Pao* reported that a 33-year-old man who had been suffering from mental depression had taken his life by jumping from the top floor of a named building. The paper disclosed the first and third Chinese characters of his name, and published a picture of his body hanging on the cover of a pedestrian walkway. (*Sing Pao*, 9.10.02, A 7)



## Jurisprudence on the privacy interests of a deceased person and the surviving relatives

1. **Mainland China** – In the absence of a right of privacy under the General Principles of Civil Law, certain privacy interests are protected within the ambit of the right to reputation, which is a personal right recognised by the civil law. Thus, giving publicity to the private facts of another, and publicly subjecting the personality of another to ridicule by fabricating facts, are actionable as infringements of the right to reputation under Article 101 of the General Principles of Civil Law.<sup>1</sup> It is not explicitly stated that the privacy interests of a deceased person are protected by the civil law, but the Supreme People's Court has held that damages for mental suffering are recoverable if a close relative of a deceased person suffered mental pain as a result of one of the following acts: (a) damage to the name, portrait, honour or reputation of the deceased by insult, libel, denigration, derision or other means that are contrary to public interest or public morals; (b) invasion of the privacy of the deceased by unlawfully disclosing or using the deceased's private facts or by means that are contrary to public interest or public morals; or (c) interference with the body or remains of the deceased by unlawfully using or damaging his body or remains or by means that are contrary to public interest or public morals.<sup>2</sup> The Supreme People's Court recognises that the close relatives of the deceased have a right of action if the personality or body of the deceased has been infringed or damaged "after his death".<sup>3</sup>

2. The Standing Committee of the National People's Congress is now studying the Draft Civil Code of the PRC tabled on 23 December 2002.<sup>4</sup> The right to privacy is expressly recognised in the Draft Code as one of the rights falling within the ambit of the right to personality. The right encompasses personal information, private activities and private space. In particular, the Code protects an individual from invasion of privacy by visual surveillance, aural surveillance, spying, intrusion into a person's home, interception of communications, disclosure, and unauthorised collection, storage and publication of private information. Article 6 of Chapter 1 in Part 4 of the Draft Code expressly provides that where an individual has passed away, his close relatives have the right to protect the name, portrait, honour, reputation and privacy of the deceased.

3. **France** - In France, the general view is that Article 9 of the Civil Code (legal protection of private life) does not apply to deceased persons. The disclosure of facts concerning a deceased person (eg the taking of a photograph of the remains or the report of his burial) does not fall within the scope of privacy. However, Etienne Picard notes that some judgments do not follow this view, at least regarding some criminal prosecutions. He argues that what is at stake in these cases is not really the right to privacy but a general interest, which may additionally protect private

<sup>1</sup> 最高人民法院關於貫徹執行“民法通則”若干問題的意見, 5.12.90, para 160. See also 最高人民法院關於審理名譽權案件若干問題的解答, 7.8.93, para 7.

<sup>2</sup> 最高人民法院關於確定民事侵權精神損害賠償責任若干問題的解釋, 26.2.01, Article 3.

<sup>3</sup> Above, Article 7.

<sup>4</sup> 中華人民共和國民法(草案). The law of the right to personality is stated in Part 4 of the Draft Code at <<http://law-thinker.com/>>.

rights. Nevertheless, it is accepted that a certain degree of respect is owed to the deceased and case-law makes it possible to defend their "memory". The surviving relatives may therefore bring a civil suit before a court on the ground that the "memory" of the deceased has been affected by the report of facts relating to his private life, where these facts were "distorted", or published in bad faith with "blameworthy flimsiness", or "without due thought".<sup>5</sup>

4. In any event, French law prohibits the publication of a photograph of a deceased person under the Criminal Code. In the *Jean Gabin* case, an appeal court upheld an order to seize the magazine that had published the photograph of the actor on his deathbed, ruling that the magazine had acted in excess of its duty of information and that the breach of private life could not be justified by the necessity of journalism.<sup>6</sup> The same arguments were also used in the *Mitterrand* case and confirmed by the appeal court, which held that taking a photograph of a person's mortal remains was a breach of the "right to private life of others" as well as a breach of the respect due to a human person, dead or alive.<sup>7</sup>

5. **British Columbia, Canada** - The Government of British Columbia recognises that there may be circumstances where personal information pertaining to an individual who has been dead for more than 20 years should still be withheld from disclosure under the Freedom of Information and Protection of Privacy Act.<sup>8</sup> Archival institutions will balance the protection of the privacy of these individuals against the public interest in disclosure.

6. It is interesting to note that the Information and Privacy Commissioner of British Columbia, David Flaherty, has consistently held that deceased persons have privacy rights.<sup>9</sup> He does not accept that a person loses all rights to privacy immediately upon death, or even very quickly thereafter, though he accepts that the privacy rights of the deceased may diminish over time. The Commissioner points out that the definition of "personal information" in the Freedom of Information and Protection of Privacy Act does not exclude deceased persons. Noting that since the provisions limit the circumstances in which a deceased person's personal information can be disclosed by the archives of a public body, he considers that there is no merit in the argument that deceased persons are not entitled to privacy protection. The Act therefore preserves respect for the dead just as it does for living individuals.

