

**THE LAW REFORM COMMISSION
OF HONG KONG**

SUB-COMMITTEE ON PRIVACY

**CONSULTATION PAPER ON
THE REGULATION OF MEDIA INTRUSION**

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during the consultation period.

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the writing of this consultation paper.*

This Consultation Paper has been prepared by the Privacy sub-committee of the Law Reform Commission. It does not represent the final views of either the sub-committee or the Law Reform Commission, and is circulated for comment and criticism only.

The sub-committee would be grateful for comments on this Consultation Paper by 30th November 1999. All correspondence should be addressed to:

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Preface

Background

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”. The Commission’s terms of reference are as follows:

“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.”

2. The Law Reform Commission appointed a sub-committee to examine the current state of law and to make recommendations. The members of the sub-committee are:

The Hon Mr Justice Mortimer, GBS (Chairman)	Vice-President Court of Appeal
Dr John Bacon-Shone	Director, Social Sciences Research Centre The University of Hong Kong
Mr Don Brech	Principal Consultant Records Management International Limited
Mrs Patricia Chu, JP	Deputy Director of Social Welfare (Services) Social Welfare Department
Mr A F M Conway	Chairman Great River Corporation Limited

Mr Edwin Lau	Assistant General Manager Head of Personal Banking The Hongkong and Shanghai Banking Corporation Limited
Mr James O’Neil	Deputy Solicitor General (Constitutional) Department of Justice
Mr Peter So Lai-yin	Former General Manager Hong Kong Note Printing Limited
Prof Raymond Wacks	Professor of Law and Legal Theory The University of Hong Kong
Mr Wong Kwok-wah	Chinese Language Editor Asia 2000 Limited

3. The secretary to the sub-committee is Mr Godfrey K F Kan, Senior Government Counsel.

4. The sub-committee has examined the law in relation to the following subjects: (a) the protection of personal data; (b) surveillance; (c) the interception of communications; (d) stalking; and (e) civil liability for invasion of privacy. The purpose of this consultation paper is to examine whether legislative or other measures are needed to provide protection against undue interference with the privacy of individuals by the news media in addition to those proposed in the consultation papers on *Stalking, Civil Liability for Invasion of Privacy, Surveillance and the Interception of Communications*. We examine the problem of media intrusion because the media are most likely, by the nature of their activities, to infringe on individuals' privacy.

Social Responsibility of the news Media

5. The concept of media social responsibility was first given prominence through the work of the Hutchins Commission on Freedom of the Press in the United States.¹ The World Association of Press Councils recognises that the free press must be accountable to the public, though not to government. It declares that “it is implicit and inherent in the institution of a free press that the press exercise its powers and duties in a responsible manner”.²

6. In a comprehensive survey of Hong Kong journalists conducted in 1990,³ the overwhelming majority of journalists responded that the following values were important to the profession: report objectively (95%); inform public promptly (95%); analyse and interpret complex issue (92%); be a watchdog of government (88%); and speak for the public (80%). About 65% of the journalists considered it important “to educate the public” and “to

¹ A panel appointed by the Commission issued a report entitled *A Free and Responsible Press* in 1947. The Report contained an analysis of the need for a socially responsible press. It identified five obligations of the media: (a) to provide “a truthful, comprehensive, and intelligent account of the day’s events in a context that gives them meaning; (b) to serve as “a forum for the exchange of comment and criticism”; (c) to project “a representative picture of the constituent groups in society”; (d) to be responsible for “the presentation and clarification of the goals and values of society”; and (e) to provide “full access to the day’s intelligence”.

² At <<http://www.presscouncil.org.au/pcsites/wapc/const.html>> (18.1.99). The Association has 17 members in 1998.

³ J M Chan, P S N Lee & C C Lee, *Hong Kong Journalists in Transition* (The Chinese University of Hong Kong, Hong Kong Institute of Asia-Pacific Studies, 1996), chapter 5.

raise the cultural level of the masses”. Only about a third thought it important for news organisations “to meet the popular taste” and “to provide entertainment”. The “social significance of event” was the most important factor affecting journalists’ news judgment.

7. However, some media organisations have given priority to their economic needs. A public opinion survey conducted by the HKU Social Sciences Research Centre in March 1999 found that as many as 41% of the respondents considered that the news media were “irresponsible” in their reporting, up from 24% in September 1997; and that only 17% of the respondents considered that the news media were “responsible”, down from 41% in September 1997.⁴ Another survey conducted by the Department of Journalism and Communication at the Chinese University reveals that the problems associated with newspapers are ethical rather than political in nature, and that market competition is the reason which leads to the lack of media ethics.⁵ The survey has also registered a decline in the credibility of all newspapers in Hong Kong.

8. All Hong Kong media organisations, other than Radio Television Hong Kong, which is a government department, are businesses running for profit. They face competition which was unknown in the past. New agencies, such as subscription television, satellite television, video-on-demand programme services and the various services offered on the Internet, are taking business away from local publishers and broadcasters. In the face of keen competition, the overriding concern of media proprietors will always be to maintain or increase market share. Commercial pressure may therefore prevail over professional and ethical standards. Some sections of the news media find it difficult not to use material which other organisations may wish to include in their newspapers or programmes. The fear that a competitor gets a scoop the next day put some editors and journalists under great pressure to intrude into the private lives of individuals even though no vital public interest is at stake. In order to halt the decrease in the size of readers or to increase circulation, some sections of the press provide more coverage for sensational stories about people’s private lives. The reason being the more personal the information, the more readers a newspaper will attract. But sensationalism poses a threat to media ethics, especially in the means by which material is obtained and the manner in which a story is presented.

9. The domination of the press by *Apple Daily* and *Oriental Daily News* has also been a growing concern. Before *The Sun* started publication in March 1999, *Apple Daily* and *Oriental Daily News* accounted for about 70% of total newspaper readership.⁶ The lapse in ethical standards in one of the mainstream newspapers will not only undermine the credibility of that newspaper, but also the credibility of the entire news media. The notion of social responsibility is therefore particularly relevant to the press operating in such an environment. As observed by Joseph Pulitzer:⁷

“Nothing less than the highest ideals, the most scrupulous anxiety to do right, the most accurate knowledge of the problems it has to meet, and a sincere sense of moral responsibility will save journalism from a subservience to business interests, seeking selfish ends, antagonistic to public welfare.”

⁴ HKU Social Sciences Research Centre, *Pop Express*, Special Release of 19 April 1999.

⁵ J M Chan, Y K So & C C Lee, “Survey on the Performance of the Hong Kong Media after the Handover”, Jan 1999.

⁶ *Hong Kong Economic Journal*, 18 March 1999, p 10; citing the 1998 Media Index compiled by AC Nielsen.

⁷ Louis A Day, *Ethics in Media Communications – Cases and Controversies* (Wadsworth Publishing, 2nd edn, 1997), p 36, quoting J Pulitzer, “The College of Journalism”, *North American Review*, 178, May 1904, p 658

10. An editorial of the *Hong Kong Standard* suggests that the public should be vigilant over media intrusion:

*“Unfortunately for those who fall victim to such media harassment the line between the public’s right to know and the individual’s right to privacy can sometimes be hard to define. More often than not it falls to a handful of media people to draw this line. Just as often their decisions are dictated by the market. And, especially in a place like Hong Kong, the market is all that matters. Those who argue that this is neither fair nor moral may have a point. But unless the community speaks out, the market is what matters.”*⁸

11. The Statement of Principles adopted by the American Society of Newspaper Editors provides, *inter alia*, that:⁹

“The First Amendment, protecting freedom of expression from abridgement by any law, guarantees to the people through their press a constitutional right, and thereby places on newspaper people a particular responsibility. ... The primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time. Newspapermen and women who abuse the power of their professional role for selfish motives or unworthy purposes are faithless to that public trust.”

12. The MacBride Final Report commissioned by the United Nations Educational, Scientific and Cultural Organisation stated that:

*“[t]he concept of freedom with responsibility necessarily includes a concern for professional ethics Such values as truthfulness, accuracy and respect for human rights are not universally applied at present. Higher professional standards and responsibility cannot be imposed by decree nor do they depend solely on the goodwill of individual journalists, who are employed by institutions which can improve or handicap their professional performance. ... As in other professions, journalists and media organisations serve the public directly and the public, in turn, is entitled to hold them accountable for their actions. Among the mechanisms devised up to now in various countries for assuring accountability, the Commission sees merit in press or media councils, the institution of the press ombudsman and peer group criticism of the sort practised by journalism reviews in several countries. ... Codes of professional ethics exist in all parts of the world, adopted voluntarily in many countries by professional groups. The adoption of codes of ethics at national and, in some cases, at the regional level is desirable, provided that such codes are prepared and adopted by the profession itself - without governmental interference.”*¹⁰

13. We believe that the following views of Mr Tung Chee Hwa, the Chief Executive of the Hong Kong SAR, have the support of the general public:¹¹

⁸ *Hong Kong Standard*, 2 September 1997.

⁹ Reproduced in Louis A Day, above, Appendix 2.

¹⁰ International Commission for the Study of Communication Problems, *Many Voices One World* (Chairman: Sean MacBride SC) (UNESCO, 1980), paras 38 - 43.

¹¹ CE’s opening speech at the 31st Annual Conference of the Chinese Language Press Institute, 23 Nov 1998. Following reports in the press about the relationship between the Commissioner of Inland Revenue and two kindergartens run by the Hong Kong Ling Liang Church, 319 parents published a statement in the press in June 1999, appealing to the media for giving due

“The print and electronic media should not allow themselves to be driven all the way by the markets. They should not take no notice of the impact they would make on the community for the sake of good circulation and profit making. The press and other forms of media are some sort of public instruments, which work influence on the public and should therefore take up their social responsibility as well. The principle of truthfulness and impartiality should be upheld in news reporting. The practice of the media should be monitored by the public.”

14. We maintain that social responsibility can coexist with press freedom and autonomy for news organisations. Freedom and responsibility are not mutually exclusive.

Structure of this consultation paper

15. We shall examine in Chapter 1 the relationship between the right to privacy and freedom of expression. The extent to which media intrusion is a problem in Hong Kong is explored in Chapter 2. Chapter 3 gives an overview of the developments in Australia, Canada, Germany, New Zealand, Peru, Sweden, Taiwan, the United Kingdom and the United States. The role played by the professional bodies in Hong Kong is assessed in Chapter 4. Whether self-regulation is the answer to the problems arising from media intrusion will also be examined in that chapter. The feasibility of employing the existing frameworks under the Personal Data (Privacy) Ordinance and the Broadcasting Authority Ordinance to protect individuals from media intrusion will be discussed in Chapters 5 and 6 respectively. The

regard to journalistic ethics and social responsibility. The statement reads: “1) To boost circulation, some sections of the media have exaggerated unverified information and used terms such as ‘suspected’ and ‘alleged’ when drawing a conclusion that had been arrived at without much careful thought or when casting a slur on a person’s reputation; even innocent parties are implicated without much concern for the effects on them. This malpractice of ‘inflicting harm to a person by mobilising public opinion’ not only damages the reputation of the individuals and organisations concerned but also violates human dignity and corrupts the moral ethos of a society. 2) Some sections of the media even frequently give undue publicity to sex and violence, pander to the public’s curiosity for the purpose of improving circulation, fabricate news and vilify the subjects of news stories. All these practices have brought incalculable damage to our next generation; and more and more parents are deeply dissatisfied with the situation. We urge the media to exercise self-discipline and demand that they give due regard to journalistic ethics and social responsibility when pursuing their commercial interests. Otherwise, once the media have lost credibility, they will suffer a decline in readership eventually.” See “A Declaration in relation to the Reportage about Ling Liang Church Kindergartens and an Appeal to the Hong Kong News Media from a Group of Parents”, *Ming Pao Daily News*, 30 June 1999, B12.

desirability of creating an independent body by law to regulate press intrusion will be explored in Chapter 7. The composition, functions and powers of such an independent body will be examined in Chapter 8.

16. Unless the context otherwise requires, the term “journalists” in this Consultation Paper includes reporters, press photographers, columnists, news presenters, news executives and editors.

Chapter 1 - The right to privacy and freedom of expression

Freedom of expression

Basic Law of the Hong Kong SAR

1.1 Prior to the handover in July 1997, the rights and freedoms protected by the International Covenant on Civil and Political Rights were entrenched by the Hong Kong Letters Patent.¹ Since July 1997, the Basic Law of the Hong Kong SAR has replaced the Letters Patent and the Royal Instructions as the constitution of Hong Kong. Article 39 of the Basic Law provides:

“The provisions of the International Covenant on Civil and Political Rights ... as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedom enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

1.2 The Preamble of the Basic Law states that the Basic Law was enacted “in order to ensure the implementation of the basic policies of the PRC regarding Hong Kong.” These “basic policies” were elaborated by the PRC Government in Annex I to the Sino-British Joint Declaration on the Question of Hong Kong, including the policy that the Hong Kong Government “shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom of the person, of speech, [and] of the press”.²

1.3 Article 27 provides that Hong Kong residents are entitled to enjoy “freedom of speech, of the press and of publications”. This Article merely identifies a particular group of rights and freedoms which the Basic Law guarantees. It does not purport to prevent the enactment of restrictions on those rights. Article 39 permits restrictions on the rights to free speech and freedom of the press guaranteed by Chapter III of the Basic Law, provided that these restrictions are provided by law and are compatible with the international covenants on human rights.³

International Covenant on Civil and Political Rights

¹ Paragraph 3 of Article VII. In essence, it provided that restrictions on rights and freedoms that were imposed by legislation passed after 8 June 1991 should not contravene the ICCPR as applied to Hong Kong.

² Annex I, §XIII, first paragraph.

³ *Secretary for Justice v Oriental Press Group*, HCMP 407/1998, at 59.

1.4 Freedom of expression is one of the basic human rights protected under the International Covenant on Civil and Political Rights (ICCPR). Paragraphs 2 and 3 of Article 19 of the Covenant provide:

“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.”

1.5 It is noteworthy that the following proposed sentence was not included in the General Comment of the UN Human Rights Committee on Article 19: “This is a right the effective enjoyment of which is essential to enable individuals to ensure for themselves the enjoyment of other rights protected in the Covenant.”⁴ It is arguable that the failure to include the sentence indicates that although freedom of expression is important, it is not accorded the pre-eminence given to it under the American constitution.⁵

1.6 Freedom of expression is capable of violating the rights of others, including privacy. Article 19 of the Covenant states 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 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.⁶

1.7 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.”⁷ But the expression is generally presumed to include the duty to present information and news truthfully, accurately and impartially.⁸ It has also been suggested that it obligates the speakers not to abuse their power at the expense of others.⁹ In determining the nature of the “duties and responsibilities”, one has to find out the status of the person in question, the content of the information expressed, and the medium chosen for such

⁴ SR 457 para 24.

⁵ See Dominic McGoldrick, *The Human Rights Committee - Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991), at 461.

⁶ M J Bossuyt, *Guide to the “Travaux Préparatoires” of the ICCPR* (Martinus Nijhoff Publishers, 1987), p 386.

⁷ General Comment 10/19 of 27 July 1983, para 2.

⁸ 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.

⁹ M Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary* (Strasbourg: N P Engel, 1993), 349.

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.

1.8 By virtue of the ICCPR, freedom of expression may be subject to such restrictions as are necessary for respect of the rights of others. Manfred Nowak remarks that none of the restrictions on freedom of expression, including censorship, prohibition of dissemination, confiscation, prohibitions regarding speaking at an assembly etc, is absolutely prohibited by Article 19.¹⁰ He says each type of interference must be examined on the basis of the limitations in paragraph 3 whether it is permissible in a particular case. The *travaux préparatoires* reveals that only with respect to prior censorship that an absolute prohibition was intended.¹¹

1.9 A permissible restriction must be “provided by law”, may only be imposed for one of the specified purposes, and must be “necessary” for achieving that purpose. The requirement of necessity implies that the restriction must be proportional in severity and intensity to the purpose being sought. In contrast to other provisions in the Covenant, Article 19(3) lacks a reference to the necessity in a democratic society. It is therefore arguable that the relevant criterion for evaluating the necessity of restrictions is not the principle of democracy but rather whether it was proportional in a particular case.¹²

1.10 Although the General Comment given by the Human Rights Committee does not comment on the scope of the specified grounds of restriction in paragraph 3, the Committee has held that restrictions might be considered acceptable on the bases that a programme encourages homosexual behaviour, that the audience cannot be controlled, and that harmful effects on minors cannot be excluded.¹³ Nowak suggests that the “other rights” whose protection might justify restrictions on freedom of expression also include the right of privacy under Article 17:

“Even though the drafters of Art. 19 expressly adopted the right to seek information actively, this does nothing to change the duty on States Parties flowing from Art. 17 to protect the intimacy of the individual against sensational journalism. Above all, the legislature must prevent abusive access to personal data. Furthermore, Art. 14(1) expressly provides the possibility of limiting the access of the public and particularly the media to court proceedings in the interest of the private lives of the parties.

The protection of the rights and reputations of others may be ensured by measures of criminal, civil and/or administrative law. For instance, criminal provisions dealing with defamation, derision or slander are as justified by Art. 19(3) as copyright provisions or compensation claims under civil law by a person whose honour has been violated or privacy otherwise infringed.”¹⁴

¹⁰ M Nowak, above, 345.

¹¹ A member said at a meeting of the UN Commission on Human Rights that “There was all the difference in the world ... between a system of censorship and a reminder to the journalist of his duties and responsibilities and of the limitations which might be placed upon him in the exercise of the right to freedom of expression.” See M J Bossuyt, *Guide to the “Travaux Préparatoires” of the ICCPR* (Martinus Nijhoff Publishers, 1987), pp 398-9.

¹² M Nowak, above, pp 351-2.

¹³ *Hertzberg v Finland*, Doc A/37/40, p 161, para 10.4.

¹⁴ M Nowak, above, p 354. P van Dijk and G J H van Hoof express the view that the restriction “protection of the reputation or rights of others” is relevant if the protection of individual privacy is called for: P van Dijk and G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* (Deventer-Boston: Kluwer Law & Taxation Publishers, 2nd edn, 1990), p 423.

1.11 As regards the expression “protection of morals” in Article 19, 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.¹⁵ As far as the protection of individuals is concerned, the expression protects the psychological as well as the physical well-being of individuals and, where a child is involved, it covers a child’s mental stability and freedom from serious psychic disturbance.¹⁶

1.12 Even if a restriction cannot be brought within the exceptions in paragraph 3, resort may be had to Article 5(1) of the ICCPR which authorises interference in a narrow range of circumstances. This article ensures that the right to freedom of expression would not be misused by private parties to destroy the rights of others. It provides that:

“Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”

1.13 The purpose of Article 5(1) is to prevent 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 misused includes the freedom of expression in Article 19. Hence, the freedom may be denied to a person who incites racial discrimination. For present purposes, there are two aspects to Article 5(1). First, any limitation on exercise of the right to freedom of expression must not be greater than is provided for in the Covenant. Secondly, the exercise of that right cannot aim at the destruction of the right of privacy under Article 17.

European Convention on Human Rights

1.14 Freedom of expression is also protected under Article 10 of the European Convention on Human Rights. The European Court of Human Rights 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,”¹⁷ and that it is applicable to information and ideas that “offend, shock or disturb the State or any section of the community”¹⁸.

1.15 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 has therefore ascribed a hierarchy of value, first to political expression, then to artistic expression and finally to commercial expression.¹⁹ Furthermore, the Court is mindful of the fact that journalistic freedom also covers “possible recourse to a degree of exaggeration, or even provocation.”²⁰ Although it must not overstep certain bounds set, *inter alia*, for the protection of the reputation of others, it is nevertheless

¹⁵ *Dudgeon v UK* (1981) 4 EHRR 149, para 47.

¹⁶ *X v Sweden*, CD, vol 7, p 18.

¹⁷ *Lingens v Austria* (1986) 8 EHRR 407, 418.

¹⁸ *Prager and Obershlick v Austria* (1995) 21 EHRR 1, 21.

¹⁹ D J Harris, M O’Boyle & C Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995), at 414.

²⁰ *Prager and Obershlick v Austria* (1995) 21 EHRR 1, at 21.

incumbent on it “to impart - in a way consistent with its duties and responsibilities - information and ideas on political questions and on other matters of public interest.”²¹

1.16 Common law recognise that press freedom has to be balanced against other interests. In carrying out this balancing exercise in a particular case, a judge would distinguish what he thinks deserves publication in the public interest and things in which the public are merely interested. Hoffmann LJ points out that a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. In his judgment:²²

“Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which ‘right-thinking people’ regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute. ...

It cannot be emphasised too strongly that outside the established exceptions, or any new ones which Parliament may enact in accordance with its obligations under the [European Convention on Human Rights], there is no question of balancing freedom of speech against other interests. It is a trump card which always wins.” (emphasis added)

1.17 Jurisdictions in Europe which are State Parties to the European Convention on Human Rights treat the rights of privacy and free expression as fundamental human rights having equal status. Both rights are subject to limitations necessary for the protection of the rights of others.²³ There is no rights hierarchy under the Convention by reference to which a conflict between privacy and free expression may be resolved. According to this view, the two rights must be balanced. One will not inevitably trump the other.²⁴

1.18 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 rights of others. The adjective “necessary” has been construed by the European Court of Human Rights as implying the existence of a “pressing social need”. In addition, the interference must be “proportionate to the legitimate aim pursued” and the reasons adduced to justify it must be “relevant and sufficient”.²⁵ 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.²⁶

1.19 The European Commission of Human Rights agrees 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 recognises that the truth of information cannot be the only criterion for being allowed to publish it. True statements can

²¹ Above, at 19 - 20. Although the European Court has held that it is incumbent on the press to impart information and idea on matters of public interest, the “special responsibility” of the press has also been used as an additional argument for the justification of the ban on publication in *Handyside v UK* (1976) 1 EHRR 737.

²² *R v Central Television Plc* [1994] Fam 192, at 203.

²³ European Convention on Human Rights, Articles 8(2) and 10(2).

²⁴ J Craig & N Nolte, “Privacy and Free Speech in Germany and Canada: Lessons for an English Privacy Tort”, [1998] EHRLR Issue 2, p 162, at 163 – 165.

²⁵ *Barthold v Germany* (1985) 7 EHRR 383, para 55.

²⁶ *Barfod v Denmark* (1989) 13 EHRR 493 at 499.

interfere with legitimate interests which deserve an equal degree of protection as freedom of expression, eg where the sphere of privacy or the honour and reputation of a person is at issue or where legal obligations of confidentiality have been breached.²⁷ The European Court of Human Rights affirms this view, 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. In addition, a correct statement can be and often is qualified by additional remarks, by value judgements, 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.”²⁸

First Amendment to the American Constitution

1.20 Justice Brandeis explained the origins of the First Amendment to the American Constitution, which states in part, “Congress shall make no law ... abridging the freedom of speech, or of the press ...”:

“Those who won our independence ... valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”²⁹

1.21 The US Supreme Court held that the First Amendment supports the view that the press must be left free to publish news without censorship, injunctions or prior restraints:

“In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.”³⁰

²⁷ *Markt Intern and Beermann v Germany* (1987) 11 EHRR 212 at 234 (European Commission decision).

²⁸ *Markt Intern and Beermann v Germany* (1989) 12 EHRR 161 at 175 (European Court decision).

²⁹ *Whitney v California*, 274 US 357, 375 (1927).

³⁰ *New York Times Co v US*, 403 US 713 at 717 (1971).

1.22 However, the First Amendment does not confer an absolute right to publish, without responsibility, whatever one may choose. The authors of *American Jurisprudence* elaborate:

*“The extraordinary protections afforded by the First Amendment’s guarantee of free speech and press carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly, a duty widely acknowledged but not always observed by the press. It does no violence to the value of freedom of speech and press to impose a duty of reasonable care upon those who would exercise such freedoms; the states have a substantial interest in encouraging speakers to carefully seek the truth before they communicate, as well as in compensating persons actually harmed by false descriptions of their personal behavior. ... Whenever the constitutional freedoms of speech and associations are asserted against the exercise of valid governmental powers, a reconciliation must be effected, requiring an appropriate weighing and balancing of the respective interests involved.”*³¹

1.23 Hence, although the language is absolute in its prohibition of limitations on the press, the right of free speech is not absolute at all times and under all circumstances. Freedom of speech does not comprise the right to speak whenever, however, and wherever one pleases, and the manner, place, or time of public discussion can be constitutionally controlled.³²

1.24 As Laurence Tribe explains, the US Supreme Court has developed two approaches for resolving First Amendment claims.³³ Government regulation which aims at ideas or information, in the sense of singling out actions for government control or penalty because of the specific message or viewpoint such actions express, is presumptively at odds with the First Amendment. On the other hand, if the regulation is not aimed at ideas and information but has the indirect result of restricting speech, the regulation is constitutional as long as it does not unduly restrict the flow of information and ideas. The latter approach requires the “balancing” of competing interests in the sense that the values of freedom of expression and the government’s regulatory interests will be balanced on a case-by-case basis. Hence, the American government is allowed to regulate speech on the ground that the expression falls outside the First Amendment’s purposes or fails to satisfy its premises, as when the message suppressed poses a “clear and present danger” or otherwise falls within one of the categories of expression which are not privileged by the First Amendment, such as: (1) portrayal of minors in sexual roles, (2) infringement of copyright, (3) obscenity, (4) defamatory falsehood, (5) contempt of court, and (6) several categories of atomic, military and intelligence information.

1.25 Likewise, it is well settled that the right of free press may be subject to legislative restriction within proper limits. Although states cannot violate the constitutional guarantee of freedom of the press, the publisher of a newspaper or magazine has no special privilege to invade the rights and liberties of others.³⁴ They are subject to reasonable regulation like other citizens. So long it does not involve suppression or censorship, the regulation of newspapers is as broad as that over other private business.³⁵ The Court has held that the power to regulate the business of newspaper publishers may be exercised in the

³¹ 16A Am Jur 2d, Constitutional Law, §491 (footnotes omitted).

³² 16A Am Jur 2d, Constitutional Law, §491.

³³ L H Tribe, *American Constitutional Law* (New York: The Foundation Press, 2nd edn, 1988), §12-2.

³⁴ *Associated Press v NLRB*, 301 US 103, 132-133, 81 L Ed 953 (1937).

³⁵ *Chronicle & Gazette Publishing Co Inc*, 168 ALR 879, 884.

interest of public health, morals, safety, and welfare.³⁶ Nonetheless, a state may not punish a newspaper for the publication of truthful and lawfully obtained information about a matter of public significance, except when necessary to further a state interest of the highest order.³⁷

Reconciling privacy with freedom of speech

1.26 The extent to which the right to privacy may be reconciled with freedom of speech turns on a number of considerations:³⁸

“Broadly speaking, justifications for free speech are either consequentialist or rights-based. The former normally draw on the arguments of Milton and Mill (from truth or democracy), while the latter conceive of speech as an integral part of an individual’s right to self-fulfilment. When it comes to defending free speech these arguments tend invariably to be amalgamated, and even confused. So, for example, Thomas Emerson discerns four primary justifications which include both sorts of claim: individual self-fulfilment, attainment of the truth, securing the participation by members of society in social, including political, decision-making, and providing the means of maintaining the balance between stability and change in society.

Supporters of ‘privacy’, on the other hand, rely almost exclusively on rights-based arguments. Thus, in his classic exposition, Alan Westin suggests that a right of privacy is essential to protect personal autonomy, allowing us to be free from manipulation or domination by others, to permit emotional release, to afford an opportunity for self-evaluation, and to allow limited and protected communication to share confidences and to set the boundaries of mental disturbance.

Difficulties emerge at once. The extent to which the law may legitimately curtail speech that undermines an individual’s ‘privacy’ is often presented as a contest between two heavyweights. But this may be mere shadow-boxing, ... ‘At most points the law of privacy and the law sustaining a free press do not contradict each other. On the contrary, they are mutually supportive, in that both are vital features of the basic system of individual rights.’”³⁹

1.27 The importance of freedom of speech is especially evident with the extraordinary development of the Internet and the resulting access to information. The so-called “information superhighway” provides hitherto unimagined opportunities both to obtain and to receive information on almost any subject.⁴⁰ In order to understand the principles underlying freedom of speech, we examine in the following paragraphs, the political and philosophical arguments which might justify its inclusion in the international covenants. According to traditional views, the free speech principle serves four main

³⁶ 58 Am Jur 2d, Newspapers, §19 & §20.

³⁷ 58 Am Jur 2d, Newspapers, §26. The American Supreme Court does not accept the contention that truthful publication may never be punished consistent with the First Amendment: *The Florida Star v BIF* 491 US 524, 105 L Ed 2d 443 (1989).

³⁸ R Wacks, *Privacy and Press Freedom* (London: Blackstone Press, 1995), pp 21-22.

³⁹ T I Emerson, “The Right of Privacy and Freedom of the Press” (1979) 14 *Harvard Civil Rights - Civil Libs Law Rev* 329, 331.

⁴⁰ R Wacks, “Privacy in Cyberspace : Personal Information, Free Speech, and the Internet” in P Birks (ed), *Privacy and Loyalty* (Oxford: Clarendon Press, 1997).

functions: (a) ascertainment and publication of truth; (b) individual self-development and fulfilment; (c) participation in a democracy; and (d) safety valve function.⁴¹

Ascertainment and publication of truth

1.28 In accordance with this theory, open discussion with no restraint will lead to the discovery of truth. However, not all speech is protected by the free speech principle. Even the most liberal democracies ban speech which incites violence, interferes with the administration of justice, or discloses state secrets or confidential commercial information.⁴² Likewise, the requirement of decency and the interests in the protection of children require that hard-core pornography should be prohibited. Whereas publications about public officials and public figures are protected if they contain information relevant to the public's assessment of their suitability for office or general worth as a public figure, newspaper articles about the private lives of ordinary individuals do not generally constitute "speech" if the publication cannot be justified on any of the grounds supporting free speech.⁴³ Although everyone should, in principle, have the liberty to express and publish true facts, this liberty does not extend to truth which causes private individuals annoyance or embarrassment without any corresponding benefit to the public. The publication of private facts which interferes with a person's private realm and is of no legitimate concern to the public should be restrained even though the facts are true.

1.29 Frederick Schauer argues that it is not always the case that knowing the truth is better than living under a misconception. Even if we are to accept that it is always better to know the truth than to be deceived by a false belief, knowing the truth does not necessarily put one in a better position than one who has no belief at all. The gain in knowledge may simply be an addition rather than the substitution of the true for the false.⁴⁴ Furthermore, it does not follow that an increase in knowledge by a person is good in itself, either for that person or for society. Knowledge that an identifiable individual is a gay, an alcoholic or a welfare recipient has no intrinsic value if the individual concerned is merely an ordinary citizen. An increase of knowledge about such private facts might harm the interests of the individuals concerned without any corresponding benefit to society and the publisher.

1.30 We would add that giving undue emphasis to attainment of truth would render investigative journalism and academic research using human subjects difficult:

"The more reliable and systematic methods of attaining truth about human matters, such as research and responsible 'human interest' journalism, could be threatened by the sensationalised and often misleading disclosures of the tabloid press. Journalists themselves get many of their best stories by guaranteeing the anonymity of their informants or subjects, or by agreeing that some things will be 'off the record' Often the truth on social issues

⁴¹ For a general understanding of freedom of speech, see F Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982).

⁴² E Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1987) pp 11 and 190 (concluding that "the case for applying for a free speech principle to invalidate actions for privacy is very weak, even where the disclosures are accurate.").

⁴³ E Barendt, above, p 189. See also M B Nimmer, "The Right to Speak from *Times* to *Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy" (1968) 56 Cal LR 935.

⁴⁴ F Schauer, "Reflections on the Value of Truth" (1991) 41 Case Western Reserve LR 699, 707-711.

and matters of lifestyle and human behaviour will more likely be discovered by protecting privacy than by violating it."⁴⁵

Individual self-development and fulfilment

1.31 Freedom of expression is essential to the realisation of a person's character and potentialities as a human being. Restraining a person from expressing himself would not only inhibit the growth of his personality but would also affront his dignity. It is only through public discussion that individuals could formulate their own beliefs and develop intellectually and spiritually. But Alan Westin points out that privacy also contributes to the development of individuality:

*"This development of individuality is particularly important in democratic societies, since qualities of independent thought, diversity of views, and non-conformity are considered desirable traits for individuals. Such independence requires time for sheltered experimentation and testing of ideas, for preparation and practice in thought and conduct, without fear of ridicule or penalty, and for the opportunity to alter opinions before making them public."*⁴⁶

Freedom of speech and privacy therefore complement each other in working toward the same goal of individual self-fulfilment.

Participation in a democracy

1.32 The free speech principle may also be viewed as a means by which citizens participate in social and political decision-making. Public discussion and debate of social and political issues assist citizens in understanding such issues and forming their own opinion on matters affecting their lives. This would in turn enable them to check government misconduct and to participate effectively in the operation of a democratic government. Freedom of speech is therefore essential to representative self-government. The argument from democracy is particularly applicable to the press because speech via the mass media contributes more to the democratic dialogue than speech via other means.

1.33 However, free speech is not the only means to facilitate citizen participation in social and political decision-making. One of the basic requirements of democracy is the moral autonomy of citizens. To the extent that privacy fosters and encourages autonomy, privacy is also important to democratic government.⁴⁷ Allowing free discussion in private would contribute to a pluralistic society and protect those who question mainstream thoughts and values. Protecting individuals from unwanted publicity therefore facilitates public discussion and effective participation in a democratic government. The freedom to express ideas and opinions would be undermined if individual privacy is not protected against intrusion.

1.34 Ruth Gavison adds that protecting privacy can attract talented individuals to serve the community by assuring that they would not be exposed to unwanted publicity

⁴⁵ E Paton-Simpson, "Human Interests: Privacy and Free Speech in the Balance" (1995) 16 New Zealand Universities L R 225, 237.

⁴⁶ A F Westin, *Privacy and Freedom* (New York: Atheneum, 1967) 34. See also R Gavison, "Privacy and the Limits of Law" (1980) 89 Yale LJ 421, at 448 and 449-450.

⁴⁷ R Gavison, "Privacy and the Limits of Law" (1980) 89 Yale LJ 421, 455.

merely because they enter public life.⁴⁸ An absolute claim to free speech would discourage people from participating in public affairs:

*“Because it is probably possible to unearth some embarrassing facts about anyone, many individuals may decide to avoid becoming public figures. Therefore, a pattern of investigation and disclosure may seriously limit the life plans of worthy individuals and cost society its more explorative and inventive potential leaders. The leaders are then likely to be individuals who have never tried anything nonconformist or extraordinary, who never challenged accepted norms, and who never made mistakes.”*⁴⁹

1.35 As far as individual self-fulfilment and citizen participation are concerned, the interests in privacy are consistent with those in freedom of speech. Privacy and free speech serve the same values and are complementary to each other:

*“In many cases where privacy and free speech conflict at a superficial level, they are at a deeper level merely two different modes of giving effect to the same underlying concerns. It is possible that in at least some of these cases, free speech values will be better served by protection of privacy than by permitting publication.”*⁵⁰

Safety valve function

1.36 According to Thomas Emerson,⁵¹ freedom of expression provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society. Open discussion promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision making process. On the other hand, suppression of discussion has the following disadvantages:

- it makes a rational judgment impossible, substituting force for reason;
- it promotes inflexibility and stultification, preventing society from adjusting to changing circumstances or developing new ideas; and
- it conceals the real problems confronting a society, diverting public attention from the critical issues.

Freedom of the press

General

1.37 The press is singled out for protection because it is more vulnerable to government control than individual speakers. Unless checked by the constitution, the government can impose restrictions on the press which would not be applicable to individual speakers, such as heavy taxation on publishing companies, requirements of large bonds to start a newspaper, and injunctions against future issues.⁵²

⁴⁸ R Gavison, “Privacy and the Limits of Law” (1980) 89 Yale LJ 421, 456.

⁴⁹ R Gavison, “Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech” (1992) 43 S Carolina L Rev 437 at 469.

⁵⁰ E Paton-Simpson, above, p 234.

⁵¹ T I Emerson, *The System of Freedom of Expression* (New York: Random House, 1970), 6-7.

