

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

CIVIL LIABILITY FOR INVASION OF PRIVACY

Executive Summary

Chapter 1 - The right of privacy

1. Privacy has been defined as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.” It has been suggested that the concept of privacy is a complex of three elements which are independent of but related to each other: (a) secrecy (the extent to which an individual is known); (b) anonymity (the extent to which an individual is the subject of attention); and (c) solitude (the extent to which others have physical access to an individual).

2. Privacy serves the following functions:

- (a) enables individuals to deliberate and establish opinions without fear of any unpleasant or hostile reaction from others;
- (b) enables individuals to continue relationships without denying one’s inner thoughts that the other party does not approve;
- (c) enhances the capacity of individuals to create and maintain human relations;
- (d) contributes to the autonomy of the citizen;
- (e) promotes liberty of political action;
- (f) encourages public participation in political decisions by enabling citizens to form judgments and express preferences on social issues;
- (g) reduces the costs of running for public office; and
- (h) helps society attract talented individuals to serve the community.

3. The Declaration on Mass Communication Media and Human Rights adopted by the Parliamentary Assembly of the Council of Europe states that the right to privacy consists essentially of the right to live one’s own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection against misuse of private communications, protection from disclosure of information given or received by the individual in confidence.

Chapter 2 - Protection of privacy under existing laws

4. Although the Basic Law of the Hong Kong SAR does not explicitly mention the right to privacy, Article 28 provides that arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person is prohibited. Article 29 supplements Article 28 by extending the protection against arbitrary or unlawful search from search of the body to search of or intrusion into the “home and other premises” of a resident. Freedom and privacy of communication is protected under Article 30.

5. Although the HK Bill of Rights Ordinance has created a cause of action for breach of privacy against the Government or a public authority, the Hong Kong courts have thus far not recognised a legally enforceable right of privacy at common law. Where the HK Bill of Rights Ordinance is inapplicable, the interests in privacy have been protected only if another interest recognised by the courts has also been violated. Although some of the existing causes of action at common law may incidentally afford some protection of privacy interests, their primary focus has been the protection of an individual’s interest in his person or property. As privacy interests are wider in scope than the interests recognised by the existing torts, the protection of privacy by common law is “patchy and inadequate”.

6. As regards the Personal Data (Privacy) Ordinance (“PD(P)O”), it does not, and was not intended to, provide a comprehensive system of protection and redress for potential and actual victims of unwarranted privacy intrusion. The main reason is that its provisions are concerned only with privacy in relation to personal data, not privacy rights in general. Intrusive behaviour that does not involve the recording of information relating to identifiable individuals simply does not engage the Ordinance.

7. Further, if a person collects data about an individual whose identity is unknown and there is no intention by that person to identify him, the collection of the data does not engage the provisions of the PD(P)O governing the collection of personal data. In addition, some provisions of the PD(P)O are not easily applied to personal data that are published generally or broadcast. For instance, the Administrative Appeals Board has pointed out the inapplicability of the security provisions of the Ordinance to personal data when they are so used. 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.

Legal assistance to persons seeking compensation under section 66 of the PD(P)O

8. Contrary to the position of the Equal Opportunities Commission under the Sex Discrimination Ordinance and the Disability Discrimination Ordinance, the Privacy Commissioner does not have the power and resources to provide assistance to aggrieved individuals who wish to make a civil claim under section 66 of the PD(P)O. Victims who have suffered damage by reason of a contravention of a Data Protection Principle have to bear all the legal costs unless they are entitled to legal aid.

9. **We recommend that the Personal Data (Privacy) Ordinance (Cap 486) should be amended to enable the Privacy Commissioner for Personal Data to provide legal assistance to persons who intend to institute proceedings under section 66 of the Personal Data (Privacy) Ordinance, along the lines of section 85 of the Sex Discrimination Ordinance (Cap 480) and section 81 of the Disability Discrimination Ordinance (Cap 487). (Recommendation 1, para 2.62)**

Chapter 3 - Freedom of expression and the right to privacy

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

11. 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; (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.

12. 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 on Human Rights are subject to limitations necessary for the protection of the rights of others. In a resolution on the right to privacy, the Parliamentary Assembly of the Council of Europe declared that the two rights “are neither absolute nor in any hierarchical order, since they are of equal value”.

Chapter 4 - The law of privacy in other jurisdictions

13. Outside the realm of personal data privacy which is specifically protected by data protection legislation, the overwhelming majority of the jurisdictions covered by our comparative study provide for a right to the legal protection of individual privacy in one way or another. These jurisdictions are Austria, British Columbia, Manitoba, Newfoundland, Saskatchewan, Quebec, Mainland China, Macao, Taiwan, Denmark, Estonia, France, Germany, Hungary, Ireland, India, Italy, Lithuania, The Netherlands, New Zealand, Norway, The Philippines, Russia, South Africa, South Korea, Spain, Thailand, the United States and most of the Latin American countries, including Brazil.