7. In Order No 27-1994 issued by the Commissioner, a reporter requested certain records about the investigation into the suicide of a patient at a treatment centre, including the diary which the deceased had written at the centre. Holding that the deceased patient retained a core of privacy interests that survived her death, the Commissioner confirmed the decision of the Ministry of Health not to allow the applicant access to the diary. However, he agreed that the fact of death might still be a relevant factor for a public body to consider when determining whether a potential disclosure of personal information about a deceased person was an unreasonable invasion of privacy.

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<sup>5</sup> E Picard, "The Right to Privacy in French Law", in B S Markesinis (ed), *Protecting Privacy* (Oxford University Press, 1999), pp 80 - 81.

<sup>6</sup> C Dupré, "The Protection of Private Life versus Freedom of Expression in French Law" in M Colvin (ed), *Developing Key Privacy Rights* (Hart Publishing, 2002), at 63-65 and 72-74.

<sup>7</sup> Above.

<sup>8</sup> RSBC 1996, Chapter 165, section 36. See "Policy and Procedures Manual: Section 36" at <[www.mser.gov.bc.ca/foi\\_pop/manual/sections/sec30\\_39/sec36.htm](http://www.mser.gov.bc.ca/foi_pop/manual/sections/sec30_39/sec36.htm)> (19.9.02).

<sup>9</sup> Eg Order Nos 27-1994, 53-1995, 96-1996, 200-1997 and 305-1999. The Commissioner in the last order upheld a decision of the police not to release the name of a deceased car accident victim to a newspaper.

8. **Manitoba, Canada** - Section 44(1)(z) of the Freedom of Information and Protection of Privacy Act provides that “A public body may disclose personal information only ... to a relative of a deceased individual if the head of the public body reasonably believes that disclosure is not an unreasonable invasion of the deceased’s privacy.” Section 22(2)(d) of the Personal Health Information Act also provides that a trustee (including a public body) may disclose personal health information to a relative of a deceased individual “if the trustee reasonably believes that disclosure is not an unreasonable invasion of the deceased’s privacy.”

9. **Nova Scotia, Canada** - Section 30(c) of the Freedom of Information and Protection of Privacy Act allows the public archives to disclose personal information about “someone who has been dead for 20 or more years” for archival or historical purposes. This provision has been interpreted to mean that deceased persons enjoy all of the privacy rights found in section 20 and personal information cannot be disclosed without meeting the criteria spelt out in that section.<sup>10</sup>

10. **Ontario, Canada** - The Municipal Freedom of Information and Protection of Privacy Act recognises that a deceased person has a right to privacy.<sup>11</sup>

11. **New Zealand** - In New Zealand, information about deceased persons is not generally covered by the information privacy principles in the Privacy Act.<sup>12</sup> However, section 46(6) provides that principle 11, which relates to disclosure of personal information, applies to deceased persons for the purpose of Privacy Act codes of practice relating to health information.

12. **Calcutt Report** - The Calcutt Committee in the UK proposed that newspapers should apply the same principles of accuracy and respect for privacy to stories about the recently dead as to stories about the living.<sup>13</sup>

13. **Privacy interests protected by American common law or the US Constitution** - In *Schuyler v Curtis*,<sup>14</sup> the defendants sought to have a statue made in memory of the plaintiff’s deceased aunt. The plaintiff claimed that his right of privacy would be violated. The New York Court of Appeals held:

*“Whatever right of privacy Mrs Schuyler had died with her. Death deprives us all of rights in the legal sense of that term, and, when Mrs Schuyler died, her own individual right of privacy, whatever it may have been, expired at the same time. The right which survived (however extensive or limited) was a right pertaining to the living only. It is the right of privacy of the living which it is sought to enforce here. That right may, in some cases, be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living and not that of the dead which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings and to prevent a violation of their own rights in the character and memory of the deceased.”*

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<sup>10</sup> Report FI-01-59 (12.7.01).

<sup>11</sup> RSO 1990, Chapter M 56. Section 2(2) provides that “personal information” does not include information about an individual who has been dead for more than thirty years. See Order M-304 (15.4.94) issued by the Information and Privacy Commissioner of Ontario.

<sup>12</sup> See definition of “individual” in section 2.

<sup>13</sup> Calcutt Committee’s proposed Code of Practice, para 16.

<sup>14</sup> 42 NE 22, 26 (1895).

14. In *McCambridge v City of Little Rock*,<sup>15</sup> the plaintiff sought to restrain the defendant from releasing certain records about her deceased son under the Arkansas Freedom of Information Act by relying on her constitutional right to privacy. The records concerned were: two letters from the deceased to his attorney; the deceased's diary; a letter from the deceased to his mother; and crime scene and pathologist photographs. The Supreme Court of Arkansas held that the mother had a privacy interest in non-disclosure of those items. It noted that the photographs were horrible and sickening. The diary also reflected the deceased's financial troubles, possible criminal charges against him, and his thoughts of suicide. As regards the letter to his mother, it dealt with their lives and relationship. The court was satisfied that the mother was sensitive to these items. Nonetheless, a highly valued governmental interest was at stake, and the public interest in disclosure outweighed her privacy interest.