⁵² 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.

1.38 In an attempt to resolve the controversy as to whether the right to press freedom is a right of proprietors or a right of editors or journalists, it has been argued that press freedom is an institutional right rather than a set of individual free speech rights exercised by the individual journalists and proprietors.⁵³ Seen in this perspective, the primary purpose of the press clause is to create a fourth institution outside the Government as an additional check on the executive, legislature and judiciary.⁵⁴ It is in the interest of an informed electorate that the press should be free to seek and impart information; in particular, to inquire and scrutinise the actions of government. The institutional nature of the press clause also means that the government necessarily retains some discretion in deciding how the press is to be structured. In the opinion of Edwin Baker, rules specifically directing at the press should not be held unconstitutional under the press clause unless they are designed to undermine the press' integrity as an institution or its independence from government.⁵⁵

1.39 Under the Basic Law, the Government of the Hong Kong Special Administrative Region is accountable to the Legislative Council which is constituted by election. The Basic Law guarantees that the election of all Council members shall be by universal suffrage. In a society moving towards a representative democracy, the electorate would like to find out more about the workings of the Government and what are 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 the elected representatives. That necessitates a free press. The European Court of Human Rights held that:⁵⁶

“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.”

1.40 Vincent Blasi argues that free expression is valuable in part because of the function it performs in checking the abuse of official power.⁵⁷ His study reveals that those who drafted the First Amendment placed great emphasis on the role free expression can play in guarding against breaches of trust by public officials. Since the Government has more resources and political power than any political and private organisations, there is a need for the press which is well-organised and well-financed to serve as a counter-force to government. The press could play the role of professional critics who can acquire enough information to pass judgment on the actions of government, and disseminate their information and judgments to the general public. The American Supreme Court held:⁵⁸

“The Constitution specifically selected the press ... to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected

⁵³ E Barendt, "Inaugural Lecture - Press and Broadcasting Freedom: Does Anyone have any Rights to Free Speech?" [1991] Current Legal Problems 63, at 79.

⁵⁴ P Stewart, "Or of the Press", (1975) 26 Hastings LJ 631.

⁵⁵ E Baker, *Human Liberty and Freedom of Speech* (Oxford University Press, 1989), ch 11.

⁵⁶ *Castells v Spain* (1992) 14 EHRR 445 at 476.

⁵⁷ V Blasi, "The Checking Value in First Amendment Theory", American Bar Foundation Research Journal (1977), No 3, p 521.

⁵⁸ *Mills v Alabama*, 384 US 214, 219 (1966).

by the people responsible to all the people whom they were elected to serve.”

1.41 In summary, the media is a “purveyor of information and public watchdog”.⁵⁹ It provides a forum for public debate on topics affecting the life of the community. It ensures that the government is accountable to the public through, not only the dissemination of information, but also the exposure of corruption and abuse of power. To perform the checking and informative functions, the press must be constitutionally protected against governmental intervention in their internal operations.

Basic Law of the HKSAR

1.42 The press receives constitutional protection under Article 27 of the Basic Law which guarantees press freedom as a specific right of Hong Kong residents. Although neither the ICCPR nor the European Convention mentions freedom of the press explicitly, it is generally accepted that it forms an integral part of the freedom of expression under both instruments.

1.43 The courts in Hong Kong apply a generous and purposive approach in the interpretation of the Basic Law.⁶⁰ Any ambiguities arising from the provisions of the Basic Law may be resolved by giving effect to the principles and purposes to be ascertained from the Basic Law and relevant extrinsic materials, including the Joint Declaration. The courts may also refer to any traditions and usage that may have given meaning to the language used in the provisions.⁶¹

1.44 Although the papers and deliberations of the Basic Law Drafting Committee are not publicly available, the *Final Report on Freedom of the Press* adopted by the Executive Committee of the Basic Law Consultative Committee gives us an insight into the intentions of the drafters and the purpose and meaning of the press clause in the Basic Law.⁶² This Report may be treated as an extrinsic aid in ascertaining the intentions of the drafters. In the paragraph on the functions of the press, the Report stated:⁶³

“In modern society, free flow of information is of great importance. Efficient and free access to information is indispensable to commercial undertakings which would like to join the competition. The press has been rendering a highly significant service to the public in this respect. If members of a modern society are to take part in regional or national affairs actively and sensibly, they need to possess sufficient knowledge of the daily affairs, for instance, to enable them to make a fair decision during elections, and to

⁵⁹ *Barthold v Germany* (1985) 7 EHRR 383.

⁶⁰ The Court of Final Appeal in *Ng Ka Ling v Director of Immigration*, FACV No 14 of 1998, agreed at p 40 that a purposive approach is to be applied in the interpretation of the Basic Law. As regards the interpretation of the provisions in Chapter III of the Basic Law which guarantees the fundamental rights and freedoms of Hong Kong residents, a generous approach will be adopted: *Ng Ka Ling v Director of Immigration*, above, at 41; *Chan Kam Nga v Director of Immigration* [1998] 2 HKC 16 (CA).

⁶¹ *Ng Ka Ling v Director of Immigration*, FACV No 14 of 1998, at 40 – 41.

⁶² Consultative Committee on the Basic Law of the HKSAR of PRC: Special Group on Culture, Technology, Education and Religion, and Special Group on Inhabitants' and Other Persons' Rights, Freedoms, Welfare and Duties, *Final Report on Freedom of the Press*; (CCBL-SG/CES/RDI-01-PR01-870311(E)); adopted by the Executive Committee of the Consultative Committee on 14 March 1987.

⁶³ Above, para 3.

allow them to maintain their vigilance towards their government. Therefore, modern society requires clear and accurate reports of events happening everyday, including analyses of their background and causes, so as to provide citizens with information for discussion and review. ...

As the press can generate pressure from public opinion to affect government personnel and policy-making, it has become another form of power for check and balance, in addition to the executive, legislative and judicial power, supervising government's administration, and promoting the growth of society."

1.45 The *Final Report* stated that freedom of the press is subject to restrictions for the protection of social order, the administration of justice, and personal rights and interests. It is interesting that the Report expressly mentioned the protection of reputation and privacy of a person when discussing the scope of the last category.⁶⁴

1.46 After stating that freedom of the press comprises the freedom to run a business in the mass media; the freedom to gather and impart information; the freedom to express opinion; and the freedom to receive information and opinion, the Report noted that the press in Hong Kong generally felt that the Basic Law should have a free press clause to safeguard press freedom.⁶⁵ It concluded that the conventions and case law of the capitalist economy of Hong Kong should serve as the basis on which press freedom could be interpreted.⁶⁶

Application of general laws to the news media

1.47 Although press freedom is instrumental in the realisation of other rights and freedom, this does not mean that the press is free to investigate or publish anything they wish or anything that their readers wish to know. The Royal Commission on the Press in the United Kingdom explained:

*"[P]roprietors, contributors and editors must accept the limits to free expression set by the need to reconcile claims which may often conflict. The public, too, asserts a right to accurate information and fair comment which, in turn, has to be balanced against the claims both of national security and of individuals to safeguards for their reputation and privacy except when these are overridden by the public interest. But the public interest does not reside in whatever the public may happen to find interesting, and the press must be careful not to perpetrate abuses and call them freedom."*⁶⁷

1.48 The Younger Committee was of the view that a substantial invasion of privacy may be justifiable where it could be shown that the object was to give news "in the public interest", but much less often, if the object was to give news merely "of public interest".⁶⁸ They concluded that the processes of inquiry involved in investigative journalism should not be treated by the law in any different way from other journalistic activities. Investigative journalism was in principle a legitimate function of the press "provided that it

⁶⁴ Above, para 5.2.1.

⁶⁵ Above, para 8.1.1.

⁶⁶ Above, para 9.

⁶⁷ Royal Commission on the Press, *Final Report*, (London, Cmnd 6810, 1977), para 2.2.

⁶⁸ *Report of the Committee on Privacy* (Chairman: The Rt Hon Kenneth Younger) (London: HMSO, Cmnd 5012, 1972), para 157.

is carried on within the same rules which bind the ordinary citizen and the ordinary working journalist alike.”⁶⁹

1.49 The press in the United States receives constitutional protection under the First Amendment. But Thomas Emerson has pointed out that such protection does not invest the press with a power to compel the production of private information:

*“The press has a constitutional right to obtain information from private sources on a voluntary basis, but it does not have any constitutional power to compel the production of such information. Moreover, there are a number of limitations upon the methods that may be employed. Thus the press is controlled in its quest for information by traditional laws against trespass, theft, fraud, wiretapping, and so on. These recognized restrictions, which are similar to those protecting the right of privacy against any physical intrusion, have not occasioned any serious conflict”*⁷⁰

1.50 The Supreme Court of the United States has affirmed that the First Amendment is not a license for the press to violate otherwise generally applicable laws. It noted that there is a “well-established line of decisions” holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report news.⁷¹ The lower federal and state courts have also rejected the argument that the press clause in the Constitution protects the press from criminal and civil liability. In *Dietemann v Time*, the Ninth Circuit held that the constitutional guarantee of the freedom of the press had never been construed to accord the media immunity from torts or crimes committed during the course of news-gathering:

*“We agree that newsgathering is an integral part of news dissemination. We strongly disagree, however, that the hidden mechanical contrivances are ‘indispensable tools’ of newsgathering. Investigative reporting is an ancient art; its successful practice long antedates the invention of miniature cameras and electronic devices. The First Amendment is not a licence to steal, or to intrude by electronic means into the precincts of another’s home or office. It does not become such a licence simply because the person subjected to the intrusion is reasonably suspected of committing a crime.”*⁷²

1.51 In Hong Kong, the media has always been subject to limitations imposed by the criminal law, including the laws of copyright, theft, fraud and other like offences. The freedom of the press under the Basic Law gives journalists a right to obtain information from private sources on a voluntary basis only. It does not give the press a power to compel a citizen to release information about himself which he is unwilling to disclose. Nor does it accord journalists immunity from liability for intruding upon the seclusion or solitude of another. Prohibiting the use of intrusive means to collect personal data would not violate the media’s right to freedom of the press. The media can always practise investigative journalism without employing intrusive means. As far as news-gathering activities are

⁶⁹ Above, para 184. In *Lea v Justice of the Peace Ltd, The Times*, 15 March 1974, the court held that “the press has no right to go upon private property or into private places and intrude upon private people and into private rights, and that the standard of conduct and manners demanded of them is as high a standard as should be demanded of every citizen in a civilised community.” See also *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892.

⁷⁰ T I Emerson, above, p 396.

⁷¹ *Cohen v Cowles Media Co*, (1991) 115 L Ed 2d 586, 595-6. See 58 Am Jur 2d, Newspapers, §20.

⁷² *Dietemann v Time*, 449 F2d 244 at 249 (9th Cir, 1971). See also *Galella v Onassis*, 487 F2d 986 (2d Cir 1973); *Houchins v KQED* (1978) 438 US 1; 69 ALR4th 1059, 1078.

concerned, the freedom of the press is the freedom to gather news by fair and lawful means; it is not a freedom to gather news by means which are unlawful or unfair. From the readers' and viewers' point of view, they will continue to enjoy the right to receive information obtained by fair and lawful means.

1.52 Another point of significance is that the press in Hong Kong is not subject to any licensing controls. The registration of a local newspaper under the Registration of Local Newspapers Ordinance (Cap. 268) is purely a matter of formality. The registration fee is nominal and there are basically no restrictions on who can own a newspaper. If the press could enjoy privilege in the gathering of news, any person, including private investigators, fraudsters and criminals, could take advantage of this privilege simply by registering as a newspaper proprietor. Needless to say, such a privilege is open to serious abuse. Insofar as law enforcement officers have to work within the confines of law and subject to all the checks and balances in the system, so should journalists who do not have to be registered with any professional body and are not accountable to anyone except their employers. Our views on the proposal to grant immunity to the media is best represented by the following opinion delivered by Fortas J in the American case of *Time v Hill*.⁷³

“The courts may not and must not permit either public or private action that censors or inhibits the press. But part of this responsibility is to preserve values and procedures which assure the ordinary citizen that the press is not above the reach of the law - that its special prerogatives, granted because of its special and vital functions, are reasonably equated with its needs in the performance of these functions. For this Court totally to immunize the press - whether forthrightly or by subtle indirection - in areas far beyond the needs of news, comment on public persons and events, discussion of public issues and the like would be no service to freedom of the press, but an invitation to public hostility of that freedom.”

1.53 Press freedom under Article 27 of the Basic Law must be weighed against other rights and freedoms specified in the Basic Law. Of particular relevance to our study are the right not to be subjected to “arbitrary or unlawful ... intrusion into a resident's home or other premises” under Article 29 and the right to “freedom and privacy of communications” under Article 30. Except for a few privileges recognised by the law, the press should not have any special rights distinct from those of the ordinary citizen.

Freedom to seek, impart and receive information

1.54 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 information should be protected and that any abuse on the part of journalists could be sufficiently prevented under the limitations clause in paragraph 3.⁷⁴ The right to seek information is of particular importance to the press. The right of the press to acquire information is justified on the grounds that it is desirable to have an informed electorate which is able to assess the wisdom of governmental decisions. Lord Simon said:

⁷³ *Time, Inc v Hill*, 385 US 374 (1967) at 420.
⁷⁴ M Nowak, above, 343.

*“The first public interest is that of freedom of discussion in a democratic society. People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on the facts and arguments relevant to the decisions. Much of such fact finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument. This is the justification for investigative and campaign journalism.”*⁷⁵

1.55 No citizen can obtain for himself all the information needed for the intelligent discharge of his political and social responsibilities. 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. The American Supreme Court acknowledged that “the free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrence.”⁷⁶ Although the Supreme Court has rejected the argument that the First Amendment creates a special right of the press to gain access to information, it has acknowledged that “without some protection for seeking out the news, freedom of the press could be eviscerated.”⁷⁷

1.56 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 imposes no duty on any person to disclose information that he is reluctant to disclose. It does not provide a person with a right to extract information from an unwilling speaker.⁷⁸

1.57 The European Convention on Human Rights makes it clear that the freedom to receive information and ideas is a freedom from interference by public authority.⁷⁹ The right envisages access to general sources of information only. It does not entitle a person to obtain information from someone who is unwilling to impart information.⁸⁰ The right is therefore nothing more than a liberty to receive, without undue interference by the public authorities, information acquired from or imparted by a willing speaker. Freedom of speech and of the press are implicated where an injunction is sought against *publication* of personal information. This freedom is not violated if an injunction is sought against unlawful *intrusion* upon privacy by the press.⁸¹

1.58 Since freedom of expression presupposes a *willing* speaker, the public’s “right to know” as perceived by the press is not an integral part of freedom of expression.⁸² If there were any “right to know” that ought to be protected by law, it is merely the right to

⁷⁵ [1974] AC 273, 315.

⁷⁶ *Estes v Texas*, 381 US 532, 539 (1965)

⁷⁷ *Branzburg v Hayes*, 408 US 665, 681 (1971).

⁷⁸ See E Barendt, *Freedom of Speech*, (Oxford: Clarendon Press, 1987), chapter III.5.

⁷⁹ Article 10.

⁸⁰ *Z v Austria*, 56 DR 13 (1988); 16A Am Jur 2d, Constitutional Law, §477. See P van Dijk & G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* (The Netherlands: Kluwer Law and Taxation Publishers, 1990), at 417-418.

⁸¹ T I Emerson, above, 394, citing *Galella v Onassis*, 487 F 2d 986 (2d Cir 1973) as authority.

⁸² E Barendt, above, 112.

know information imparted by willing speakers, subject to all the restrictions that are permissible under Article 19(3) of the ICCPR.⁸³ The editorial of *Tin Tin Daily News* wrote:

“In order to gather news, reporters have recklessly followed public figures day and night, and taken photographs about them surreptitiously. Such conduct has already been condemned by the community. The mass media in Hong Kong also adopts similar tactics. They set up so-called ‘puppy teams’, disturbing another, disclose the details of private life of another, and then report the facts in an exaggerated tone in an attempt to attract readers. This is unethical and despicable. ... The principle of freedom should not be used to obstruct or harm others. As Hong Kong already enjoys freedom of the press, the principle of freedom should not be undermined. Although the public has a right to know, what they need to know are matters which are of benefit to the public, and not the private and emotional affairs of another. ... Nowadays, many media organisations no longer speak for the public. They no longer administer justice by exposing the dark side of society, but only abuse the ‘public’s right to know’ and use it as a shield for their reckless news-gathering activities.”⁸⁴

1.59 The “right to know” does not entitle everyone to know whatever they want to about anyone. We do not have the right to know what our friend or relative says to his spouse in bed; nor do we have a right to know his medical history, find out whether he has slept with a prostitute, how much assets he has, or how much money he owes the bank. The editorial of *Sunday Telegraph* observed that “[if] you do not have the right to know those things, the press does not have the right to tell them to you.”⁸⁵ An article in the *Hong Kong Economic Journal* says:⁸⁶

“Broadly speaking, the public’s right to know is a democratic right under a government which subscribes to the notions of democracy and accountability. Its scope covers public affairs and public policies and planning of the Government which relate to people’s livelihood and public interest. All information which related to these matters falls within the ambit of the people’s right to know. As regards private affairs and private life which does not impinge upon the public interest, they belong to the ambit of privacy and have nothing to do with the public’s right to know. The public has no right to know information about the private life of an individual in society, whether he is a public figure or an ordinary citizen who is a nobody. Since society has no right to know the private facts about an individual, it is ludicrous to rely on the public’s right to know to justify the invasion of privacy of another.”

1.60 Hong Kong is a free and liberal society which places a high value on human rights of which the right to privacy is one. People who want to have access to an individual’s personal information must justify why they need it. The individual should not be required to justify his desire for privacy.

⁸³ Whether the public has a right to know Government activities is a separate issue. The main concern of this chapter is whether the public has a right to know information about private individuals.

⁸⁴ *Tin Tin Daily News*, 1 September 1997.

⁸⁵ *Sunday Telegraph*, 14 September 1997.

⁸⁶ Yip Po-keung, “The Death of Princess Diana and Media Ethics”, *Hong Kong Economic Journal*, 9 September 1997.

Chapter 2 - Media intrusion in Hong Kong

2.1 Under the conditions of economic recession and severe competition in the media, journalists have found it increasingly difficult to maintain a high standard of media ethics.¹ The Hong Kong Journalists Association reports that deterioration in professional and ethical standards has “[eroded] the responsible exercise of freedom of the press in the public interest”:²

“There are real signs, indeed that the aggressive marketing tactics of [Oriental Daily News] and [Apple Daily], founded to a certain extent on sensationalism and unethical journalistic practices, is leading to a very real fall in professional standards among media workers. This cannot be in the public interest.”

“The past year has been difficult for professional ethics, particularly as leading newspapers have resorted to greater sensationalism to increase their market share. In the printed media, declining standards and ethics have been symbolised by the use of sensational photographs, some of them highly disturbing and intrusive. Apple Daily and the Oriental Daily News, the two main protagonists, compete to see which newspaper can print the most outrageous, attention-grabbing pictures - severed arms from a tug-of-war competition in Taiwan, a trainee solicitor hanging by his neck, the list is endless, as is the damage caused to the unfortunate victims or their relatives and friends whose right to privacy has been violated. Numerous complaints from the public, and public criticism from the HKJA, have had little effect on the practice, which continues unabated. An unrepentant Jimmy Lai, the owner of Apple Daily, told those gathered at a seminar organised by the Freedom Forum in June 1998 that so long as such photos continue to stimulate sales, he would not cease using them.”

2.2 The Ethics Committee of the Association also reported in November 1998 that nearly half of the complaints that were substantiated in the past three years “related to claims of inaccurate or misleading reporting in which the media were alleged to have intruded into the complainants’ privacy.”³ According to an opinion poll conducted by the Society for Truth and Light, three of the best-selling newspapers, namely, *Apple Daily*, *Oriental Daily News*, and *The Sun* scored the highest points in both the Improper Reportage Index and the Inaccuracy Index.⁴

2.3 Complaints about the media infringing an individual’s right to privacy fall mainly into two categories:

¹ The HKJA and ARTICLE 19, *The Ground Rules Change - 1999 Annual Report*, pp 21 – 22.

² The HKJA and ARTICLE 19, *Questionable Beginnings – 1998 Annual Report*, pp 35 & 38.

³ HKJA Ethics Committee, “Media Ethics: The HKJA Mechanism”, 22 Nov 1998, p 1.

⁴ Society for Truth and Light, *Report on the Survey on the Chinese-language Newspapers Pollution Index (April 1999)*. *Apple Daily*, *Oriental Daily News* and *The Sun* scored 6.5, 6.1 and 5.7 out of 10 in the Improper Reportage Index respectively. In the Inaccuracy Index, they scored 6.1, 5.6 and 5.5 respectively.

- a) the use of objectionable means (e.g. surreptitious recording and filming) to obtain information for publication or broadcasting; and
- b) unsolicited or unwanted publicity, however obtained, concerning private individuals or affairs.

2.4 Despite the enactment of the Personal Data (Privacy) Ordinance, there have been instances where the media have intruded upon individual privacy. In order to illustrate the scope and magnitude of the problem, we have cited in this chapter a number of cases taken from the print and broadcast media. The bulk of the cases are taken at random from the best-selling Chinese-language newspapers in Hong Kong. The source of the cases is not cited because this runs the risk of giving further publicity to the private facts published in the press.

2.5 Where a particular case involves the publication of a photograph in a newspaper, the objection might relate to the taking or obtaining of the photograph by a journalist, the publication of the photograph in the newspaper by a publisher, or both. In some cases, it is the taking of a photograph which is objectionable; in others, it is the publication in the press. Much depends on the circumstances of the case. In any event, it is important to bear in mind that the means of obtaining a photograph and the publication of a photograph are separate issues which should not be conflated. Although public disclosure of private facts should normally be allowed if giving publicity to the facts is in the public interest, disclosure in the public interest cannot justify the use of unlawful or unfair means to gather information for publication. Just as an ordinary citizen cannot search a person or break into a house in order to obtain information the publication of which may be justified in the public interest, so no journalist should be allowed to use unlawful or unfair means to gather information merely because the publication of the information to be obtained could be justified in the public interest.

Victims of crime and tragedy

2.6 The news media play an important role in keeping the public well informed of events of public importance and interest. Wherever a crime or tragedy occurs, journalists will be there to take photographs and interview the individuals involved. In the course of gathering information, some journalists may take pictures of victims who have been injured and are unwilling or not fit to give consent. These victims may be receiving first aid on the site, lying on a stretcher, or being wheeled into a hospital. In reporting an event, a report may identify a victim by his name, age, and particulars of his address and occupation. This may cause distress or embarrassment to the victim if he does not want others to learn about the details of his injury or the events leading to the crime or tragedy. Although a report may have excluded one of the Chinese characters of a victim's name, or have merely given a brief description of his address and occupation, his relatives, friends, colleagues, neighbours and acquaintances would normally have no difficulty identifying him, particularly when the report is accompanied with a close-up of his head. Likewise, the eyes of a victim in a photograph may be obscured but in the majority of cases, this cannot stop him from being identified by those who know him. In order to "add life" to a story, some newspapers report all the minute details of an incident even though doing so would cause extreme distress to the individual concerned. Reporting the details of an event is one thing, but reporting such details with the identity of the individual disclosed is another. Information such as the fact that an identifiable individual is suffering from cancer or other illness; his genitals have been injured as a result of the incident; he is having an extra-marital affair; his family is in a financial crisis; and he has been abused by a family member, are all sensitive information which ought not be disclosed in the press in the absence of any overriding public interest -

unless his identity is anonymised in the report. The purpose of distributing news could normally be fulfilled without disclosing the identity of the parties.

2.7 It has been argued that identities are essential to establish the authenticity of the news. They serve the purpose of enabling a newspaper to comment safely, whereas comment would attract liability if the newspaper's remarks could be construed to apply to another person. In news items concerning accidents and illness, it is necessary to be specific to avoid misconceptions and false attribution.⁵ It may further be argued that a vivid account of the news with photographs showing the subject's plight is necessary so as to convey to the public "the real depth of the emotions involved". However, in most cases, the private facts of an identifiable individual are reported only to satisfy curiosity. If the individuals concerned can be identified by neighbours and relatives, this may cause additional embarrassment and distress. Victims are entitled to dignity and respect even though events may have made them part of the news. In the case of victims of crime, a decision not to reveal their identities would not only protect their privacy, but would also ensure their physical safety and encourage other victims to report crimes without fear of exposure.

2.8 Further, the publication of the full name, photographs and details of the private life of those who survived a suicidal attempt may be objectionable. It would be prudent for the press to weigh the possible loss of dignity for the victim against the news value of the suicide. The German Press Code provides that the press must exercise restraint when reporting suicides. The only exception is when the suicide is "of contemporary historical significance and general public interest." Likewise, Taiwan's Press Code provides that newspapers shall "not publish, without the consent of the individual concerned, photographs depicting his private life which is not related to a public interest."⁶ Jay Black and others propose that the following questions should be asked before taking a photograph or recording on videotape:⁷

- *"Am I invading someone's privacy? If so, is it for an appropriate reason?"*
- *Is this a private moment of pain and suffering that needs to be seen by our readers or viewers?"*
- *Does this photo tell the story I want? Would another photo be more appropriate?"*
- *Am I shooting at a distance that is not obtrusive or potentially revictimizing individuals?"*
- *Am I acting with compassion and sensitivity?"*

They add that the editor should ask whether the photograph has any social value or historical significance and whether publicising it would cause unnecessary harm. The editor should avoid using the photograph if it does not add to the story or merely appear for layout purposes or sensationalistic reasons.⁸

2.9 Some would argue that unless there are special circumstances justifying the disclosure of identities of the individuals involved in a news story, the public has no need to know and the media has no right to publish their identities. Reporting the substance of the news without revealing the identity of the subject would usually be sufficient to arouse

⁵ See the views of the British Press Council recorded in the Younger Report: *Report of the Committee on Privacy* (London: HMSO, Cmnd 5012, 1972), para 166.

⁶ Taiwan's *Code of Ethics for the Press*, para 7(4).

⁷ J Black, B Steele & R Barney, *Doing Ethics in Journalism - A Handbook with Case Studies* (Boston: Allyn and Bacon, 2nd edn, 1995), 156.

⁸ J Black, B Steele & R Barney, above, 159.

public concern and stimulate public discussion of social issues. According to this view, the identity of a victim should be anonymised unless its disclosure can be justified in the public interest. For example, the Swedish Code of Ethics for the Press, Radio and Television declares:⁹

“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.”

2.10 We think that in determining whether the identity of an individual should be disclosed in a news feature, an editor should take into account whether the disclosure can be justified in the public interest. Furthermore, journalists should normally seek permission from victims and their families before using their photographs for news features. We believe that the following guidelines set down by the Press Council in Germany would assist journalists in coming to an appropriate decision when reporting crimes and tragedies:¹⁰

“As a general rule, there is no justification for publishing the names and photographs of offenders or victims in reports on accidents, criminal offences, criminal investigations or court proceedings. In all such cases, care must be taken to weigh up the public’s right to be informed and the personal rights of the individual concerned. Victims of accidents or crime are entitled to special protection from disclosure of their names. The identity of the victim is irrelevant for understanding the events surrounding an accident or crime unless it involves a person of contemporary history or occurs in circumstances touching on issues of wider public interest. In the case of relatives who have nothing to do with the incident, respect for their legitimate personal rights must, as a matter of principle, take precedence over the public’s right to be informed.”

2.11 The following are examples in which the private misfortunes or private lives of victims of crime and tragedy have been publicised in the news media:

- a) A newspaper published the surname and one of the two Chinese characters of the first name of a man whose penis was seriously hurt by a nail accidentally fired out of a staple gun. The report contained a photograph of the man lying on a stretcher.
- b) A man’s genitals were stabbed by a robber when the former sought to protect his friend’s property from being taken away by the latter. A newspaper disclosed his full name and age.
- c) A newspaper revealed the age, surname and one of the two characters of the first name of a man who had a stroke when watching an erotic film in a cinema. The report was accompanied with a photograph showing the facial appearance of that person lying on a stretcher.

⁹ Adopted by the Swedish Co-operation Council of the News Media in 1995; at <<http://www.uta.fi/ethicnet/sweden.html>>.

¹⁰ Press Code drawn up by the German Press Council (February 1994), Guideline 8.1.

- d) A woman was kicked out of a car by her husband when she tried to stop him urinating on the street. She was injured as a result. A photograph showing her crying on the street with blood on her face was published in a newspaper. The newspaper disclosed her full name and age and reported that she had been physically abused by her husband in the past.
- e) A newspaper published a photograph of a woman involved in a car crash. It showed that her underpants were clearly exposed to public view while she was receiving first aid on the road.
- f) A man attempted to commit suicide but failed. A newspaper disclosed his full name and age and published a photograph showing that he was lying on a stretcher unconscious. The newspaper reported that he had failed to complete his studies in Australia and was then working in a bank with a salary of about \$10,000.
- g) A man attempted to commit suicide by jumping into the sea from a bridge. He was rescued alive by the Marine Police. A newspaper disclosed his age, surname and one of the two characters of his first name, and the name of the government department in which he had been working. It also reported that he told the police that he was very upset because he has had a hernia.
- h) A woman attempted to commit suicide. At least two newspapers published a photograph of her holding a knife in her hand and crying on the floor. They disclosed her surname, her place of work and the reason which prompted the suicidal attempt. Her colleagues, neighbours and relatives had no difficulty identifying her.
- i) A wife attempted to commit suicide when travelling with her husband on a cruise. A newspaper reported that she suspected her husband of having an affair with a woman in Mainland China. The full names of both the husband and wife were disclosed. The story was accompanied with a photograph of the wife lying on a stretcher.
- j) A husband set fire to himself when he failed to force his wife to drink poisonous liquid. The wife was also burnt when she tried to put out the fire. A newspaper reported that the husband had a mistress in Mainland China. It disclosed the wife's age, surname and one of the two characters of her first name, and published a photograph of her front view when she was wheeled into hospital.
- k) A student was stung by a bee inside his school. The newspaper disclosed that he was being treated for leukaemia (commonly known as blood cancer). It published his age, surname and one of the characters of his first name. It also gave the name and form of the school in which he attended. The report was accompanied with a photograph of him getting off an ambulance. The eyes of the student were slightly obscured in the photograph but he was nonetheless identifiable.
- l) The temporary shelter of a widow was burnt down in a fire. A newspaper published a photograph of her picking up the remains of her property. Her two daughters (one of whom was aged eight) were also included in the photograph. The newspaper stated the full names of the widow and daughters. It reported

that the widow had been receiving financial relief from the government and she had collected used clothes from her friends on the day of the fire.

- m) At least two newspapers published a photograph of a female victim who was seriously burnt while she was sleeping inside her flat. The victim was seen lying on a stretcher. Since she had to receive first-aid with the assistance of electronic equipment, her bra was cut off in the middle and the two parts of the bra were seen hanging loosely on her shoulders. Her breasts, which had two pads put on them, were not covered by the blanket provided by the ambulancemen. A tiny portion of her breast was obscured in the photograph. Her full name and age was given in one newspaper.
- n) A woman was indecently assaulted inside a university hall. A newspaper disclosed the name of the hall, the floor on which the victim lived, and the year and name of the faculty of which she was a student. The report was accompanied with a photograph showing that the victim was boarding a vehicle. The face of the victim was obscured. Subsequently, the Police issued a statement saying that the victim was identifiable even though the face of the victim in the picture was obscured. They criticised the conduct of the newspaper as unethical on the ground that exposing the identity of the victim would cause her immense distress and embarrassment.¹¹
- o) A newspaper reported that a woman was robbed and raped by a man who was suspected to be an illegal immigrant. The article disclosed the age of the victim and the place in which the crime occurred, which is a small village in a specified district in the New Territories. It was also accompanied with a photograph of the victim walking with a plainclothes policeman. Although the victim's eyes in the photograph were obscured and her name was not disclosed, the Police stated that she could still be identified. They condemned the newspaper for its unethical conduct.¹²
- p) A policeman incurred a debt when gambling in Macau. A debt collector intimidated him and set fire to his house when the latter failed to pay his debt. He was injured as a result. A newspaper published a photograph of the victim standing in a ward using his hands to hide his face from the camera.
- q) Some investors who were afraid of losing all their money deposited in a securities firm which had become insolvent staged a protest on the street. One of the protesters was a housewife. She told a reporter that as a result of her loss, her children had to eat bread for lunch. She said she could not imagine how her husband would feel when he found out that she had lost all her savings. Despite the information given by her, a press photographer took a photograph of her side-view apparently without her knowledge. The photograph was published in the newspaper. Although the newspaper disclosed only her surname, her husband, neighbours and relatives would recognise her appearance if they had read that newspaper.

¹¹ *Sing Tao Daily*, 17 June 1998; *Hong Kong Daily News*, 17 June 1998. It is an offence to publish any matter which is likely to identify any person as the complainant of a "specified sexual offence", including rape and indecent assault: Crimes Ordinance (Cap 200), sections 156 & 157.

¹² Above.

- r) A bald-headed worker was injured when working in a construction site. A newspaper reported that he insisted on putting on his wig before being sent to hospital. The report gave his full name and published two photographs taken when he was attended to by ambulancemen. His bald head was visible in one of the two photographs.
- s) A woman was sent to hospital after taking an overdose of drugs in a bid to reduce weight within a short period of time. A newspaper disclosed the full name and age of the woman. A photograph showing her husband accompanying her to hospital was also published.

2.12 We note that, as a matter of fact, some sections of the press are more likely to anonymise a victim if he is a wealthy businessman, or a powerful figure who may or may not have connections with a triad society, as opposed to victims who are merely ordinary citizens on the street. A recent example is a “wealthy businessman” who was alleged to have been defrauded by his investment agent to whom he had entrusted a huge sum of money. Not even his surname was revealed in the press. It shows that the press is not insensitive to privacy concerns. The problem is that some sections of the press appear to pay more attention to the privacy concerns of the rich and powerful who might take action against the offending news organisations than to those of ordinary citizens.

Persons in grief or distress

2.13 Most journalists show respect for the privacy, dignity and well-being of persons encountered in the course of gathering news. They are usually sensitive to the feelings of those affected by grief when seeking interviews or photographs. However, journalists occasionally intrude into private grief in the aftermath of accidents and tragedies. For instance, in December 1998, a 76-year-old hawker set himself on fire inside a court after a magistrate ordered that the articles that had been put on sale by him be confiscated. The hawker was later certified dead in a hospital. A few days later, his son made a public statement, urging the media to cease asking for interviews with the family members of the deceased, in particular, his surviving wife who was also 76 years old.

2.14 Some intrusions into grief have been defended on the ground that victims and their families find it therapeutic to talk about their grief to the media. Hurst and White address this argument in the following terms:

“Grief counsellors ... argue that following sudden news of the death of loved ones the bereaved are in no state to make rational judgements about whether they want to be interviewed, and may be manipulated by the media. Some journalists share the same qualms. A former police rounds reporter for The Age said she found the whole idea of intrusions distasteful and added : ‘I think people are often taken advantage of when they’re at their most vulnerable and probably just looking for a shoulder to cry on. The journalists end up being the shoulder. I’m sure a lot of victims and their relatives end up regretting it later.’ ... Criminologists Peter Grabosky and Paul Wilson found that some journalists they talked to were prepared to be ‘super-assertive, and sometimes manipulative’ in obtaining information from distraught relatives. Others talked of the tricks of the trade used to con photographs out of a bereaved family and one reporter accused his opposition of stealing photographs off mantelpieces. Their research led

them to the conclusion that 'for many journalists the pressure to deliver a story tends to eclipse ethical considerations'."¹³

2.15 In commenting on the journalistic practice of dispatching a reporter to a burning house to film and interview the victim, Louis Hodges observes that if the victim does not want to talk to the news media, the journalist who insists places an added burden on that victim; and if the victim is filmed against his will, the victim has lost yet more control of his life than the loss occasioned by the fire. He points out that although the burning house, the cause and extent of the fire, and the leaking gas line may be publicly important, the private grief of the victim is not. It is possible to tell the story of tragedy without interviewing or filming the victim.¹⁴ We share the same views as Hodges.