14. Jurisdictions which do not recognise a right of action for breach of privacy are Australia, England and Wales, Malaysia and Singapore.

Chapter 5 - Providing civil remedies to victims of unwarranted invasion of privacy

Need for civil protection against invasion of privacy

15. Privacy is an important value which should be protected by law as a right in itself and not merely incidentally to the protection of other rights. It is a fundamental human right recognised in the Universal Declaration of Human Rights, the ICCPR and many other international and regional treaties. Nearly every country in the world recognises privacy as a fundamental human right in their constitution, either explicitly or implicitly.

16. **Absence of protection against interference by private parties –** Under Article 17 of the ICCPR, the Government is under an obligation to adopt measures to give effect to the prohibition against interference with one's privacy by private persons as well as by the Government or public authorities. Although the HK Bill of Rights Ordinance enables an individual to bring an action for breach of the right to privacy under Article 14 of the HK Bill of Rights, these actions can only be brought against the Government and public authorities but not against private persons. What is lacking is a right of action for breach of privacy against private persons. If the legislature has seen fit to provide a statutory remedy enabling private citizens to sue public authorities for breach of privacy, without providing a definition of privacy, there is no reason why a more specific tort of invasion of privacy should not be created which is actionable against private persons as well as public authorities. Denying citizens legal protection against invasion of privacy by private persons on the ground that privacy cannot be defined, or that the result is uncertain, appears indefensible. If the courts can be trusted to perform a balancing exercise in resolving privacy claims against public authorities under the HK Bill of Rights Ordinance, they should also be trusted to perform the same exercise in resolving privacy claims against private persons based on a statutory tort of invasion of privacy.

17. **Privacy as a value deserving legal protection –** Privacy serves many important functions in society. An explicit commitment to privacy as a legal concept would modify people's behaviour and encourage them to respect and be more sensitive to each other's privacy needs. Imposing liability for invasion of privacy would have a deterrent effect which would make potential intruders think twice before they act. We acknowledge that it is difficult to define the parameters of the right of privacy in precise terms, but this does not preclude us from examining whether an infringement of the privacy interests embodied in the right of privacy should be made a tort.

18. **Privacy as a legal concept –** It has been argued that the right of privacy is too elusive a concept to support a workable and enforceable definition.

However, uncertainties in the law are not unusual. To decline to reform the law because of the difficulty in defining the wrong is “a doctrine of despair” which could be applied to any proposed legal reform.

19. We consider it inappropriate to deny relief in egregious cases merely because certain borderline claims pose difficulties in the balancing process. Many common law and civil law jurisdictions provide civil remedies for infringement of privacy. The lack of an exhaustive definition of privacy has not been a bar to its legal protection in these jurisdictions. Although the concept of privacy is elusive, there is a growing consensus as to what kind of acts or conduct would constitute an infringement of privacy. There is no evidence that a right of action for invasion of privacy has led to unwarranted claims or blackmailing actions in jurisdictions that protect privacy by law.

20. **Personal Data (Privacy) Ordinance** – It is clear from the discussion in Chapter 2 that the protection under the PD(P)O is not comprehensive enough to protect individuals from all types of unwarranted invasion of privacy. The primary concern of the Ordinance is information privacy. It is not designed to safeguard communications and surveillance privacy, territorial privacy, and privacy of the person. Even in the field of information privacy, the Collection Limitation Principle, the Use Limitation Principle and the Security Safeguards Principle in the PD(P)O have been ineffective in protecting individuals from unwarranted surveillance and publicity.

21. **Incidence of privacy invasion** – It has been argued that complaints about invasions of privacy in Hong Kong are not substantial and that reforming the law of privacy is an excessive response to a minor problem in society. Although it may be true that such complaints are rare, it does not indicate that invasion of privacy is not prevalent in Hong Kong. Such rarity may be explained by the very fact that invasion of privacy is not actionable under existing law. Moreover, many invasions of privacy are difficult to uncover. Nonetheless, we have collected in our *Privacy and Media Intrusion Report* many local cases which present a *prima facie* case of unwarranted invasion of privacy. Yet even if it is true that invasion of privacy is not prevalent in Hong Kong, it would be unreasonable and unjust to deny privacy victims a civil remedy purely on this ground. The need to introduce civil measures to protect individuals from invasion of privacy derives from the right to privacy under Article 17 of the ICCPR in conjunction with Article 39 of the Basic Law; it does not hinge on the incidence of privacy invasions in Hong Kong.

22. **Effect on freedom of expression** – Privacy and freedom of speech are complementary in nature. In jurisdictions where unwanted publicity is actionable in tort, the legislation or common law invariably recognises the importance of press freedom by requiring that the plaintiff’s privacy interests should be balanced against the defendant’s right to freedom of expression, or by providing for a defence of publication in the public interest. The provision of such a defence would ensure that investigative journalism would not be hampered by a privacy action. We are not aware of any evidence that free expression has been unduly restricted in jurisdictions which recognise a tort action for breach of privacy.