15. In *Sheets v Salt Lake County*,<sup>16</sup> the plaintiff gave the police his murdered wife's diary on the understanding that it would be kept confidential. A police officer subsequently allowed an author to obtain copies of the diary. The court held that the plaintiff's constitutional right of privacy was invaded because the diary contained entries about the plaintiff and his marriage that only a spouse would know and that information was both intimate and personal to the plaintiff.

16. In *JB Pictures v Department of Defense*,<sup>17</sup> the US Department of Defence changed its policy regarding ceremonies to honour the dead for soldiers killed abroad. The new policy allowed public and press access to interment ceremonies if the relevant family members consented, and also to arrival ceremonies held at soldiers' home bases, again with the family's consent. One of the interests asserted by the Government was the protection of the privacy of families and friends of the deceased, who might not want media coverage of the unloading of caskets. The court did not think the Government hypersensitive in thinking that the bereaved might be upset at public display of the caskets of their loved ones.<sup>18</sup> It held that, on balance, the policy did not violate the First Amendment's guarantees of freedom of speech and of the press.

17. In *Reid v Pierce County*,<sup>19</sup> the plaintiffs claimed that for a period of at least ten years, employees of the Pierce County Medical Examiner's Office had appropriated autopsy photographs of corpses, showing them at cocktail parties and using them to create personal scrapbooks. The Washington Supreme Court held that the immediate relatives of a deceased person have a protectable privacy interest in the autopsy records of the deceased and that the protectable privacy interest is grounded in maintaining the dignity of the deceased. It held that by displaying the autopsy photographs, a matter private to the lives of the plaintiffs had been given publicity by the County. The County's actions were sufficiently egregious to enable the families of the deceased to bring a common law invasion of privacy action, even though they were not directly involved in the publicity.<sup>20</sup>

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<sup>15</sup> 766 SW 2d 909 (1989).

<sup>16</sup> 45 F 3d 1383 (10<sup>th</sup> Cir 1995).

<sup>17</sup> 86 F 3d 236 (DC Cir 1996).

<sup>18</sup> Above, at 241.

<sup>19</sup> 136 Wn 2d 195 (1998).

<sup>20</sup> Above, at 211-213. Cf. *Gadbury v Bleitz*, 133 Wash 134, 44 ALR 425 (1925). In that case, the Washington Supreme Court held that "There is neither solecism nor unreason in the view that the right of custody of the corpse of a near relative for the purpose of paying the last rites of respect and regard is one of those relative rights recognized by the law as springing from the domestic relation, and that a willful or wrongful invasion of that right is one of the torts for which damages for injury to feelings are recoverable as an independent element."

18. **Privacy interests recognised by the Freedom of Information Act (FOIA)** - The federal courts in the US had rejected granting a privacy interest in a deceased person under the FOIA. For example, in *Providence Journal Co v FBI*,<sup>21</sup> the plaintiff requested the release of information regarding informants and agents of the FBI. A Rhode Island federal district court held that “as to persons now deceased, there is no protectable privacy interest.” Again in *US v Schlette*,<sup>22</sup> the court held that “*when the defendant is dead, ... [the privacy] ground for nondisclosure is foreclosed. Privacy interests are personal to the defendant and do not survive his death.*”

19. Likewise, in *Swickard v Wayne County Medical Examiner*,<sup>23</sup> a judge was found shot to death and the post-mortem examination found that the gun-shot was self-inflicted. A reporter sought disclosure of the coroner's report under the FOIA. The Michigan Supreme Court held that the privacy rights are personal and can only be maintained by a deceased's family members if the information reveals private facts about the family:

*“the general rule [is] that the right of privacy is personal, and the relatives of deceased persons who are objects of publicity may not maintain actions for invasion of privacy unless their own privacy is violated. There is no relational right to privacy in Michigan. ... We agree that ... for an invasion to occur, the relative must be brought into ‘unjustifiable publicity’.”*<sup>24</sup>

20. However, some American courts did not rule that privacy interests expire upon a person's death under the FOIA. They instead held that death substantially diminishes the privacy interests when conducting the balancing test. In *Diamond v FBI*,<sup>25</sup> the plaintiff requested the names of individuals connected with an FBI investigation. The court stated that “*since the material that plaintiff seeks is thirty or more years old, ... some of the individuals connected with the investigations are now dead, in which case their privacy interests are diminished ... and the balance tips towards disclosure.*” Similarly, in *Ferguson v FBI*,<sup>26</sup> the court held that “*A dead person's privacy interest may survive his or her death, but it is necessarily greatly diminished by death and must be balanced against the plaintiff's interest and the public interest in disclosure.*”

21. In any event, US federal courts have generally permitted the surviving relatives of a deceased person to claim a privacy interest in records regarding the deceased under the freedom of information legislation. In *Marzen v Department of Health and Human Services*,<sup>27</sup> a baby with a blocked esophagus and Down's syndrome died after the parents had refused to consent to surgery to remedy the blocked esophagus. The plaintiff filed suit to compel the release of medical and other reports concerning the baby. In conducting the balancing test, the court held that “*whatever public interest can be gained from disclosure of the intimate details contained in the medical records cannot justify the invasion of the parents' right to*

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<sup>21</sup> 460 F Supp 778 (1<sup>st</sup> Cir 1978).