2.16 Since victims often feel confused and disoriented immediately after a crime or tragedy occurs, the news media can inflict a "second victimisation" upon victims or survivors by enhancing their feelings of violation, disorientation, and loss of control. Both victims and their families should be able to recover and put their experiences behind them. Reportage that is intrusive adds to their distress. A veteran journalist was reported as saying that the attitude of some Hong Kong journalists who joined the profession in the past 10 years has become more arrogant when interviewing victims. He was quoted as saying that:

*"Whilst someone is still coping with the death of a family member in a traffic accident, some journalists still raise their voice and speak in a hostile tone which is akin to that used in interrogating a suspect: 'How is it! What is your family situation!' This is hardly acceptable."*¹⁵

2.17 We agree with the National Victim Centre in the United States that victims should have rights when dealing with the media, including the right:¹⁶

- to say no to an interview;
- to exclude children from interviews;
- to refrain from answering any questions with which the victim is uncomfortable or that the victim feels are inappropriate;
- to demand a correction when inaccurate information is reported;
- to ask that offensive photographs or visuals be omitted from airing or publication;
- to conduct a television interview using a silhouette or a newspaper interview without having their picture taken; and
- to grieve in private.

2.18 The following advice given by the National Victim Centre in Texas is also pertinent:

¹³ J Hurst & S A White, *Ethics and the Australian News Media* (MacMillan Education Australia Pty Ltd, 1994), p 116 (footnotes omitted); referring to P Grabosky and P Wilson, *Journalism and Justice: How Crime is Reported* (Sydney: Pluto Press, 1989).

¹⁴ L Hodges, "The Journalist and Privacy", in *Journal of Mass Media Ethics: Special Issue - Privacy II* (New Jersey, Hillsdale, Lawrence Erlbaum Associates, 1994), 209.

¹⁵ To protect the interests of the journalist concerned, the source of this quote is not cited.

¹⁶ The National Victim Center (US), "Crime Victims' Privacy Rights in the Media", at <<http://www.nvc.org/ddir/INFO35.HTM>> (28.4.98). Guideline 11.2 of the German Press Code provides that "The bounds of acceptable reporting on accidents and disasters are exceeded where the suffering of victims and the feelings of their families cease to be respected. Those hit by misfortune must not become victims for a second time because of the tactless media coverage."

“Never feel that because you have unwillingly been involved in an incident of public interest that you must personally share the details and/or your feelings with the general public. If you decide that you want the public to be aware of how traumatic and unfair your victimisation was, you do not automatically give up your right to privacy. By knowing and requesting respect for your rights, you can be heard and yet not violated. ... You have the right to grieve in privacy. Grief is a highly personal experience. If you do not wish to share it publicly, you have the right to ask reporters to remove themselves during times of grief.”¹⁷

2.19 The Professional Practice Policy of Herald and Weekly Times Limited in Australia contains detailed provisions on grief and trauma:¹⁸

“8.1 All people, including public figures, should be treated with sensitivity and courtesy during times of grief and trauma.

8.2 Ordinary citizens caught up in newsworthy events are ignorant of journalistic practice and that ignorance should not be exploited.

8.3 When seeking permission to interview or photograph a victim or bereaved person, make every effort to make the initial approach through an intermediary, such as family member, friend, counsellor etc. Make a direct approach to the subject only if no intermediary is available.

8.4 If permission is refused, do not persist. (You may, however, leave a contact number or card so the person may reconsider the request at a less stressful time.)

8.5 Do not enter non-public areas of any institution charged with caring for, and counselling, victims and their families (such as hospitals, welfare institutions, funeral parlours or chapels, churches etc.) without identifying yourself to a responsible official or without the express permission of the affected people, their intermediaries or their medical/welfare/legal advisor or guardian.

8.6 A victim or bereaved person has the right to terminate an interview and/or photographic session at any time and should be made aware of this right before the interview/photographic session begins.

8.7 If a subject breaks down during an interview, offer to terminate the interview.

8.8 Conduct all interviews with the utmost sensitivity to both the distress likely to be caused by the interview itself and the possible impact on the interviewee that publication of information given in times of stress may have.

8.9 If you feel at any time that ordinary citizens may not be aware of the import of what they are saying, discuss this with them and give them the opportunity to withdraw any such remarks.

¹⁷

Quoted in J Black, B Steele & R Barney, above, 196.

¹⁸

Para 8.0. The Policy is reproduced in J Hurst & S A White, above, Appendix 7.

8.10 *Draw your editorial supervisor's attention to any material or image that may be particularly sensitive or to any circumstance that may have led you to omit material from your copy.*

8.11 *Photographs of victims or grieving people should be published only following due consideration of sensitivity and privacy.*

8.12 *Any restrictions placed on the use of photographs supplied by the immediate family or an intermediary should be honoured.*

8.13 *Distressing or gratuitous reference to the state of a victim's body or to body parts should be avoided.*

8.14 *Care should be taken when republishing any material on the anniversary of a trauma or crime not to cause undue distress to victims or their families."*

2.20 The public has an interest in learning about the details of accidents and tragedies, particularly their causes and any significance they may have on society. But such an interest does not necessarily require an interview with a grief-stricken spouse or parent who is still in a state of shock. An individual's right to privacy at times of bereavement or extreme distress should be respected. Both enquiries and publications at times of grief and shock should be carried out with sympathy and discretion for the sake of the families involved. People in distress should not be put under pressure to provide interviews. Filming or recording of those in distress should not be carried out in such a way as to increase the grief or suffering of the subject and his family. Use of materials gathered in an accident or disaster must not be used for voyeuristic or prurient purpose even though they are filmed or recorded in public places. Pictures which are likely to exacerbate grief or cause distress should be published only if permission has been granted by the individuals concerned or can be justified in the public interest.

Recording in hospitals

2.21 Where permission has been granted to film or record in organisations by the relevant management, journalists are not obliged to seek the consent of individuals whose appearance is incidental or where they are shown to be anonymous members of the general public. However, in sensitive places such as hospitals, individual consent should generally be obtained unless their identity has been concealed.

2.22 Hospitals are places where journalists may gather information for a news item. For instance, press photographers may take pictures of injured victims arriving at a hospital. Pictures of victims alighting from an ambulance, lying on a stretcher, sitting on a wheelchair, or waiting for treatment or admission at the waiting area of a hospital are fairly common in newspapers and television programmes. These pictures are mostly taken without the consent of the victims. The victims, when arriving at a hospital, are invariably injured, sick, disoriented, or even unable to move or respond. Consent could not be inferred from the fact that the victim or patient does not object to a journalist taking a photograph. In a bid to protect the interests of victims, the nursing staff sometimes use a file or their own hands to hide the faces of victims from the cameras. In one case, a hospital went to the trouble of covering the whole body of a traffic accident victim with a cloth while he was being transported on a stretcher inside the hospital.

2.23 Although all hospitals restrict public access to places where patients are treated or accommodated, the privacy of victims who have been admitted into hospitals may still be ignored by those who wish to find out more about their experience. Journalists may represent themselves as the victims' friends and relatives in order to gain access to a ward. Apart from obtaining information about the victims and the events leading to an incident, journalists may take pictures of victims lying on bed even though the former are fully aware that the latter are sleeping, paralysed, unconscious, mentally unstable, or otherwise in no fit condition to give consent. It should be noted that even if a patient may apparently have given his consent to be photographed and interviewed, that patient might not be in a fit condition to be photographed and interviewed or to give any informed consent.¹⁹ However, the Bylaws of the Hospital Authority merely require the consent of the patient.²⁰ To protect the interests of patients, consideration may be given to amending the Bylaws so that the consent of a hospital should also be required if a journalist wishes to take a picture of a patient. However, it has been argued that only a minority of patients in hospitals is unfit to give informed consent. Requiring further consent from hospital is not only unnecessary for the majority of patients, but would be open to the accusation that this would infringe the rights of a patient to have free access to the press. The medical profession and members of the public are welcome to express their views on this issue.

2.24 Media intrusion in hospitals is an extreme form of invasion of privacy. An American court held that "whatever 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."²¹ The Press and Television Codes of Ethics in Taiwan declare that journalists should respect hospital regulations and obtain the consent of the subject when gathering information in hospitals; in particular, pictures should not be taken against the wishes of the subject.

2.25 We have proposed in the Consultation Paper on *Surveillance and the Interception of Communications* that the use of a recording device in those parts of a hospital where patients are treated or accommodated without the consent of the lawful occupier should be guilty of an offence.²² Unless journalists have the express consent of both the hospital and the patient concerned, they should not take photographs in those parts of a hospital in which patients are treated or accommodated. To protect the privacy and health of patients waiting to be treated or admitted into hospital, the taking of photographs in the waiting area of a hospital should generally be prohibited.

2.26 The following examples indicate that media intrusion may take place in hospitals:

- a) A former artiste was surreptitiously photographed shortly after she had undergone an eye operation. The photograph was published in a magazine. She was seen lying on a hospital bed with her eyes still blindfolded.

¹⁹ Eg the plaintiff in *Kaye v Robertson* [1991] FSR 62.

²⁰ Bylaw 7(1) of the Hospital Authority Bylaws (Cap 113, sub leg A) provides that no person shall, in a hospital - "(f) take any photograph or film or video picture whereby the likeness of a patient in the hospital is thereby depicted without the consent of such patient; or (g) take any photograph or film or video picture whereby any ward in a hospital is thereby depicted without the consent of a member of the staff whose consent shall not be withheld unless annoyance or disturbance to a patient, or prejudice to medical treatment of a patient, is thereby caused or likely to be caused."

²¹ See 86 ALR3d 374 at 378.

²² HKLRC Privacy Sub-committee, *Privacy: Regulating Surveillance and the Interception of Communications* (1996), chapter 1.

- b) A husband and wife from Hong Kong were involved in a traffic accident in Shenzhen. A newspaper reported that the four limbs of the husband were paralysed. It published a photograph showing that he was lying on a bed in a Shenzhen hospital with his eyes shut. The full names of the husband and wife were revealed in the report.
- c) Six men were attacked by gangsters when leaving a discotheque in Shenzhen. A newspaper published a photograph of a victim lying facedown on a hospital bed. It reported that he had been stabbed many times on his hands and back.
- d) A construction worker fell from the 29th floor onto the ground when the scaffolding supporting her collapsed. At least two newspapers published a photograph of her lying on a hospital bed with her eyes closed. One report stated that she was grieving and her eyes were wet with tears. The other reported that she was emotionally unstable.
- e) Many women contracted a virus after undergoing a surgical operation in a Shenzhen hospital which specialised in gynaecology and paediatrics. A newspaper published a photograph of a Shenzhen woman lying on a hospital bed. She was reported as having given birth to a child by caesarean section. The photograph showed that her abdomen was not covered by any clothing. Her bed trousers were loosely worn and her private parts were covered by a white cloth. Her full name was given in the report and her face was not obscured. In contrast, the same newspaper showed more restraint in respect of a Shenzhen woman whose husband was a Hong Kong resident. That woman was seen sitting inside a ward. Her name was not given and her eyes were obscured in the photograph to protect her identity.
- f) A woman was injured in an accident. A journalist took a photograph of her sitting on a wheelchair inside the waiting area of a hospital, waiting to be admitted to the hospital for treatment. On a separate occasion, a newspaper published a photograph of an old lady sitting on a wheelchair in the waiting area of a hospital. It shows that the lady was resting on her arm with her eyes closed. That photograph was used to illustrate a story that a hospital was crowded with patients because many people had caught cold.
- g) The wife of a Hong Kong businessman suffered severe injuries in a fire that occurred in a Shenzhen hotel and remained in a coma thereafter. Her husband lodged a claim against the hotel. A photograph of her lying unconscious on a hospital bed was published in a newspaper.
- h) A middle-aged man was rescued by firemen when he attempted to commit suicide by setting his flat on fire. He was found to be emotionally unstable when sent to hospital. A newspaper reported that he escaped from the hospital after he had been admitted for observation, and that it was suspected that he ran away from the hospital in an attempt to avoid the pursuit of journalists. The newspaper also published a photograph showing him being brought back to the hospital by the police. No attempt was made to obscure his face.
- i) In order to illustrate that smoking by patients is common in hospitals, a newspaper published a 20 cm x 15 cm photograph of the side-view of a hospital patient. It shows that the patient was in a hospital uniform smoking a cigarette.

One of his nostrils had a plastic tube stuck in it. He was not facing the camera. His face was not obscured. The caption disclosed his age and surname and reported that part of his liver was removed because of liver cancer, leaving a 14-inch scar which was easily recognisable, and had to be hospitalised again because he was later found to have brain cancer.

2.27 The question is whether the hospitals and individuals in the above cases had given their consent to the journalists taking those photographs and the newspapers publishing the same. The cases show that there is evidence that the privacy of Shenzhen citizens has been intruded upon by the Hong Kong press. We consider that Hong Kong journalists should observe the same professional standards even though they are gathering information in other jurisdictions for use in Hong Kong. The privacy of individuals residing or staying in Shenzhen deserves the same level of respect from the news media in Hong Kong.

Surviving victims and relatives

2.28 At a conference about reforming the news media in Hong Kong, a senior executive of a television company said that there was a total lack of compassion for victims and survivors in local journalism:

“There’s no respect for death and other tragedies – no respect for the victims and worse yet, certainly no respect for the survivors either. Photographers literally stick their lenses under the noses of those leaving the morgue after having just identified the bodies of their loved ones; so-called reporters chase after them to ask the inane question of how they feel about their loss; etc.”²³

2.29 Surviving victims and relatives may provide important information to journalists for understanding the background of an event or for explaining a social or economic issue to the public. However, we consider that journalists should be sensitive to their feelings when determining whether to publicise the private lives of the victims and their friends and relatives. The media should treat the surviving friends and relatives with respect and not merely as a means to journalistic or commercial ends. They should not identify a victim’s friends and relatives unless this can be justified in the public interest.

2.30 We are also of the opinion that journalists should exercise care when determining whether to publish (or re-publish) a photograph showing the dead body of a victim or a family photograph of the deceased taken during his lifetime. They should always bear in mind the effects which such photographs may have on the private life of the surviving relatives, particularly the offspring of the victim who are still children. In *R v Broadcasting Complaints Commission, ex parte Granada Television Ltd*,²⁴ the death of Helen Sandford in 1987 was reported in a local newspaper and discussed in a medical journal. Three years later, Granada broadcast “The Allergy Business” which showed photographs of three people including a photograph of Helen with the word “dead” superimposed. Helen’s parents were not forewarned that the programme would include material relating to Helen and saw it at home by chance. The Broadcasting Complaints Commission ruled that the transmission without forewarning the parents was an unwarranted infringement of their privacy. The Court of Appeal held that the fact that a matter had once been in the public domain could not

²³ Raymond R Wong, “Credibility Crisis: What’s Wrong with Journalism and How to Fix It”, at <http://www.hku.hk/mstudies/english/Sph_rrw1.htm> (2.3.99), p 1. Speech delivered at the conference jointly organised by the HKU Centre of Asian Studies and The Freedom Forum Asian Center on 26 Jan 1999.

²⁴ [1995] 3 EMLR 163; [1995] COD 207.

prevent its resurrection, possibly many years later, from being an infringement of privacy. It referred to Article 8 of the European Convention on Human Rights and further expressed the view that it would be an unacceptably narrow interpretation of the meaning of privacy and contrary to common sense to confine privacy to matters concerning the individual complainant and not as extending it to his family.²⁵

2.31 Journalists should ask themselves how they would feel if it was they who were subjected to scrutiny by the media, and it was their own private misfortune that was exposed in the public eye. The Taipei Journalists' Association declares that "Unless [a journalist is] in good conscience, [he should] never put [his] pen to paper."²⁶ As suggested by the Poynter Institute for Media Studies in the US, journalists should ask the following questions to ensure that their decisions are ethically justified:²⁷

- *"Who are the stakeholders - those affected by my decision? What are their motivations? Which are legitimate?"*
- *What if the roles were reversed? How would I feel if I were in the shoes of one of the stakeholders?"*
- *What are the possible consequences of my actions? Short term? Long term?"*
- *What are my alternatives to maximize my truth-telling responsibility and minimize harm?"*
- *Can I clearly and fully justify my thinking and my decision? To my colleagues? To the stakeholders? To the public?"*

2.32 The following examples show how the private lives of surviving victims and relatives may be intruded upon by the news media:

- a) A man suffered a heart attack when staying with a prostitute and died after receiving treatment in hospital. His full name and age and a photograph of him taken during his lifetime were published in a newspaper.²⁸
- b) A husband committed suicide by hanging himself in his flat. A newspaper not only published his full name and age and a photograph of him taken during his life time, but also the age, surname and the second character of the first name of his wife. The story was accompanied with a photograph showing the living room of the flat. The wife was seen checking the items in a drawer. A relative who had come to look after her was also included in the photograph. The wife was reported to be suffering from mental illness. Another newspaper published a photograph of her husband lying on a stretcher when he was carried into an ambulance. Two weeks later, the same newspaper reported that a sum of \$5,000 had been transferred from its emergency relief fund to assist the wife. The headline of the story read: "Four-year-old Girl and Mentally Ill Mother Lost

²⁵ The BBC Producers' Guidelines provide: "So far as is reasonably practicable, surviving victims or the immediate families of the dead people who are to feature in the programme should be informed of the BBC's plans. Failure to do this may be deemed a breach of privacy, even if the events or material to be used were once in the public domain. The programme should proceed against the objections of those concerned only if there is a clear public interest." BBC, *Producers' Guidelines* (November 1996), ch 4, section 5.6, p 46.

²⁶ Para 8 of Canon of China Journalists, adopted by Taipei Journalists' Association in 1957.

²⁷ B Steele, "Doing Ethics: Ask Good Questions to Make Good Ethical Decisions - A Poynter Institute Handout" (1995), at <http://www.poynter.org/research/me/me_doetho.htm>.

²⁸ One can also think of the hypothetical case of revealing the identity of a private citizen who died in consequence of acquiring AIDS. Revealing such information is likely to adversely affect the private life of the family members of the deceased.

Support”. The paper re-published the photograph of the deceased husband lying on a stretcher.

- c) A man died in a traffic accident. A newspaper published his wedding photograph in which the man and his wife were seen toasting each other. The face of his wife was not obscured in the photograph.
- d) A university student died in a traffic accident. A year later, a journalist called on the student’s parents. A photograph of the mother was taken at the doorstep, probably by means of a hidden camera. The newspaper disclosed that the mother had heart problems and burst into tears every time she was reminded of her son. The father had lodged a civil claim against the driver. It further reported that both the mother and the father had wept during the interview.
- e) One of the beneficiaries under a will of a former celebrity revealed in a radio programme in Canada how the estate of the celebrity would be distributed. A magazine in Hong Kong publicised those details, including who the beneficiaries were and how much each would receive under the will. The magazine further remarked that the spouse of the deceased, now living in Hong Kong, was not entitled to a share in the estate.
- f) A man hanged himself in a bid to persuade his estranged parents to come together. A newspaper published the letters purportedly containing the last wishes of the deceased. One of them was addressed to his sister. In the letter, he was alleged to have asked his brother not to choose politics as his career. The full name and age of his brother were revealed in the report. A photograph showing the brother making a telephone call outside the mortuary was also published.
- g) A front-page story of a magazine revealed that a deceased insurance agent had slept with many men in order to get more business. The press had reported that the agent had a family.

2.33 We note that a few newspapers do not refrain from publishing photographs that depict dead bodies under sheets, in bags, or lying on the floor. A few years ago, a magazine was widely criticised for publishing a photograph of the dead body of a 10-year-old boy killed by a blackmailer. In another three cases, involving respectively a singer, an accountant and a gang leader, the journalists went so far as to take photographs of the corpse inside a mortuary or coffin. Despite the harm that might be done to surviving family members, the editors had given their permission for such photographs to be published in the press. In a study carried out by the Caritas Community Centre in Kowloon, 89% of the parents interviewed considered that it was improper to publish a picture of an uncovered dead body. 92% of the parents also thought that it was improper to publish an enlarged picture of a dead person whose underwear was exposed to public view.²⁹ The intent of the law of privacy is to protect living individuals from undue interference with their private life. There is, strictly speaking, no privacy issue if the private facts of a dead person are publicised - unless such publicity has unduly interfered with the private life of a living individual.³⁰ However, the right to die with dignity is generally regarded as an article of faith

²⁹ Caritas Community Centre (Kowloon), *Opinion survey on the views of parents on the way Chinese-language newspapers deal with news pictures* (June 1999), para 7(2).

³⁰ Taiwan’s Code of Ethics for Television Broadcast provides that broadcasters should avoid showing dead bodies on the television when reporting fatalities. It is worth noting that the *Texarkana (Texas) Gazette* in the US has adopted a Dead Body Policy which seeks to make

in society. Even if the tragedy involves a public figure or occurs in public view, journalists should nonetheless report it with a sense of compassion. We note that the Calcutt Committee on privacy 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.³¹

Funerals

2.34 Journalists may cover a funeral if the funeral is attended by public figures or the deceased was the subject of a newsworthy event. We think that when reporting a funeral, journalists should avoid engaging in intrusive conduct such as taking close shots of people who are grieving. In the funeral of Leonard Ho, co-founder of the Golden Harvest movie studio, film star Jackie Chan was reported to have lost his temper when the press photographers rushed up to the hearse trying to take pictures.

2.35 Taking pictures of the inside of a funeral hall is intrusive if it is done against the express wishes of surviving relatives. In one case, five women were found dead in a flat in Kowloon. Prior to the funeral service of one of the deceased, the relatives put up a notice at the door of the funeral hall, advising that journalists were prohibited from taking pictures of events inside the hall and of relatives attending the service. A newspaper reported that when the friends of the deceased realised that some journalists had ignored the notice and had taken pictures, they kept the door to the hall shut. This report was accompanied with a photograph of the inside of the hall, presumably taken before the friends of the deceased shut the journalists out. A few persons can be seen sitting next to the flowers sent in by the friends and relatives of the deceased. One could reasonably expect that the publication of this photograph, if not the taking thereof, was against the wishes of the surviving friends and relatives.

2.36 The following provisions from the BBC Producer's Guidelines illustrate how a news organisation should behave if it seeks to cover funerals:³²

“Normally, programmes should cover funerals only with the permission of the family. Good reasons are needed if the wishes of the family are to be ignored. We should ensure that funerals are covered sensitively, and should avoid intrusive conduct, such as close camera shots of people who are grieving.”

Identity of parties and witnesses in court proceedings

2.37 Article 14(1) of the ICCPR provides that a party to criminal or civil proceedings is entitled to “a fair and public hearing by a competent, independent and impartial tribunal established by law”. Since not all members of the public can or have the time to attend hearings, journalists sitting in the press bench of a courtroom have been

the *Gazette* a sensitive paper instead of being an exploitative, shocking newspaper: “Effective [from 9 October 1989], we will initiate a kinder, gentler photo policy that precludes dead bodies in photos. There may be some exceptions to this, if there is compelling news value. But as the norm, we will cease to show bodies under sheets, or in bags, or on stretchers, or in any other state of demise. I can't rationalise to myself how body photographs add anything to the value of our newspaper. Instead, I think many of our readers would find them offensive. I would also extend this policy to people who are severely injured and likely to die. ... The guiding philosophy behind the policy is one of compassion for the victim's friends and family and an empathy for the sensibilities of our readers. ...” Quoted in J Black, above, 170.

³¹

³²

Calcutt Committee's proposed Code of Practice, para 16.
Para 6.

described as “the eyes and ears of the public”. Robertson and Nicol explain that press reporting of court cases has many important virtues:³³

- a) Publicity is the very soul of justice. It is a safeguard against judicial error or misbehaviour.
- b) It deters perjury, in that witnesses are likely to tell the truth if they know that any lie they tell might be reported, and provoke others to come forward to discredit them.
- c) It enhances public knowledge and appreciation of the workings of the law.
- d) It assists the deterrent function of criminal trials.
- e) It permits the revelation of matters of genuine public interest.

2.38 Compared to the United Kingdom and the United States, the standard of legal journalism in Hong Kong is generally not high. Press reports of court proceedings are at times sensational. Although the identity of parties and witnesses in court proceedings and the particulars stated in court documents or disclosed during a hearing are matters in the public domain,³⁴ giving publicity to the alleged facts of a claim or the evidence given in court may affect the private life of the relevant party or his friends and relatives if the full names of the parties are also revealed in the news report. Where an individual is suing for damages in a personal injury action, the facts revealed in the proceedings may relate to sensitive data about his or her family life, sex life, financial status, and mental and physical condition, including his or her reproductive ability. Likewise, the private details of victims of crime which are revealed in criminal proceedings may also be published in the press. These facts may be highly sensitive if the victims are identifiable. Furthermore, the physical safety of victims of crime would be endangered if their names and addresses become known to their assailants through the press. Publicising their identities would also discourage victims from reporting offences for fear of exposure.

2.39 The US Supreme Court noted that:

“The details of many, if not most, courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues thought to provide principal support for the decision in New York Times ... And while participants in some litigation may be legitimate ‘public figures,’ either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others.”³⁵

2.40 Article 14(1) of the International Covenant on Civil and Political Rights provides that the press and the public may be excluded from a trial for reasons of “morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires”.³⁶ It is interesting to note that although all other limitation

³³ G Robertson & A Nicol, *Media Law* (Harmondsworth: Penguin, 3rd edn, 1992), pp 14-18, 305-309.

³⁴ Journalists and other members of the public may inspect Statements of Claim, affidavits and other documents filed with the High Court. Affidavits may attach copies of private correspondence containing private facts of the parties.

³⁵ *Time, Inc v Firestone*, 424 US 448 at 457.

³⁶ The European Convention on Human Rights has a similar provision. See Article 6(1) of the Convention. The exclusion of the public from divorce proceedings and from medical disciplinary proceedings has been considered by the Strasbourg authorities as permissible on this ground. The identity of victims of crime may be protected on other policy grounds. For example, the names of rape victims are suppressed to protect them from loss of face and to encourage them to give evidence for the prosecution. The court may also direct that a

clauses of the Covenant include “public morals”, the word “public” was omitted in Article 14. This may mean that grounds more related to private than to public morals are acceptable for excluding the press and the public from a trial, as when intimate details of private life are at issue.³⁷ It appears that the public, including the press, can be excluded for reasons of “morals” in, for example, a hearing concerning a sexual offence. The “interest of the private lives of the parties” is at stake if the proceedings involve family matters, sexual offences or other cases in which publicity might violate the private and familial sphere of the parties.³⁸

2.41 The press is generally free to report on the private lives of the parties so long as these facts are revealed in open court. However, it does not mean that restraint need not be exercised when reporting private facts in circumstances where no public interest is involved. Ten years ago, a university student who had been charged with and eventually convicted of shop-lifting jumped to her death after her name and other personal particulars had been publicised by the press. Although the News Executives’ Association insisted that the press had not breached any law and was free to report a public trial, the Hong Kong Journalists Association considered that the front-page treatment of the theft case in a newspaper was out of all proportion to the seriousness of the offence. It doubted whether there was any news value in publishing the full identity of a person convicted of a minor offence. In another case, a victim of a serious traffic accident sued the driver for damages. The victim was paralysed and became impotent as a result of the accident. Seagroatt J was reported as asking the press to be humane and sensitive to the feelings of victims when reporting court proceedings. He believed that the press was more likely to avoid taking a picture of the victim the more it learned about his trauma.³⁹

2.42 Recently, in a case in which the defendant was tried for procurement of unlawful sex by false representations, the judge made an order prohibiting the media from disclosing the identity of the victim. During the hearing, evidence that the victim was asked to perform anal and oral sex with the defendant was adduced. Notwithstanding the prohibition order, several journalists took pictures while she was leaving the court. The victim was reported to be frightened when the cameras were pointing at her. She sought to protect her identity with her umbrella but a newspaper reported that she failed in her attempt because there was no way she could fend herself from the intrusive cameras on her own. The news organisations concerned could not be prosecuted for contempt of court unless they publish or broadcast the pictures thereby revealing her identity.

2.43 The draft Covenant on Journalistic Ethics of the Taiwan Journalists’ Association states the general principle that “Unless public interest is involved, journalists should respect the right of privacy of the subjects. Even if a public interest is involved, journalists should still avoid intruding upon the misfortune of the subjects.”⁴⁰ We think that the press should endeavour to apply the same principle to the reporting of court proceedings. In particular, it should be humane and sensitive to the feelings of victims of crime, and should avoid reporting sensational stories about the injuries sustained by an identifiable victim who has given evidence in criminal proceedings.

blackmail victim be anonymised to encourage potential witnesses in other blackmail proceedings to come forward.

³⁷ A C Kiss, “Permissible Limitations on Rights” in L Henkin (ed), *The International Bill of Rights – The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), at 303-4.

³⁸ M Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary* (Strasbourg: N P Engel, 1993), 250.

³⁹ PI 738/95. The claim was settled out of court. *Ming Pao Daily News*, 13 January 1998.

⁴⁰ Para 7. The draft was promulgated in 1995. Quoted in Ma Chi-shen, *Hsin Wen Lun Li (Journalistic Ethics)* (Hong Kong, 1997), Appendix 5.

2.44 The following cases are instances where the private details of a victim giving evidence in criminal proceedings had been reported by the press:

- a) Two defendants were charged with false imprisonment and criminal intimidation. The full name and age of the victim were disclosed in at least two newspapers. Both papers reported that he was then a uniformed policeman of a specified police station and that he had lost \$300,000 by gambling in Macau. One newspaper even published a photograph of the victim stepping out of court.
- b) A newspaper published the full name, age and photograph of a victim who had given evidence against a defendant charged with criminal intimidation. It reported that the defendant admitted that he had had an affair with the wife of the victim.
- c) In reporting a criminal case, a newspaper disclosed that a defendant cut open the upper part of the victim's trousers and poured inflammable liquid on his genitals. The defendant then set fire to the victim. Part of the headline read: "Set fire to burn the victim's genitals in a bid to get loan agreement signed". The full name and age of the victim were disclosed in the report. It also included a photograph of the victim running near the High Court (presumably to escape from the pursuit of journalists) using his hands to hide his face (presumably to prevent his face from being photographed by journalists).
- d) A defendant was found guilty of assaulting a man who had refused to pay for the service provided by a prostitute. The full name, age and occupation of the victim were published in a newspaper.

Past criminal records

2.45 The press occasionally discloses that an individual was convicted of a criminal offence in the past. In our Consultation Paper on *Civil Liability for Invasion of Privacy*, we comment that criminal convictions are public records the publication of which should not be restrained on the ground that it is a breach of privacy. However, we also note that some commentators have argued that persons who have been convicted of minor offences should have a right to have their criminal records forgotten. They contend that public knowledge and increased awareness of a particular crime may be gained by discussing past records without revealing the identities of the offenders. Divulging such records would shatter the newly found respectability of former offenders and may ruin their future and cause their friends and relatives to shun them. We agree that the general public has an interest in rehabilitating criminals and returning them as productive and law-abiding citizens to society. The Court of Appeal in California held that:

*"one of the major objectives of society ... and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal. ... Where a person has ... rehabilitated himself, we, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime."*⁴¹

2.46 In the United States, a matter that was once of public record may be protected as a private fact if the information is not newsworthy. The following comment

⁴¹ *Melvin v Reid* 112 Cal App 285 at 292; quoted in *Briscoe v Reader's Digest Association Inc* 57 ALR3d 1.

made by the American *Restatement of the Law of Torts* explains that a lapse of time is one of the factors to be considered in determining whether to publicise the past criminal record of an individual:

“The fact that there has been a lapse of time, even of considerable length, since the event that has made the plaintiff a public figure, does not of itself defeat the authority to give him publicity or to renew publicity when it has formerly been given. Past events and activities may still be of legitimate interest to the public, and a narrative reviving recollection of what has happened even many years ago may be both interesting and valuable for purposes of information and education. Such a lapse of time is, however, a factor to be considered, with other facts, in determining whether the publicity goes to unreasonable lengths in revealing facts about one who has resumed the private, lawful and unexciting life led by the great bulk of the community. This may be true, for example, when there is a disclosure of the present name and identity of a reformed criminal and his new life is utterly ruined by revelation of a past that he has put behind him.”⁴²

2.47 We believe that in striking the balance between the public’s right to know the past criminal record of an individual and the interest of an individual in avoiding reference to the fact that he had been convicted of a crime, the press should take the following factors into account:

- whether he is a public figure and, if so, whether there is a connection between the offence for which he was convicted and his public office or mandate;
- whether the offence in question is consistent with his public image;
- the seriousness of the offence;
- how many years have lapsed since he was convicted of the offence;
- whether the individual had become fully rehabilitated; and
- whether the publication of the identity of the individual could be justified on other grounds.

Juveniles in court proceedings

2.48 The publication of identities of juvenile offenders impedes rehabilitation by exposing them to the glare of publicity. Further, it is arguable that juveniles are entitled to learn from mistakes. They should not be stigmatised as criminal for life by their friends and relatives. On the other hand, the recent increase in juvenile crime is a growing public concern. Teenagers are more mature and sophisticated than they used to be. Where a juvenile offender knowingly committed a serious offence with full knowledge that it is wrong to do so, there is no compelling reason to shield him from media spotlight. Nevertheless, the public’s need to apprise of the problems arising from juvenile delinquency may be satisfied without prejudicing the privacy interests of juvenile offenders. Generally, the interest of a juvenile offender in rehabilitation is paramount unless he poses a serious threat to the safety of others.

2.49 Taiwan’s News Council considers that the interest in the protection of juveniles is sufficiently important to pass a resolution specifically on the reporting of court proceedings involving juveniles.⁴³

⁴² *Restatement 2d, Torts*, § 652D, Comment k.

⁴³ Passed on 6 November 1967. Quoted in Ma Chi-shen, p 98.

“Youth are malleable. Even if they occasionally contravene the law, they should still be sympathised and forgiven, hoping that they would change for the better, change their quality, and eventually become good persons. ... In reporting events involving juveniles, journalists should obviously not publicise the juvenile’s name so as to protect him from affronts to his dignity or from prejudices against his rehabilitation. Even if that juvenile has been committed to trial or has already been convicted and sentenced, his name or photographs should not be published prior to the announcement of the Court. As for other data such as his occupation, origin or residential address, their publication should also be avoided if they would enable others to identify him. It goes without saying that the press should not publish the name of his parents and relatives. These persons are not the subjects of the incident. The purpose of this resolution is to promote journalistic ethics.”

2.50 Under the Juvenile Offenders Ordinance (Cap 226) in Hong Kong, children and young persons under the age of 16 who are concerned in the proceedings of a Juvenile Court⁴⁴ are protected from identification by the press.⁴⁵ However, those who are tried in a court other than a Juvenile Court are not protected. Their identities may be disclosed by the press.

2.51 Taiwan’s Press Code provides that journalists should “not publicise the name, address and other related information which might lead to the identification of a minor who is suspected of committing an offence or who has already been convicted of an offence.” It further provides that photographs of minors involved in an offence should also be banned.⁴⁶ In a report commissioned by Taiwan’s News Council, three academics considered that the practice of excluding the second Chinese character of an accused could not truly protect juvenile criminals. They recommended that their names should be excluded altogether.⁴⁷

2.52 The Calcutt Committee in the UK proposed that “The press should 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 or defendants.”⁴⁸ The Code of Practice ratified by the Press Complaints Commission follows closely the Committee’s proposal, except that *defendants* under the age of 16 are excluded from protection. In contrast, the Code on Fairness and Privacy adopted by the UK Broadcasting Standards Commission provides that “children under 16 involved in police enquiries or court proceedings relating to sexual offences should not be identified or identifiable in news or other programme.”⁴⁹

2.53 The following are instances where juveniles concerned in criminal proceedings were identified in newspapers in Hong Kong:

⁴⁴ 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.

⁴⁵ Juvenile Offenders Ordinance (Cap 226), section 20A(1). In Hong Kong, children under the age of 7 years are exempt from criminal responsibility. A child aged not less than 7 years but under 14 is also exempt unless the prosecution prove that he committed an offence with “a mischievous discretion”, i.e. when he did the criminal act, he knew what he was doing was “seriously wrong”.