23. **Conclusion** – We consider that the protection of privacy is in the interests of both the individual and society. It is in the public interest to protect the

interests of individuals against mental suffering and injury to their emotions. To treat privacy as purely an individual interest and to pit it against other public interests is misguided. Privacy should be afforded the same level of protection as other fundamental human rights as long as the law gives sufficient recognition to the legitimate interest of the press. We therefore conclude that individuals should have a civil remedy for invasion of privacy that is unwarranted in the circumstances.

Judicial development or legislation?

24. The HK Journalists Association argued that until the Legislative Council is “properly elected”, it should not enact legislation affecting such a fundamental right as freedom of expression. In this connection, we note that 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 provisions found to be in contravention of the Basic Law would ultimately be held by the Court to be of no legal effect.

25. 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 private persons. Accepting these arguments would deprive victims of unwarranted privacy invasion 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 Covenant, to the extent that the unlawful or arbitrary interference originates from a private person – until such time as all members of the Legislative Council are elected by universal suffrage.

26. In our view, the right of Hong Kong people to legal protection from arbitrary or unlawful interference with their privacy by private persons under Article 17 is *not* contingent on full realisation of Article 25(b) of the ICCPR, 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.

27. There are few signs that the courts in Hong Kong would be likely to develop a tort of invasion of privacy when presented with a privacy case that does not give rise to a cause of action under the law of torts. Although the courts in South Africa, India and the US have been able to develop the common law to protect privacy, the House of Lords in the UK has unanimously decided that there was no common law tort of invasion of privacy in England and Wales. It is true that there are English decisions suggesting that the action for breach of confidence can be developed to protect certain privacy interests, but there is no reason why the law should protect privacy only when the facts of the case can be brought within the scope of the law of confidence. Besides, there can be an invasion of privacy without disclosure of confidential personal information.

28. Development of the law of privacy by the courts would take a long time and the tort's status and scope would not be resolved definitively until considered by the Court of Final Appeal. While we acknowledge that Hong Kong courts are capable of developing the common law by making reference to the case-law in other jurisdictions, legislation can save the Court starting from scratch and would assure the public of an effective remedy. The Court would also have the benefit of clear guidelines as to how the right of privacy should be balanced against the right to freedom of expression and other competing interests.

29. Further, the very generality of the right of privacy under Article 14 of the HK Bill of Rights is itself an argument for legislation, as the legal protection against government intrusion is uncertain and, hence, less than satisfactory. The legislature should clarify the law by creating one or more specific torts of invasion of privacy, indicating what the privacy concerns are and how they should be reconciled with the competing claims.

30. The principles for determining the types of actionable infringements of privacy and the scope of exceptions and defences are matters that should be debated and decided by the legislature. Whereas the common law is developed on the basis of arguments put forward by the litigants in the case before the court, the legislative process enables a comprehensive framework for the resolution of privacy claims to be formulated after hearing a wide range of arguments from all interested parties, including the Privacy Commissioner, the media, the news associations and other NGOs.

31. In the light of these arguments, we conclude that a tort of invasion of privacy (which is enforceable against private persons as well as public authorities) should be created by statute. Since a right of privacy defined in general terms would make the law uncertain and difficult to enforce, we have decided not to recommend the creation of a general tort of invasion of privacy. We consider that the proper approach is to isolate and specify the privacy concerns in which there is an undoubted claim for protection by the civil law, while, at the same time, identifying the overriding public interests to which the right of privacy must give way. Our conclusion is therefore to enact legislation creating one or more specific torts of invasion of privacy which clearly define the act, conduct and/or publication which frustrates the reasonable expectation of privacy of an individual without justification.

Chapter 6 - Intrusion upon the solitude or seclusion of another

32. In order to protect an individual's interests in solitude and seclusion and to provide a civil remedy for unwarranted surveillance whether conducted with or without the assistance of a recording device, a tort of intrusion upon solitude or seclusion should be created by statute.

33. Apart from "Peeping Toms" and eavesdroppers, those who, for example, without consent or lawful authority:

- open another's private and personal mail;
- examine another's personal belongings such as his diary, wallet or address book;
- search another's premises, vehicle, locker, briefcase or handbag;
- conduct a body search;
- gain access to another's bank statements or medical records;
- obtain access to data stored in another's computer;
- fix a tracking device on the vehicle or personal belongings of another;
- intercept the communications of another; or
- keep another under constant or systematic surveillance,

also invade the privacy of that other by intruding into his private affairs or concerns. Such conduct should be rendered tortious by holding the perpetrator liable for intrusion into another's private affairs or concerns. Intrusions of this nature may take place in a private or public place. Any one who overhears the conversation between two or more persons in a public place with the aid of a technical device in circumstances where the interlocutors are reasonably entitled to expect to be free from aural surveillance may be held liable under this head.