<sup>22</sup> 842 F 2d 1574 (9<sup>th</sup> Cir 1988).

<sup>23</sup> 475 NW 2d 2d 304 (Mich 1991).

<sup>24</sup> Above, at 310-312.

<sup>25</sup> 532 F Supp 216, 226 (SDNY 1981).

<sup>26</sup> 774 F Supp 815, 825 (SDNY 1991).

<sup>27</sup> 825 F 2d 1148 (7<sup>th</sup> Cir 1987).

privacy.”<sup>28</sup> Most of the facts about the case were already in the public domain and disclosure “almost certainly would cause [the baby’s] parents more anguish.”<sup>29</sup>

22. In *Badhwar v US Department of Air Force*,<sup>30</sup> the court held that the families of deceased aircraft pilots have privacy interests in autopsy reports which would be “of a kind that would shock the sensibilities of surviving kin”.

23. In *New York Times Co v National Aeronautics and Space Administration*,<sup>31</sup> the newspaper sought a tape of voice communications recorded aboard the Challenger space shuttle immediately prior to its explosion. Under Exemption 6 of the FOIA,<sup>32</sup> NASA need not disclose “information which applies to a particular individual” if its disclosure “would constitute a clearly unwarranted invasion of personal privacy”. After ruling that the voices of the astronauts, and whatever those voices might reveal of their thoughts and feelings at the very moment of their deaths, constituted information which applied to particular individuals, the US Court of Appeals held that “NASA is entitled to an opportunity to prove its claim that release of the tape would invade the privacy of the deceased astronauts, or of their families.”<sup>33</sup>

24. On remand, NASA contended that the privacy issue was one enjoyed by the families of the astronauts. On the other hand, the newspaper argued that, because the tape pertained solely to official Government business and related entirely to a public event, no privacy interest was implicated by its release. It also contended that, because NASA had already published a transcript, no privacy interest could remain in the tape itself. The court found that the privacy interest of the families was a valid and substantial one.<sup>34</sup>

*“According to plaintiff, the tape contains no such ‘intimate details,’ as it records only technical observations during the shuttle’s launch period. However, plaintiff is misconstruing the nature of the privacy interest implicated by disclosure of the tape. NASA does not dispute that the substantive information contained in the tape is technical and non-personal. Rather, the ‘intimate detail’ that underlies the privacy interest in this tape is the sound of the astronauts’ voices. Exposure to the voice of a beloved family member immediately prior to that family member’s death is what would cause the Challenger families pain. What the astronauts said may not implicate privacy interests; ... But how the astronauts said what they did, the very sound of the astronauts’ words, does constitute a privacy interest. This is the ‘intimate detail’ that the Challenger families seek to protect from disclosure. Moreover, this privacy interest is substantial. This Circuit has held that the privacy interest under Exemption 6 includes ‘reasonable expectations of undisturbed enjoyment in the solitude and seclusion of [one’s] own home.’ ... [The Challenger families] may be subjected not just to a barrage of mailings and personal solicitations, but also to a panoply of telephone calls from media groups as well as a disruption of their peace of mind every time a portion of the tape is*

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<sup>28</sup> Above, at 1152.

<sup>29</sup> Above, at 1154.

<sup>30</sup> 829 F 2d 182, 185-186 (DC Cir 1987).

<sup>31</sup> 920 F 2d 1002 (DC Cir 1990) (en blanc).

<sup>32</sup> 5 USC §552(b)(6).

<sup>33</sup> Above, at 1004 and 1010.

<sup>34</sup> 782 F Supp 628, 631-632 (DDC 1991).

*played within their hearing. Thus, the Court finds that their privacy interest is substantial.”*

25. In *Hale v US Department of Justice*,<sup>35</sup> the court held that Exemption 7(C) of the FOIA exempts photographs of a deceased murder victim from disclosure because no discernible public interest outweighed “the personal privacy interests of the victim’s family”.

26. In *State v Rolling*,<sup>36</sup> members of a murder victim’s family requested non-disclosure of photographs and video of a murder scene and autopsies after the media had demanded to copy the photographs and video. The court held that the deceased’s relatives might acquire a privacy interest that was “either derivative from the victims themselves or in their own right”. It found that substantial injury would occur to the deceased’s relatives if “confronted in the media with images of their slain and mutilated loved ones”. It therefore declared that the photographs and video could not be copied, but the media might view them in the presence of the records’ custodian.

27. In *Katz v National Archives and Records Administration*,<sup>37</sup> the plaintiff brought an action under the FOIA, by which the plaintiff challenged a decision of the defendant to withhold certain autopsy records of President John F Kennedy, which included optical photographs and x-rays taken during the autopsy. After hearing that many full-colour photographs of the President’s body and exploded head were “shocking and lurid” as well as “graphic and explicit”, the court held that the Kennedy family had a clear privacy interest in preventing the disclosure of both the x-rays and photographs. In relation to the contention that the family’s privacy interests in the photographs had been diminished by prior publication and dissemination and that denying access would not serve to prevent anguish from disclosure because they were already in the public domain, the court held that *“there can be no mistaking that the Kennedy family has been traumatized by the prior publication of the unauthorized records and that further release of the autopsy materials will cause additional anguish.”*<sup>38</sup> In balancing the family’s privacy interests and the public interest in disclosure, the court found that allowing access would constitute a clearly unwarranted invasion of the family’s privacy, which justified the defendant withholding the records under the Act.