⁴⁶ Paras 4(4) & 7(5).

⁴⁷ See Ma Chi-shen, above, 127.

⁴⁸ *Report of the Committee on Privacy and Related Matters* (London: HMSO, Cm 1105, 1990), Appendix Q, section 12.

⁴⁹ BSC, *Code on Fairness and Privacy* (1998), para 32.

- a) In a criminal case tried in a magistrate's court, seven young persons, all below the age of 18, were charged with false imprisonment and indecent assault. A newspaper disclosed the full names of six defendants, one of whom was only 14 years old. It further reported that the remaining defendants were aged 16 or 17.
- b) A girl had sex with a man when she was only 15 years old. A month later, she extorted \$60,000 from the man by claiming that she was pregnant. She was 16 years old when she was tried for blackmail. Her full name was disclosed in the report.
- c) Four out of five defendants in a criminal case were charged with rape, indecent assault and false imprisonment. A newspaper reported that they aged 15 to 17 years. It gave the full names of all the defendants. Another newspaper suppressed the identity of the 15-year-old defendant by publishing his surname only. At least four of the five defendants were acquitted on all charges.
- d) A 15-year-old boy was charged with drug trafficking. A newspaper published his full name when reporting that he admitted his guilt in court.
- e) Two newspapers reported that seven boys and girls below the age of 8 in a small village in the New Territories were indecently assaulted by a paedophile. Although both reports did not disclose the names of the children, the name of the village was given in one newspaper. Since the village is a small one, all children below the age of 8 in that village were implicated.

2.54 We believe that in order to protect the future of young persons, the news media should exercise care when reporting juvenile crime and court proceedings involving juveniles. We have considered whether it is appropriate for Hong Kong to follow the Calcutt Committee's proposal and, if so, whether such a policy should be extended to other offences. In the course of our deliberations, we note that it might be in the public interest to disclose the identity of minors who are charged with heinous crimes such as murder or manslaughter. Even if the offence is not heinous, it may nevertheless be regarded as serious. This might be the case if a minor is charged with rape or inflicting grievous bodily harm.

2.55 Whether to publish the identity of a juvenile offender will ultimately depend on the age of the juvenile and the nature of the crime. There are various options available, such as lowering the age limit from 16 as proposed by the Calcutt Committee to, say, 15 or 14, below which the identity of a child charged with an offence ought not be disclosed even though it is not unlawful to do so; restricting the protection to children charged with "minor offences"; extending the protection proposed by the Calcutt Committee to children charged with any offences other than those carrying seven years' imprisonment (or life imprisonment); keeping the identity of a child charged with any offence anonymous unless and until he has been convicted of a "serious offence" (or offence carrying life imprisonment); or simply leaving the matter to the good sense of editors.

2.56 Our preliminary view is that the protection under the Juvenile Offenders Ordinance should be extended to children under the age of 16 who are concerned in proceedings other than those of a Juvenile Court. However, since the need to protect the identity of child offenders involves issues other than privacy matters, it would not be appropriate for us to come to a definite view prior to consulting the public on this matter. We therefore invite members of the public to submit their views as to whether the identity of

children involved in criminal proceedings (whether as defendants, victims or witnesses) ought to be protected from publication; and if so, how the line should be drawn.

Media scrums

2.57 In order to discharge their duties effectively, journalists may have to be persistent in questioning or pursuing persons who feature in a news event. However, although it may be legitimate for journalists to go to the subject's office or home to try to secure pictures or interviews, the combined effect of news-gathering at a particular place by a large number of journalists from various news organisations may be intimidating to the person in its centre. In an attempt to address the problem of "media scrums", the BBC has issued the following guidelines for its producers.⁵⁰

"We must not harass people unfairly with repeated telephone calls, or repeated knocks at the door, or by obstructing them as they come and go (this could amount to a criminal offence of aggravated trespass if it takes place on private property). It may be possible or appropriate for pooling arrangements to be reached, or for the BBC to withdraw altogether if it is clear that the subject does not intend to appear. BBC teams on the spot who are asked by the subject to leave should refer to editors for guidance. The appropriate decision will depend upon the precise circumstances, but considerations to bear in mind are :

- *is the subject a private citizen or a public figure?*
- *is the subject victim, villain, or merely interested party?*
- *has the subject expressed a clear intention or wish not to appear or give interviews?*

There will be cases when the BBC judges it proper to withdraw and when we therefore miss material which other organisations gather and publish."

Harassment and following

2.58 The following is a vivid account given by a reporter of how journalists may harass an individual in order to secure an interview in a hospital:⁵¹

"although [artiste Law Kar-leung] was hospitalised [for acute hepatitis (type A)], the journalists still repeatedly telephoning him and 'overwhelmed' the pager of his record company's manageress ... with a huge number of messages. Even more outrageous was that the journalists went to the hospital and kept on pushing the door vigorously as a result of which Law could not sleep. In the end, he had to gather all journalists and answer their enquiries on one special occasion so that he might truly take a rest. He therefore had to give the press a briefing [on a hospital bed] last Saturday even though he was still in hospital, only because he was 'forced' to do so by the journalists."

2.59 Hong Kong journalists are renowned for their persistence in gathering information. Indeed as many as 62% of journalists in Hong Kong regarded it as proper "to badger unwilling informants to get a story". Only 15% regarded such practices as

⁵⁰ BBC, ch 4, section 4.

⁵¹ "Law Kar Leung Forced to Meet the Press", *Next Magazine*, No 430, Book B, p 14.

improper.⁵² In the Consultation Paper on *Stalking*, we recommend that it be a crime and a tort for a person to pursue, without lawful authority, a course of conduct which amounts to harassment of another, unless the pursuit is reasonable in the circumstances. We suggest in the *Stalking* Paper that it is unnecessary to include a definition of harassment in the legislation because the concept is well understood by the courts. However, some guidelines as to what conduct would amount to harassment would be helpful to journalists and the public. For example, the Code of Practice of the UK Press Complaints Commission provides that the following requirements on harassment should be complied with unless the conduct of the newspaper or magazine can be demonstrated to be in the public interest:⁵³

“(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 ... 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.”

2.60 Journalists may seek to obtain information by overt or covert means. They may keep watch outside the home of, or places frequented by, a public figure, particularly if he is involved in marital failure or extra-marital affairs. They may follow him on motorcycles or block his way by cars, or even risk a traffic accident or confrontation to take a photograph. A few artistes and celebrities have been reported to have driven recklessly to escape from a pursuit.

2.61 It is important to note that even if our proposals on stalking were implemented, a subject receives no protection if he is not aware that he has been followed or watched by a journalist. A survey carried out by *Apple Daily* found that 88% of the 340 respondents believed that it was an invasion of privacy for reporters to trail public figures.⁵⁴ In an opinion poll conducted by the Social Sciences Research Centre of the University of Hong Kong on the “tracking methods” used by the news media in news coverage,⁵⁵ 47% of the respondents did not approve of the tracking method used by the mass media in reporting news. Only 24% had no objection to the media using such methods. Fifty two percent of the respondents also thought that the media should not use the exclusive information obtained from tracking celebrities or public figures as a means of increasing their circulation or audience ratings, compared with 28% who approved such use.

2.62 In our opinion, journalists should not follow individuals, whether or not they are public figures, unless it can be justified in the public interest. In particular, in the absence of any public interest, journalists should not persist in pursuing or photographing individuals after they have been asked to desist. Of course, the conduct of journalists must also be within the law.

2.63 The following are instances where journalists watched or followed their subjects:

⁵² J M Chan, P S N Lee & C C Lee (1996), above, p 101.

⁵³ Clause 4.

⁵⁴ *Apple Daily*, 2 September 1997.

⁵⁵ HKU Social Sciences Research Centre, *Pop Express*, No 13, September 1997.

- a) A singer was reported to have been involved in a traffic accident when avoiding the pursuit of reporters who were chasing after him in a vehicle.
- b) An ex-schoolmate of a pop star was trailed by a journalist for a few days in order to confirm the rumour that the pop star no longer treated him as her boyfriend.
- c) A judge of the Court of Appeal was followed and his home besieged by journalists of *Oriental Daily News* for three days in order to “teach him what the term paparazzi meant”. The High Court in *Secretary for Justice v Oriental Press Group* held that “the motive and real purpose behind this operation was to take revenge for the court’s decisions against the Oriental Press Group and to mete out a punishment to the judge for his judgments against the Group.”⁵⁶
- d) A magazine reported that its journalists had been following a Miss Hong Kong for a few days when she was studying in a Hong Kong university. The journalists took secret photographs of her while she was attending a seminar in a lecture theatre. A photograph of her boyfriend waiting outside the university was also published.
- e) The journalists of a magazine followed a performer, her boyfriend and an actor who was rumoured to be her new boyfriend, for seven days in order to find out more about her love affair. The magazine reported that the performer had been very much on her own; her boyfriend had gone out with a middle-aged woman; and the actor had had a date with his colleague whose name was publicised in the report.
- f) A journalist surreptitiously followed a woman and her child for at least one day. The husband of the woman was the son of a public figure. The couple was involved in custody proceedings at that time.

Doorstepping

2.64 In order to seek and report the truth, journalists may confront individuals for an interview, without prior arrangement, either in public, on private property or at the doorstep of private premises. Such tactics, commonly known as “ambush interviews” or “doorstepping”, are likely to be employed if a journalist seeks to obtain information from someone who does not wish to be interviewed or photographed, or to obtain some footage of the inside of the private property to which access is likely to be denied. These interviews are objectionable on the following grounds:⁵⁷

“First, when the ambush is captured on tape for broadcast, the element of surprise often results in an appearance of guilt on the part of the source. Particularly when the interviewee is inexperienced in dealing with the media, the attempts to fend off the unexpected interrogations of the determined, aggressive reporter can project a visual image of uncertainty and guilt.

Second, ambush interviews can violate the basic journalistic standards of balance and fairness. Anyone who becomes the subject of a media inquiry,

⁵⁶ HCMP 407/1998, at 29.

⁵⁷ Louis A Day, *Ethics in Media Communications – Cases and Controversies* (Wadsworth Publishing, 2nd edn, 1997), at 129.

which includes even sources suspected of illegal activity, has the right either to reject an interview altogether or at least provide a reasoned response to the reporter's questions."

2.65 In light of the above, it may be thought that such tactics should be used only if the subject fails or is unlikely to respond to a request for an interview and there is *prima facie* evidence of crime or serious anti-social behaviour.⁵⁸

2.66 There are two cases which are worth mentioning:

- a) In one case, a man stabbed his daughter-in-law to death after they had had a dispute. The man then killed himself. One or more journalists called on the deceased's son at eleven o'clock in the evening. No one inside answered the door. The journalists called the police for assistance, justifying their action on the ground that the son might have done something silly to himself. The police broke open the door and discovered that the son had merely been meditating on his own. The efforts of the journalists were rewarded when the journalists secured an interview with the son. One newspaper published a photograph of the son sitting inside his flat with a plain-clothes policeman searching his wallet. The full name and age of the son were also published.
- b) In a criminal case in which the defendant was charged with assault occasioning actual bodily harm, a press photographer alleged that he was assaulted by the defendant while the latter was escorting a Mr Ma outside the High Court. The defendant was one of the eight persons who had been escorting Mr Ma from the High Court after Mr Ma's appearance in a contempt case. The magistrate found that the press photographer grabbed the defendant's jacket and pulled him during a scuffle. The photographer "intended to inject himself into the cordon surrounding [Mr Ma]. It was a forceful and persistent attempt."⁵⁹ The magistrate held that "photographers have a clear right to photograph persons after they have left the court building but do not have the right to prevent the lawful progress of those walking in a public place." He further held that the dissemination of newsworthy material was in the public interest but photographers should act in a "moderate, non-confrontational manner".⁶⁰

Gathering information by clandestine methods

2.67 One of the primary goals of journalism is to seek and report the truth. However, people often conceal information of public importance that could prove embarrassing or damaging to them if made known to the public. In such circumstances, journalists are tempted to find out the truth by relying on clandestine methods. Concealed cameras or hidden tape recorders may therefore be used by journalists in private premises or public places without the subjects' consent; and telephone conversations may be recorded

⁵⁸ Para 4.7 of the RTHK Producers' Guidelines (September 1998) provide: "Questions asked by reporters as public figures come and go from buildings are usually part of legitimate news gathering, even if the questions are sometimes unwelcome. Door-stepping should generally be a last resort. It could be justified under the following circumstances: [a] The investigation involves crime or serious anti-social behaviour, or is of great public interest. [b] The subject has failed to respond to a repeated request to be interviewed, has refused an interview on unreasonable grounds, or has a history of such failure or refusal."

⁵⁹ "Photographer out of line at court", *South China Morning Post*, 20 October 1998. Case No: WSC 9208/98.

⁶⁰ Above.

without the other party's knowledge. Without these methods, investigative journalism might sometimes be impossible, and evidence of crime, anti-social behaviour or inefficiency of officials might never be uncovered and exposed. However, journalists must guard against infringing a person's right of privacy without reasonable grounds. Apart from ensuring that news-gathering activities are lawful in the criminal and civil sense, journalists must observe the principle that the degree of intrusion resulting from the use of clandestine methods is proportionate to the seriousness of the subject matter under investigation. The mere fact that a subject is of interest to the public does not justify journalists using undercover methods to gather information.

2.68 The Ethics Committee of the Hong Kong Journalists Association notes that some complaints lodged by members of the public involved the obtaining of news material by means which were not "straight forward":⁶¹

"Sometimes photographs were taken with a hidden camera or videotaping was done without prior consent. Complainants were also unhappy about the use of 'undercover' reporting techniques by journalists when the journalists approached their targets. Sometimes reporters made agreements to keep certain information confidential and then broke the agreement."

2.69 The Ethics Committee points out that over-riding public interest considerations were not involved in some of these cases. They state that the "sharp increase" in ethics complaints involving the use of means which are not straight forward is "a worrying trend". They believe that media organisations have a duty to ensure that the material they use is obtained in a conventional manner by their staff.⁶²

2.70 The question of how press freedom may be reconciled with the right of privacy in each of the following circumstances will be examined in detail in the following paragraphs:

- a) surreptitious recording in public places;
- b) extra-territorial surveillance;
- c) use of deceptive means to gather information;
- d) surreptitious recording in private premises;
- e) recording of oral or telephone conversations with the consent of one party; and
- f) interception of telephone conversations.

Surreptitious recording in public places

2.71 Individuals in public places do not have the same degree of privacy as in their own homes or offices. They can be observed by others and their private conversations may be overheard by anyone who is lawfully present nearby. Insofar as the individuals concerned are not in a state of solitude or seclusion, and their presence in the public place is not a matter of private concern, the recording of their conversations or their activities, whether done openly or surreptitiously, is generally not covered by the intrusion tort proposed in our Consultation Paper on *Civil Liability for Invasion of Privacy*. But surreptitious recording can be unfair to those recorded and may infringe their privacy. It may constitute an unfair means of collection of personal data, and therefore unlawful under the Personal Data (Privacy) Ordinance.

⁶¹ HKJA Ethics Committee, "Media Ethics: The HKJA Mechanism", 22 November 1998, p 2.

⁶² Fong So, "Media Ethics : The HKJA Mechanism", in *HKJA 28th Anniversary*, (1996), at p 30.

2.72 Under our proposals in the *Civil Liability Paper*, a defendant in an action for invasion of privacy based on public disclosure of private facts would have a defence if the private facts publicised were in the public domain. But accurate reporting of such events may cause unnecessary distress and anxiety to the subject. The mere fact that the personal information is in the public domain is not in itself sufficient to justify the news media reporting it. There are certain categories of “public places” where individuals might have a legitimate expectation of privacy. When an individual is staying inside a church, a clinic, a community centre, a public washroom, or even a restaurant, he might rightly expect to be free from media attention.

2.73 Some sections of the media have exploited this grey area and have taken secret photographs of well-known figures while they were in public places. Some prominent businessmen, professionals and showbusiness personnel were surreptitiously photographed while they were entering or leaving a restaurant, night-club or hotel. On a few occasions, the male subject was photographed walking on the street in the company of a young lady. If the subject is married, giving publicity to such facts is likely to cause family disputes or even marital breakdown, with all the adverse consequences which a separation or divorce would have on the children of the couple, but perhaps with no corresponding public interest involved.⁶³

2.74 The use of a hidden device to obtain personal information with a view to its publication or broadcasting is objectionable even though the subject is in a public place. We agree with the Independent Television Commission in the UK that “The use of hidden microphones and cameras to record individuals who are unaware that they are being recorded is acceptable only when it is clear that the material so acquired is essential to establish the credibility and authority of a story, and where the story itself is equally clearly of important public interest.”⁶⁴

Extra-territorial surveillance

2.75 Journalists may record activities inside private premises by using a technical device outside the premises without the consent of the occupier or the subject. In one case, journalists from a magazine used a long-lens camera to take photographs of the inside of a flat owned by the boyfriend of an artiste on Lantau Island. Some of the photographs were published in the magazine. The artiste was seen quarrelling with her boyfriend in the living room. On another occasion, the journalists from the same magazine took a photograph of the artiste packing her belongings inside her room in Sai Kung. Apparently, the room was visible to passers-by. The artiste drew the curtain as soon as she discovered that she was under surveillance. The photograph was published by the magazine in the same article. In another case, journalists from a magazine kept watch outside the building of an artiste from the evening to the next morning. They monitored the activities inside her flat and took photographs of her working inside her reading room. Two of these photographs were published in the magazine.

Use of deceptive means to gather information

2.76 Journalists may obtain personal information or pictures through misrepresentation or subterfuge. They may falsify or misrepresent their identities, and pose as customers, patients, employees, officials or visitors in order to speak to the subject over the telephone or gain access to private premises, thereby enabling them to obtain first-hand

⁶³ See “The Inside World of ‘Puppy Teams’”, *Ming Pao Daily News*, 3 September 1997, D1.

⁶⁴ ITC Programme Code (Summer 1995), section 2.4.

information which would otherwise be denied to them. Pictures may also be taken by hidden cameras carried with them without the consent of the subjects.

2.77 A woman who used to be a journalist with a reputable newspaper in Hong Kong said that she found it difficult to accept some of the means by which Hong Kong journalists obtained information. She quoted the example of journalists misrepresenting themselves as the relatives of victims injured in traffic accidents so that they might gain access to the hospital ward and interview the victims. She added that she had witnessed a victim experiencing an extreme state of distress as a result of such intrusion.

2.78 Another reported incident involved a film star who alleged that a newspaper journalist gained entry to her home by falsely describing himself to her domestic maid as her friend. The journalist subsequently took photographs inside her home.

2.79 While deception might allow journalists to expose unlawful activities and social evils, such practices may undermine the public's trust in the media and erode the credibility of journalism. It would adversely affect the news-gathering ability of journalists in the long term. Besides, the use of dishonest methods to obtain information is always open to the accusation that two wrongs do not make a right. There is also the question of hypocrisy:

“Given that the news media’s function, at least in part, is to seek out and expose wrongdoing as such, it had better not be guilty of the very same sins it exposes in others if it is to avoid the charge of hypocrisy. That is, journalists have a moral duty to report faithfully and expose wrongdoing. Hence journalists and the news media must themselves consistently aim to respect the very same ethical standards of behaviour that they demand others should adhere to or strive for.”⁶⁵

2.80 Although some would argue that any form of deception to obtain information is unacceptable in a profession which requires its members to be honest in their gathering and reporting of information, we think that deception which is not unlawful may be acceptable in those rare instances in which the journalist has reason to believe that the value of the information sought is of vital public interest, and the information cannot be obtained by non-deceptive means, provided always the kind and degree of deception is proportionate to the evil to be exposed. We agree with the Poynter Institute for Media Studies in the US that the following criteria should be applied when the use of hidden cameras or the misrepresentation of identity is being considered:⁶⁶

- *“When the information obtained is of profound importance. It must be of vital public interest, such as revealing great ‘system failure’ at the top levels, or it must prevent profound harm to individuals.*

⁶⁵ M Kieran, *Media Ethics - A Philosophical Approach* (London: Praeger, 1997), 2.

⁶⁶ B Steele, “Deception / Hidden Cameras Checklist - A Poynter Institute Handout” (February 1995), at <http://www.poynter.org/research/me/me_decho.htm>. Lambeth articulates that before resorting to deceptive means, the journalist must be satisfied that the probable violation of the “social contract” is judged to be: (a) systemic or nearly so, i.e. pervasively rather than selectively or occasionally present; (b) urgent, requiring immediate attention in the public interest; (c) in need of media attention before it can be properly exposed and corrected, i.e. it cannot or will not be corrected without the news media and without the news media’s use of deceptive means; (d) substantive, i.e. it violates one of the principles of the social contract in such a way that a faithful adherent of the contract would clearly adopt deceptive means to expose it; and (e) the news organisation must report to the public its attempt to use truthful, open means, the reasoning behind its choice of deceptive means, and its moral justification of why such means were deemed necessary. E Lambeth, 44 & 148-9.

- *When all other alternatives for obtaining the same information have been exhausted.*
- *When the journalists involved are willing to disclose the nature of the deception and the reason for it.*⁶⁷
- *When the individuals involved and their news organisation apply excellence, through outstanding craftsmanship as well as the commitment of time and funding needed to pursue the story fully.*
- *When the harm prevented by the information revealed through deception outweighs any harm caused by the act of deception.*
- *When the journalists involved have conducted a meaningful, collaborative, and deliberative decisionmaking process on the ethical and legal issues.”*

2.81 The Poynter Institute further suggests that the following criteria cannot be used to justify deception:⁶⁸

- Winning a prize.
- Beating the competition.
- Getting the story with less expense of time and resources.
- Doing it because “the others already did it.”
- The subjects of the story are themselves unethical.

2.82 We consider that the following guidelines taken from the German Press Code provide some guidance as to the circumstances under which deception may be used to gather news:⁶⁹

“Research is a legitimate tool of publicistic work but must be conducted within the bounds of the constitution, the law and respect for human dignity. As a matter of principle, a researching journalist who makes untruthful statements about his identity or the identity of the publication he represents is guilty of conduct incompatible with the dignity and role of the press.

Covert research can be justified in individual cases if it brings to light information of special public interest which could not be obtained by other means.

In the case of accidents and disasters, the press shall bear in mind that rescue operations for victims and persons in jeopardy take precedence over the public’s right to be informed. Nor does the public’s interest in being

⁶⁷ J Black *et al* remark that this requirement forces journalists to be judicious in their choice of exceptions to the truth-telling principle and requires them to be ultimately accountable to the public. J Black *et al*, 122. The Code of Ethics of the Society of Professional Journalists in the US provides that “Journalists should be honest, fair and courageous in gathering, reporting and interpreting information.” It states that journalists should “[a]void undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public. Use of such methods should be explained as part of the story.”

⁶⁸ Above.

⁶⁹ Press Code drawn up by the German Press Council (February 1994), Guideline 4.1.

informed justify any unlawful acts committed by journalists to acquire news material.”

2.83 Paragraph 5 of the Hong Kong Journalists Association’s Code of Ethics provides that the use of means that are not “straight forward” to obtain information and photographs can be justified only by “over-riding considerations of the public interest”.⁷⁰ We would add that journalists should not use means which are not straightforward unless (a) the means are lawful in the criminal and civil sense, (b) there is no other reasonably practicable means of obtaining the information, (c) the degree of intrusion is proportionate to the seriousness of the matter under investigation, and (d) the use of such means can be justified to be in the public interest

Surreptitious recording in private premises

2.84 Journalists may use hidden cameras to record dangerous or illegal activities. Visual proof adds weight to their reports. Yet journalists may also use hidden devices to record private activities inside private premises. For instance, a newspaper published an article describing the activities inside a private club. The article alleged that the club was frequented by homosexuals. Several photographs taken covertly inside the common room, toilet and shower room of the club had been published in the newspaper. Although the eyes of the individuals were obscured, a columnist of another newspaper wrote that those who knew the subjects in the photographs would have had no difficulty identifying them. He alleged that one of the subjects was known to him and that that person was worrying how he could explain the matter to his parents. The columnist suggested that the subjects might lose their jobs or break up with their family as a result of the exposure.

2.85 Under our proposals in the *Civil Liability Paper*, a defendant in an action for invasion of privacy would not be liable if the act or conduct in question was reasonably necessary for the protection of the person or property of the defendant or another. Hence, reporters may place a bug in private premises without the consent of the occupier or carry a hidden recording device with him while he is lawfully present in private premises - if he could argue that it is necessary to protect the person or property of a certain class of Hong Kong residents, e.g. patients or consumers. However, the placement or use of a hidden device may not be proportionate to the legitimate aim of the intrusion. For instance, while a reporter who seeks to investigate an allegation that a doctor unlawfully prescribes prohibited drugs to patients may legitimately argue that carrying a hidden camera or microphone with him while posing as a patient is reasonably necessary for the protection of patients, the reporter would be going too far if he plants a recording device in the doctor’s consultation room to enable him to monitor the doctor’s activities day and night.⁷¹

2.86 We believe that hidden cameras and microphones should generally not be used to record individuals who are not aware of their existence unless the material so obtained is essential to establish the credibility of a story, and the story itself is of important public interest. Besides, the criteria for the use of unattended recording devices should be much stricter than those for the use of recording devices carried by a journalist. Whereas recording devices may be used to collect personal information with a view to its publication

⁷⁰ For the Privacy Commissioner’s views on this provisions, see “Intrusive Reporting - Paper for Provisional Legislative Council Information Policy Panel Meeting on 26 September 1997”, para 5.

⁷¹ Note that the Privacy Sub-committee has proposed in its consultation paper on *Privacy: Regulating Surveillance and the Interception of Communications* (1996) that the placement or use of a “sense-enhancing, transmitting or recording device” in private premises without the consent of its lawful occupier be a crime.

or broadcasting if there is evidence of a crime or serious anti-social behaviour, unattended recording cameras or microphones should not be used unless there is evidence of serious crime. The means used should be proportionate to the matter under consideration. The following provisions of the BBC Producers' Guidelines provide a good example as to how the line may be drawn:⁷²

“Unattended recording devices (‘bugging’) - The BBC will never plant an unattended recording device on private property without permission of the owner, occupier, or their agent unless for the purpose of gaining evidence of serious crime. Controller, Editorial Policy must always agree in advance and will require clear evidence that the crime has been committed by those who are to be the subject of the recording.

Other secret recording techniques (carrying hidden cameras or microphones) - If permission of the owner, occupier or their agent has not been obtained, the BBC will generally use hidden cameras or microphones on private property only where prime facie evidence exists of crime or of significant anti-social behaviour by those to be recorded. It will be necessary for programme-makers to show why an open approach would be unlikely to succeed, and why the material is necessary in programme terms.”

Recording of oral or telephone conversations with the consent of one party

2.87 It is permissible under our proposals in the Consultation Paper on *Civil Liability for Invasion of Privacy* to record a telephone conversation if it is done by or with the consent of one of the parties to the conversation. A journalist who makes a call would continue to be able to record a conversation without giving notice to the other party. Recording oral or telephone conversations can ensure accuracy in reporting and protect journalists from charges that they have misquoted the interviewee. Surreptitious recording may also be the only way to extract information about illegal activities that would otherwise be concealed from public view. Such surreptitious recording, though not unlawful, may nonetheless be thought immoral. Although journalists should be allowed to record oral or telephone conversations for note-taking purposes and to defend possible legal action, we consider that surreptitious recordings of oral or telephone conversations for possible broadcasting should not be made unless consent from the other party would not be forthcoming *and* there is *prima facie* evidence of crime or serious anti-social behaviour. Where such requirements are not satisfied, the journalist should identify himself and explain that he is seeking information to be included in a programme. Furthermore, even if the subject has agreed to be interviewed, the conversations should not be used in a broadcast programme unless the subject has also given his consent to its transmission.⁷³

Interception of telephone conversations

2.88 Apart from recording a conversation, there is the possibility of someone (who may or may not be a journalist) intercepting a telephone conversation without the consent of the parties. Information obtained by the interception may be published by the

⁷² BBC, ch 4, section 2.2.

⁷³ See BBC, ch 4, section 2.3.

press. In March 1999, a newspaper published the contents of a telephone conversation which had been intercepted by a person described as a reader of the newspaper. The conversation was alleged to have been made between a singer and a celebrity. The Hong Kong Performing Artistes Guild issued a statement condemning the interception and reportage. They stated that the publication of intercepted material, whether the contents are true or not, is an abdication of the social responsibility of the news media and would undermine the credibility of the news media. *Ming Pao Daily News* comments that the reportage is a breach of privacy that cannot be justified in the public interest but would indirectly encourage intrusion by unauthorised interception.

Public figures and their family members

2.89 Public figures and their family members are likely to become the subject of media intrusion. The US Supreme Court has defined the meaning of “public figure” for the purposes of the First Amendment as follows:⁷⁴

“For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”

2.90 In July 1995, the Hong Kong Performing Artistes Guild staged a public protest against the intrusive activities of some sections of the press. Its declaration stated:⁷⁵

“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 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.”

2.91 A survey conducted by the Social Sciences Research Centre of the University of Hong Kong shows that the public generally objects to the news media reporting on the private life of legislators and television artistes.⁷⁶

- a) Over 60% of respondents were opposed to the exposure of the private life of legislators by the media. As regards the private life of television artistes, about 55% were opposed to the reporting of such facts by the media.
- b) Most of the respondents felt that the public has a right to know the academic qualifications, nationality, age and medical history of legislators. But they were

⁷⁴ *Gertz v Robert Welch, Inc* 418 US 323, 345 (1974).

⁷⁵ Quoted in Y S Chan, “The Public Interest Issues Arising from the Activities of ‘Puppy Teams’” *Hong Kong Economic Journal* 6 February 1998.

⁷⁶ The survey was commissioned by *Eastweek Magazine* and reported in *Eastweek Magazine*, 20 May 1993.

inclined to think that the family background, personal wealth and private life of legislators should be kept secret.

- c) The respondents generally felt that reports on television artistes had nothing to do with press freedom or the public's right to know.

2.92 We agree with the views expressed in *American Jurisprudence* that those who expressly or impliedly submit themselves to public attention or criticism must accept that they have less privacy than others, at least as to legitimate reporting of facts concerning their public activities:

"A person who by his or her accomplishments, fame, or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his or her doings, affairs, and character, may be said to have become a public personage, thereby relinquishing at least a part of his or her right of privacy. ... [A]ny person who engages in a pursuit or occupation which calls for the approval or patronage of the public submits his or her private life to examination by those to whom he or she addresses his or her call, to the extent that may be necessary to determine whether it is wise and proper to accord him or her the approval or patronage which he or she seeks."⁷⁷ (emphasis added)

2.93 The American Restatement makes a similar observation:

"One who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment, cannot complain when he is given publicity that he has sought, even though it may be unfavourable to him. So far as his public appearances and activities themselves are concerned, such an individual has, properly speaking, no right of privacy, since these are no longer his private affairs."⁷⁸ (emphasis added)

2.94 Accordingly, we conclude in our Consultation Paper on *Civil Liability for Invasion of Privacy* that the publication of private facts concerning a public figure which are wholly unconnected with his fitness for a public office or profession or his ability to discharge public or professional duties should generally be suppressed. The mere fact that he is a public figure should not deprive him of protection if the press gives publicity to his private activities or behaviour which has no relevance to his public or professional role.

2.95 The following statements from the BBC Producers' Guidelines best describe how press freedom could be reconciled with the privacy interest of public figures who are holding public office:⁷⁹

"Public figures are in a special position but they retain their rights to a private life. The public should be given the facts that bear upon the ability

⁷⁷ 62A Am Jur 2d, Privacy, § 193. "One who undertakes to fill a public office offers himself to public attack and criticism, and it is now admitted and recognised that the public interest requires that a man's public conduct shall be open to the most searching criticism." *Manitoba Press Co v Martin* (1892) 8 Manitoba R at 70, per Bain J.

⁷⁸ Restatement 2d, Torts, section 652D, Comment e. *American Jurisprudence* elaborates that "any individual who voluntarily seeks public attention will be deemed a public personage who is subject to fair comment and criticism." See 62A Am Jur 2d, Privacy, § 193.

⁷⁹ BBC, *Producers' Guidelines* (November 1996), chapter 4, section 1.

or the suitability of public figures to attain or hold office or to perform their duties, but there is no general entitlement to know about their private behaviour provided that it is legal and does not raise important wider issues.

As a general principle, BBC news programmes should not report the private legal behaviour of public figures unless broader public issues are raised either by the behaviour itself or by the consequences of its becoming widely known. The mere fact that private behaviour is 'in the public domain' (i.e. that someone else has reported it), is not in itself sufficient to justify the BBC reporting it too."

2.96 The news media may therefore report the activities of public figures provided that such activities are matters of legitimate public concern. However, they should not disclose more details than are necessary to keep the public informed of the issues at stake. For instance, although there might be a legitimate interest in publicising the fact that a senior government official was seriously ill, the publication of the minute details of the official's medical record would be excessive and unreasonable, even though the materials came into the hands of the editors lawfully.

2.97 As regards artistes and celebrities who seek publicity, although they have no right to privacy in respect of their public appearances and public activities, their privacy should nevertheless be respected by the media unless it is they who submit their private lives to public scrutiny.

2.98 The news media is also interested in reporting on the family members of public figures. We consider that an individual's actions should not be reported merely because of his family ties to a public figure. His actions should be reported only if what he has done is of significance to society.

2.99 The following examples show that the media is interested in reporting the private lives of public figures who are or had been in show-business:

- a) The journalists of a magazine had been watching for at least two evenings outside a building in which a former Miss Asia lived. On one occasion, she was spotted (and surreptitiously photographed) arriving at the main entrance of the building with a man who was reported to be the boss of a listed company and who had recently married. The magazine further reported that the man left the building at half past two in the morning. Two days later after the man was spotted outside the building, the same man was followed by journalists from the magazine. He was seen (and surreptitiously photographed) chatting happily with his wife on the staircase of a cinema. All the photographs were published in the magazine. The full names of the man and his wife were also disclosed.
- b) A magazine reported that an actress left a hotel room at around four o'clock in the morning after spending more than four hours with a director in the room.
- c) A former artiste had been pregnant for four months. A newspaper reported that she was sent to hospital after she had discovered that she was bleeding from her genitals when she was in the washroom. A photograph of her lying on a stretcher was published. The newspaper said she used to take part in films which were not suitable for children but had not been in showbusiness since 1993. The story was accompanied with a sexy photograph of her taken when she was still an actress.

- d) A singer was reported to have been living in premises which were owned by a wealthy woman. The name of the woman was revealed in the report.
- e) A magazine published the intimate details of the sex life of a former Miss Hong Kong and her separated husband. These details were disclosed by the husband and had caused embarrassment to the former Miss Hong Kong.
- f) A magazine reported that an artiste had been rumoured to have suffered a loss in the stock market. It further published a monthly credit card statement which was purported to be addressed to her. Although her address and credit card number in the statement were blanked out, the financial data recorded therein were not. The report suggested that her financial position was not sound.

Children

2.100 Children may become the subject of media attention. A child may commit a crime or engage in anti-social behaviour. Equally possible is that the victim of crime or anti-social behaviour is a child. News about a child attempting to commit suicide is also not uncommon. Where an adult has become a public figure by reason of a newsworthy event, the media may wish to cover his children's reactions. Journalists may follow the children of a public figure in order to find out more about the latter even though the private facts of the children are not matters of public concern. Occasionally, it is the parent who voluntarily discloses private facts about his children to the media. Very often, particulars of the child are revealed and his privacy intruded upon merely to make the report more sensational and interesting to read.

2.101 Media intrusion into the private life of a child and publicising the identity of a child will cause unnecessary embarrassment and additional psychological stress to the child and his or her parents, especially if the child is a victim of sexual abuse. This would not only adversely affect the child's self-image but would also jeopardise the rehabilitation process which would otherwise help the child to recover from the trauma, to return to normal life and to turn over a new leaf.

2.102 The Code on Fairness and Privacy adopted by the Broadcasting Standards Commission in the UK provides:⁸⁰

“Children’s vulnerability must be a prime concern for broadcasters. They 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. They should not be questioned about private family matters or asked for views on matters likely to be beyond their capacity to answer properly. Consent from parents or those in loco parentis should normally be obtained before interviewing children under 16 on matters of significance. Where consent has not been obtained or actually refused, any decision to go ahead can only be justified if the item is of overriding public interest and the child’s appearance is absolutely necessary. ...”