34. **We recommend that any person who intentionally or recklessly intrudes, physically or otherwise, upon the solitude or seclusion of another or into his private affairs or concerns in circumstances where that other has a reasonable expectation of privacy should be liable in tort, provided that the intrusion is seriously offensive or objectionable to a reasonable person of ordinary sensibilities. (Recommendation 2, para 6.84)**

35. This intrusion tort would require proof of the following:

- (a) the plaintiff had a reasonable expectation of privacy in the circumstances of the case;
- (b) either an intrusion upon the solitude or seclusion of another or an intrusion into another's private affairs or concerns;
- (c) the intrusion was done intentionally or recklessly; and
- (d) the intrusion was seriously offensive or objectionable to a reasonable person of ordinary sensibilities.

36. An actionable intrusion may be physical or non-physical, and may be committed with or without the aid of a technical device. There should not be any requirement that the intrusion must occur in a private place or premises, nor should there be a requirement that the defendant has acquired or recorded any personal information about the plaintiff as a result of the intrusion.

37. **We recommend that the legislation should specify the factors that the courts should take into account when determining whether the plaintiff had a reasonable expectation of privacy at the time of the alleged intrusion. (Recommendation 3, para 6.84)**

38. These factors may include:

- (a) the place where the intrusion occurred

- (b) the object and occasion of the intrusion
- (c) the means of intrusion employed and the nature of any device used
- (d) the conduct of the plaintiff prior to or at the time of the intrusion

39. **We recommend that the legislation should specify the factors that the courts should take into account when determining whether an intrusion was seriously offensive or objectionable to a reasonable person.** (*Recommendation 3, para 6.84*)

40. These factors may include:

- (a) the magnitude of the intrusion, including the duration and extent of intrusion;
- (b) the means of intrusion;
- (c) the type of information obtained or sought to be obtained by means of the intrusion;
- (d) whether the plaintiff could reasonably expect to be free from such conduct under the customs of the location where the intrusion occurred;
- (e) whether the defendant sought the plaintiff's consent to the intrusive conduct;
- (f) whether the plaintiff has taken any actions which would manifest to a reasonable person the plaintiff's desire that the defendant not engage in the intrusive conduct; and
- (g) whether the defendant had been acting reasonably in the interests of the plaintiff.

41. **We recommend that it should be a defence to an action for the intrusion tort to show that the plaintiff expressly or by implication authorised or consented to the intrusion.** (*Recommendation 4, para 6.91*)

42. We consider that:

- (a) *the recording or interception of a telephone conversation* by a person who is not a party to that conversation is an intrusion upon a party to that conversation for the purposes of the intrusion tort, even though another party to that conversation has consented to that person recording or intercepting the conversation; and
- (b) *the covert listening to, or recording of, a face-to-face conversation* by a person who is not a party to that conversation is an intrusion upon a party to that conversation for the purposes of the intrusion tort, even though another party to that conversation has consented to that person listening to or recording that conversation.

43. A defendant who is alleged to have covertly listened to, recorded or intercepted a telephone or oral conversation to which the plaintiff was a party should not have a defence on the ground that the listening, recording or interception was authorised or consented to by another party to the conversation. However, the defendant would be exempt from liability if the intrusion is justifiable under one of the defences proposed below.

44. **We recommend that it should be a defence to an action for the intrusion tort to show that the act or conduct in question was authorised by or under any enactment or rule of law. (Recommendation 5, para 6.109)**

45. **We recommend that it should be a defence to an action for the intrusion tort to show that the act or conduct constituting the intrusion was necessary for and proportionate to:**

- (a) the protection of the person or property of the defendant or another;**
- (b) the prevention, detection or investigation of crime;**
- (c) the prevention, preclusion or redress of unlawful or seriously improper conduct; or**
- (d) the protection of national security or security in respect of the Hong Kong SAR. (Recommendation 6, para 6.113)**

Chapter 7 - Unwarranted publicity given to an individual's private life

46. Individual privacy may be invaded by unwarranted publicity given to facts concerning an individual's private life. Giving publicity to intimate information about an individual without his consent can prejudice his ability to maintain social relationships and pursue his career. A person may also want to keep to himself facts that tend to show him in a favourable light. Thus, an individual may not want others know that he is a prodigy, a subscriber to a philanthropic society, or a wealthy person.

47. Controlling the disclosure of personal information supports privacy interests:

- It helps us to forge and conduct personal and social relationships.
- It protects individual choice by preventing a person from being diverted from his chosen path lest others would be offended or might try to bring pressure to bear on him if his choice is made known to others.
- It enables family life to flourish in a secure home.
- It protects the privacy and freedom of private communications.
- It enables people to indulge their personal preferences in sex, play, reading matter, religious worship, food or dress, in settings where they are not visible to others.
- It enables sheltered experimentation and testing of ideas without fear of ridicule or penalty.