28. In *Accuracy in Media Inc v National Park Service*,<sup>39</sup> AIM applied under the FOIA for photographs of the body of the Deputy White House counsel taken at the scene of his death and at the autopsy. The court held:

*“obviously AIM cannot deny the powerful sense of invasion bound to be aroused in close survivors by wanton publication of gruesome details of death by violence. One has only to think of Lindbergh’s rage at the photographer who pried open the coffin of his kidnapped son to photograph the remains and peddle the resulting photos. While law enforcement sometimes necessitates the display of such ghoulish materials, there seems nothing unnatural in saying that the interest asserted against it by spouse, parents and children of the deceased is one of privacy - even though the holders of the interest*

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<sup>35</sup> 973 F 2d 894, 902 (10<sup>th</sup> Cir 1992).

<sup>36</sup> 1994 WL 722891 (Fla Cir Ct, 1994), cited in P N Bailey, above, at 317.

<sup>37</sup> 862 F Supp 476 (DDC 1994).

<sup>38</sup> Above, at 485.

<sup>39</sup> 194 F 3d 120 (DC Cir 1999); 529 U.S. 1111 (2000).

*are distinct from the individual portrayed. We need not here explore whether the interest belongs to living close survivors (in which case it might end at their deaths), or alternatively may inhere posthumously in the subject himself (in which case it would seem to be of indefinite duration), or both.*

*AIM quite rightly notes that exemption 7(C) protects against unwarranted 'invasions' of privacy, not against grief per se. There is no grief exemption. It is the 'invasion' that triggers a weighing of the public interest against the private harm inflicted, not the grief or any feeding frenzy of media coverage, even though the latter constitute the private harm. But the release of photos of the decedent at the scene of his death and autopsy qualifies as such an invasion."<sup>40</sup>*

29. In *Favish v Office of Independent Counsel*,<sup>41</sup> the plaintiff sought from OIC ten post-mortem photographs relating to the death of the Deputy Counsel to the President caused by a self-inflicted gunshot wound. The photographs were taken at the scene of his death and the bulk of the photographs had already been in the public domain. The exemption invoked by the OIC under the FOIA was the privacy of the deceased's family members. The deceased's sister alleged that release of the photographs would set off another round of intense scrutiny by the media, leading to the family becoming "the focus of conceivably unsavoury and distasteful media coverage." After referring to *Katz* and *New York Times Co* above, the court stated:

*"It could, no doubt, be suggested that the president or the astronauts so tragically destroyed were special cases, leading to special solicitude for the feelings of their families. That would be a constricted reading of the precedents. What the cases point to is a zone of privacy in which a spouse, a parent, a child, a brother or a sister preserves the memory of the deceased loved one. To violate that memory is to invade the personality of the survivor. The intrusion of the media would constitute invasion of an aspect of human personality essential to being human, the survivor's memory of the beloved dead. We hold as a matter of law that the personal privacy in [Exemption 7(C) of the FOIA] extends to the memory of the deceased held by those tied closely to the deceased by blood or love and therefore that the expectable invasion of their privacy caused by the release of records made for law enforcement must be balanced against the public purpose to be served by disclosure."<sup>42</sup>*

30. The court also rejected the argument that "family grief" or "emotional grief" is not a legally cognisable privacy interest under the FOIA.<sup>43</sup> In relation to the argument that the survivors' privacy interests in avoiding disclosure of personal matters or controlling the dissemination of such information had been diminished because the circumstances of the deceased's death were publicly known, the court held that it was "mistaken", pointing out that the US Supreme Court in *US Department of Justice v Reporters Committee for Freedom of the Press*<sup>44</sup> had stated

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<sup>40</sup> Above, at 123. FOIA Exemption 7(C) protects records compiled for law enforcement purposes if their production would "constitute an unwarranted invasion of personal privacy."

<sup>41</sup> 217 F 3d 1168 (9<sup>th</sup> Cir, 2000).

<sup>42</sup> Above, at 1173.

<sup>43</sup> Above, at 1183.

<sup>44</sup> 489 US 749, 762-764.



-that the fact that “an event is not wholly ‘private’ does not mean that an individual has no interest in limiting disclosure or dissemination of the information.”<sup>45</sup>

31. **Florida, US** - In Florida, the privacy of a deceased’s family in autopsy records was protected by the Earnhardt Family Protection Act.<sup>46</sup> The Act was passed in the wake of a tragedy involving Earnhardt, a famous stock car driver who died in a car race. The speculation over his exact cause of death had led several news organisations to request his autopsy photographs for an independent medical evaluation. Florida’s legislature came to the rescue of his family by passing the Act, which exempts a photograph or video or audio recording of an autopsy from Florida’s public records law.<sup>47</sup> The Earnhardt family was therefore allowed to mourn in private without the autopsy photographs on the cover of every newspaper. Section 2 of the Act states:<sup>48</sup>

*“The Legislature finds that photographs or video or audio recordings of an autopsy depict or describe the deceased in graphic and often disturbing fashion. Such photographs or video or audio recordings may depict or describe the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings of an autopsy are highly sensitive depictions or descriptions of the deceased which, if heard, viewed, copied or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased. The Legislature notes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury. ...”*

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<sup>45</sup> 217 F 3d 1168 at 1184 (9<sup>th</sup> Cir, 2000). See also *US Department of Defense v Federal Labor Relations Authority* 50 US 487 at 499 (1994) (“An individual’s interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.”)