⁸⁰ BSC, *Code on Fairness and Privacy* (1998), para 32.

2.103 Under the United Nations Convention on the Rights of the Child, children below the age of 18 should not be subjected to arbitrary or unlawful interference with their privacy. They are entitled to the protection of the law against such interference⁸¹ and to receive such protection and care as are necessary for their well-being, in particular, their interest in completing their full-time education without unwarranted media intrusion. The privacy of children should not be sacrificed only to satisfy the curiosity of readers and to increase the circulation of a newspaper or magazine. Children whose fathers or mothers are in the public eye are particularly vulnerable. A publication invading the privacy of a child cannot be justified on the ground that it is in the public interest to intrude into the privacy of his parent. The fame, notoriety or position of a child's parent cannot justify the publication of material about the private life of a child. A child has a general right to object to being followed or photographed by journalists even though his parent is a public figure. In the absence of any public interest justification other than the relationship with his parent, the news media should not publicise facts about a child's private life or include him in a picture if this is against his wish or detrimental to his interests.

2.104 The following are instances where the private lives of children have become the subject of media attention:

- a) A separated couple had a dispute over the custody of their child. The separated husband was the son of a public figure. A journalist surreptitiously followed the separated wife on the day when her child, who was the subject of the dispute, participated in sports events organised by his school. After the sports events were over, the journalist followed the mother and child to a fast-food stall where the two were surreptitiously photographed having snacks together. The photograph, which included the child, was published in a magazine. The full name of the child was also disclosed.
- b) A magazine published on the front cover a photograph of the two sons of an artiste who had participated in a beauty contest when she was in her 40's. It reported that her sons, aged 9 and 12, were studying in an international school in Hong Kong.
- c) A Mainland Chinese worker who had participated in the pro-democracy movement in China in 1989 applied to the Immigration Department for extension of permission to stay in Hong Kong. He had a family in Hong Kong, including two sons, the elder of whom was four years old. A newspaper disclosed the full names of the sons as well as the father. It also published a photograph of his family in which the father was seen filling a form but his elder son was hiding his face with his hands. The subtitle read: "While the father becomes the focus of media attention because of his right of abode [in Hong Kong], his son sitting next to him refuses to face the camera."
- d) A mother was seriously injured when she sought to protect her 11-year-old son from being knocked down by a car. A newspaper reported that her son might not have followed the traffic regulations when crossing a street. It published the full name of the mother, the surname and the second character of the first name of the son, and a family photograph of the child sitting with the mother. Although the photograph may have been obtained lawfully, there is a risk that publishing it in the newspaper would expose the child to hatred and contempt by his

⁸¹ Article 16.

classmates and acquaintances. Another newspaper published the same photograph but the face of the child in that photograph was obscured.

- e) A 13-year-old student used a cutter to cut her hand. She was described by a newspaper as a “problem girl” who was “introverted and anti-social” and could not get herself involved in school and family life. The article disclosed her surname (and crossed out the second character of her name, thereby revealing that her name had only two characters including her surname), age, family address (including the floor number and the name of the building and housing estate), and the class and name of the school she attended. It further revealed that she was emotionally unstable, had difficulty communicating with others, that her relationship with her family was poor, that she had been found guilty of stealing money and sentenced to a reform school for one month, under the care of the Social Welfare Department, that she had been ordered to stay overnight at the psychiatric department of a specified hospital for observation and counselling, and had developed a habit of cutting her hands. A photograph of her waiting inside a hospital was published. Although her eyes were obscured, her classmates, friends and relatives would have had no difficulty identifying her if they have read the article.
- f) In a bid to report on the measures which had been introduced to prevent the spread of an intestinal virus in Hong Kong and to inform readers that a school had instructed its students to wear slippers inside the washroom, a journalist took a photograph of three boys urinating inside a school toilet. The hips of one of them were exposed to the camera.
- g) A 17-year-old student attempted to commit suicide by jumping from the roof of a building. She landed on an air bag on the ground floor. A newspaper reported that she was a Form 4 student living in a specified building in Shatin. Her brother was reported as saying that she might have had emotional problems with her boyfriend. The report was accompanied with a photograph showing her jumping from the roof of the building. Her face was not obscured in the photograph.
- h) A newspaper reported that a 63-year-old man who was unemployed and in financial difficulties had to queue for free rice distributed at Yue Lan Festival. It added that he had applied for Comprehensive Social Security Assistance payment and had three children aged nine to thirteen who came to Hong Kong from Mainland China in 1998. The report was accompanied with a photograph showing him embracing a bucket of rice with his daughter sitting next to him. The name of his daughter was disclosed in the report.
- i) A Hong Kong resident had been sentenced to death in Mainland China for a series of crimes involving kidnappings and smuggling of arms and ammunitions. A newspaper published on the front page, a photograph of his two sons, aged four and seven, leaving a Guangzhou restaurant after visiting him at a detention centre before the appeal against his execution was decided. The faces of the two boys were not obscured.
- j) The press reported that a popular singer was not on good terms with her husband. A newspaper published the full name of their daughter and the name of the kindergarten she was going to attend. A columnist of another newspaper wrote that certain sections of the news media had interviewed the child outside the

kindergarten, followed her, taken pictures of her, and published her private facts which had been told by other sources.

Accuracy

2.105 There have been instances where newspapers and periodicals were alleged to have published inaccurate data about an individual:

- a) An article in a magazine alleged that a prominent businessman was dying of cancer. When the businessman decided to bring an action in defamation, the editor admitted that the allegation was entirely without basis. It was reported that the author of that article was a 19-year-old journalist who had received no more than secondary school education.
- b) A newspaper alleged in its front page that a former senior Chinese official had committed suicide. Two days later, the individual concerned gave a telephone interview at Beijing, confirming that he was still alive.
- c) The host of a radio programme was assaulted on the street. A photograph showing the injury on his head had been manipulated and published in a magazine. The injury depicted in the altered photograph was more serious than it really was.
- d) The chairman of a public company once talked to the press about the conduct of a magazine. He said that he had given permission to the magazine taking some photographs of his office. However, one of the photographs published in the magazine had allegedly been altered by the inclusion of a non-existent photograph in his office. He claimed that he did not have such a photograph inside his office when he invited the journalist to his office.
- e) A Harvard academic was commissioned by the Government to produce a report on Hong Kong's health care financing and delivery system. He was reported as having told a newspaper that a journalist from a Hong Kong magazine visited his office in the United States. The academic declined to be interviewed but allowed the journalist to take pictures of his office. Subsequently, the magazine published an article about "the interview". He said he now realised that journalists could write an article about an interview provided that they were allowed to take pictures.
- f) A newspaper published a picture showing a businessman participating in the ground-breaking ceremony of a hotel invested by a company. The caption named the lady standing next to the businessman as his wife. Subsequently, the company issued a notice alleging that it was a misnomer.

2.106 An article in a newspaper pointed out that a press photographer who had not taken any photographs of a juvenile offender might take a photograph of another juvenile on the street as a substitute if the editor decided to treat the news as a top story in the newspaper. The article suggested that the newspaper did not respect the rights of the innocent juvenile because he had neither money nor reputation such that it was unlikely that he would take legal action against the newspaper. The article also expressed concern over

the “phenomenon” of newspaper publishing a “fake photograph” of an individual which purported to be the picture of a victim.⁸²

2.107 We consider that the news media should take care not to publish inaccurate or misleading personal information including pictures.

Dramatised reconstruction

2.108 The broadcaster may reconstruct a crime or certain anti-social behaviour in order to educate the public or to investigate a social issue. Such dramatised reconstruction may publicise the private facts of victims or perpetrators. Although they might be justified on the ground that the subject matter is one which is of genuine public concern, care should be taken not to interfere with the private lives of the individuals concerned and their immediate family members. Where the victim has died, the BBC Producers’ Guidelines stipulate that his family members should be informed of the times of the intended transmission of the programmes.⁸³

Surreptitious recording for entertainment purposes

2.109 Television programmes may record surreptitiously in public places for entertainment purposes. The individual who features in the recording may feel aggrieved if the material is broadcast without his consent, especially when he is thereby exposed to ridicule. The express consent of the individual should therefore be obtained before the material is broadcast. Any request to destroy the material recorded should be complied with.

Other cases

2.110 A newspaper reported that a journalist from another newspaper forced his way into the residence of a would-be Miss Asia and took photographs inside against her wishes.

2.111 A newspaper published a picture of the front gate of the house of a Hong Kong resident who was being tried for kidnapping and smuggling of arms in Mainland China. Four persons, presumably press photographers, were seen standing or sitting on the concrete fence of the house. Four ladders about one metre high were placed beside the fence. The caption read: “Open secret – Photographers try to gain access to [the resident’s] Cumberland Road home.”

2.112 Some newspapers and magazines publish photographs of women whose underwear (such as panties or the shoulder strap of a bra) are accidentally exposed to public view. Some readers find such publications objectionable, even though the information disclosed is arguably in the public domain.

Conclusion

2.113 The cases mentioned in this chapter suggest that press freedom has been abused by some sections of the news media. They also indicate that there is a pressing social need to protect members of the public from unwarranted media intrusion. An increase in the

⁸² Tai Wu-tsz, “The news media bully people who are kind but are afraid of people who are ferocious”, *Ming Pao Daily News*, 29 April 1999, G6.

⁸³ See BBC, *Producers’ Guidelines* (November 1996), section 5.6; Independent Television Commission, *The ITC Programme Code - Summer 1995*, section 2.2(iii).

knowledge of the private facts revealed in the above cases did not have much bearing on the ability of citizens to make informed judgments about their social and political lives. Giving publicity to the identities of victims and their friends and relatives, whether by revealing their names or addresses or by publishing their pictures, would not normally put the audience in a better position to understand social issues, nor would it help them to assess the wisdom of governmental decisions and to make responsible judgments about their daily lives. But giving publicity to the identities of these individuals may cause distress, embarrassment and humiliation to them.

2.114 However, despite the enactment of the Personal Data (Privacy) Ordinance and the efforts made by the Privacy Commissioner to stress the importance of personal data privacy, there have been instances where the news media have intruded upon individual privacy. The existing legal framework within which the news media operates has failed to prevent the professional standards of the media from declining. It is telling that mainstream newspapers are involved in the intrusive conduct referred to in this chapter. Yet the various professional bodies representing the interests of the news media have made no serious attempts to regulate such intrusive news-gathering activities and publications.

2.115 Individuals who are neither wealthy nor powerful are particularly vulnerable. While the media would exercise restraint when dealing with the rich or powerful for fear that any excesses on their part would result in legal proceedings against them, the privacy interests of ordinary citizens are often sacrificed or ignored in order to satisfy the curiosity of the public and to outperform competitors in the market.⁸⁴ In the UK, around 90% of the cases dealt with by the Press Complaints Commission involved ordinary members of the public who had been given some unwanted or unjustified treatment by the newspapers. Only about 5% of the cases involved people who were considered to be celebrities.⁸⁵ We consider that all individuals should be protected from unwarranted intrusion irrespective of their status and power in society.⁸⁶

2.116 Ma Chi-shen, Dean of the Department of Journalism and Communication in the University of Chinese Culture in Taiwan, has compared the pen used by a journalist to a weapon with a pointed edge. He remarks, metaphorically, that the pen used by a journalist can injure a person and kill him without causing him to bleed. If the pen is used without restraint, the welfare of every individual is at risk. He further remarks that in view of the immense power and influence of the news media over society and the speed and wide coverage of mass communication, the harm caused by a news organisation which is not functioning properly would be far more serious and widespread than that caused by a sharp weapon. He hopes that journalistic ethics could play a role in promoting self-criticism and self-regulation by the media.⁸⁷

2.117 After reviewing the experience of press self-regulation in other jurisdictions, we shall examine whether self-regulation provides the answer to media intrusion in Hong Kong.

⁸⁴ See Tai Wu-tsz, "The news media bully people who are kind but are afraid of people who are ferocious", *Ming Pao Daily News*, 29 April 1999, G6.

⁸⁵ The Rt Hon Lord Wakeham, "Ethical Decisions" at <http://www.hku.hk/mstudies/english/Sph_rhlw1.htm> (3.3.99), p 2.

⁸⁶ Sir Zelman Cowen stresses that "[t]he virtues of a free society can only be acceptable in a society where the utmost pains have been taken to preserve the rights of the individual who may be at a grave disadvantage in resisting the pressures of great and powerful organisations possessed, as they may be, in comparison with the individual, of almost unbounded resource." Z Cowen, "The Law and the Press: The Public's Right to Know", in *Papers of the 7th Commonwealth Law Conference, Hong Kong, 18-23 September 1983* (7th Commonwealth Law Conference, 1983), 279 at 286.

⁸⁷ Ma Chi-shen, *Hsin Wen Lun Li (Journalistic Ethics)* (Hong Kong, 1997), 258.

Chapter 3 - Press self-regulation in other jurisdictions

3.1 A few commentators in Hong Kong have remarked that precedents of successful press councils in other parts of the world are few and far between. The failure of the National News Council in the United States has been quoted to support the argument that press council is not a feasible solution to the problem of media abuse. In fact, press councils are fairly common in both developed and developing countries. Jurisdictions which have a press council or similar body include Australia, Austria, Bangladesh, Belgium, British Columbia, Denmark, Egypt, Fiji, Germany, Honolulu, India, Israel, Italy, Japan, Manitoba, Minnesota, Nepal, New Zealand, Nigeria, Norway, Ontario, Oregon, Peru, Sri Lanka, Sweden, Switzerland, Taiwan, Tanzania, the Netherlands, Turkey, the United Kingdom, and Washington.¹ Li Zhan has conducted a comparative study of 16 press councils and similar bodies in the 1980's. We examine in this chapter the position in Australia, Canada, Germany, Peru, Sweden, Taiwan, the United Kingdom and the United States.

Australia²

3.2 The journalists' section of the Media, Entertainment and Arts Alliance in Australia has adopted a code of ethics which touches on privacy matters. Any person can lodge a complaint against a member of the Australian Journalists Association (AJA) for conduct that falls under any of the code's clauses. Most of Australia's journalists are members of the union. Each Australian state has an AJA judiciary committee comprising union members. If a member is found guilty of acting in breach of the code, he may be censured, fined or expelled from the union.

3.3 The Australian Press Council was established after discussion between publishers and the AJA.³ It is funded by contributions from the newspaper and magazine industries. The Constitution of the Council calls for balanced representation of publishers, journalists and the public. The Chairman must have had no previous connection with the press and has been, by tradition, a distinguished person with a legal background. The first chairman was a retired Justice of the High Court. The current chairman is an Emeritus Professor at the Australian National University.

3.4 The Council consists of 13 industry members and 8 public members (including the chairman). Ten industry members are nominated by metropolitan, suburban, regional and country publishing groups. The remaining ten members - seven public members, two journalist members and one editor member - are appointed by the Council on the nomination of the Chairman. Journalist and editor members are usually retired, freelance

¹ For an overview of the press councils in some of these jurisdictions, see: Li Zhan, *Xin Wen Dao De (Journalistic Ethics)* (Taipei: Sanmin Shuju, 1982).

² See M Armstrong, D Lindsay & R Watterson, *Media Law in Australia* (Oxford University Press, 3rd edn, 1995), chapters 9 and 11; and J Hurst & S A White, *Ethics and the Australian News Media* (MacMillan Education Australia Pty Ltd, 1994).

³ The website of the Australian Press Council is at <<http://www.presscouncil.org.au/pcsites/apc.html>>. The AJA withdrew from the Council in 1987.

or academic journalists who are not in the direct employ of the constituent bodies which subscribe to the Council. Most public members were nominated by the Chairman from applicants who responded to advertisements placed in the appropriate locality. On occasions, the Chairman has approached individuals he believed would benefit the Council. The current public members include a teacher, a part-time project research officer who used to be a lecturer in bioethics at a nursing school, a law professor, a senior barrister, the Managing Director of Accord Cross Cultural Developments, and the Executive Director of the Disability Services Office in South Australia. Members vote as individuals, not as representatives of the bodies that nominated them. The Constitution provides for alternate members to act for members in their absence. A survey conducted by the Council of past complainants shows that many believe that the number of public members should be increased, the median indicating that public members should account for 50% of the Council and the remaining 50% to be filled by publisher and journalists in equal number.⁴

3.5 Apart from maintaining press freedom, the Council deals with complaints from the public about newspapers and magazines which appear to have breached its Statement of Principles. The Statement is drafted by the Council with the co-operation of the publishers and their editors, after consultation with the industry. The Council secretariat will first try to mediate a settlement to the satisfaction of the parties. If such a settlement is impossible, the complaint will be referred to the Council for adjudication. The Complaints Committee is comprised of seven members, with a majority of public members, including the Chairman. 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 the publishers who fail to meet its standards; nor does it have power to enforce publication of its censure. In the period from 1988 to 1993, about 10% of adverse adjudications were not published in the newspaper or magazine concerned. Although about 60% of the respondents to the Council's survey of complainants were not primarily concerned with monetary compensation, a majority of respondents strongly indicated that the Council should be able to impose a fine if it rules against the publication.⁵

3.6 The Australian Law Reform Commission commented that the delivery of a mere reprimand by a conciliation body like a Press Council appears to be "an inadequate redress for a wronged person". It said that the possibility of a reprimand had not been shown to be an effective deterrent to privacy-invasive publishers.⁶ Hurst and White point out that it was largely because the Press Council lacked power to impose sanctions that several Australian states attempted to enact privacy legislation in the 1970's and why the Australian Law Reform Commission put forward a draft Bill to protect people against publication of information about their private facts.⁷

Canada

*The Atlantic Provinces*⁸

⁴ Australian Press Council, *Survey of Complainants: Preliminary Report* (1994).

⁵ D A Kirkman, "Whither the Australian Press Council? Its Formation, Function and Future" (Australian Press Council, 1996), Part IV.

⁶ Law Reform Commission of Australia, *Unfair Publication: Defamation and Privacy* (Report No 11) (Canberra: AGPS, 1979), para 230.

⁷ J Hurst & S A White, above, 121.

⁸ "Atlantic Press Council" at <<http://www.media-awareness.ca/eng/indus/newsmag/atpress.htm>> (15.1.99). The Atlantic Provinces include New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland.

3.7 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 formal Code of Practice.

British Columbia⁹

3.8 The British Columbia Press Council consists of 11 elected members, five from member newspapers and six from the public. All of British Columbia's dailies and more than 100 community papers are members of the Council. It considers "unsatisfied" complaints from the public about the conduct of member newspapers. It is concerned with newspapers only. It uses its Code of Practice as a yardstick for assessing complaints. All complaints are treated as being against the publication, not any individual. 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.

3.9 The Chairman is E N Hughes QC who has a long and distinguished career in public life. He was a judge in Saskatchewan for almost 20 years before he moved to British Columbia. The public directors include a former mayor, a unionist of a major public sector, a member of the Immigration and Refugee Board of Canada, and a successful businessman with a long history of social and civic involvement in his community. Of the five professional members, three are publishers and two are editors.

Manitoba¹⁰

3.10 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 legal action is involved or is contemplated, or if the newspaper involved is not a member of the Council. The Council has nine directors; four professional members from the newspaper industry, and five members (including the chairman) representing communities throughout Manitoba.

Ontario¹¹

3.11 The Ontario Press Council is a voluntary association of Ontario newspapers. It aims at improving the press by adjudicating complaints from the public and defending press freedom in the public interest. It also considers complaints from members of the press about the conduct of individuals and organisations towards the press. All the provinces' dailies have joined the Council.

⁹ "British Press Council" at <<http://www.bcpressecouncil.com/ink/>> (18.1.99).

¹⁰ "Manitoba Press Council" at <<http://www.media-awareness.ca/eng/indus/newsmag/mapress.htm>> (15.1.99).

¹¹ "Ontario Press Council" at <<http://www.media-awareness.ca/eng/indus/newsmag/ontpress.htm>> (15.1.99).

3.12 There are 21 council members, including the chairman, 10 members of the public who are broadly representative of Ontario society, and 10 members drawn from contributing newspapers, broadly representative of the industry. All of them are elected at an Annual Meeting. Names for election to the Council are nominated by a Nominating Committee that consists of the Chairman, two public members and two professional members. Professional members 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 editors; and one advertising representative.

3.13 The Council has an Inquiry Committee to examine complaints in detail. It 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. Member newspapers are obliged to publish the text of the adjudication in a prominent place in the newspaper.

3.14 The Chairman of the Council is a former editor of a magazine who has served as an eminent scholar in the Graduate School of Journalism at the University of Western Ontario. The remaining public members include a chancellor of a university, a retired chairman of an accounting firm, a retired president of a university, secretary-treasurer of Ontario Federation of Labour, a barrister/solicitor, executive director of the John Howard Society, Anglican Archdeacon of York, a dairy farmer, a former chief administrative officer for City of Hamilton, and a senior counsel to a law firm.

Germany¹²

3.15 As at 1985, the German Press Council, which was modelled on the now defunct British Press Council, consisted of 20 members, half of them representing the publishers and the other half representing journalist unions. The members were independent of the delegating organisations. Not more than five lay members might be appointed but in practice were not. The aims of the Council included the recognition and elimination of grievances, investigation of complaints about specific publications, and assurance of free access to news sources. Such complaints were handled by a special committee chaired by a prominent judge. In recognition of the importance of the Council, the legislature supplied part of the funds necessary to guarantee the independence of the Council.

3.16 Helmut Kohl, then professor of civil law, observed that it was unrealistic to assume that the representatives of journalists and publishers were motivated by the same spirit:

“Publishers complain bitterly that the unions do not assign independent persons possessing wisdom, experience and repute, but rather functionaries who attempt to pursue union interests. Journalists point out that publishing has long lost its dedication to public enlightenment and, in many cases, is merely another business. They have been particularly enraged by the fact that precisely those publishing houses that were the targets of the [Code of Ethics and Guidelines for Editorial Work] have steadfastly refused to publish the [Council’s] reprimands.”¹³

¹² H Kohl, “Press Law in the Federal Republic of Germany”, in Pnina Lahav (ed), *Press Law in Modern Democracies - A Comparative Study* (Longman: 1985), at 216-8.

¹³ H Kohl, above, at 217.

New Zealand¹⁴

3.17 The New Zealand Press Council adjudicates on complaints made against the editorial content of newspapers which are members of the Newspaper Publishers Association or the Community Newspapers Association. The Newspaper Publishers Association is the trade association of the New Zealand newspaper industry. All daily and Sunday newspapers in New Zealand are members of the association. The Council has an independent chairman and is comprised of representatives of the public, publishers and journalists. The public representatives make up the majority of the Council.

Peru¹⁵

3.18 The Press Council of Peru is jointly established by 12 national publishers representing a total of 15 newspapers and 5 magazines. It has an Ethics Tribunal responding to requests from people affected by publications which are published by members of the Council and any complaints regarding alleged ethical transgressions of journalistic ethics by any print media. The five members of the Tribunal are elected by the five board members of the Council and another five people recognised for their prestige and honesty, including the federal Ombudsman, a rector of a university, and a priest. The Tribunal can issue public pronouncements on complaints against the media, including those who are not members of the Council, in cases which involve alleged transgressions of journalistic ethics.

Sweden¹⁶

3.19 Sweden established the first press council in the world in 1916. The Co-operation Council of the Press consists of the Publishers' Club, the Swedish Federation of Journalists and the Swedish Association of Newspaper Publishers. The Co-operation Council has adopted a Code of Ethics for the Press, Radio and Television. These three press organisations have also joined together to form the Opinion Board of the Press. The following are features of the Board as explained by Håkan Strömberg:¹⁷

- The Board serves as a court of honour in cases concerning the enforcement of journalistic ethics in the print media.
- It consists of five members and a chairman. Each of the three press organisations appoints one member. The remaining two are appointed jointly by an ombudsman of the legislature and the chairman of the Bar Association. The five members then appoint the chairman who should be a judge.
- Cases are brought before the Board by a Press Ombudsman who is appointed by a committee of three, consisting of an ombudsman of the legislature, the chairman of the Bar Association, and the chairman of the Co-operation Council of the Press.
- The role of the Press Ombudsman is to enforce journalistic ethics in newspapers and periodicals.

¹⁴ "New Zealand Press Council", at <<http://www.inl.co.nz/industry/presscouncil.html>> (15.1.99).

¹⁵ "Press Council of Peru established", at <<http://www.ifex.org/alert/00002445.html>> (15.1.99).

¹⁶ Håkan Strömberg, "Press Law in Sweden", in Pnina Lahav (ed), *Press Law in Modern Democracies - A Comparative Study* (Longman: 1985), at 248-250.

¹⁷ Håkan Strömberg, above, at 249.

- The Press Ombudsman may take action on his own motion or investigate a complaint by a private party.
- The Press Ombudsman is paid by a foundation jointly established for this purpose by the three organisations.
- A complainant may submit his case to the Board direct.
- In clear and less serious cases, the Ombudsman may make a ruling on the complaint. However, either the editor or the complainant may appeal to the Board.
- Where the Board decides against a newspaper or periodical, the latter may be ordered to publish the statement of opinion in its entirety, without undue delay, in a clearly visible format, or to publish a correction or reply. In addition, the offending newspaper or periodical may be ordered to pay the costs of the Board and the Ombudsman. The obligation to comply with the order of the Board is of a moral rather than of a legal character.
- The Board does not award any damages to the injured party.

3.20 Strömberg remarks that although press self-regulation in Sweden functions “rather well” on the whole, the legitimacy of a system whereby abuse on the part of the press is adjudicated by its own representatives is open to question. In his opinion, the inability of the Board to award damages is a “definite drawback”.

Taiwan¹⁸

3.21 Prior to 1988 when all the major constraints on press freedom were removed by the Chinese Nationalist Government, the news media in Taiwan was under Government control. Journalists were treated as if they were Government officials. In 1963, the Newspaper Society of Taipei facilitated the formation of the Taipei Press Council which was the first self-regulatory body in Taiwan. 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 order to ensure that its adjudications were impartial, its constitution provided that neither Government officials nor incumbent journalists could be a member of the Council. In 1974, the Taipei News Council was expanded into a news council for the whole of Taiwan. Its membership includes bodies representing the interests of journalists, newspaper editors, the newspaper industry and the broadcast industry. The Council has ratified three Codes of Ethics for the press, television broadcast and radio broadcast.¹⁹ Chen Gui-lan and others observe that the council is not effective in regulating the conduct of the Taiwan news media for the following reasons:²⁰

- a) The Council does not have authority to impose sanctions on an offending member, nor is an offending member obliged to comply with its rulings. Some newspapers have ignored the rulings or refused to publish the adjudications with prominence.
- b) Although the members of the Council were not incumbent journalists, most of them have close connections with the news media. Further, since all the funds of the Council were contributed by the news media, the Council is more concerned

¹⁸ See generally, Ma Chi-shen, *Hsin Wen Lun Li (Journalistic Ethics)* (Hong Kong, 1997), ch 3.

¹⁹ The Code of Ethics for the Press is reproduced in Annex 2.

²⁰ Chen Gui-lan (ed), *Xin Wen Zhi Ye Dao De Jiao Cheng (“Course Materials on Professional Ethics for the News Media”)*, (Shanghai: Fudan University Press, 1997), 215-216.

with resolving a dispute by mediation rather than ensuring strict compliance with the relevant Code. It therefore fails to impose an effective check on the news media.

- c) Since the Council lacks funds and professional staff, it does not have the resources to carry out long-term and in-depth investigation, analysis and comparative study.

3.22 Since 1988, the news media have developed vigorously and enjoy a wide degree of freedom which was unknown during the period when martial rule was in place. Although the News Council is no longer representative of the industry, the draft Covenant on Journalistic Ethics issued by the Taiwan Journalists' Association in 1995 confirms that journalists should respect the right of privacy of news subjects unless a public interest is at stake.

United Kingdom²¹

Press Complaints Commission

3.23 **General Council of the Press** - 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. It concluded that the press was insufficiently critical of itself as an institution. In the absence of a body overseeing the well-being of the whole industry, it was difficult to maintain standards of integrity and responsibility. The Commission therefore 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. It considered that it was for the profession itself to pass judgment on the conduct of the press. It envisaged that the adjudications of the General Council would have the force of rulings by the General Medical Council or the Law Society. After the profession was threatened with a Private Member's Bill to set up a statutory Press Council, a General Council of the Press was established by the industry in 1953. However, all the members were drawn from the press and its chairman was the then proprietor of *The Times*. Out of the 25 members, 15 were editorial members (including 7 journalists members) and 10 were managerial representatives. The Council did not have any enforcement powers.

3.24 **Press Council** - The second Royal Commission on the Press was set up in 1961 to examine the economic and financial factors affecting the production and sale of newspapers and periodicals in the UK. The Commission criticised the General Council for its unsatisfactory constitution. It gave the press another opportunity to establish an authoritative press council with a lay element, failing which a statutory body should be set up. 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 5 lay members. The first chairman was Lord Devlin, a retired Lord Justice. A person who was aggrieved by any action of the press could complain to the Press Council. The Press Council published the Declaration of Principle on Privacy in 1976.²² The objects of the Press Council included the following:

²¹ See generally, C Courtney, D Newell & S Rasaiah, *The Law of Journalism* (Butterworths, 1995).

²² The Declaration provided that the publication of information about private lives of individuals without their consent was acceptable only if there was a legitimate public interest overriding the right of privacy.

- a) to preserve the freedom of the press;
- b) to maintain the character of the press in accordance with the highest professional and commercial standards;
- c) to consider complaints about the conduct of the press;
- d) to deal with these complaints in whatever manner might seem practical and appropriate; and
- e) to keep under review developments likely to restrict the supply of information of public interest and importance.

3.25 **The Younger Report** - The Younger Committee on Privacy examined the Council's performance on privacy in 1972. The Committee stated that it did not see "how the Council can expect to command public confidence in its ability to take account of the reactions of the public, unless it has at least an equal membership of persons who are qualified to speak for the public at large."²³ It therefore recommended that the Council should alter its constitution so that one half of the membership was drawn from the public, and that the Council should nominate for each public member vacancy a selection of names from which the appointee should be chosen. It further recommended that the Council should establish 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. Subsequently, the Council increased its lay membership from 5 to 10, but it also increased 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.

3.26 Although one of the objects of the Press Council was to maintain the character of the press "in accordance with the highest professional and commercial standards", the third Royal Commission criticised it for placing greater emphasis on preserving press freedom than maintaining the highest ethical standards. The predominantly professional membership of the Council also tended to be satisfied with less than rigorous standards. Although its adjudications constituted a body of case law, it was not always clear on what basis they were made. There were no standards against which the public could judge the performance of the press. The third Royal Commission therefore recommended that the Council should:

- a) obtain undertakings from newspapers that they would publish upheld complaints on their front page;
- b) initiate more complaints itself, especially by way of monitoring and publicising the record of persistent offenders;
- c) support an effective right of reply;
- d) produce a code of conduct for journalists; and
- e) supply detailed reasons for its decisions.

3.27 In response to the criticism that the Press Council failed to command public confidence in its ability to take account of the reactions of the public, the Press Council adjusted its membership to give parity between lay and professional members with a lay chairman. The lay members were appointed by an Appointments Commission which was comprised of members selected by the Press Council. The Council could not require publication of an apology or payment of compensation. Where it 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

²³ *Report of the Committee on Privacy* (Chairman: The Rt Hon Kenneth Younger) (London: HMSO, Cmnd 5012, 1972), para 189.

that the Declaration of Principle on Privacy were routinely ignored. There were also instances where the offending newspapers refused to publish the adjudications with any prominence.

3.28 **The Calcutt Report** - During the 1988/89 session, two Private Members' Bills on Protection of Privacy and Right of Reply were introduced. Both Bills completed their committee stages in the House of Commons but the progress was halted when the Government established the Calcutt Committee to consider what measures were needed to give further protection to individual privacy from the activities of the press. The *Calcutt Report on Privacy and Related Matters*²⁴ noted that the Press Council was not regarded as independent, partly because of its financial dependence on newspaper and magazine publishers. It considered that there was an inherent conflict between its roles as a defender of press freedom and as an impartial adjudicator in disputes.²⁵ 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 recommended that the Press Council be replaced by a Press Complaints Commission (PCC), specifically charged with adjudicating on complaints of press malpractice. As the PCC must be seen to be authoritative, independent and impartial, all appointments to the Commission were to be made by an Appointments Commission which was independent of the industry. The Report also suggested that the PCC should have an independent chairman and no more than 12 members. 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.

3.29 The Calcutt Report recommended that the PCC should have the following features:

- a) The PCC 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.
- b) The PCC should publish, monitor and implement a comprehensive code of practice for the guidance of the press and the public.
- c) PCC adjudications should, in certain cases, include a recommendation that an apology be given to the complainant.
- d) Where a complaint concerns a newspaper's refusal to give an opportunity to reply to an attack made on a complainant 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.
- e) The PCC should have clear conciliation and adjudication procedures designed to ensure that complaints are handled with the minimum delay.
- f) It should have a specific responsibility and procedure for initiating inquiries whenever it thought it necessary.

3.30 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

²⁴ *Report of the Committee on Privacy and Related Matters* (London: HMSO, Cm 1102, 1990).
²⁵ Paras 14.28 & 14.29.

perform adequately, the PCC should be replaced by a statutory tribunal with statutory powers and a statutory code of practice.

3.31 **Press Complaints Commission** - Subsequent to the Calcutt Report, a Press Complaints Commission was established by the newspaper industry in 1991. The first chairman was Lord McGregor, who had chaired the third Royal Commission on the Press. It was hoped that an independent chairman would ensure that the decisions were arrived at with impartiality. The Commission had 6 lay members and 9 press members. All members were appointed by the industry. Press freedom was not the concern of the Commission. Its object was to enforce a code of practice by adjudicating complaints that newspapers had infringed the code. Robertson and Nicol suggested on the basis of the following observations that the PCC would not live up to the expectations of the Calcutt Committee:²⁶

- 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. It therefore failed to deter breaches of the code.
- b) The PCC failed to resolve the problem of maverick newspapers which 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 PCC operated a code of practice 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 against the offending newspaper.
- 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. Since the majority of the members were from the press, the PCC was perceived to be dominated by press interests.
- g) There was no appeal procedure to which unsuccessful complainants could resort.

3.32 **The Calcutt Review** - In 1992, the United Kingdom Government invited Sir David Calcutt QC to conduct an assessment of the effectiveness of press self-regulation. The Calcutt Review concluded that press self-regulation under the PCC had not been effective.²⁷ 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

²⁶ 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).

²⁷ David Calcutt, *Review of Press Self-Regulation* (London: HMSO, Cm 2135, 1993).

devised by the industry and which is over-favourable to the industry.”²⁸ The Calcutt Review stated that the following changes had to be made to rectify the situation:

- 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.

3.33 **Statutory press complaints tribunal** - The Calcutt Review recommended that a 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 as simple and as speedy as possible. It should have the following functions and powers:²⁹

- to draw up and keep under review a code of practice;
- to restrain publication of material in breach of the code unless the publisher could show that he had a good arguable defence;
- to receive complaints (including third-party complaints) of alleged breaches of the code;³⁰
- to inquire into those complaints;
- to initiate its own investigations without a complaint;³¹
- to require a response to its inquiries;
- to attempt conciliation;
- to hold hearings;
- to rule on alleged breaches of the code;
- to give guidance;
- to warn;
- to require the printing of apologies, corrections and replies;
- to enforce publication of its adjudications;
- to award compensation;
- to impose fines;
- to award costs;
- to review its own procedures; and
- to publish reports.

3.34 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 senior level.

²⁸ Above, para 5.26.

²⁹ Above, para. 6.5.

³⁰ Where a third party complaint is received in a case where the individual affected has declined to make a complaint, the tribunal would need first to ensure that that individual would wish to raise no objection to the tribunal investigating the complaint.

³¹ Before initiating any investigation, the tribunal would need first to ensure that any individual affected would wish to raise no objection to the tribunal investigating the matter.