48. In the absence of legal protection in this area, individuals would be deprived of the freedom to engage in the free expression and reception of ideas and opinion, particularly those which question mainstream thoughts and values. Conversely, protecting private information from publicity would attract more talented individuals to serve the community and is conducive to the formation of public opinion and effective participation in government.

49. Since Data Protection Principle 3 of the PD(P)O restricts the use of personal data to that for which the data were collected, the Ordinance cannot restrain unwanted publicity if the published information has been collected by the publisher precisely for the purpose of publication. As far as media coverage is concerned, the publication in the media of personal data collected by a journalist is normally consistent with the purpose for which the data were collected. The requirement that it is practicable for the identity of the individual to be ascertained from the data also poses a problem if his name or other forms of identification is not disclosed in the publication. The PD(P)O is therefore not effective in restraining unwanted publicity given to personal information which is not a matter of genuine public concern. Further, victims of unwarranted publicity cannot maintain an action for defamation if what was publicised is proved to be true. But truth may be more injurious than falsehood.

50. We conclude that a person who suffers damage as a result of another person giving publicity to a matter concerning his private life without justification should have a remedy at civil law. However, we are doubtful whether it is practicable to specify the categories of information that reasonable members of society would consider ought to be protected from unwarranted publicity. Private life is a broad term not susceptible to exhaustive definition. Categories of facts relating to an individual's private life are not fixed and may change over time. It is undesirable to give a definitive statement as to what facts relate to an individual's private life for the purposes of the tort.

51. **We recommend that any person who gives publicity to a matter concerning the private life of another should be liable in tort provided that the publicity is of a kind that would be seriously offensive or objectionable to a reasonable person of ordinary sensibilities and he knows or ought to know in all the circumstances that the publicity would be seriously offensive or objectionable to such a person. (Recommendation 7, para 7.45)**

52. The tort as formulated above would require proof of the following:

- (a) the complaint relates to a matter concerning the private life of the plaintiff;
- (b) the defendant has given publicity to that matter;
- (c) the publicity would be seriously offensive or objectionable to a reasonable person of ordinary sensibilities; and
- (d) the defendant knew or ought to have known in all the circumstances that the publicity would be seriously offensive or objectionable to such a person.

53. **We recommend that the legislation should specify the factors that the courts should take into account when determining whether the publicity would be seriously offensive or objectionable to a reasonable person. (Recommendation 8, para 7.46)**

54. These factors may include:

- (a) whether the facts pertaining to an individual are very intimate;
- (b) whether the defendant used unlawful or intrusive means to collect the facts;

- (c) the manner of publication;
- (d) the extent of the dissemination;
- (e) the degree of harm to the plaintiff's legitimate interests; and
- (f) the motive of the defendant.

55. **We recommend that it should be a defence to an action for unwarranted publicity to show that the plaintiff has expressly or by implication authorised or consented to the publicity.** (*Recommendation 9, para 7.50*)

56. **We recommend that it should be a defence to an action for unwarranted publicity to show that the publicity has been authorised by or under any enactment or rule of law.** (*Recommendation 10, para 7.51*)

57. **We recommend that it should be a defence to an action for unwarranted publicity to show that the publicity would have been privileged had the action been for defamation.** (*Recommendation 11, para 7.53*)

58. **We recommend that it should be a defence to an action for unwarranted publicity to show that the publicity was in the public interest.** (*Recommendation 12, para 7.78*)

59. **Without limiting the generality of Recommendation 12, we recommend that any publicity given to a matter concerning an individual's private life should be presumed to be in the public interest if the publicity was necessary for:**

- (a) the prevention, detection or investigation of crime;
- (b) the prevention or preclusion of unlawful or seriously improper conduct;
- (c) establishing whether the plaintiff was able to discharge his public or professional duties;
- (d) establishing whether the plaintiff was fit for any public office or profession held or carried on by him, or which he sought to hold or carry on;
- (e) the prevention of the public being materially misled by a public statement made by the plaintiff;
- (f) the protection of public health or safety; or
- (g) the protection of national security or security in respect of the Hong Kong SAR

and was proportionate to the legitimate aim pursued by the defendant. (*Recommendation 13, para 7.87*)

60. **Facts concerning an individual's private life that are available in the public domain** – We agree that personal data recorded in public records are to some extent public if the records are open for public inspection. However, the fact that the records are accessible to the public does not make the data a matter of public knowledge. Accessibility to public records is generally limited for practical reasons. The right to gain access to the records in a public register often depends on physical presence at the registry and requires the payment of a fee. The way the data are

recorded and indexed also requires prior knowledge of certain relevant details before a search can be carried out. Furthermore, the PD(P)O restricts the use of public register personal data collected by a member of the public to the lawful purpose for which the data were collected by him. Hence, much personal information contained in public registries is and remains unknown to the general public. The “practical obscurity” of personal information in public records is something that ought to be taken into account by the law. It is one thing to make information in a public record available to a member of the public who has a legitimate interest in receiving the information; it is another to give publicity to such information in the absence of any public interest. Despite the public nature of the record, the individual concerned retains a privacy interest in having the information protected from unwarranted publicity.