<sup>46</sup> Codified in Fla Stat §406.135 (2001).

<sup>47</sup> Nonetheless, the court may, upon a showing of good cause, issue an order authorising disclosure of autopsy material. In determining good cause, the court would consider “*whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family’s right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form.*” Fla Stat § 406.135(2)(a).

<sup>48</sup> Quoted in P N Bailey, “In the Wake of a Tragedy: The Earnhardt Family Protection Act Brings Florida’s Public Records Law under the Hot Lights”, 26 Nova L Rev 305 (2001), fn 47.

**Press Councils and similar bodies in other jurisdictions (Table 1)**

**Annex 4**

Jurisdiction	Name	Founder	Coverage (Press / All media)	Composition					Chairman	Code
				Publishers/ Editors	Journalists	Public Members	Legis- lature	Others		
Australia	Press Council	Publishers Journalists	Press (incl Internet)	10	3	7 + 1 Chairman	0	0	Public member	Own code
Austria	Press Council	Publishers Journalists	Press	12	12	0	0	0		Own code
Bangladesh	Press Council	State	Press	3 publishers + 3 editors	3	3	2	1 Judge	Judge	Own code
Belgium	Council of the Flemish Media	State	All media	1 Chairman + 30 members elected by associations representing proprietors, editors and journalists						No code
Canada	Alberta Press Council	Publishers	Press	8	0	8 + 1 Chairman	0	0	Public member	Own code
	Atlantic Press Council	Publishers	Press	8	0	8	0	0		No code
	British Columbia Press Council	Publishers	Press	3 publishers + 2 editors	0	5 + 1 Chairman	0	0	Public member	Own code
	Manitoba Press Council	Publishers	Press	4	0	4 + 1 Chairman	0	0	Public member	
	Ontario Press Council	Publishers	Press	6 + 1 (rep. advertising)	3	10 + 1 Chairman	0	0	Public member	Policy statement
	Quebec Press Council	Publishers Journalists	All media	7	7	7 + 1 Chairman	0	0	Public member	Statement of principles
Cyprus	Press Council	State	Press	3	3	0	4	1 lawyer	Lawyer	No code
	Code of Conduct for Journalists Committee	Journalists Publishers Broadcasters	All media / Journalists	12 + 1 Chairman					Judge	Journalists' code
Denmark	Press Council	State	All media	2	2	2	0	2 Judges	Judge	Journalists' code
Egypt	Supreme Council of the Press	State	All media	Yes	Yes	Yes	2 + 1	Yes	President of consultative Assembly	Own code

Jurisdiction	Name	Founder	Coverage (Press / All media)	Composition					Chairman	Code
				Publishers/ Editors	Journalists	Public Members	Legis- lature	Others		
Estonia	Press Council	Publishers Journalists Educators Consumers	All media	9		7	0	0		Industry code
Finland	Council for the Mass Media	Publishers Journalists	All media (incl Internet)	3	3	3	0	1 Chairman		Journalists' code
Fiji	Media Council (with Complaints Committee)	Media Organisations	All media	7	0	7	0	0	Lay member	Own code
				Complaints Committee has 3 lay members (incl Chairman)					Lay member	
Germany	Press Council	Publishers Journalists	Press (incl Internet)	10	10	0	0	0	Publisher / Journalist	Own code
Ghana	National Media Commission	State	All media	1	2	7	3	2 (by President)		National Media Policy
India	Press Council	State	Press	6 publishers + 6 editors	7	3	5	1 (news agency)	Usually a retired judge	No code
Indonesia	Press Council	State	All media	4	3	2	0	0	Elected by members	Own code
Israel	Press Council (with Ethics Tribunal)	Publishers Editors Journalists	Press	30%	30%	40%	0	0	Chairman of Tribunal is a public member	Own code
				60 members in total (Ethics Tribunal has 3 members: 1 rep. public, 1 rep. publishers, and 1 rep. journalists)						
Italy	National Committee for Accuracy & Reliability of Information	Journalists	All journalists	0	2	2	0	1 Judge	Judge	Industry code
Japan	Editorial Affairs Committee and Newspaper Ethical Standards Monitoring Chamber of NSK	Publishers Editors	Press	100% (Monitoring Chamber has 7 members)	0	0	0	0		Own code
Kenya	Media Council	Publishers Editors Journalists	Press	Yes	Yes	Yes		Ambassa- dor & Dir of Information		