3.35 In its White Paper on *Privacy and Media Intrusion*, 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, thereby laying the Government open to charges of press censorship. The Government also thought 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.³² Eric Barendt comments that the Conservative Government was reluctant to impose statutory controls because it did not want to antagonise the press whose support had been crucial to its chances at a general election.³³

3.36 **Existing Press Complaints Commission** - At present, the PCC consists of 9 Public Members (including the Chairman) and 7 Press Members. All of them are appointed by an Appointments Commission which has 5 members.³⁴ Although the Chairman of the PCC is appointed by the industry, he 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 present Chairman is Lord Wakeham, former Secretary of State for Energy, and Lord Privy Seal and Leader of the House of Lords.

3.37 The Appointments Commission has a lay majority. This is to ensure that appointments of Public Members are made by a body that is not dominated by the industry. 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 (Pressbof) and three other independent persons nominated by the Chairman of the PCC. They are Lord Mayhew of Twysden, QC (former Attorney General and Secretary of State for Northern Ireland); Sir Geoffrey Holland (Vice-Chancellor of Exeter University); and David Clementi (Deputy Governor of the Bank of England).

3.38 None of the Public 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 Public 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. The Public Members include a dental surgeon, a solicitor, former Permanent Secretary of the Home Office, a professor of social administration, the chairman of the Mental Health Act Commission, the chairman of Edinburgh Festival Fringe, the Principal Deputy Chairman of Committees in the House of Lords, and a bishop. Press Members must be persons experienced at senior editorial level in the press. They are expected to bring editorial experience and technical expertise to the work of the Commission.

3.39 There is evidence that the newspaper and magazine publishing industry is committed to self-regulation under the supervision of the PCC. For the first eight years of the PCC, every critical adjudication by the Commission has been printed in full and with due prominence. Although the Code of Practice was written by a committee of editors, it has been ratified by the PCC. The PCC reports that adherence to the industry's Code of Practice³⁵ has been written into the contracts of employment of the vast majority of editors in the UK, and into the contracts of a significant number of journalists as well. This provides the "teeth" of self-regulation that is otherwise lacking in a voluntary mechanism run by a

³² *The Government's Response to the House of Commons National Heritage Select Committee - Privacy and Media Intrusion* (London: HMSO, Cm 2918, 1995), chapter 2.

³³ E Barendt, "Britain Rejects Media Privacy Law", (1995) 2 *Privacy Law and Policy Reporter* 109.

³⁴ PCC, "How Commission Members Are Appointed", at <<http://www.pcc.org.uk/about/appoint.htm>> (1.5.98).

³⁵ See Annex 3.

press council. Besides, all the adjudications of the Commission are published in a quarterly bulletin which is distributed to all editors, members of Parliament, and other interested parties. The PCC also plays a role in the training of trainee journalists. Moreover, since many newspapers and magazines now provide an on-line version on the Internet, the industry agreed in 1997 that the Code of Practice and the PCC's jurisdiction apply to both publications in a printed form, and publications on the Internet which originated from the publishers who already subscribe to the Code. The existing PCC is therefore different from the PCC at the time when Sir David Calcutt QC conducted the review in 1992.

3.40 The PCC is funded by the Press Standards Board of Finance (Pressbof) which is an independent body charged with collecting a fee from the entire newspaper and magazine publishing industry. The cost of running the PCC in 1996 and 1997 was £1,320,000 and £1,170,000 respectively. This arrangement ensures that the PCC has secure and adequate funding, while the independence of the Commission is at the same time guaranteed by a majority of lay members. Moreover, the publishers have donated space in their newspapers or magazines for advertisements about the work of the PCC. The willingness of the industry to provide financial support has been seen as a sign of its commitment to effective self-regulation.

Broadcasting Standards Commission

3.41 Although this chapter is on press self-regulation, we wish to add a few paragraphs on the Broadcasting Act 1996 which has effected certain changes to the regulatory framework for the broadcast media in the UK.

3.42 The Broadcasting Act 1996 establishes a Broadcasting Standards Commission (BSC) which constitutes a merger of the former Broadcasting Complaints Commission and the Broadcasting Standards Council set up under the Broadcasting Act 1990.³⁶ The Commission consists of not more than 15 members appointed by the Government. Persons who appear to be concerned with, or to have an interest in the preparation or provision of programmes for broadcasting are disqualified from being appointed as a member.³⁷ Members must not have such financial or other interest as is likely to affect prejudicially the discharge of their functions as members of the Commission.

3.43 The BSC is under a duty to draw up and keep under review a code for the guidance of broadcasters on practices to be followed in connection with, *inter alia*, (a) unwarranted infringement of privacy in programmes broadcast by the British Broadcasting Corporation or included in a licensed service; and (b) unwarranted infringement of privacy in connection with the obtaining of material included in such programmes.³⁸ All broadcasters in Britain are required to "reflect the general effect" of this code.

3.44 The BSC has to consider and adjudicate complaints relating to unwarranted infringement of privacy in, or in connection with the obtaining of material included in, the programmes.³⁹ There is no appeal against the adjudications but its findings are subject to judicial review. In *R v Broadcasting Complaints Commission, ex parte BBC*,⁴⁰ it was held

³⁶ Part IV, sections 106 - 130.

³⁷ Schedule 3, para 3.

³⁸ Section 107(1). The BSC has issued a code on fairness and privacy which came into effect on 1 January 1998.

³⁹ Section 110. The BSC will not entertain a complaint if the matter complained of is frivolous or is the subject of proceedings in a court, or is a matter in respect of which the person affected has a remedy by way of court proceedings and it is not appropriate for the Commission to consider a complaint about it: section 114(2).

⁴⁰ *The Times*, 16 October 1992.

that the Broadcasting Complaints Commission had jurisdiction to hear complaints about infringement of privacy, regardless of whether the material was subsequently included in the programme actually broadcast.

3.45 Only a person who is affected by the unwarranted infringement of privacy is entitled to make a complaint. If that person has died, a complaint may be made by his personal representative, relative or a person closely connected with him.⁴¹ Where a complaint is upheld, the BSC may give directions requiring a broadcaster to publish a summary of the complaint and the BSC's findings "in such manner, and within such period, as may be specified in the directions". The broadcaster may be required to publish the finding in the press as well as on the air. It is obliged to comply with the Commission's directions and report on any action taken by it in consequence of the findings.⁴² The BSC will publish periodic reports containing, as regards every complaint, (a) a summary of the complaint, and where appropriate, (b) a summary of their findings and directions given by them, and (c) a summary of any action taken by a broadcaster.⁴³

3.46 We note with interest that the Press Complaints Commission and the Broadcasting Standards Commission appear to be functioning satisfactorily. We are not aware of any claims that the British newspapers and broadcasters are controlled by the Government and the regulatory bodies; nor are we aware of any claims that press freedom has been compromised as a result.

United States

3.47 All the major professional media associations in the United States have developed codes of ethics. These associations include the American Society of Newspaper Editors, the Associated Press Managing Editors Association, the Radio-Television News Directors Association, the Society of Professional Journalists, and the National Press Photographers Association. In addition to these professional codes, many media organisations have their own codes detailing their policies regarding employees' conduct.

3.48 Many local news councils were formed in the 1950's and 1960's. 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 of 18 distinguished citizens. Only eight members were from the industry. Both the media and the complainants may be represented by lawyers at hearings. The council's findings included both majority and dissenting opinions. It was dissolved ten years later because of lack of funding and resistance from major news organisations. However, there are regional news councils in a number of states including Minnesota, Oregon, Washington and Hawaii.

3.49 The Minnesota News Council was formed in the early 70's. It receives and adjudicates on complaints which are heard in public. It has 24 members: half from the public and half from the media. 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.⁴⁴

⁴¹ Section 111.

⁴² Sections 119(1)-(3) and 120.

⁴³ Section 119(8) and (10).

⁴⁴ B Shaw, "How to Start a News Council", at <<http://www.mtn.org/newsncnl/General/Shaw.html>> (4.5.98), p 4.

Chapter 4 - Media self-regulation in Hong Kong

Introduction

4.1 We examine in this chapter to what extent could media intrusion be effectively dealt with by the news media without outside interference.

4.2 The news media comprises of the print and the broadcast media. According to the *Hong Kong Annual Report*, they include 50 daily newspapers, 693 periodicals, two commercial television companies, a subscription television service, a regional satellite television service, two commercial radio stations, and one government radio-television station.¹

4.3 Although the number of local newspapers actually sold is less than the figures recorded in the registry set up under the Registration of Local Newspapers Ordinance, the Hong Kong print media is nonetheless vigorous and highly competitive. At present, readers have a choice of two major English-language dailies and more than a dozen Chinese-language dailies.

4.4 The broadcast media is regulated by the Broadcasting Authority under the Broadcasting Authority Ordinance. The role of the Authority in the regulation of media intrusion will be examined in Chapter 6.

Professional associations

4.5 The interests of various sectors of the Hong Kong news media are represented by the following bodies:

- the Newspaper Society of Hong Kong;
- the Hong Kong Chinese Press Association;²
- the Society of Hong Kong Publishers;³
- the Hong Kong News Executives' Association;
- the Hong Kong Journalists Association;
- the Hong Kong Federation of Journalists;
- the Hong Kong Press Photographers Association; and
- the Foreign Correspondents' Club.⁴

¹ *Hong Kong - A New Era: A Review of 1997* (HK: Information Services Department, 1998).

² One of the objects of the Hong Kong Chinese Press Association is to promote the press industry in Hong Kong. The majority of its members have a special interest in covering horse-racing news.

³ The Society maintains a group of local publishers and local representatives of foreign publishers in the newspaper and magazine industry. It works to establish standards and guidelines for publishers relating to quality control, auditing, circulation and advertising.

⁴ The Foreign Correspondents' Club provides social facilities to its members and organises a range of professional activities, including news conferences.

4.6 Membership of the journalists associations is low. According to the findings of a survey conducted in 1990, only about 5% of journalists in Hong Kong have joined the News Executives' Association and 13% enrol in the Hong Kong Journalists Association.⁵ The Hong Kong Federation of Journalists has been in existence for about two years.

4.7 There is no code of ethics applicable to the newspaper and magazine publishing industry. As far as we are aware, only the Hong Kong Journalists Association (HKJA) has a Code of Ethics for the guidance of its members. The Code is reproduced in Annex 1. Compared with the code enforced by the Press Complaints Commission in the UK, the Association's Code gives scant advice on the ethical standards for news-gathering. It does not contain any provisions on the collection of information about patients, children, victims of crime, and innocent relatives and friends. The Code simply provides that a journalist shall obtain information by "straight forward means" and shall not intrude into private grief or distress unless it can be justified by "over-riding considerations of the public interest". Whereas the Code of Practice of the UK Press Complaints Commission defines "public interest" as including "(i) detecting or exposing crime or a serious misdemeanour; (ii) protecting public health and safety; and (iii) preventing the public from being misled by some statement or action of an individual or organisation", no guidance is given by the HKJA as to what constitutes "public interest" in its Code of Ethics. In our view, the Code does not give sufficient guidance and protection to both journalists and ordinary citizens.

4.8 The HKJA has a three-member Ethics Committee to rule on breaches of its Code of Ethics. However, the Committee has no lay members. All the members are from the Executive Committee of the Association. The investigations and hearings of the Committee are carried out in private. Its findings are neither published nor reported in the press.⁶ Even if the Committee is willing to balance press freedom against privacy, the scales are held by the press itself. There is no guarantee that the interests of the public in the protection of individual privacy will be given due weight when the Committee is considering complaints from the public. The fact remains that the Association represents the interests of journalists rather than those of the public. It is neither impartial nor independent. As far as its regulatory role is concerned, the Association cannot command the confidence of the public.

4.9 Furthermore, the Association has no jurisdiction over the 87% journalists who are not its members. These journalists are free to intrude upon an individual's privacy without any justification as long as it is not unlawful to do so. Nor are news organisations subject to its jurisdiction. News organisations may refuse to respond or decline to provide information for the Association to investigate complaints. The Ethics Committee of the Association reports:

*"Under such circumstances, given the one-sided nature of evidence available, the HKJA has at times found it very difficult to come to a definite conclusion. We note that the media complain loudly if the government and large companies refuse to answer questions. Yet media organisations, despite their great influence on society, often refuse to abide by the same standards."*⁷

⁵ J M Chan, P S N Lee & C C Lee (1996), above, 45.

⁶ But note that the Committee made the following statement in November 1998: "The HKJA plans to publish all the complaints it receives, subject to consent from complainants. The aim is not to embarrass any media outlet. Indeed we discourage any attempt to analyse these complaints to find which outlets are more ethical than others." HKJA Ethics Committee, "Media Ethics: The HKJA Mechanism", 22 November 1998, p 1.

⁷ HKJA Ethics Committee, "Media Ethics: The HKJA Mechanism", 22 November 1998, p 3; FONG So, "Media Ethics: The HKJA Mechanism" in *HKJA 28th Anniversary* (1996), 30-31.

4.10 Even if a journalist or news organisation is found guilty of unethical conduct, the responsible organisation is not bound to publish the result of the adverse ruling. A member of the Ethics Committee describes the complaints procedure of the Association in the following terms:

“The HKJA’s mechanism of receiving and adjudicating on complaints is unique, because it is the only channel in Hong Kong by which members of the public can lodge complaints on media ethics. However, it may be too self-flattering to think that this mechanism enjoys modest success. In fact, our system is often considered to be highly ‘passive’, in that the HKJA simply waits for complaints. Some even say that our adjudications are ‘useless’ because the association has no power to discipline media workers or organisations for ethics violations. ... We would also like to stress that the HKJA has no interest whatsoever in playing the role of a ‘watchdog with teeth’. Indeed, we are totally against the idea of forming a statutory body with the power to discipline media workers or media organisations.”⁸
(emphasis added)

4.11 Apart from a Code of Ethics, the Association 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”.⁹ 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 that it is necessary to regulate the conduct of its members.

4.12 As far as members of the HKJA are concerned, a serious breach of the provisions of the Code may, in theory, lead to expulsion from the Association. But since membership of the Association is not compulsory for journalists, this sanction will not have any effect on the contractual relationship between the expelled member and his employer. In any event, in a poll of HKJA members on media ethics, only 13% of the respondents supported the idea of “threaten[ing] to expel unethical members” in a bid to improve ethical standards.¹⁰ The HKJA is therefore playing an important but nevertheless limited role in regulating media intrusion. The experience in the United Kingdom shows that a code drafted, issued and enforced by the industry is unlikely to command the confidence of the public.

4.13 The role played by other professional bodies in promoting journalistic ethics is also limited. One of the objects of the Society of Hong Kong Publishers is to enhance the professional standing of publishers in Hong Kong, but news-gathering activities and reportage in newspapers and magazines are not its major concerns. Besides, only a minority of local newspapers is members of the Association.

4.14 The Newspaper Society of Hong Kong, which represents most of the proprietors of Chinese- and English-language newspapers, organises three major functions each year: a meeting to discuss the pricing of newspapers, an annual ball, and the Best News Writing and Photography Competition.¹¹ The maintenance of journalistic ethics is not the

⁸ FONG So, “Media Ethics: The HKJA Mechanism” in *HKJA 28th Anniversary* (1996), 28.

⁹ C Bale, “Journalistic Ethics - The Rights and Wrongs”, in *HKJA 25th Anniversary* (1993), 51.

¹⁰ HKJA Press Release, 22 November 1998.

¹¹ Not much publicity has been given to the contest because only newspapers whose journalist has won an award would report the event.

major concern of the Society. Even if it were anxious to maintain high journalistic standards, the fact that three mainstream newspapers, i.e. *Apple Daily*, *Oriental Daily News* and *The Sun* are not members of the Society makes any positive efforts undertaken by the Society in the area of journalistic ethics of limited consequence.¹²

4.15 As for other journalists associations, the newly formed Hong Kong Federation of Journalists told us that they did not have any Code of Ethics for their members. The prime concern of the News Executives' Association and the Hong Kong Press Photographers Association has been the preservation of press freedom. The constitution of the Hong Kong Press Photographers Association does contain two paragraphs under the heading of "Code of Ethics". But these provisions are more concerned with upholding press freedom than with maintaining ethical standards among its members.¹³ They fail to offer any guidance to press photographers as to how the conflict between press freedom and individual privacy may be resolved in specific circumstances.

4.16 At the meeting of the LegCo Panel on Home Affairs held on 26 April 1999, a representative of the Press Photographers Association stated that the Association could issue a letter or public statement criticising a newspaper for publishing an offensive and objectionable picture in breach of professional ethics. However, the newspaper might take legal action against the officers of the Association if the letter or statement was issued. He said that since their membership was small and they did not have much resources to defend legal action taken by massive newspapers, the Association had not taken an active role in promoting media ethics. 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 comments made by the representative of the Press Photographers Association and the Chairperson of the HKJA illustrate that even if the news associations are willing to play an active role in restraining intrusive practices, they will not, except in extreme cases, point their fingers at a particular newspaper and hold it accountable for these practices lest it will take legal action against members of the association in retaliation.

4.17 A sizeable public outcry over media ethics emerged in October 1998 over the television and press reports on the bizarre behaviour of the widower of a woman who committed suicide by flinging herself to her death after allegedly pushing her two sons from the balcony of a high-rise. Television interviews made by entertainment program crews reported the widower having no remorse over the tragic death of his wife. Later, *Apple Daily* made a serial front page account of the man looking for women in Shenzhen, with a photograph showing him embracing two women in bed. Subsequently, a large number of complaints were made to various institutions including the Broadcasting Authority, Television and Entertainment Licensing Authority, HKJA and the media organisations concerned.

4.18 That incident did not involve an intrusion upon the privacy of a living individual, as the widower admitted consent on his part and further claimed that he freely sold these details of his private life in return for money. The lament of the public related to

¹² The HKJA reported in 1998 that *Apple Daily* and *Oriental Daily News* shared about 70% of total newspaper readership in Hong Kong: HKJA and ARTICLE 19, *Questionable Beginnings - Freedom of expression in Hong Kong one year after the handover to China* (1998), at 34. It reports that a survey conducted by AC Nielsen shows that *Apple Daily* and *Oriental Daily News* had an average daily readership of 1,917,000 and 1,891,000 in February 1998 respectively. See HKJA and ARTICLE 19, above, at 35.

¹³ The section provides: "1. The HKPPA acknowledges the public's right to freedom in searching for the truth and the right to be informed through the use of pictures. 2. The HKPPA believes that photographers should at all times maintain the highest standards of ethical conduct and strive to maintain freedom of the press and access to all sources of news and visual information."

the general ethical standards of the media, such as chequebook journalism and bad taste. One religious group went as far as urging the public to boycott *Apple Daily* but as newsvendors reflected, the call had not caused any impact on the sales of the newspaper. Subsequently, *Apple Daily* published an apology admitting that the way they reported the story was inappropriate. The effect of any individual boycott of a newspaper is marginal because newspapers are complex packages of which only a portion might offend the readers.¹⁴

4.19 In the wake of the controversy, the HKJA organised a seminar to consider the moral health of the media. Not unexpectedly, no solution was offered as to how to improve and maintain a high ethical standard for the media, except to remind the industry again to guard against any government attempt to intervene using ethical issues as a pretext. Nonetheless, as more and more people expressed their dissatisfaction with the professional and ethical standards of the media, the Association announced in November 1998 that it was “attempting to set up a [Media Ethics Forum] which could lobby for better ethics, offer education, and handle public complaints.”¹⁵

4.20 Subsequently, the Broadcasting Authority fined Asia Television Ltd \$100,000 and Television Broadcasts Ltd \$50,000 for their “exploitative” coverage of the widower’s activities in Shenzhen. The Authority stated that Asia Television Ltd “went to great lengths to provoke and prompt [the widower] to dwell on his personal life, sexual needs, and his indifference towards the death of his wife and two sons.” It ruled that such coverage was “a very serious breach” of the provisions of the Commercial Television Code of Practice on Programme Standards in relation to human relationships.¹⁶ Although the television companies have been criticised and fined for their misconduct, *Apple Daily* has neither been censured nor punished by any regulatory body - there being no regulatory body monitoring the ethics of the press; nor is there any industry-wide code of ethics applicable to the press.

4.21 At the LegCo Panel meeting held in April 1999, the News Executives’ Association informed that they were drafting a Code of Ethics for Hong Kong Journalists. They said they would consult news executives in various news organisations and revise the draft after consultation. The revised draft would then be published for comments by members of the profession, academics and members of the public. Further revision would be made thereafter. A representative of the Association admitted at the meeting that it was difficult to reach a consensus in the industry. He pointed out that since market considerations outweighed all other concerns, the industry might be unwilling to abide by the requirements set out in the “gentleman’s agreement”. He said that in that event, the Association might have to give consideration to setting up a news council to receive complaints.

News Council

4.22 The World Association of Press Councils declares that independent press councils can maintain and enhance the freedom and the responsibility of the press. Its constitution stipulates, *inter alia*, that a press council provides “a democratic, efficient and inexpensive forum for the hearing of complaints against and by the press, and for

¹⁴ Thomas Gibbons, *Regulating the Media* (London: Sweet & Maxwell, 1998), pp 46-48 (arguing that the mere possibility of market transactions should not be allowed to dictate the regulatory approach).

¹⁵ HKJA Press Release, 22 November 1998.

¹⁶ Paragraph 5(h) of the Code states: “The portrayal of family and similarly important human relationships and the presentation of any material with sexual connotations shall be treated with sensitivity and not in an exploitative or irresponsible manner. Respect shall be maintained for the sanctity of marriage and the importance of the home. ...”

maintaining and assisting in the enhancement of its freedom, responsibility and accountability".¹⁷ As neither the Newspaper Society nor the Hong Kong Chinese Press Association represents all newspapers in Hong Kong and both associations do not play a significant role in the maintenance of journalistic ethics, a news council which oversees and enforces an industry-wide code of practice on privacy matters might be created to regulate media intrusion.

4.23 One of the main functions of a news council is to prevent abuse of press freedom. It provides a mechanism through which the standards of care and responsibility on the part of the news media can be maintained without jeopardising freedom of the press. Investigation and public condemnation of bad journalism by a news council would contribute to higher professional standards. Citizens unwilling or unable financially to bring proceedings against the media may hold the media accountable by lodging a complaint with the council. Publishers and broadcasters can also save legal fees and court costs. The public is more likely to have a higher respect for journalism if the news organisations are subject to the scrutiny of an independent body. Members of the public would be more willing to assist journalists in gathering news. Furthermore, the industry would attract more talented students to join the profession.

4.24 However, a voluntary news council may not be the most effective means of reviewing and investigating media complaints. It may lack sufficient funds to set up the complaints mechanism. If the public are represented in the news council, some media organisations may be unwilling to participate and give their support. Moreover, a voluntary body would not have power to compel organisations to co-operate in complaint investigations. Nor can the organisations be forced to abide by its determinations and publish the findings with due prominence.

4.25 The idea of setting up a news council is not new to Hong Kong. Indeed, the Hong Kong Journalists Association was in favour of this idea in the early 1980's. In 1985, Robin Hutcheon, then Chairman of the Newspaper Society of Hong Kong, set up a preparatory committee to put this idea into practice. He invited private individuals as well as journalists to join the committee. Subsequently, he gave the chair to Hon Mr Justice Simon Li who was then a judge of the Court of Appeal. This move was ill-received by the industry. There were considerable misgivings about a committee which was chaired by a person who had no experience of the industry and which was comprised of members of the public as well as journalists. The industry speculated that the Government was behind the move. In the face of opposition from the industry, the committee decided to dissolve itself. The idea of maintaining professional standards by means of a news council has remained shelved since then.

4.26 The unsuccessful attempt to establish a news council shows that some sections of the industry were unwilling to leave ethical issues in the hands of a body which comprises members of the public. But the experience in the United Kingdom indicates that a body established and dominated by the industry which has press freedom as one of its avowed objects cannot be relied upon to balance the interests of the industry and the individual's right to privacy.

4.27 Although many would think that journalists do not want to have a body looking over their shoulders, there is hard evidence that the majority of journalists in Hong Kong think that there is an urgent need to have a press or news council. In a comprehensive survey conducted by three academics at the Chinese University of Hong Kong in 1990, 58%

¹⁷ At <<http://www.presscouncil.org.au/pcsites/wapc/const.html>> (18.1.99). The Association has 17 members in 1998.

of the 522 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.¹⁸ Although Hong Kong Journalists Association expressed no objection to the setting up of a press council in late 1980’s, it remained sceptical of this idea in the run-up to the handover in 1997. In any event, the Association is against the establishment of a statutory body with power to discipline journalists and media organisations:

“we are totally against the idea of forming a statutory body with the power to discipline media workers or media organisations. Such a body, put in simple terms, could invite outside interference in an industry which should remain autonomous to the largest extent possible.”¹⁹

“We believe that it is better to take a decentralised approach, through the application of a code of ethics and the drawing up of related documents on specific ethical issues, for example, election coverage.”²⁰

4.28 Subsequent to the incident involving the widower, there have been calls for the establishment, or at the least the consideration of the establishment of a news council. The feasibility of establishing a media council has been discussed on four episodes of *Media Watch* produced by the RTHK. At the Legislative Council hearing in November 1998, the Chairman of the Hong Kong News Executives’ Association stated that the Association “in principle has nothing against [a media council] provided it is established on the media industry’s initiative, without any government involvement whatsoever.”²¹ The Chairperson of the HKJA also stated at the hearing that the Association did not object to the idea of setting up of a media council in principle, but that “any initiative or involvement on the part of government would be unacceptable.”²² Despite such encouraging remarks, the industry has not taken any initiative to set up such a council.

4.29 To be successful, a news council requires the support and participation of the overwhelming majority of news organisations. A major newspaper can spoil the whole scheme by not co-operating with the council or giving minimal or no coverage to its adjudications. Bob Shaw, a founding member of the 30-year-old Minnesota News Council in the US says:²³

“If the managing editor or publisher of the largest daily newspaper(s) in your area wants a council, ... or if the manager of your state’s newspaper

¹⁸ 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. The following are the results shown in table 19: Very Urgent (22%); Urgent (36%); Doesn’t Matter (23%); No Urgent Need (7%); Not Urgent At All (2%); No Opinion (10%). Although the survey included questions on the need to have a code of ethics and a news council for the press in Hong Kong, J M Chan *et al* do not reveal the findings in their book published in 1996.

¹⁹ FONG So, “Media Ethics: The HKJA Mechanism” in *HKJA 28th Anniversary* (1996), 28.

²⁰ FONG So, “Growing Awareness of Media Ethics” in *HKJA 27th Anniversary* (1995), 20. The HKJA conducted a poll of its members on media ethics in October 1998. There were 178 responses representing a response rate of 27%. When asked what should be done on ethical issues, only 20% of the respondents supported the idea of “urg[ing] the government to set up a Press Council with powers to fine newspapers”.

²¹ Raymond R Wong, “Statement to LegCo Panel on Home Affairs – Special Meeting on Wednesday, Nov 25, 1998”. He said that the council’s membership would include representatives from the media, “news consumers’ ombudsmen” and academics. He stressed that the function of the Council is not to set standards and codes of practice “as the individual media organisation would be more appropriate to do this themselves.”

²² *South China Morning Post*, 16 Nov 1998.

²³ B Shaw, “How to Start a News Council”, at <<http://www.mtn.org/newsncnl/General/Shaw.html>> (4.5.98), p 3.

association and significant members of his board want a council, it could work. If, on the other hand, a person outside the press wants to start a council and does not consult the press during the formative stage, that project, I believe, is doomed.”

4.30 Although we would welcome the establishment of a voluntary news council in Hong Kong to raise the ethical standards of the news media if there is any chance of success, there is no reasonable prospect that one will be established in the foreseeable future. *Apple Daily*, *Oriental Daily News* and *The Sun* are not members of the Newspaper Society. In any event, the Newspaper Society is silent on this subject. There are also no signs that the overwhelming majority of the news organisations would give their whole-hearted support to the establishment of a news council.

Self-restraint by individual news organisations

4.31 Given that Hong Kong does not have a news council, self-regulation would, in the end, mean nothing more than asking journalists to gather and report news in accordance with their conscience, or refer to the Code of Ethics issued by the HKJA for guidance whenever they are caught in a difficult position. Most newspapers exercise restraint when reporting rapes, kidnapping cases and other major crimes. Where a complaint about inaccuracies is received, the newspaper may publish a correction or apology. As regards unfair coverage, it may be dealt with by publishing the complaints as letters to the editor. However, as noted by a member of the Ethics Committee of the HKJA, “There remains considerable scope for the media to institutionalise letters to the editor pages. Some newspapers do not have regular letters pages, and some of the more well-known publications are known to have refused potentially controversial correspondence.”²⁴

4.32 The Chairperson of the HKJA was reported as saying that the media’s self-discipline and public monitoring would be more effective weapons against intrusive press coverage.²⁵ Others have argued that the press is primarily responsible to the readers for their performance, not to any outside body. It is the job of the press to uphold the standards of the industry. It should be up to the industry itself to strike the balance between the duty owed to the publisher or broadcaster and the interest of protecting an individual’s privacy from media intrusion. In our opinion, this is a difficult if not impossible task, unless the industry has an acceptable and enforceable code of practice which is binding on both journalists and proprietors alike, or all proprietors are willing to incorporate into the contracts of employment the provisions of a code of practice which is acceptable to both the industry and the public. There are no signs of either of these two scenarios becoming a reality in the foreseeable future.

News ombudsman / Readers’ representative

4.33 One way to improve accountability of a news organisation is to appoint an ombudsman. The task of a news ombudsman is to act as an arbitrator and conciliator between the news organisation and its audience. He receives and investigates complaints about the conduct of journalists. Some ombudsmen also consider complaints about accuracy, fairness, balance and good taste in news coverage. The duties of an ombudsman in a newspaper company may include the following:²⁶

²⁴ C Bale, “Media Ethics: Press Council Overkill?” in *HKJA 26th Anniversary* (1994), 23.

²⁵ *Hong Kong Standard*, 8 September 1997.

²⁶ E B Lambeth, *Committed Journalism* (Indiana University Press, 2nd edn, 1992), 114.

- a) to receive, investigate and reply to complaints from readers;
- b) to supervise the preparation of corrections;
- c) to monitor news and feature columns;
- d) to write memoranda to management evaluating performance of reporters and editors;
- e) to write internal newsletters about readers' views; and
- f) to write critical columns published in the newspaper.

4.34 A news ombudsman helps to explain the newsgathering process to the public and overcome the belief that the news media is arrogant and insensitive to public concerns. The credibility of the news organisation concerned can thus be improved. His presence in a news organisation also prods reporters and editors to exercise more care and give more thought to their work. The Organisation of News Ombudsmen articulates the reasons why a newspaper or broadcaster should have an ombudsman:²⁷

- a) the quality of news reporting could be improved;
- b) the newspaper or broadcaster would become more accessible and accountable to its readers or members of its audience;
- c) its news professionals would be more aware about the public's concerns;
- d) time for publishers and senior editors, or broadcasters and news directors, could be saved by channelling complaints to one responsible individual; and
- e) some complaints that might otherwise become costly law suits could be resolved.

4.35 In the opinion of Charles Bailey, a former editor of the Minneapolis *Tribune*, ombudsmen are better attuned to the public temper than editors who are burdened with other professional and administrative duties. They help reduce public hostility toward the press and increase understanding of how the press functions. The ombudsman "helps his newspaper to be fair, and helps persuade the public that it is fair".²⁸

4.36 The establishment of news ombudsmen to take up complaints and breaches of a Code of Practice was supported by the Newspaper Publishers Association in the United Kingdom.²⁹ However, the Calcutt Committee was critical of such a scheme:

*"However high his standards and however much independence he may be given to criticise, a readers' representative cannot be, or be seen to be, wholly independent of the newspaper which employs him. This may reduce public confidence in him and hence his effectiveness. His role in preventing unjustified intrusions into privacy is likely to be limited to criticising them after the event. By then any damage has already been done. Furthermore, he can only advise or exhort: the final say about what should be published rests with the editor."*³⁰

4.37 Robert Haiman, president of the Poynter Institute for Media Studies, holds the same view. He thinks that what journalists need is more systematic and independent criticism from the outside, not more criticism from their peers. The ombudsman is an

²⁷ ONO, "The Organisation of News Ombudsmen", at <<http://www5.infi.net/ono/intro.html>> (4.5.98), p 1.

²⁸ C W Bailey, "Newspapers need ombudsmen", *Washington Journalism Review*, November 1990, p 32.

²⁹ See the Declaration issued by the Association in 1989.

³⁰ *Report of the Committee on Privacy and Related Matters* (London: HMSO, Cm 1102, 1990), para 13.14.

insider, despite attempts to foster his independence.³¹ Cliff Bale, a veteran Hong Kong journalist, noted that this option might be difficult for the newspapers to accept because there would be a financial cost involved. Nonetheless, he conceded that this could, in the long run, become the most effective way to prove that media organisations are fully accountable to the public.³²

4.38 According to our understanding, *Next Magazine* was the first and only media organisation in Hong Kong which had appointed a news ombudsman. Kenneth W Y Leung, associate professor of the Department of Journalism and Communication in the Chinese University of Hong Kong, was appointed by the magazine to investigate and comment on complaints lodged against the magazine. His comments were posted on the website of the Nextmedia Group.³³ After inviting the journalists concerned to respond, he replied to the complaint and gave his own comments on the issues involved - some of which were critical of the magazine. This experiment was discontinued in September 1998. The publisher explained that “in over a year, we had less than 10 complaints.”³⁴

4.39 Despite the inherent limitations stated above, we support the appointment of ombudsmen by news organisations. However, news ombudsmen are no substitute for scrutiny from the outside. We believe that it is only through an independent body that the news media can be made accountable to the public.³⁵

Conclusion

4.40 Yuen Ying Chan, senior consultant for journalism and media studies at the University of Hong Kong, observes that the following elements of a free press are lacking in Hong Kong:³⁶

- enlightened media laws and regulatory regimes;
- shared values and a code of conduct among practitioners;
- continuing education and career opportunities for journalists;
- effective and non-partisan professional organisations;
- press monitoring groups and publications;
- active civic groups serving as media watchdogs; and
- a commitment on the part of government and major businesses to support independent, non-commercial news enterprises.

³¹ R J Haiman, panel discussion, American Society of Newspaper Society Convention, 22 April 1981, Washington, DC. His arguments are summarised in: E B Lambeth, 115.

³² C Bale, “Media Ethics: Press Council Overkill?” in *HKJA 26th Anniversary* (1994), 23.

³³ At <<http://www.nextmedia.com.hk/mn>>.

³⁴ Quoting Yeung Wai Hong; in Frank Ching, “Learning Self-Control – Hong Kong’s media are torn between ethics and profits”, *Far Eastern Economic Review*, 17 Dec 1998, at 25.

³⁵ The National Heritage Committee of the House of Commons in the UK suggested that a regulatory level was needed beyond that of a Press Commission. It recommended that a statutory Press Ombudsman be appointed with power to investigate complaints submitted to the Press Commission whose outcome was not satisfactory to one of the parties. He would also have a right to institute investigations where no complaint had been made. The Ombudsman would have authority to require the publication of corrections, retractions or apologies and, where appropriate, to supervise their wording. He would also have authority to order the payment of compensation to those affected by breaches of the Code and to impose a fine on publications which are responsible for flagrant or persistent breaches of the Code. Where a newspaper refuses to pay a fine or compensation, the Ombudsman would be able to seek a court order requiring it to be paid. A newspaper which dissents from the Ombudsman’s decision would be entitled to ask the court to discharge the order. We think that it is unnecessary to consider the creation of a statutory news ombudsman at this stage.

³⁶ Y Y Chan, “Building the Infrastructure for a Free Press in Hong Kong”, 26 Jan 1999.