61. What is at issue is whether someone has given “publicity” to “a matter concerning the private life of another”, not whether someone has given publicity to “personal information which is not in the public domain”. In determining whether a person is liable for the tort of unwarranted publicity, it is immaterial whether the matter publicised by that person has already been “made public” or “disclosed” in the public domain. The mischief is unwarranted “publicity”, not unauthorised “disclosure” (in the sense of first revelation) of a fact pertaining to an individual. Giving publicity to a fact which has already been disclosed in the public domain, or giving further publicity to a fact which has once been publicised, should not automatically deprive the individual of the protection against unwarranted “publicity”. Prior disclosure or publicity would not alter the private nature of a fact if that fact relates to the private life of an individual: further publicity would only aggravate the injury caused by the initial publicity.

62. We therefore consider that it is unnecessary and inappropriate for the privacy legislation to provide for a public domain defence to exempt facts that can be found in records that are readily accessible to the public, or have come into the public domain through no fault of the defendant. Use of personal data for a purpose other than that for which the data were collected is contrary to the Use Limitation Principle in the PD(P)O whether or not the data are in the public domain. There are no provisions in the Ordinance whereby information ceases to be “personal data” under the Ordinance simply because it was collected from the public domain. The absence of a public domain defence for the publicity tort would not impinge on press freedom because the fruits of investigative journalism would be sufficiently protected by the public interest defence and the defence of qualified privilege. If the legislation provided for a public domain defence, a victim of unwarranted publicity would be unable to seek redress from a person who had given publicity to details of his private life that are in the public domain, even though the publicity constitutes a serious and unjustifiable interference with his privacy. In our view, the fact that the facts are, or have once been, made publicly available should not necessarily deprive an individual of legal protection from unwarranted publicity. The publisher should not automatically have a defence simply by showing that the facts were or are in the public domain. He should justify the publicity by arguing, for example, that it is privileged or in the public interest.

63. **We recommend that the legislation should provide that the plaintiff in an action for unwarranted publicity given to an individual’s private life should not be precluded from obtaining relief by reason merely of the fact that the matter to which the defendant has allegedly given publicity:**

- (a) could be found in a register to which the public or a section of the public had access;
 - (b) has been disclosed by the plaintiff to his family members, friends, neighbours and/or other selected individuals;
 - (c) has been disclosed or published by a third party without the consent of the plaintiff;
 - (d) has been made available on the Internet by a third party without the consent of the plaintiff; or
 - (e) related to an occurrence or event which happened in a place which was visible or accessible to members of the public.
- (Recommendation 14, para 7.139)*

Chapter 8 - Privacy of ex-offenders

64. Section 2 of the Rehabilitation of Offenders Ordinance (Cap 297) renders a first conviction “spent” only if it is an offence in respect of which the offender was not sentenced to imprisonment exceeding three months or to a fine exceeding \$10,000. Further, only a first conviction can become “spent” under the Ordinance.

65. Once a conviction has become “spent”, no evidence is admissible in any proceedings which tends to show that the offender was so convicted. However, the Ordinance does not prevent the disclosure of a “spent” conviction for sentencing purposes in criminal proceedings in which the individual concerned is subsequently convicted of a further offence; nor does it prevent its disclosure in any criminal proceedings if he is subsequently convicted of a further offence, regardless of whether he is the defendant or not.

66. The number of ex-offenders who benefit from the scheme is therefore limited. The practice of the Police disclosing a “spent” conviction in a Certificate of No Criminal Conviction has also been criticised as defeating the purposes of the Ordinance.

67. **We recommend that serious consideration should be given to amending the Rehabilitation of Offenders Ordinance (Cap 297) so that: (a) more ex-offenders could benefit from the rehabilitation scheme under the Ordinance; and (b) ex-offenders falling within the scope of the Ordinance could benefit more fully from the scheme, taking full account of the experience of the United Kingdom in the operation and reform of the Rehabilitation of Offenders Act 1974.** *(Recommendation 15, para 8.29)*

Chapter 9 - Anonymity of victims of crime

Anonymity of victims of sexual offences

68. Section 156, in conjunction with section 157, of the Crimes Ordinance (Cap 200) makes it an offence to publish any matter which is likely to lead members of the public to identify any person as the complainant in a “specified sexual offence”. “Specified sexual offence” is defined as meaning rape, non-consensual buggery or indecent assault. This definition does not include sexual offences such as incest; assault with intent to commit buggery; buggery with a defective or a person under the age of 21; gross indecency with a male defective or a man under the age of 21; procurement of unlawful sex by threats or false pretences; administering drugs to obtain or facilitate unlawful sex; intercourse with a defective or a girl under the age of 16; and gross indecency with or towards a child under the age of 16.