Jurisdiction	Name	Founder	Coverage (Press / All media)	Composition					Chairman	Code
				Publishers/ Editors	Journalists	Public Members	Legis- lature	Others		
Lithuania	Ethics Commission of Journalists & Editors / Inspector of Journalistic Ethics	State	All media	10		0	0	0		Journalists' code
Luxembourg	Press Council (with Complaints Committee)	State	All journalists	20	20	0	0	0	Journalist or editor	Own code
				Complaints Committee has 2 journalist members and 2 editor members						
Macao	Press Council (not yet appointed)	Government	Press	Not yet appointed						Statutory code
Nepal	Press Council	State	Press	10			2	1 Chairman		Own code
The Netherlands	Press Council	Publishers Publishers Broadcasters	Journalists in all media	10		10	0	4 Judges	Judge	No code
New Zealand	Press Council	Publishers Journalists	Press (incl Internet)	3	2	5 + 1 Chairman	0	0	Public Member	Statement of principles
Nigeria	Press Council	State	Press			Yes				Industry code
Norway	Press Council	Publishers Editors Journalists	Press	2	2	3	0	0		Industry code
Peru	Press Council's Ethics Tribunal	Publishers	Press	0	0	5	0	0	Lawyer	
The Philippines	Press Council	Publishers	Press	10 + 1 Chairman	0	0	0	0	Editor	No code
Portugal	High Authority for the Mass Media	State	All media	1	1	1	5	1 Judge + 1 by Gov't + 1 co-opt member	Judge	Own code
Russia	Grand Jury for the Media	Journalists	All media							Journalists' code
South Africa	Press Ombudsman / Appeal Panel	Publishers Journalists	Press	6		6 + 1 Chairman	0	0	Judge	Industry code

Jurisdiction	Name	Founder	Coverage (Press / All media)	Composition					Chairman	Code
				Publishers/ Editors	Journalists	Public Members	Legis- lature	Others		
South Korea	Press Arbitration Commission	State	All media	40 to 80 members (at least two-fifths recommended by Judiciary / more than one-fifth from the press)					Elected by members	
	Press Arbitration Committee	State	All media	0	1	3	0	1 Judge	Judge	
	Newspaper Ethics Committee	Publishers	Press	100%	0	0	0	0		
Sri Lanka	Press Council	State	Press	1	1	4	0	Director of Information		Own code
	Press Complaints Commission	Publishers Editors	Press	5	0	5 + 1 Chairman	0	0	Public member	Editors' code
Sweden	Press Council (with Press Ombudsman & 2 Opinion Boards)	Publishers Journalists	Press	Each Opinion Board has 6 members					Usually a judge	No code
				3		2 + 1 Chairman	0	0		
Switzerland	Press Council	Journalists	All media	0	15	6	0	0	Journalist	Own code
Taiwan	Press Council	Media associations	All media	11					Elected by members	Own code
Tanzania	Media Council (with Ethics Committee)	Media	All media	7		4	0	3		Own code
				Ethics Committee has at least 6 members: 2 press members, 2 public members & 2 jurists						
Turkey	Press Council's Supreme Board	Publishers Journalists	All media (incl Internet)	Supreme Board has 34 members						Own code
				18	8	8	0	0		
United Kingdom	Press Complaints Commission	Publishers	Press (incl Internet)	7	0	9	0	0	Public Member	Own code
United States	Minnesota News Council		All media	12		12 + 1 Chairman	0	0	Usually a judge	No code
	Washington News Council	Citizens	All media	50%		50%	0	0	Former judge	No code

**Press Councils and similar bodies in other jurisdictions (Table 2)**

<b>Jurisdiction</b>	<b>Name</b>	<b>Third party complaint</b>	<b>Own investigation</b>	<b>Complaint against non-member</b>	<b>Whether legal waiver required</b>	<b>Finance</b>	<b>Duty to publish decision / correction</b>	<b>Remarks</b>
Australia	Press Council	Yes	No	Yes	Yes	Private	Yes	Moral sanctions / Some small newspapers are not members and do not co-operate
Austria	Press Council	Yes	Yes			Private	Yes	Moral sanctions / At least one or two major newspapers are not members / Vast majority of newspapers complied
Bangladesh	Press Council		Yes	Statutory	Not consider if legal action pending	State	Yes	Moral sanctions / Orders not enforceable / Council immune from legal actions / Newspaper reports privileged
Belgium	Council of the Flemish Media			Statutory		State	No	No sanctions apart from publication of opinion
Canada	Alberta Press Council	No			Not consider if legal action pending	Private	Yes	Moral sanctions
	Atlantic Press Council			No	Not consider if legal action pending	Private	Yes	Moral sanctions
	British Columbia Press Council			Yes if consent		Private	Yes	Moral sanctions / Covers all British Columbia dailies
	Manitoba Press Council			No	Discretion	Private	Yes	Moral sanctions
	Ontario Press Council			Yes if consent	Discretion	Private	Yes	Moral sanctions
	Quebec Press Council	Yes		Yes		Private & State	Yes	Moral sanctions
Cyprus	Press Council			Statutory				No sanctions Not functioning at the moment
	Code of Conduct for Journalists Committee	Yes	Yes			Private	Yes	A.k.a. Media Complaints Commission / No sanctions / Accept complaints from interested persons