4.41 One could imagine that media self-regulation can hardly be effective in such an environment. Indeed, it is difficult for self-regulation to be effective in the absence of any self-regulatory body which passes judgment on the conduct of newspapers and journalists. Unlike the Newspaper Publishers Association in the United Kingdom, neither the Newspaper Society of Hong Kong nor the Hong Kong Chinese Press Association plays a significant role in maintaining the ethical standards of journalists. The only professional body willing to take up the responsibility of overseeing journalistic ethics is the Hong Kong Journalists Association. However, members of the Association account for only a small proportion of Hong Kong journalists. Even if the Association were willing to play a greater role in self-regulation, there would not be enough journalists to make this a success. In any event, the Code of Ethics of the Association is not comprehensive. There is no public involvement in the drafting and enforcement of the Code; nor is the Association accountable to the public. In the poll of HKJA members conducted in October 1998, only 20% of the respondents thought that the Association's Code of Ethics should be "strengthened". There are also indications that the Association is unwilling to enforce ethical standards on its members. Yet even if it were willing to adopt and enforce the most stringent standards, this would have no impact on journalists who are not members of the Association. Furthermore, although about 60% of journalists in Hong Kong considered it urgent to set up a press council, none of the news organisations and professional bodies have taken the initiative to put this idea into practice. As at April 1999, none of the news organisations has a news ombudsman to consider complaints from the public. Relying solely on market forces would not deter intrusive behaviour. As the interests of the audience conflict with the interests of individuals whose privacy have been unjustifiably intruded, any calls from a pressure group not to buy a newspaper which falls below the ethical standards are unlikely to succeed. More importantly, any possible reduction in circulation does not alleviate the mental suffering of victims of press intrusion. Our primary focus has been to protect individuals from media intrusion and to provide an effective remedy for victims of intrusion. A victim of press intrusion ought to have some kind of redress from the offending newspaper.

4.42 In summary, there is no self-regulation on the industry level. Unless the Newspaper Society expands its membership to cover all the local newspapers and is willing to take the lead in devising a method of self-regulation which has procedures dealing promptly and fairly with complaints about breaches of an acceptable Code of Practice which is binding on the whole industry, there is little scope for voluntary self-regulation of the press.

4.43 In the run-up to the handover of Hong Kong to China in July 1997, the main concern of the news media had been on the preservation of press freedom after 1997. Not much attention has been paid to improving the ethical standards of the news media. This is understandable because "in the absence of freedom there can be no exercise of responsibility".³⁷ Article 27 of the Basic Law now guarantees "freedom of speech, of the press and of publication". The constitution of Hong Kong therefore gives the news media special protection. In June 1998, the Political and Economic Risk Consultancy reported that "Hong Kong's press and broadcast media has weathered the transition to Chinese sovereignty much better than sceptics were anticipating a year ago."³⁸ We think that now is the right time for the print and broadcast media to put more emphasis on journalistic ethics.

4.44 One of the essential attributes of a profession is its ability to maintain standards of responsible and professional behaviour through review by its members. But such reviews can only be carried out through a strong professional body which has the

³⁷ International Commission for the Study of Communication Problems, *Many Voices One World* (Chairman: Sean MacBride SC) (UNESCO, 1980).

³⁸ "No obvious media censorship: poll", *South China Morning Post*, 15 June 1998.

authority to apply and enforce such standards against all members of the profession. David Feldman says:

“One of the features which distinguishes professions from other groupings is that the former have criteria and procedures for admission to membership, and disciplinary procedures and measures (including the withdrawal of the right to practise), which are designed to impose and uphold standards of ethics and responsibility which protect those with whom the professional has to deal. Until journalism adopts a professional organisation of this sort, its claim to be free of regulation in the public interest will always be suspect.”³⁹

4.45 It has been suggested that criticism from other newspapers is effective in ensuring that the press complies with the ethical standards of the news media. This suggestion appears to be out of touch with reality. Take *Ming Pao Daily News* as an example. Its editorial board occasionally receives letters from its readers complaining about the conduct of other newspapers. But the board’s stance is that *Ming Pao Daily News* will not handle such complaints. One of its editors declares that *Ming Pao Daily News* is not an ombudsman and that it has no wish to turn itself into an enemy of other newspapers.⁴⁰ He says:

“the fact that readers [send in the complaints] reflects that they are dissatisfied with the conduct of the media but could find no avenues to voice their grievances. To avoid being accused of infringing press freedom, the Government dare not regulate even the publication of Guide to Call Girls Service in newspaper columns, and allow such publications to continue corrupting the morals of our teenagers. Since members of the Legislative Council want to attract more publicity, they also dare not antagonise the media; thus leaving the responsibility to speak out for the public, to the media which fails to live up to people’s expectation.”⁴¹

4.46 We shall examine in the next chapter whether and to what extent the existing framework established under the Personal Data (Privacy) Ordinance can be utilised to regulate media intrusion.

³⁹ D Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford: Clarendon Press, 1993), 590.

⁴⁰ Tai Wu-tsz, “*Ming Pao Daily News* is Not an Ombudsman”, 23 Nov 1998, D6.

⁴¹ Above.

Chapter 5 - Regulation under the Personal Data (Privacy) Ordinance

5.1 We examine in this chapter to what extent the existing framework under the Personal Data (Privacy) Ordinance (Cap 486) can be utilised to address the problem of media intrusion.

Personal Data (Privacy) Ordinance

5.2 News reports, photographs and video footage of individuals from which it is practicable to identify the individuals concerned constitute personal data under the Personal Data (Privacy) Ordinance (“PDPO”). Media intrusion may therefore entail a breach of one of the Data Protection Principles stated in the schedule to the Ordinance. Any individual whose data have been collected or published by a news organisation in breach of a Data Protection Principle (“DPP”) may lodge a complaint with the Office of the Privacy Commissioner for Personal Data. If the Commissioner upheld the complaint, he may issue an enforcement notice directing the news organisation “to take such steps as are specified in the notice to remedy the contravention or, as the case may be, the matters occasioning it.”¹ It seems that the Commissioner may, in serious or significant cases, require the offending news organisation to publish an apology or correction in its publication if this is an appropriate remedy. Any data user who contravenes an enforcement notice commits an offence and is liable on conviction to a fine and to imprisonment for 2 years. Where the data subject suffers damage by reason of the contravention, he may also claim compensation by bringing legal proceedings pursuant to section 66 of the PDPO.

5.3 DPP 1(1) provides that personal data shall not be collected unless: (a) the data 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. News organisations and journalists are not exempt from DPP 1. However, whether a collection is “necessary for” or “directly related to” journalistic purposes and whether data collected by a journalist are “excessive” in relation to these purposes are open to interpretation.

5.4 DPP 1(2) requires that personal data should be collected by means which are both lawful and fair in the circumstances. This means that the media is prohibited from collecting personal data by means which are unfair even though doing so is not unlawful. Where the data subject has been deceived or misled as to the purpose for which the data are to be held or used, the collection is likely to be treated as unfair if no public interest is involved.

5.5 The Privacy Commissioner has advised that collection by means unknown to the individuals (for example, photo-taking in public places using long-range camera lens or hidden cameras) is generally not considered to be a fair means of collection. Other examples given by the Commissioner include the taking of photographs of individuals in private

¹ Cap 486, section 50.

premises from outside those premises 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. However, these means might be considered fair if there is an over-riding public interest in the collection of personal data.²

5.6 In addition to DPP 1, DPP 3 provides that personal data shall not, without the “prescribed 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”. News organisations are therefore under an obligation to ensure that personal data collected by journalists are used only for journalistic purposes unless the data subject agrees otherwise.

5.7 The Data Protection Principles in the Ordinance are broad statements of principle for the general guidance of data subjects and data users. They do not provide sufficient guidance to the news media in relation to the collection of information with a view to its publication or broadcasting. It should be noted that the overwhelming majority of the examples cited in this Paper occurred after the PDPO came into force. This illustrates that the general provisions contained in the Data Protection Principles have not as yet provided effective protection to individuals who have suffered at the hands of the news media.

Code of practice under the Personal Data (Privacy) Ordinance

5.8 Under the PDPO, the Privacy Commissioner may issue codes of practice for the purpose of providing practical guidance for the observance of the Data Protection Principles. He therefore has power to issue a Code of Practice on the collection and use of personal data for journalistic purposes. A Code of Practice which applies to all journalists and news organisations would not only give substance to the Data Protection Principles as applied to the news media, but would also give practical guidance and protection to the news media and the public. It would be particularly helpful in explaining what types of data collection methods would be deemed unfair under DPP 1. The Code may also clarify under what circumstances personal data would be regarded as excessive in relation to journalistic purposes. Where a journalist or news organisation is alleged to have contravened a DPP, the Code may be adduced in evidence in proceedings under the Ordinance.³

5.9 Strengthening protection under the PDPO by means of a Code of Practice is a viable approach to the problem of media intrusion. Under this option, the Code would be approved by a body independent of both the industry and the Government. Enforcement of the Code by the Privacy Commissioner would also have the backing of the statutory powers and sanctions under the Ordinance. The Office of the Privacy Commissioner provides a well-established machinery to adjudicate upon complaints against the media. Since the Commissioner is now the focus of attention on privacy matters, issuing such a Code would also increase the awareness of the public of their rights against the media under the PDPO. Another advantage is that the Code would apply to private individuals as well as newspaper publishers and licensed broadcasters. Any person who publishes personal data on the Internet or collects personal data with a view to their publication in the news media (including the Internet) would be subject to the Code, whether or not that person is a news organisation or journalist.

5.10 The Privacy Commissioner was reported as saying that he received few complaints from celebrities or public figures regarding media intrusion.⁴ He said there had

² Minutes of the meeting of the Panel on Information Policy of the Provisional Legislative Council held on 26 Sept 1997, para 27.

³ Cap 486, section 13.

⁴ *Hong Kong Standard*, 27 September 1997; *South China Morning Post*, 27 September 1997.

not been a demand from public figures to have guidelines on media intrusion. We think that the number of complaints of media intrusion from public figures is not an accurate reflection of the level of media intrusion experienced by the general public. Public figures are not the only persons who may be aggrieved by the intrusive conduct of the news media. Ordinary citizens who are neither wealthy nor powerful and who do not have any interest group to look after their interests are particularly liable to have their privacy intruded upon by the news media. The examples in this paper illustrate that ordinary citizens represent the bulk of the victims and that media intrusion is by no means uncommon in Hong Kong. The fact that not many complaints have been initiated may be explained by expectations that media intrusions are not covered by law and by the fact that some invasions of privacy are not perceived by victims.

5.11 We consider that the Privacy Commissioner should invite the industry to produce a code for his approval. In the event that the industry fails to co-operate with the Commissioner or cannot reach agreement on a draft code, the Commissioner should step in and take up the responsibility to prepare the code.⁵

Recommendation 1

We recommend that the Privacy Commissioner for Personal Data issues 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.

Need for further measures to regulate media intrusion

5.12 On the assumption that the Privacy Commissioner agrees to issue a Code of Practice as recommended above, a question arises as to whether this recommendation without more would afford adequate and effective protection to victims of media intrusion. Our preliminary view is that even if the Privacy Commissioner agrees to issue a Code of Practice for the news media, it is likely to be of limited effect.

Data Protection Principle 1

5.13 By virtue of DPP1(1), a news organisation must collect personal data for a lawful purpose directly related to a function or activity of the organisation. The collection must also be “necessary for or directly related to” such a purpose. Furthermore, the data must not be excessive in relation to the same. Section 61(3) of the PDPO defines “news activity” as meaning any journalistic activity and including the gathering of news for the purpose of dissemination to the public, and the dissemination of news to the public. As it is always open to a news organisation to argue that personal data collected by its journalists are worthy of discussion or of reporting by the media and that the data are collected for the purpose of dissemination to the public, data collected by journalists are normally for a lawful

⁵ Before approving the code, the Privacy Commissioner would be under a statutory duty to consult with bodies representative of data users to which the code would apply and “other interested persons”. In the case of guidelines for the news media, we take it to mean that members of the public would also be consulted in addition to journalists, editors and news proprietors.

purpose directly related to a news activity. It is unlikely that the Privacy Commissioner would substitute a news organisation's judgment as to what information is newsworthy with his. By the same token, it is open to a news organisation to argue that the collection of personal data in connection with a newsworthy event is necessary for or directly related to a journalistic purpose.

5.14 Further, it is difficult for a data subject to argue that data collected by a news organisation are excessive in relation to a journalistic purpose. Journalists are only interested in collecting data that are "newsworthy" or would assist them in collecting data worthy of reporting. These data are directly related to journalistic purposes and are not excessive in relation to the same. Moreover, since the Privacy Commissioner has no right to inspect the personal data systems used by media organisations and can only look at the personal data reported in the news media to assess compliance with DPP 1(1), he could not truly assess whether any data collected by a media organisation are excessive for the purpose of DPP 1(1). One may safely conclude that DPP 1(1) is of limited consequence to the news media.

5.15 DPP 1(2) requires that the collection be fair but it is doubtful to what extent a Code of Practice elaborating on fair collection could help. The requirement that personal data be collected by means which are fair in the circumstances is a loose one. The news media would be quick to point out that publication and news-gathering require separate treatment. They would argue that although they should refrain from publishing personal information, including pictures, if this constitutes an unwarranted invasion of privacy, it is generally fair for journalists to approach or take pictures of a person involved in a newsworthy event even though he is a victim of a tragedy or an unlawful act and is not physically or mentally fit. It is difficult for the Privacy Commissioner to refute such an argument if the data subject is a legitimate subject of public interest and is in a place accessible or visible to the public. As far as news-gathering activities are concerned, consent of the data subject is not the only determining factor where the subject concerned becomes part of an event of public concern through his own conduct or by force of circumstances.

5.16 More importantly, most of the cases of unwanted publicity in the press relate to personal data collected by means which are both lawful and fair in the circumstances. Thus, even if the Privacy Commissioner could produce detailed guidelines on fair collection practices for the news media, the guidelines would not have a significant impact on the industry. Regulating unfair collection practices by the news media is not sufficient to tackle the problem of unwanted publicity given by the press.

5.17 Further, since the PDPO defines "personal data" as data relating to a living individual, the Code would not cover the public disclosure of private facts about a deceased. The surviving relatives and friends could not complain under the Ordinance if personal data about the deceased have been collected and used in breach of the Data Protection Principles.

Data Protection Principle 3

5.18 DPP 3 provides that personal data shall not, without the "prescribed 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". This principle offers limited protection to people whose personal data are revealed in consequence of a crime, accident or tragedy. The Privacy Commissioner has advised that by not objecting to the reporters taking photographs, the individuals concerned are deemed to have given implied consent to publication of their photographs taken by the reporters.⁶ In fact, whether or not the

⁶ Above, para 30.

individuals have consented to publication is neither here nor there. Personal data in relation to victims and public figures are collected by journalists for journalistic purposes. Journalists can always argue that including these data in a newspaper is consistent with the purpose for which the data were to be used at the time of the collection and, therefore, consistent with DPP 3.

5.19 The gravamen of unwanted publicity is non-consensual publication of private facts in the media. However, consent of the data subject is not the key issue in DPP 3. Under DPP 3, consent is an issue if and only if the data are used for any purpose other than “the purpose for which the data were to be used at the time of the collection”. A data user is not required to obtain the consent of the data subject if the former uses the data for the original intended purpose. Hence, it is unnecessary for a newspaper which has collected personal data for journalistic purposes to obtain the consent of the data subject before publishing the data in the newspaper. It is not a contravention of DPP 3 for a newspaper to publish, against the wishes of the data subject, personal data collected by it for journalistic purposes even though the publication amounts to an unwarranted intrusion.

5.20 It is true that by virtue of DPP 1, personal data collected by a journalist must not be excessive in relation to journalistic purposes. However, this requirement does not preclude journalists from obtaining personal data about data subjects involved in newsworthy events. Journalists may require these data for good purposes, for example, to check accuracy or credibility or to follow up a news story. But giving publicity to these data is a different matter. Although it is normally legitimate to obtain the name, age and address of the data subject in a newsworthy event, publishing them in a newspaper might constitute an unwarranted invasion of privacy if it cannot be justified in the public interest. Neither DPP 1 nor DPP 3 may assist the subject who does not wish to see his personal particulars disclosed in the press.

5.21 In practical terms, the Code of Practice recommended to be issued by the Privacy Commissioner would not restrain the news media from publishing the following matters if such matters have been obtained by journalists without contravening DPP 1:

- (i) the name, age, pictures and private life of the following persons who may be adults or minors:
 - victims of crime and tragedy and their friends and relatives;
 - persons accused or convicted of minor offences and their friends and relatives;
 - individuals who survive a suicidal attempt;
 - individuals who happen to be the family members of public figures; and
 - individuals who are formerly public figures but have retired into a life of seclusion;
- (ii) the identity of children under the age of 16 who are not concerned in the proceedings of a Juvenile Court;
- (iii) aspects of the private lives of public figures which are not related to their public role or activities;
- (iv) the intimate details of the private life of a witness in criminal proceedings as revealed in public hearings;

- (v) those parts of the underwear or personal belongings which are accidentally exposed to public view or otherwise within the eyesight of the public.

5.22 The object of the Ordinance has been to protect the privacy of individuals *in relation to personal data*, not to protect individuals from invasion of privacy as such. The Data Protection Principles do not cover all forms of media intrusion. There may well be an invasion of privacy without breaching DPP 3. DPP 3 only limits the purpose of a use or disclosure of personal data; it does not aim at protecting the private life of individuals from unwanted publicity as such. The principle merely states that data must not be used for a purpose other than the purpose for which they were to be used at the time of the collection; it does not provide that data must not be used in such a way as would constitute an unlawful or arbitrary interference with the privacy of the data subject.

5.23 Data collected by journalists are for journalistic purposes. Publishing the data in a newspaper is consistent with journalistic purposes even though this might infringe the data subject's privacy without justification. It is unlikely that a news organisation which has given publicity to personal data in its newspaper would be held liable for a breach of DPP 3 even though the data subject objects to such publicity. As long as the data are collected lawfully and fairly and for a journalistic purpose, DPP 3 would not forbid a news organisation giving publicity to the data. Individuals whose right of privacy has been infringed by the media publishing their data in connection with a newsworthy event may not have a remedy under the PDPO if it was a journalist who had collected the data and the collection was lawful and fair in the circumstances.

5.24 DPP 3 is therefore not effective in protecting individuals from unwanted publicity. Whereas the requirement that personal data be collected by fair and lawful means under DPP 1 would provide a mandate for the Privacy Commissioner to issue guidelines for the purposes of regulating the unfair collection of personal data by the media, DPP 3 is not helpful when it comes to the news media infringing an individual's privacy by giving publicity to personal data lawfully obtained by a journalist.⁷ We therefore conclude that any Code of Practice issued by the Privacy Commissioner would be neither adequate nor effective in protecting individuals from unwanted publicity given by the press.

Exemptions for the news media under section 61(1)

5.25 In order to ensure that the media would not be inhibited from performing the role of a watchdog, the PDPO granted various exemptions to the news media. By virtue of section 61(1), publishers and broadcasters are exempt from the provisions of DPP 6 and sections 18(1)(b) and 38(i) unless and until the data are published or broadcast (wherever and by whatever means). The same section also exempts publishers and broadcasters from the provisions of sections 36 and 38(b). The effects of section 61(1) are as follows:

- (a) The Privacy Commissioner may not carry out an inspection of any personal data system used by a news organisation for the purposes of ascertaining information to assist him in making recommendations to that particular news organisation or to the news media generally relating to the promotion of compliance with DPP 1 and 3.

⁷ The requirement that personal data be collected "lawfully" implies that the collection must not only be lawful in the strict sense but also be "fair in the circumstances". The PDPO has rendered "unfair" collection, unlawful by virtue of DPP 1.

- (b) Even though the Privacy Commissioner has reasonable grounds to believe that an act or practice relating to personal data has been done or engaged in (or is being done or engaged in) by a news organisation and may be a contravention of DPP 1 or 3, the Commissioner may not carry out an investigation in relation to the news organisation to ascertain whether the act or practice is a contravention of DPP 1 or 3.
- (c) Even if the Privacy Commissioner receives a complaint about an act or practice that has been done or engaged in (or is being done or engaged in) by a news organisation, alleging that the act or practice is a contravention of DPP 1 or 3, the Commissioner cannot carry out an investigation in relation to the news organisation to ascertain whether the act or practice is a contravention of DPP 1 or 3, unless and until the data are published or broadcast. Prior to the data being published or broadcast, the sole remedy of the data subject under the Ordinance is to take legal action against the news organisation in a court of law for breach of DPP 1 or 3, as the case may be, pursuant to section 66 of the Ordinance.
- (d) Even if a news organisation holds personal data about an individual, the individual concerned may not request the news organisation to supply him with a copy of such data by relying on section 18(1)(b) unless and until the data are published or broadcast.
- (e) Despite DPP 6, an individual is not entitled to-
 - (i) ascertain whether a news organisation holds personal data of which he is the data subject;
 - (ii) request access to personal data within a reasonable time;
 - (iii) be given reasons if a request referred to in (ii) is refused;
 - (iv) object to a refusal referred to in (iii);
 - (v) request the correction of personal data;
 - (vi) be given reasons if a request referred to in (v) is refused; or
 - (vii) object to a refusal referred to in paragraph (vi)
 unless and until the data are published or broadcast.

5.26 Because of the constraints laid down in section 61(1), the Privacy Commissioner cannot be proactive in ensuring that the news media would comply with the Data Protection Principles. The Commissioner cannot initiate an investigation even though he has reason to believe that a news organisation has contravened DPP 1 or 3. He can only react passively to complaints made by members of the public. Yet even if he has received a complaint, he cannot conduct an investigation in relation to the news organisation concerned unless and until the data have been published or broadcast. A data subject whose data have been collected by a journalist in breach of DPP 1 does not have a right to request access to his data held by the journalist or the news organisation concerned unless and until the data are published or broadcast.

5.27 It would be entirely a matter for the Privacy Commissioner to decide whether to issue a Code for the media. Even if he is in favour of issuing such a code, it is doubtful whether the industry is willing to co-operate with him in producing it. By reason of section 61(1), the Privacy Commissioner may not inspect the personal data system used by the news organisations for the purposes of drafting the Media Code. He would have to rely on the co-operation and advice of the industry in understanding the functions and needs of the news media.

Privacy torts proposed in the Civil Liability Paper

5.28 We have recommended in our consultation papers on *Stalking and Civil Liability for Invasion of Privacy* that the following acts or conduct should be tortious:

- (a) a course of persistent conduct which amounts to harassment of another;
- (b) invasion of privacy by intrusion upon the seclusion or solitude of another or into his private affairs or concerns, provided that the intrusion is seriously offensive and objectionable to a reasonable person; and
- (c) invasion of privacy based on public disclosure of private facts, provided that the disclosure in extent and content is of a kind that would be seriously offensive and objectionable to a reasonable person.

5.29 If all the above proposals were adopted, it would go some way towards resolving the problem of media intrusion. But bringing a legal action for invasion of privacy would not only be costly and time-consuming but would also further publicise the very information which the victim once sought to keep private. Protection against media intrusion should not be restricted to legal measures. More importantly, many cases of media intrusion are not covered by our proposals, as when:

- (a) the “intrusion” or “public disclosure” is not seriously offensive and objectionable to a reasonable person;
- (b) the event to be covered by the press occurs in public place or private premises which are accessible to the public;
- (c) although the subject concerned is located in private premises which are not accessible to the public, he receives no protection if his activities are visible to the public;
- (d) the private facts published in a newspaper or broadcast programme were in the public domain, as when they have been revealed in court proceedings or can be obtained from public records;
- (e) the private facts published in a newspaper or broadcast programme are of legitimate concern to the public;
- (f) the intrusion is reasonably necessary for the protection of the person or property of the defendant or another;
- (g) the subject is not aware that he is being followed or watched; or
- (h) the subject is dead.

5.30 Our proposals on imposing civil liability for invasion of privacy based on public disclosure of private facts are of no avail to the majority of victims who are unfortunate enough to become the subject of a newsworthy event. The law of privacy as developed under our proposals would accord substantial latitude for news-gathering in public places. Journalists will remain free to capture any personal data that are generally accessible to the public. Likewise, anything that takes place in public places or in public view can continue to be reported in the press. However, some would argue that individuals are entitled to a zone of privacy even in public places. Publishing without consent, a photograph

of two lovers walking hand in hand on a beach might harm the couple if they are married but not to each other. Giving publicity to private facts in public records may also give rise to privacy concerns even though the records are accessible to the public. Most of these facts remain unknown to the public unless they are publicised by the press. The publication of such facts requires some restraint if the harm that may result from such disclosure outweighs the public benefits.

5.31 With the advent of the Internet, journalists can dig up the past life of individuals from the Internet. Fred Mann observes that a few web-sites have made a business out of compiling publicly available information about private citizens in the United States. Anyone, including journalists, can visit these sites and build a dossier on any individual at a modest cost. Besides, there is at least one web-site which allows anyone to see every posting any named individual has made to Internet Usenet groups. A casual comment or politically sensitive statement made to online discussion partners can easily be found and reported by the media.⁸ Likewise, information about an individual who is at the centre of controversy can easily be reported world-wide by posting a message on the Internet. The implication is that private information, whether or not obtained by intrusive means, can, in principle, easily be put in the public domain by any individual with access to the Internet.

Conclusion

5.32 The recommendation in this chapter would go a long way meeting requirements to protect privacy in relation to gathering of news. However, in light of the inherent limitations of the Personal Data (Privacy) Ordinance and the restrictive scope of the privacy torts proposed in our *Civil Liability Paper*, we conclude that further measures are required to give more effective protection to individuals in the context of media intrusion. We shall examine in Chapter 6 whether the existing framework under the Broadcasting Authority Ordinance could be utilised to better protect individuals from intrusion by broadcasters. The problem of intrusion by newspaper and magazine publishers will be addressed in Chapter 7.

⁸ F Mann, Philadelphia Online, "New Media' Brings a New Set of Problems" (1998), at <<http://www.poynter.org/research/nm/nmmann98.htm>> (30.4.98), p 3. The web-site monitors postings from various discussion groups and allows a visitor to search them by keyword or author. What were once perceived as private chats are now accessible to the public.

Chapter 6 - Regulation under the Broadcasting Authority Ordinance

6.1 Media intrusion may be effected by the broadcast media. Some commentators have treated radio and television sets as “uninvited guests” in the family living room. Many people watch television and listen to radio as part of the normal things that they do on an ordinary day. They watch or listen to broadcast programmes on the usual channels at the usual times irrespective of what is actually being transmitted. They turn on the radio or television set for no particular reason or intention. Some do so merely because they cannot find anything else to do. The audience have no control over the contents of the programmes transmitted on a particular channel. Although they may switch off a television or radio, they cannot do so before the offending materials are transmitted.

6.2 Newspapers and magazines, on the other hand, are read by those who have some prior knowledge of the style and contents of the publications. The readers have to take an active step to acquire a copy of the publication by paying for it at the news-stand. Whereas the readers of a newspaper or magazine is a well-defined group of individuals with particular preferences and tastes, the listeners and viewers of broadcast programmes can be anyone who has access to a television set or radio. Compared to newspapers and magazines, television and radio are more intrusive. They are accessible to virtually everyone in a dwelling. The pervasiveness and intrusive nature of the broadcast media necessitate more stringent controls over the contents of broadcast programmes than those appearing in the press.

6.3 The broadcast media consists of two commercial television broadcasters, one Hong Kong-based satellite television operator, one subscription television broadcaster, two commercial radio broadcasters, and one public broadcaster, i.e. Radio Television Hong Kong. Whereas anyone could publish anything in a newspaper within the confines of the general law as long as he has complied with the procedural requirements under the Registration of Local Newspapers Ordinance (Cap 268), broadcasters are additionally subject to regulation under the Broadcasting Authority Ordinance (Cap 391). This is in line with the general practice in other jurisdictions where radio and television are subject to a greater degree of regulation than that applied to the press.¹

6.4 In Hong Kong, all television and radio programmes (except those produced by Radio Television Hong Kong) broadcast by licence of the Chief Executive-in-Council. All licensed television and sound broadcasters in Hong Kong, including cable and satellite television broadcasters, are regulated by the Broadcasting Authority which is a statutory body created under the Broadcasting Authority Ordinance. These broadcasters are under a statutory obligation to comply with the Codes of Practice on programme, advertising and technical standards. Radio Television Hong Kong agreed in 1995 that it would abide by the

¹ This difference in treatment has been justified on the following grounds: (a) The airwaves are a public resource. (b) The frequencies for broadcasting are limited. (c) It is costly to start a broadcasting station. (d) Radio and television can exert more influence on public opinion. They intrude into the home, are more pervasive, and are more difficult to control. (e) Pluralism and programme variety cannot be achieved in the broadcast media without regulation. See E Barendt, *Broadcasting Law* (1992), pp 4 – 9.

Broadcasting Authority's Code of Practice on programme standards and would subject itself to the jurisdiction of the Broadcasting Authority.²

6.5 The Broadcasting Authority consists of three public officers and not less than six nor more than nine lay members appointed by the Chief Executive. Its main functions are -

- to make recommendations to the Chief Executive-in-Council on applications for and renewal of licences;
- to monitor television and radio broadcasts in Hong Kong to ensure compliance with the relevant regulations, codes of practice and licence conditions;
- to consider complaints about broadcasts relating to breaches of standards set out in the Codes of Practice and impose sanctions on the broadcasters if necessary; and
- to issue and revise codes of practice on programming standards and advertising standards for television and radio broadcasts.

6.6 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.

6.7 If the Authority rules against a broadcaster, it may issue directions requiring the broadcaster to take such action as the Authority considers necessary.³ The Authority may also impose a financial penalty on a broadcaster which is in breach of a Code of Practice, any licence conditions, or a direction issued by the Authority. Indeed, during the period from March 1990 to August 1997, the Authority had imposed financial penalties on a total of 18 occasions, accounting for 3% of the complaint cases dealt with by the Complaints Committee in that period.⁴ A broadcaster who is aggrieved by a provision of a Code of Practice or direction issued by the Authority may appeal to the Chief Executive-in-Council. The decisions of the Broadcasting Authority are published in its monthly press releases and annual reports.

6.8 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 to discuss areas of common interest or concern;
- periodical surveys and public hearings during mid-term reviews of the licensees; and
- public consultation through the Television Viewing Advisory Scheme, which comprises 18 district advisory groups and 5 advisory panels, with over 500 members.

² Programme-makers of RTHK are additionally required to follow the *RTHK Producers' Guidelines* (September 1998).

³ Broadcasting Authority Ordinance (Cap 391), sections 9B and 20; Television Ordinance (Cap 52), section 34.

⁴ *Report of the Broadcasting Authority : September 1996 - August 1997*, Appendix 10.

6.9 There is also an advisory committee on Codes of Practice whose function is to review the codes of practice on programme, advertising and technical standards for both television and radio services. Although the Codes are very comprehensive in relation to programme standards, they do not contain any provisions on privacy. The main concerns of the Codes of Practice on Programme Standards are on decency and decorum in production; accuracy, fairness and impartiality in reporting; and violence and sex depicted in programmes. The focus of the Codes is on what is shown on the screen. This leaves off-screen matters such as the means by which information is obtained, unregulated. There are no procedures under the Broadcasting Authority Ordinance under which an individual may lodge a complaint against a broadcaster for having used objectionable means to obtain personal information for broadcasting, or for broadcasting personal information which the subject does not wish to be publicised.

6.10 Since the Broadcasting Authority is entrusted with the powers and functions to ensure that the licensees fulfil their responsibilities and obligations stipulated in the relevant legislation, licences and Codes of Practice, one convenient way to strengthen the protection of privacy against intrusion by broadcasters is to entrust the Authority with the additional task of monitoring whether the journalistic activities of the broadcasters are intrusive. The Authority may be empowered to consider and adjudicate upon complaints about unwarranted invasion of privacy in, or in connection with the obtaining of material in preparation for, the programmes subject to the Codes. This is a practical option because the framework constituted under the Broadcasting Authority Ordinance is well suited for dealing with complaints about media intrusion in an effective manner. We note that the *RTHK Producers' Guidelines* issued in September 1998 contain privacy provisions.

6.11 Implementing this option requires that provisions prohibiting the unwarranted invasion of privacy by broadcasters be incorporated into the existing Codes of Practice. The Codes of Practice Committee could then keep the provisions under review. Compliance with the provisions could be monitored by the Television and Entertainment Licensing Authority and under the Television Viewing Advisory Scheme.

6.12 Adopting the framework set up under the Broadcasting Authority Ordinance to deal with intrusion by broadcasters is also desirable because the Authority is independent and impartial. The Chairman is neither appointed by nor chosen from the industry. The Codes are not drafted and enforced by the industry. The many provisions of the Ordinance, including those empowering the Authority to issue directions and impose financial penalty, would ensure that any privacy provisions to be incorporated in the Codes will be complied with and enforced if necessary. A good example of privacy provisions for broadcasters can be found in the Code on Fairness and Privacy adopted by the Broadcasting Standards Commission in the UK, the BBC's Producers' Guidelines, and the Programme Code of the Independent Television Commission in the UK.⁵ Since the contents of broadcast programmes have for many years been subject to regulation under the existing framework, compliance with privacy provisions should not be an undue burden on broadcasters. They have been very successful in monitoring their news and newsreel programmes so as to ensure that they are of good taste, accurate, impartial, well-balanced and not sensational as required by the Code of Practice on Programme Standards.⁶ We believe that they should have no difficulty taking privacy concerns into account when providing their service.

⁵ Independent Television Commission, *The ITC Programme Code - Summer 1995*. The Code applies to all services licensed by the ITC and to certain foreign satellite programmes included in local delivery services licensed by the ITC. The privacy provisions of the *RTHK Producers' Guidelines* (at paras 4.7 & 5.1) are not as comprehensive as those in the BBC Guidelines and the ITC Code.

⁶ For example, paragraph 15 of the Commercial Television Code of Practice on Programme Standards (August 1997) provides that a news or newsreel service shall observe seven

6.13 Any privacy provisions to be adopted by the Broadcasting Authority would apply to both news and entertainment programmes. Although a producer of news programme would be in a better position to argue that a particular intrusion or programme could be justified in the public interest and therefore not unwarranted, the defence of public interest would be available to all producers, regardless of the nature of the programmes for which they are responsible.

Recommendation 2

We recommend that the Broadcasting Authority adopts 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.

6.14 We acknowledge that some of the privacy provisions to be adopted in the Broadcasting Authority's Codes of Practice may overlap with the provisions of the Privacy Commissioner's Code of Practice for the news media proposed in Chapter 5 above. But since the Broadcasting Authority's privacy provisions would be directed at licensed broadcasters and focused on privacy issues specific to the broadcasting industry, and that the provisions would not be constrained by the Data Protection Principles in the Personal Data (Privacy) Ordinance, individuals aggrieved by the intrusive activities of a broadcaster would be likely to seek redress pursuant to the Broadcasting Authority Ordinance instead of the PDPO.

6.15 We have consulted the codes of ethics adopted by the news media and journalists associations in other jurisdictions, including Australia,⁷ Mainland China,⁸ Finland, Germany, Ireland, Italy, Russia, Spain, Sweden, Taiwan,⁹ the United Kingdom and the United States¹⁰. Most of the codes of media ethics in European countries are accessible on the Internet.¹¹ Any code of practice which regulates the collection and use of personal data by the news media should take into account the codes in these jurisdictions as appropriate. We are particularly impressed by the privacy provisions in the codes adopted by the Press Council in Germany,¹² and those adopted by the Press Complaints Commission, the Broadcasting Standards Commission, the BBC and the Independent Television Commission

principles, including: (i) Good taste should guide the selection and presentation of news. Morbid, sensational, or alarming details not essential to factual reporting shall be avoided. News shall be televised in such a manner as to avoid unnecessary alarm", and (ii) "Pictorial representation of news shall be carefully selected to ensure fairness and shall not be misleading or sensational."

⁷ J Hurst & S A White, above, Appendices 1 to 7.

⁸ The *Code of Ethics for Journalists in China* adopted by the Standing Committee of the All China Journalists' Association provides that journalists shall "uphold the civil rights provided for in the Constitution, not disclose private facts of another, not defame others, obtain news by lawful and straight-forward means, respect the declaration and legitimate requests of interviewees." The Code is reproduced in Chen Gui-lan (ed), above, Appendix II.

⁹ The Codes of Ethics for the press, television broadcast and radio broadcast ratified by the Taiwan News Council are reproduced in Ma Chi-shen, *Hsin Wen Lun Li (Journalistic Ethics)* (Hong Kong, 1997), Appendices 2 to 4.