69. **We recommend that the prohibition on identifying victims of rape, non-consensual buggery and indecent assault under section 156 of the Crimes Ordinance (Cap 200) should be extended to cover victims of other sexual offences.** (*Recommendation 16, para 9.7*)

70. We agree that the law should protect the identity of claimants who bring an action in tort pursuant to section 76 of the Sex Discrimination Ordinance alleging that another person has committed an act of sexual harassment against him or her which is unlawful by virtue of Part III or IV of the Ordinance.

71. **We recommend that the District Court in proceedings under section 76 of the Sex Discrimination Ordinance (Cap 480) should have the power to make an order prohibiting the publication of any matter which is likely to lead to the identification of the claimant. Any person who fails to comply with such an order should be guilty of an offence.** (*Recommendation 17, para 9.8*)

Anonymity of victims of non-sexual crime

72. Bearing in mind Article 14(1) of the ICCPR and Article 10 of the HK Bill of Rights, both of which provide that the press and the public may be excluded from all or part of a trial “when the interest of the private lives of the parties so requires”, we consider that it is desirable to have specific provisions protecting the privacy of victims of non-sexual offences. There are cases where the identities of victims ought to be protected from publicity even though the offence with which the defendant is charged is not a sexual offence. For example, the victim may have contracted AIDS or have become impotent as a result of the defendant’s unlawful act. The privacy interests of victims in these cases are analogous to those of victims of sexual offences. However, notwithstanding Article 14(1) of the Covenant, the interest of the private life of a witness (or an alleged victim) is not one of the grounds specified in the Criminal Procedure Ordinance for excluding the public from a criminal court or holding the whole or part of the criminal proceedings in a closed court.

73. We consider that protecting the privacy interests of victims of non-sexual

offences is consistent with the principles underlying the protection of victims of sexual offences. The Court should have the power to direct that the identity of a victim of crime should not be publicised outside the courtroom. Giving the Court a discretionary power to make an anonymity order is proportionate to the legitimate aim of protecting the privacy of the victim or witness without compromising press freedom and the interests of justice. Even if a court made such an order, the public and the press would still be free to observe and report the whole proceedings, including any evidence given by the victim or witness concerned.

74. We recommend that the courts in criminal proceedings should have the power to make an order prohibiting the publication of any matter which is likely to lead to the identification of the victim of an alleged offence or any witness in the trial until such time as may be ordered by the Court, provided that the making of such an order is in the interests of the private life of the victim or witness and would not prejudice the interests of justice. Any person who fails to comply with such an order should be guilty of an offence. (Recommendation 18, para 9.30)

Chapter 10 - Appropriation of a person's name or likeness

75. We agree that the law should protect an individual's name, likeness or other indicia of identity against unauthorised use. Every individual should have a right to prevent his personality from being exploited by a third party without his consent, whether he is a celebrity or not. However, since commercial exploitation of a person's personality does not fall within the remit of the privacy reference, any remedy for misappropriation of a person's name or likeness must lie in the law of intellectual property. As far as the commercial use of a person's name or likeness is concerned, the subject is best treated as a tort in its own right, rather than as a tort of invasion of privacy.

76. We recommend that serious consideration should be given to according legal protection to individuals against the unauthorised use of their name, likeness or other indicia of identity for a purpose other than for the legitimate information of the public. (Recommendation 19, para 10.38)

77. We recommend that the Privacy Commissioner for Personal Data should give consideration to issuing a code of practice on the use of personal data in advertising materials for the practical guidance of advertisers, advertising agents and the general public. (Recommendation 20, para 10.46)

78. We recommend that the Broadcasting Authority should give consideration to adopting in their Codes of Practice on Advertising Standards provisions governing the use of personal data in advertisements broadcast by the licensed television and sound broadcasters in Hong Kong. (Recommendation 21, para 10.46)

Chapter 11 - Publicity placing someone in a false light and factual inaccuracies reported in the press

Publicity placing someone in a false light

79. If publicity placing someone in a false light is actionable as an invasion of privacy, the making of false statements about the private life of an individual would be actionable even though the maker is not liable in defamation. This would expand the scope of the law of defamation. The law of copyright already provides a remedy where an individual's work is subjected to derogatory treatment or where a work is falsely attributed to him as an author. The tort of malicious falsehood might also be relevant in appropriate circumstances if the plaintiff has suffered special damage. Freedom of speech might be unduly restricted if liability for the making of false statements were to be extended. We have therefore decided that it is unnecessary to create a tort of giving publicity to a matter concerning an individual that places him before the public in a false light.