<b>Jurisdiction</b>	<b>Name</b>	<b>Third party complaint</b>	<b>Own investigation</b>	<b>Complaint against non-member</b>	<b>Whether legal waiver required</b>	<b>Finance</b>	<b>Duty to publish decision / correction</b>	<b>Remarks</b>
Denmark	Press Council	Discretion	Yes	Statutory		Private & State	Yes	Failure to comply with order to publish is punishable by fine or simple detention
Egypt	Supreme Council of the Press			Statutory		State		Disciplinary action against journalists
Estonia	Press Council		Yes		Not consider if legal action pending	Private	Yes	Moral sanctions
Finland	Council for Mass Media	Discretion	Yes		Not consider if legal action pending	Private & State	Yes	Moral sanctions only but full compliance so far
Fiji	Media Council (with Complaints Committee)			Yes	Yes	Private	Yes	Moral sanctions
Germany	Press Council	Yes	Yes	Yes	Not consider if legal action pending	Private & State	Yes	Moral sanctions / Over 90% coverage / Some poor quality newspapers refused to publish
Ghana	National Media Commission		Yes	Statutory		State	Yes	May enforce order to publish a reply by court action
India	Press Council	Yes	Yes	Statutory	Yes	Private & State	Yes	Moral sanctions / Orders not enforceable / Council immune from legal actions / Newspaper reports privileged
Indonesia	Press Council		Yes	Statutory	Not consider unless agreed not to use recommendations in court	Private & State	No	Moral sanctions
Israel	Press Council (with Ethics Tribunal)				Not consider if legal action pending	Private	Yes	Moral sanctions / May issue warning or reprimand
Italy	National Committee for Accuracy & Reliability of Information	Yes		Any journalist		Private	Yes	Regional Order of Journalists may take disciplinary action
Japan	Editorial Affairs Committee and Newspaper Ethical Standards Monitoring Chamber of NSK		Yes			Private		May suspend or expel member from NSK if does not heed warning / A few newspapers were expelled in the past
Kenya	Media Council					Private		Established in 2002

<b>Jurisdiction</b>	<b>Name</b>	<b>Third party complaint</b>	<b>Own investigation</b>	<b>Complaint against non-member</b>	<b>Whether legal waiver required</b>	<b>Finance</b>	<b>Duty to publish decision / correction</b>	<b>Remarks</b>
Lithuania	Ethics Commission of Journalists & Editors / Inspector of Journalistic Ethics		No	Statutory	No	Private	Yes	Orders not enforceable
Luxembourg	Press Council (with Complaints Committee)			Statutory				May make recommendations, issue directives and express an opinion
Macao	Press Council (not yet appointed)	No		Statutory	No	Government		Council has power to consider complaints about violation of Press Law / Members immune from legal actions
Nepal	Press Council			Statutory	Yes	State	Yes	Secretariat served by Department of Information / May recommend withdrawal of concessions
The Netherlands	Press Council	No	No	Any journalist		NPC Foundation	Yes	Moral sanctions / May speak or comment on issues without complaint / About 70% of the media concerned complied
New Zealand	Press Council	Yes			Yes	Private	Yes	Moral sanctions
Nigeria	Press Council			Statutory		State		May suspend or expel journalist
Norway	Press Council		Yes		Not consider if legal action is pending but no waiver required	Private	Yes	Moral sanctions
Peru	Press Council's Ethics Tribunal			Yes		Private	Yes	Moral sanctions
The Philippines	Press Council					Private	Yes	Only guarantees right of reply / Moral sanctions
Portugal	High Authority for the Mass Media		Yes	Statutory		State		May issue directives and impose fine for breach of regulations
Russia	Grand Jury for the Media			Any journalist		Private	No	May suspend or expel journalist
South Africa	Press Ombudsman / Appeal Panel				Yes	Private	Yes	Moral sanctions but newspapers invariably published critical adjudications
South Korea	Press Arbitration Commission and its Committees		Yes	Statutory		Public Interest Fund	Yes	Arbitration award enforceable by court action / The PAC is funded by fees levied on broadcast advertisers



Jurisdiction	Name	Third party complaint	Own investigation	Complaint against non-member	Whether legal waiver required	Finance	Duty to publish decision / correction	Remarks
	Newspaper Ethics Committee					Private	Yes	May require newspaper to correct or make apology, or suspend or expel journalists
Sri Lanka	Press Council		Yes	Statutory		State	Yes	May enforce orders by court action
	Press Complaints Commission					Private & State	Yes	Decisions enforceable through the courts under the Arbitration Act; will replace the statutory Press Council
Sweden	Press Council (with Press Ombudsman & 2 Opinion Boards)	Yes (with consent)	Yes	Yes	No	Private & admin. fee	Yes	May ask offending newspaper pay an administrative fee / Covers almost all the press in Sweden / Full compliance so far
Switzerland	Press Council		Yes		Discretion	Private	No	No sanctions other than make observations and recommendations
Taiwan	Press Council	Yes	Yes	Yes		Foundation	Yes	Moral sanctions / Some newspapers ignored rulings
Tanzania	Media Council (with Ethics Committee)				No	Foundation + fees	Yes	May order "token payment of damages and costs" / 98% rulings complied with
Turkey	Press Council's Supreme Board				No	Private		May reprimand or censure
United Kingdom	Press Complaints Commission	Discretion		NA	No	Private	Yes	Moral sanctions / 100% coverage / Chairman of Code Committee is an <i>ex-officio</i> member of the PCC
United States	Minnesota News Council			--	Yes	Private	No	No sanctions
	Washington News Council			--	Yes	Private	No	No sanctions