Factual inaccuracies reported in the press

80. One of the key elements of privacy is the ability of an individual to control the release and use of information about himself. The publication of inaccurate facts about an individual adversely affects his personal, family and business relationships. Wrongly reporting that a named person is a lottery winner, a debtor, a homosexual, a prostitute, mentally ill, infertile, licentious or receiving social security assistance is no less an interference with that person's privacy than would be the case if the report were true. We therefore consider that accuracy of facts about an individual is a core principle in the protection of privacy. Since the Broadcasting Authority's Codes of Practice already provide adequate protection against inaccurate or misleading coverage in the broadcast media, our focus is on whether it is necessary to provide relief for inaccurate or misleading coverage in the print media.

81. To the extent that the news media is exempt from the provisions on access to personal data prior to publication, and the provisions on accuracy and correction of personal data do not seem to have created a right to the dissemination of a correction in the medium concerned after publication, it is necessary to provide a mechanism through which inaccuracies (including fabrications) and distortions, whether deliberate or inadvertent, about an individual that have been published in the print media can be corrected in a subsequent issue. Not all publication of inaccurate (including fabricated) or misleading personal information would give rise to an action for libel. In any event, libel actions are expensive and few injured parties would wish to take the time and trouble to bring an action against the publisher. Even if the court has determined that the newspaper has published a false and defamatory statement, the newspaper may not be compelled to publish in its paper a retraction or a notice declaring that a court has determined that the impugned statement was false.

82. We recommend in our *Privacy and Media Intrusion Report* that the Press Privacy Code enforced by the proposed self-regulating privacy press complaints commission 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. Providing a correction mechanism through the proposed press complaints commission would reduce the number of libel claims in the courts. With a cheap and speedy alternative means of redress, an individual whose reputation or private life has been adversely affected by a false statement in the press is less likely to feel the need to seek financial compensation in the courts, which is currently the individual's sole option. This possible settlement outside the Court would reduce legal costs for both the public and the press. Further, if a swift remedy is available to the injured parties shortly after the impugned report, they would be able to avoid some of the harmful consequences that publication could bring.

83. We conclude that it is unnecessary to create a tort of giving publicity to a matter concerning an individual that places him before the public in a false light. However, we recommend that (unless the recommendations in our *Privacy and Media Intrusion Report* in relation to inaccurate and misleading reports in the print media about an individual have been implemented in full) the legislation should create a right to correct factual inaccuracies about an individual along the lines of the *Minimum Rules Regarding the Right of Reply* set out in Resolution (74)26 of the Council of Europe Committee of Ministers so that inaccurate facts published in the print media about an individual could be corrected without undue delay and with, as far as possible, the same prominence given to the original publication. (*Recommendation 22, para 11.57*)

Chapter 12 - Enforcing the right to privacy

84. We recommend that both the tort of intrusion upon another's solitude or seclusion and the tort of unwarranted publicity should be actionable without any proof of damage. (*Recommendation 23, para 12.2*)

85. We recommend that in an action for intrusion or unwarranted publicity, the Court may:

- (a) award damages, including, where appropriate, exemplary damages;**
- (b) grant an injunction if it shall appear just and convenient;**
- (c) order the defendant to account to the plaintiff for any profits which he has made by reason or in consequence of the intrusion or unwarranted publicity; or**
- (d) order the defendant to destroy or deliver up to the plaintiff any articles or documents containing information about the plaintiff which have come into the possession of the defendant by reason or in consequence of the intrusion or, as the case may be, which have resulted in the defendant being held liable to the plaintiff for**

unwarranted publicity. (*Recommendation 24, para 12.12*)

86. We recommend that damages should include injury to feelings. (*Recommendation 25, para 12.12*)

87. We recommend that in awarding damages the Court should have regard to all the circumstances of the case, including:

- (a) the effect of the intrusion or unwarranted publicity on the health, welfare, social, business or financial position of the plaintiff or his family;**
- (b) any distress, annoyance, embarrassment or humiliation suffered by the plaintiff or his family; and**
- (c) the conduct of the plaintiff and the defendant both before and after the intrusion or unwarranted publicity, including publicity for, and the adequacy and manner of, any apology or offer of amends made by the defendant. (*Recommendation 26, para 12.12*)**

88. We recommend that:

- (a) a hearing in an action for intrusion or unwarranted publicity may be held in private if publicity would defeat the object of the hearing; and**
- (b) the court may order that the identity of any party or witness shall not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness. (*Recommendation 27, para 12.20*)**

89. We recommend that no action for intrusion or unwarranted publicity should be brought after the expiration of three years from the time when the plaintiff first became aware, or ought reasonably to have become aware, of the occurrence of the act, conduct or publication in question, subject to the normal rules applicable to plaintiffs who are under a disability. (*Recommendation 28, para 12.23*)

90. We recommend that:

- (a) actions for intrusion or unwarranted publicity should be limited to living individuals and that the person to whom any right of action should accrue is the individual whose right of privacy is threatened or has been infringed; and**
- (b) on the death of the plaintiff or defendant, the cause of action should survive for the benefit of the plaintiff's estate or, as the case may be, against the defendant's estate. (*Recommendation 29, para 12.24*)**

December 2004