¹⁰ See J Black *et al* (1995), above.

¹¹ EthicNet, "Databank for European Codes of Journalism Ethics", at <<http://www.uta.fi/ethicnet/index.html>>.

¹² At <<http://www.uta.fi/ethicnet/germany.html>>.

in the United Kingdom. We consider that these codes provide a good starting point for the purposes of drafting a code regulating media intrusion.

6.16 We would add that the code should take into consideration both the consequences and the nature of an act and seek to harmonise the two in particular instances. Whilst the code should be flexible, it should not be so flexible as to be “a mere rationalisation for the personal preferences of those who invoke it.”¹³

Recommendation 3

We recommend that when drafting the privacy provisions, the Broadcasting Authority and the Privacy Commissioner for Personal Data should take into account the Press Code issued by the German Press Council, the Code of Practice ratified by the British Press Complaints Commission, the Code on Fairness and Privacy adopted by the Broadcasting Standards Commission in the UK, the Producers’ Guidelines issued by the BBC, and the codes of conduct adopted in other jurisdictions.

6.17 Since intrusion by broadcasters would be adequately dealt with under the Broadcasting Authority Ordinance, we consider in the next chapter what measures are required to effectively deal with the problem of intrusion by newspaper and magazine publishers.

¹³ E B Lambeth, above, 23.

Chapter 7 - Further measures to regulate press intrusion

7.1 We have explained in Chapter 5 above that the Personal Data (Privacy) Ordinance may not provide adequate and effective protection to victims of media intrusion. If our recommendation in Chapter 6 is implemented, intrusion by broadcasters would be adequately dealt with under the Broadcasting Authority Ordinance. This chapter will therefore focus on intrusion by newspaper and magazine publishers. Unless the context otherwise requires, the word “press” in this chapter is used in a strict sense, ie it refers to newspapers and magazines only.

7.2 Before we proceed to examine what measures are required to better protect individuals from press intrusion, it would be helpful if we examine the pros and cons of having a code of ethics for the news media.

Code of ethics for the news media¹

7.3 A code of ethics is often seen as representing the conscience of a profession and its members. Louis Day explains why a system of ethics is essential to the well-being of society:²

- (a) It builds trust and co-operation among individuals in society. If the media fails to live up to society’s moral expectations, confidence in journalism will be eroded and the media will not be able to discharge their social responsibilities.
- (b) It serves as a “moral gatekeeper” in apprising society of the relative importance of certain moral values. It identifies those practices where social disapproval is significant enough to render them immoral.
- (c) It acts as a moral arbitrator in resolving conflicting claims based on individual self-interest.
- (d) It clarifies for society the competing values and principles inherent in emerging and novel moral dilemmas.

7.4 An editorial in *Hong Kong Economic Journal* suggests that a society without ethics is difficult to sustain even though it is governed by the rule of law.³

¹ See generally, Ma Chi-shen, *Hsin Wen Lun Li (Journalistic Ethics)* (1997), ch 1-4.

² L A Day, *Ethics in Media Communications: Cases and Controversies* (Wadsworth Publishing, 1997), ch 2.

³ “The Helplessness of Rule of Law / The Silence and Insensitivity of Ethics”, *Hong Kong Economic Journal*, 3 August 1998. The editorial comments on a case in which a legislator was charged with forgery. See also the editorial in *Hong Kong Economic Journal* on 15 Feb 1999 entitled “Abandon Getting Rich by Speculation / Cultivate a Noble Spirit”.

“Hong Kong is an amoral society. Although mass culture pays attention to law, it rejects discussion on ethics. Our church, school, politicians, public opinion, social work organisations etc are clearly not bold enough to make known their positive stance on the question of ethics. Maybe the ethics pendulum of our society has not yet followed the footsteps of many developed countries in the West and swung back from the extreme of amorality. Such being the case, the rule of law is bound to continue to be flimsy and powerless.”

7.5 A code of ethics falls between law and personal values. Kaplar and Maines explain the differences between ethics and law:⁴

“Ethics is the process of moral decisionmaking, of moral choice. It exhorts us to do the right thing because doing so is virtuous and right in itself (as Kant might say). Ethics strives for the ideal. Law, on the other hand, is imposed on the individual from the outside; it is not developed internally. ... In the former case, choosing to act legally is motivated by fear - the desire to avoid punishment. Choosing to act ethically, however, is motivated by virtue - the desire to strive for a moral ideal. To put it another way, when one acts legally one is choosing not to fall below a certain minimum standard of conduct. When one acts ethically one is choosing to act according to the highest standard of conduct.”

Press code on privacy matters

7.6 We appreciate that journalistic ethics are matters for the journalistic profession to decide. But since press conduct may impinge on the right of privacy enjoyed by members of the public, it is in the public interest that a code of conduct (or code of practice) on privacy matters be put in place to regulate press intrusion. That said, some have argued that a formal code of conduct for the media does not serve any useful purpose. The reservations about codes are several:⁵

- a) they are too general;
- b) their adoption was largely for public relations purposes;
- c) they are hypothetical if they do not at the same time cover publishers and broadcasters;
- d) they do not provide enforcement mechanisms; and
- e) they foster a false sense of purity.

7.7 However, a code of conduct would provide “a general guide to good practice to which proprietors, editors and journalists should be prepared to subscribe and which members of the public would find valuable as an indication of what they are entitled to expect from the industry.”⁶ Sir David English, the Chairman of the Code Committee of the UK Press Complaints Commission, asserts that a clear and practical code for the industry is crucial to editors, the public, and members of the Commission for the following reasons:⁷

⁴ R T Kaplar and P D Maines, *The Government Factor - Undermining Journalistic Ethics in the Information Age* (Washington: Cato Institute, 1995), 34-35.

⁵ E B Lambeth, above, 67.

⁶ *Report of the Committee on Privacy and Related Matters*, above, para 15.5.

⁷ “Report by the Chairman of the Code Committee” (1996), at <<http://www.pcc.org.uk/annual/codechai.htm>> (1.5.98).

- a) it gives the editors a firm set of ground rules, rooted in best practice and robust common sense, on which they and their competitors should operate;
- b) the public will know what standards to expect from newspapers and magazines, and what their rights are when complaining; and
- c) members of the Commission may judge the complaints brought to them against the code.

7.8 If journalists treat themselves as professionals, it is an anomaly that the press does not have an industry-wide code of conduct. Where journalism is not regarded as a profession, having an industry-wide code of conduct would no doubt raise their social status to that of a profession. The Calcutt Committee remarks that:⁸

“Any system whereby protection or redress for the individual is dependent upon the discretion of the editor (who cannot be sure that a rival will not run a story that he agrees not to publish) or individual journalists is open to criticism. The pressures of competition, the ethos of the newspaper, the character of the editor or journalist, the identity of the individual and the nature of the story may all affect the outcome, with serious consequences for the individual. In the absence of any public editorial commitment to a detailed code of practice, a complainant has no assurance that any representations will succeed.”

7.9 A press code on privacy matters would not form part of the law. It would set out the standards that are over and above the legal obligations of journalists and publishers. Such a code would not strive for the moral ideal by setting out the highest standard of conduct, but would embody values which most, if not all, members of the journalistic profession accept as binding upon themselves. Where the information obtained by a journalist is freely available in the public domain and the story to be reported is about a vulnerable person, the code would prompt the journalist to think whether the information should be used despite the possible harm to that person. Hence even though material about a child or a victim of crime is revealed in a court case, and that it is lawful for the press to report material disclosed in court proceedings, a journalist would nevertheless feel obliged to ponder for a moment whether it is necessary to name the child or victim in the story, and whether doing so would make him even more vulnerable. In other words, a code of conduct provides extra protection for vulnerable parties on top of that provided by the law. Decisions to publish private information would not be dictated by the self-serving interests of the press, but would have to be justified in terms of the provisions of the code. A journalistic code of conduct therefore keeps the news media alert to its responsibilities to gather and report news fairly and lawfully.

7.10 A press code on privacy matters would be of benefit to the industry because there would then be a level playing field for all newspaper and magazine publishers. The code would also have the benefit of imposing the same standards on all ranks of the media. The performance of all parties who are involved in the collection and dissemination of news, including press photographers, reporters, news executives, chief editors and proprietors, would be measured against the same standards set out in the code. Such a code may also be made part of the employment contracts of journalists. This would not only enable newspaper proprietors and editors to discipline journalists who have been found to offend the code, but would also protect journalists from unfair treatment by editors or proprietors when the latter instructed the former to act in breach of it.

⁸ *Report of the Committee on Privacy and Related Matters*, above, para 13.5.

7.11 Although the Hong Kong Journalists Association has found it necessary to issue a code of ethics for its journalists members, the Newspaper Society of Hong Kong has not issued any code of practice for its members. Newspaper proprietors and publishers in Hong Kong do not subscribe to any code of practice for the press. However, a newspaper proprietor, as the person having ultimate control over the activities of its newspaper, should bear the responsibility for any unwarranted intrusion by his staff. Editors who have been trained in journalism might claim that they should have autonomy in controlling the contents of the newspaper and the activities of journalists, but not all proprietors in Hong Kong subscribe to this principle and give full discretion to the editors. Proprietors may interfere with the editorial process and exercise personal control in the day-to-day running of the newspaper. A proprietor who adopts an interventionist approach might put undue pressure on journalists and editors if he does not abide by the professional standards of the journalistic profession.

7.12 Apart from proprietors, editors could also influence the way in which a journalist obtains or presents a news story. They might instruct journalists to act in a way which would constitute a breach of media ethics. As front-line journalists normally act on the instructions of an editor or proprietor, they would welcome a level playing field so that they need not be ruthless in carrying out their duties in order to meet the excessive demands of their boss or to outperform their colleagues in other newspapers. Nevertheless, there might be instances where a journalist intruded into privacy without authority from his editor, believing that the latter would use the material obtained by such intrusive means. Proprietors, publishers, editors and journalists should therefore abide by the same professional standards set out in any press code on privacy matters.

7.13 We note that the report on privacy published by the Secretary-General of the United Nations in 1976 provides, *inter alia*, that “States shall favour the establishment of journalists’ codes of ethics including provisions concerning respect for the privacy of the individual”.⁹

Independent body to regulate press intrusion

7.14 Many professions that have dealings with the public are under a statutory duty to regulate the professional conduct of their members by way of disciplinary procedures.¹⁰ Their members are invariably bound by a Code of Conduct approved and enforced by the professional body to which they belong. Any member of the profession who is accused of professional misconduct would be subject to disciplinary procedures in accordance with the rules adopted by the relevant professional body.

7.15 A survey conducted in 1990 revealed that about half of the journalists in Hong Kong have not received professional education in journalism.¹¹ Insofar as journalists regard themselves as professionals and are exercising the press freedom guaranteed under the Basic Law, it is an anomaly that they are not subject to any regulatory measures which would normally be applicable to a profession. In an Asian Executives Poll conducted by the *Far Eastern Economic Review*, 65% of the business executives in Hong Kong responded that press freedom is important to economic growth. But exactly 50% also stated that the

⁹ UN Document E/CN.4/1116, para 177(3)(d).

¹⁰ Eg Legal Practitioners Ordinance (Cap 159), Dentists Registration Ordinance (Cap 156), Medical Registration Ordinance (Cap 161), Architects Registration Ordinance (Cap 408), Engineers Registration Ordinance (Cap 409).

¹¹ The survey found that 20% of Hong Kong journalists had not received post-secondary or university education. Of those journalists with college education in Hong Kong, 40% did not major in journalism: J M Chan, P S N Lee & C C Lee (1996), above, 44.

Government should have “limited control” over the media.¹² A news ombudsman rightly observes 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.”¹³

7.16 Many professions are subject to regulation not only because of the need to regulate the relationship among their members but also because of the need to protect the interest of the general public. In the context of press intrusion, the question of regulation arises because of complaints from the public as well as grievances from victims of press intrusion concerning the conduct of the press. To the extent that press intrusion impinges on the privacy right of members of the public, the general public have a stake in seeing that the press is operating in a manner that is consistent with the principles underlying Article 19 of the ICCPR. It is therefore in the public interest to regulate press intrusion despite the many important functions of a free press. Hence, an independent body overseeing a press code on privacy matters should be set up to define the boundaries of acceptable behaviour so that intrusive conduct which exceeded the bounds of reasonableness could be made the subject of an investigation.

7.17 As mentioned in Chapter 4, the idea of setting up a news council gains more support since the public uproar over the incident involving the widower. More and more people perceive the need for a self-regulatory body for the press. Both the HKJA and the News Executives’ Association have declared that they would raise no objection to establishing a news council provided that the Government is not involved. A number of academics also find this option attractive. Johannes M M Chan of the University of Hong Kong perceived the need to set up a press council as early as in 1988. He said:

“While I personally would strongly support any resistance against government control of the press, the press should, on the other hand, be expected to ensure and maintain the highest standard of professional ethics. I believe there is a strong need for a local code of ethics, which can guide the journalists in discharging their duties. A code of ethics should go hand in hand with a Press Council, which would be entrusted with the duties of ensuring the compliance of the code, updating the code and giving practical advice and directions from time to time. To ensure its impartiality, the Press Council should consist of members from the profession as well as members of the public. Every respectable profession must have some internal mechanism to ensure the standard and integrity of its members; the press, as a profession, should be no exception. It should not be seen as a control or interference with press or editorial freedom, but, to the contrary, it is an ultimate guarantee for press freedom.”¹⁴

7.18 Clement So York-kee, assistant professor of journalism and communication at the Chinese University of Hong Kong, was reported as saying that when self-discipline failed to work, a media council comprising professionals and representatives from other sectors – except government – may help uphold ethics and professional standards.¹⁵ Sze Man-hung, senior lecturer at Hong Kong Polytechnic University, has suggested that the

¹² *Far Eastern Economic Review*, 22 April 1999, p 26.

¹³ A C Nauman, “News Ombudsmanship: Its History and Rationale” (1994) at <<http://www5.infi.net/ono/nauman2.html>>.

¹⁴ J Chan, “Freedom of the Press - Defence of Human Rights” in *HKJA 20th Anniversary 1968 - 1988*, pp 31 & 43.

¹⁵ *South China Morning Post*, 16 Nov 1998.

setting up of a news council is one of the solutions to the problems arising from the excesses of the media.¹⁶ Fung Ying-him and Chan Sum-ye of the City University have also outlined the basic framework of a news council for Hong Kong after discussing the experience in Minnesota in the United States.¹⁷ More recently, Kenneth W Y Leung, Associate Professor of the Journalism and Communication Department at the Chinese University of Hong Kong, advocates the setting up of a statutory body similar to the Consumer Council and the Office of the Ombudsman to receive complaints about the media, to investigate inappropriate reportage on its own initiative, and to publish the findings of its investigation.¹⁸

7.19 Given that there is a pressing social need to protect individuals from unwarranted press intrusion, press activities must be subject to regulation to the extent that they impinge on individual privacy. If it is accepted that press intrusion should be regulated, then there must be effective regulation. And if a voluntary system is absent or is not effective, there will have to be a body created by law with statutory powers to regulate press intrusion. We are not suggesting that journalists should be registered or that publishers should be subject to licensing controls. But since there is no reasonable likelihood that a system of voluntary press regulation will be put in place, let alone succeed, in the foreseeable future, it is necessary to create a body by law to regulate press intrusion.

7.20 To ensure that it is free from government interference, the mechanism for the regulation of press intrusion must be and be seen to be independent of the Government. Hence, an independent Appointments Commission should be set up to appoint members to that regulatory body. Although the establishment and maintenance of the mechanism should be independent of the Government, it is not necessary to exclude the press from the process. Members of the press may be represented on the body to supply the necessary expertise in journalism which may be lacking in members drawn from the public. This would ensure that decisions reached by that body are sound and could command the respect of the press. Apart from receiving and investigating complaints from the public, that body may be given power to issue a code of conduct on privacy matters, and to require the printing of apologies and corrections by the offending newspaper if the latter has acted in breach of that code.

7.21 The scope of a press code on privacy matters would be wider than a Code of Practice under the Personal Data (Privacy) Ordinance. Whereas the latter could only address the applicability of the Data Protection Principles to the news media, the former would cover all aspects of press activities which may give rise to a privacy concern in relation to the collection and use of private facts for journalistic purposes, whether the Data Protection Principles are implicated or not.

7.22 We note that there is a growing concern over media abuse involving issues other than privacy. Given that our remit is on privacy, we have not given any thought to these issues. However, we believe that it is more than worthwhile to set up a body to regulate press intrusion only. The British Press Complaints Commission has reported that complaints in relation to privacy and accuracy accounted for 20% and 53% of the complaints concluded in 1997 respectively.¹⁹ Since accuracy in reporting personal data in the press is an aspect of

¹⁶ Sze Man-hung, "Is News Council an Anomaly?", Dec 1998 (article distributed at the conference on News Media in Hong Kong jointly organised by the HKU Centre of Asian Studies and The Freedom Forum Asian Centre on 26 Jan 1999).

¹⁷ Fung Ying-him & Chan Sum-ye, "Models for the Creation of a News Council", *Hong Kong Economic Journal*, 24 Dec 1998; Chan Yuk-sai, "Can Legal Measures be Applied to Monitor the Media?", *Hong Kong Economic Journal*, 30 Nov 1998.

¹⁸ Meeting of LegCo Panel on Home Affairs held on 26 April 1999.

¹⁹ PCC, "Review of the Year" (1997), at <<http://www.pcc.org.uk/annual/97/review97.htm>> (15.1.99), p 5. The breakdown of complaints relating to privacy is as follows: privacy (13.0%); listening devices (0.1%); hospitals (0.3%); harassment (3.0%); intrusion into grief (2.0%); innocent relatives (0.6%); children in sex cases (0.3%); victims of crime (0.3%).

individual privacy which should fall within the purview of the independent body, and press intrusion appears to be more widespread in Hong Kong than in the UK, we maintain that the independent body could play a significant role even though its scope is confined to privacy.

Pros and cons of establishing a mechanism by law to regulate press intrusion

7.23 Although we are satisfied that there is a need to establish a mechanism with statutory powers to regulate press intrusion, we must take on board the concerns of those who are apprehensive about the creation and functioning of bodies set up by law. Their main concern is that such a body is liable to be abused or taken over by those in authority. The mere fact that a body is created by statute and its functions and powers are vested by the legislature is no guarantee that it would not be so. It is always open to the legislature to amend the enabling statute, thereby changing the constitution of the body or giving it more powers than are reasonably necessary to achieve the objective, hence eroding the independence of the body and freedom of the press. Those in authority may also appoint persons to sit on the body who are partisan or take a dim view of press freedom. A body dominated by such persons is likely to undermine press freedom and the long-term interests of Hong Kong. Furthermore, the claim for independence may result in a low degree of accountability making it more likely to abuse its powers.

7.24 Although the above arguments are not without merit, they are largely misguided. In any event, they are not problems without cure. First, the Basic Law has promised that all members of the Legislative Council shall ultimately be returned by universal suffrage. It is highly unlikely that a legislature constituted by election would modify the mechanism in such a way as would knowingly infringe fundamental human rights.

7.25 Secondly, the Legislative Council has to operate under the Basic Law. It may not pass legislation which contravenes the Law.²⁰ Since the Basic Law provides that restrictions on the rights and freedoms enjoyed by Hong Kong residents shall not contravene the human rights conventions, provisions which impose restrictions on the right to freedom of speech and of the press that are not permissible under the ICCPR are likely to be found by the courts to be contrary to the Basic Law and therefore of no legal effect.

7.26 Thirdly, insofar as the powers of the executive, legislature and judiciary should be and are subject to checks and balances, and the press is seen as the fourth institution which acts as an additional check on the Government, it is only natural that the profession should be subject to such checks and balances as are reasonably necessary for the protection of the lawful rights and freedoms of others. The following remarks made in the editorial of *The Sunday Telegraph* are pertinent:

“The hypocrisy of many of the defences of the current regime of self-regulation seems to be obvious to everyone except the journalists who put those defences forward. The very editors who so fiercely criticise the evident failings of self-regulation to ensure high standards of behaviour in other areas - the Stock Exchange, the police, the medical profession - seem unable to appreciate just how hollow their protestations that journalists can be trusted to look after themselves sound to the public.”²¹

²⁰ Basic Law, Article 11, para 2. The courts are entrusted with the task to determine whether a piece of legislation contravenes the Basic Law.

²¹ *The Sunday Telegraph*, 14 September 1997.

The legislature, as the body representing the interests of the general public, is well suited to define the parameters within which press regulation should operate if the press fails to regulate itself effectively.

7.27 Lastly, to minimise any risk of abuse by those in authority, the statute may contain provisions which ensure that the body created under it is independent of the Government. As suggested above, an independent person may be invited to appoint an Appointments Commission to appoint members of that body. The independent body so constituted would then be charged with the responsibility of drawing up a press code on privacy matters and adjudicating upon complaints about breaches of the code.

7.28 Apart from setting up a mechanism which would preclude the Government from interfering with the functioning of the body, other safeguards may also be built into the legislative framework to prevent members of that body from abusing their powers. For example, the legislation may impose requirements as to qualification and disqualification for membership, and may require the body to consult the industry and the public when drawing up the privacy code; require it to give reasons for its adjudications, to publish its findings in a periodic report, and to publish an annual report.

7.29 Legal regulation of the media is not a novel idea. As in other jurisdictions, the broadcasting industry in Hong Kong is regulated by an independent authority created by statute, namely, the Broadcasting Authority created by the Broadcasting Authority Ordinance. The Broadcasting Authority is independent of both the industry and the Government. There has never been any suggestion that press freedom has been put in jeopardy on the ground that the industry is regulated by a statutory body, nor has there been any suggestion that the Government interferes with press freedom on the ground that the enabling statute was introduced by the Government and the broadcasting industry is regulated by law. The success of the Broadcasting Authority shows that press freedom and legal regulation are not irreconcilable. Provided that sufficient safeguards are built into the legislative framework, any risk of abuse and unwarranted interference by the Government can be kept to a minimum.

7.30 Apart from the Broadcasting Authority, there are other examples of statutory bodies which are independent of the Government and have won the respect of the public, such as the Boundary and Election Commission, the Office of the Ombudsman, the Office of the Privacy Commissioner, the Solicitors Disciplinary Tribunal, the Barristers Disciplinary Tribunal, the Judicial Officers Recommendation Commission, and the Independent Police Complaints Council. By virtue of the Legal Practitioners Ordinance (Cap 159), the Solicitors Disciplinary Tribunal and the Barristers Disciplinary Tribunal are given statutory powers to inquire into the conduct of solicitors and barristers respectively. No one has ever suggested that the Government interfered with the independence of the legal profession by legislating for the conduct of legal practitioners. Likewise, the Judicial Officers Recommendation Commission, which is empowered to make recommendation regarding the filling of judicial vacancies, was created under the Judicial Officers Recommendation Commission Ordinance (Cap 92). Indeed, both the High Court and the Court of Final Appeal are established by law. But there is not the slightest hint that the enabling Ordinances provide an opportunity for the Government to interfere with the administration of justice.

7.31 It has been argued that creating a statutory authority to monitor the press would undermine press freedom and the autonomy of editors. Once a mechanism is put in place, it can be extended to other areas at the behest of those in control. However, as long as there are provisions in the legislation ensuring that the body regulating press intrusion is

independent of the Government, the creation of such a body would not provide an opportunity for the Government to interfere with press freedom. After all, it is the legislature, not the Government, which would have the final say on the composition, functions and powers of that body. Any claim that the creation of such a body would lead to more stringent regulation and would allow the Government to interfere with press freedom is therefore groundless. By the same token, any code of conduct on press intrusion ratified by such an independent body cannot have any Government involvement. There is no reason why such a wholly independent body should lead to a Government-controlled press. Even if the independent body is funded by public revenue, this will not in any way undermine its integrity if its autonomy is guaranteed by statute.

7.32 Indeed, a distinct advantage of having a body created by law is that the legislation may provide that the body and its members are immune from legal action for anything done by them in the exercise of their powers. In Chapter 4 above, we recounted the worries of the profession that any adverse comments made by a news association about a particular newspaper would result in legal action taken by the newspaper against the executive officers of the association. If this is a real concern of the industry, then the solution must lie in a body created by law. Only a body created by law can be absolutely immune from liability for passing judgments which are critical of newspapers. Members of a voluntary body, no matter what form it will take, such as the Media Ethics Forum proposed by the HKJA, the Federation of News Associations proposed by the Chinese Press Association, and the news or press council proposed by some academics, are liable to be sued in defamation if they have made a statement or adjudication which is critical of a newspaper which does not subscribe to the self-regulatory scheme. It appears that unless a self-regulatory body has the support of all newspaper proprietors, only a body created by law can discharge the monitoring functions without fear of reprisals from maverick newspapers.

7.33 The idea of issuing a code of conduct for the news media has been attacked on the ground that ethical issues are not matters appropriate for adjudication by an outside body. However, to the extent that the press in many jurisdictions do not find it repugnant to be bound by a Press Code enforceable by a press council, there is no reason why an industry-wide code of conduct on privacy matters is impractical or works against the interests of the press in Hong Kong. As a matter of fact, all broadcasters in Hong Kong are bound by the Codes of Practice on Programme Standards issued by the Broadcasting Authority. These codes embody ethical as well as professional standards that are enforceable against the broadcasters. Both the interests of broadcasters and the general public are well served by these codes. It should be noted that although the independent body would be created by law, the code of conduct to be issued by that body would not be statutory in nature. Neither the Administration nor the legislature would have any direct say in the contents of the code. The press would also be consulted and directly involved in the drafting process. The independent body would be self-regulatory in nature, though with the participation of the public.

7.34 It may be recalled that Asia Television Ltd and Television Broadcasts Ltd have been fined a total of \$150,000 for the coverage of the widower whose wife had killed herself and their two sons. The Authority concluded that such coverage constituted a serious breach of the provisions of the Commercial Codes of Practice on Programme Standards, including those stipulating that the portrayal of family and similarly important human relationships shall be treated with sensitivity and not in an exploitative or irresponsible manner; respect shall be maintained for the sanctity of marriage and the importance of the home; and care must be taken in the treatment of themes dealing with prostitution, or social or domestic conflict. Although one may think that the conduct of one or more newspapers was no less culpable than the two television companies, the fact remains that no newspaper has been censured, let alone punished, by a regulatory body for the extensive coverage of the

widower; the reason being there is no voluntary or statutory body monitoring the conduct of the press, nor is there any code of ethics applicable to the press industry. The audience and social influence of a mainstream newspaper are no less than those of a television or radio company. Yet only broadcasters are monitored by a regulatory body in accordance with a set of codes of practice. The press is not required to adhere to the professional standards one would reasonably expect from a responsible news organisation in a free society. A code of conduct for the press, albeit restricted to privacy matters, would redress the imbalance to a certain extent.

7.35 Public disclosure of private facts about a vulnerable person in a newspaper may cause that person embarrassment, affront his dignity, ruin his career or family, harm his physical or mental health, or even cause his death in extreme cases. The public may find it interesting to learn about the private lives of another, but in a civilised society in which people respect each other's lawful rights, the press is not entitled to invade an individual's privacy merely because the readers derive pleasure from learning about the details of his private life.

7.36 By drawing reference to Article 19 of the ICCPR, it is arguable that the exercise of press freedom under the Basic Law carries with it duties and responsibilities.²² Press freedom is subject to such restrictions as are necessary for respect of the rights recognised in the ICCPR.²³ Under Article 17 of the ICCPR, Hong Kong residents have a right to the protection of the law against "arbitrary" as well as unlawful interference with their privacy. The "protection of the law" under that Article calls for measures in the area of private and administrative law as well as prohibitive norms under the criminal law.²⁴ Article 39 of the Basic Law further provides that the provisions of the Covenant shall be implemented through the laws of Hong Kong. It follows that the Administration and the Legislative Council are under an obligation to protect Hong Kong residents from any arbitrary interference with their privacy by the press. In our view, press intrusion that cannot be justified in the public interest is an "arbitrary" interference with the right of privacy under Article 17 of the ICCPR. Such interference is an abuse of freedom of the press. It cannot be a legitimate exercise of press freedom. Protecting individuals from such arbitrary interference is not an infringement of press freedom. On the contrary, it is a permissible objective of government. Legislating for the creation of an independent body to regulate press intrusion is narrowly aimed at this legitimate objective. It will not have any communicative impact on speech protected by the Basic Law. After all, we are not proposing that the specific conduct of which examples are given in Chapter 2 must necessarily be prohibited, but rather that a set of professional standards should be established and enforced by an independent body to prevent abuse.

7.37 To the extent that arbitrary interference with privacy by the press is an abuse of freedom of the press, protecting individuals from unwarranted press intrusion would not only have no impact on the legitimate exercise of freedom of expression, but would also result in the public holding the journalistic profession in high regard. If intrusive press conduct can be curbed by setting up an independent mechanism to balance privacy with press freedom in accordance with Article 19 of the ICCPR, and the press could develop respect for the right of privacy under Article 17 of the Covenant when carrying out news-gathering activities and presenting a story, respect for press freedom would be enhanced and the press would be held in high regard by the public.

²² Courts may look at the relevant provisions in the ICCPR for guidance when interpreting an article in the Basic Law that confer rights and freedom on individuals. Eg *Chan Kam Nga v Director of Immigration* [1998] 2 HKC 16.

²³ Basic Law, Article 39, para 2.

²⁴ UN Document E/CN.4/116.

7.38 We recognise that it is up to members of the journalistic profession to regulate the relationship among themselves. The industry is free to employ someone who is not trained in journalism to perform the duties of a journalist. It is free to decide what to investigate, how to investigate, and how a story should be reported. However, by nature of its functions, the activities of the press have an impact on the general public. The press is not merely a profession but is also performing the functions of the “fourth estate”.²⁵ There is a public element in its activities. In our opinion, regulation of press intrusion by an independent body is legitimate as long as such regulation is aimed at the negative effects of press activities on individual privacy and would not undermine the integrity of the press as an institution.

7.39 Although press freedom is exercised by the press industry, it is commonly asserted that the freedom is exercised by the industry in the interest of the public. In the United States, restrictions on broadcasters’ freedom have frequently been justified in the interest of the audience. The American Supreme Court held that

*“the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of viewers and listeners, not the right to the broadcasters, which is paramount.”*²⁶

7.40 The same argument can also be employed to justify measures to protect individuals from transgressions by the print media. For ordinary citizens, freedom from the press is as important as freedom of the press. Despite the fact that all publishers are private enterprises, the public have a stake in the proper running of the industry. They are entitled to see that press freedom has not been abused to the prejudice of the lawful rights and freedoms of ordinary citizens. The Administration as the guardian of the interests of the public, and the legislature as representing the interests of the constituencies, are under an obligation to ensure that the press does not abuse its freedom. By creating an independent body to regulate press intrusion, the Government could provide a mechanism through which the *public* could monitor the press. Such an entity would be independent and cannot be run or controlled by the Government. The role of the Government would be confined to that of providing a legislative framework to facilitate *public* scrutiny of the press with the participation of the press. Once the enabling legislation is passed, the Government would have no role to play in either the adjudication process or the formulation of professional standards. Since members of the public would be represented on the statutory body, complainants would receive a fair hearing. On the other hand, the press members on that body would guarantee that press freedom would be taken into account when preparing the Code and adjudicating complaints.

7.41 The HKJA has suggested that a pressure group, to be known as the Media Ethics Forum, with members drawn from people outside the media (such as teachers and social workers) may be formed to lobby for media ethics, educate the public and handle public complaints. However, in the absence of a code of ethics which applies to and binds the whole industry, there will be no yardstick against which the conduct of the news media may be measured, and the decisions metered out by the Forum would fail to provide insight into the bases for them. Without any guidance and agreement as to what amounts to unprofessional and unethical conduct, the Forum may make comments or “rulings” which prove to be internally inconsistent or even arbitrary, thereby providing little guidance to the

²⁵ *Black’s Law Dictionary* explains at p 657 that the term has its source from a reference to the reporters’ gallery of the British Parliament whose influence on public policy was said to equal that of Parliament’s three traditional estates: the clergy, nobility, and the commons.

²⁶ *Red Lion Broadcasting v Federal Communications Commission*, 395 US 367, 390 (1969).

industry and the public. Furthermore, without the support of all newspapers and without any sanctions to enforce its adjudications, an offending newspaper is likely to refuse to cooperate and ignore its “rulings”. Kenneth W Y Leung was quoted as saying that the proposal to set up a Media Ethics Forum is asking too much of community groups that are not properly organised or financed, and have neither the time nor the expertise to monitor the media.²⁷

7.42 The Hong Kong Chinese Press Association has proposed that the seven news associations in Hong Kong should come together and form a Federation of News Associations. However, unless all newspapers proprietors are represented on the Federation and the Federation issues a code which is binding on all newspapers, the Federation and any code issued by it would not be effective in protecting individuals from press intrusion.

7.43 We appreciate the efforts made by the Hong Kong News Executives’ Association in drafting a Code of Ethics for Hong Kong Journalists in consultation with the industry. But as pointed out by the LegCo members at the meeting of the LegCo Panel on Home Affairs held on 26 April 1999, the Association failed to offer any suggestions as to how breaches of the code would be dealt with in the future. Although the new Code might be more comprehensive than the one issued by the HKJA and would receive support from some sections of the industry, the fact remains that the News Executives’ Association does not represent the will of newspaper proprietors; nor are news executives of all newspapers represented on the Association.²⁸ There is nothing that the Association can do if the person who is found to have breached the code is not a member of the Association. The Code will have no effect on proprietors and journalists who are not members of the Association. It may be recalled that the HKJA already have a Code of Ethics for its members and they have an Ethics Committee to implement the Code. But the Chairperson of the HKJA had advised that one or two newspapers had ignored their requests for information and so refused to cooperate in their investigations. Apparently, the voluntary complaints mechanism set up by the HKJA fails to curb excesses of the press. Even if the News Executives’ Association proceeded to the second stage and eventually established a mechanism to adjudicate complaints about breaches of its Code, it would face the same difficulties faced by the HKJA – unless all newspaper proprietors agree to participate in the framework.

7.44 Generally speaking, news associations put their faith in public criticisms, media education, opinion surveys, signature campaigns, and even boycott. However, these activities are not effective in resolving the problem of press intrusion. 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 individual privacy will not alleviate the pain, suffering, embarrassment and inconvenience of the victims. The fact that the offending newspaper has a low circulation only affects the seriousness of an intrusion. Members of the public should be protected from unwarranted intrusion by newspapers irrespective of the profitability and circulation figures of the newspaper involved. Individuals whose privacy has been unjustifiably intruded upon should have a right to seek redress from the offending newspaper, even though the relief sought may be no more than an apology or correction.

7.45 Unless all newspaper proprietors and editors subscribe to an industry-wide code of ethics and they all support the creation of a news or press council to deal with

²⁷ Frank Ching, “Learning Self-Control – Hong Kong’s media are torn between ethics and profits”, *Far Eastern Economic Review*, 17 Dec 1998, at 25.

²⁸ The executive committee of the Association consists of representatives from five broadcasting companies and six newspapers, including *Ming Pao*, *Apple Daily*, *Hong Kong Commercial Daily*, *Ta Kung Pao* and *Hong Kong Standard*.

complaints from the public about breaches of the code in an effective manner, any efforts on the part of the news media to regulate media abuse would be of limited consequence to victims of press intrusion.

7.46 To conclude, effective press self-regulation is impossible because the press industry in Hong Kong is by its nature unable to regulate itself effectively or to establish any body to do the same. There is therefore a pressing social need to invoke the assistance of the public in establishing a wholly independent mechanism which is free from Government interference to regulate press intrusion. To achieve that goal, it is necessary to confer with the industry with a view to issuing a code of conduct in relation to privacy matters and to establishing an independent body with jurisdiction to deal with breaches of that code.

Recommendation 4

We recommend that an independent body to be known as the Press Council for the Protection of Privacy (“the Council”) should be created by law to deal with complaints from members of the public about breaches of a press code on privacy-related matters (“the Privacy Code”).

7.47 We emphasise that these proposals have been made solely for the protection of privacy and do not apply to issues such as obscenity, bad taste, right of reply and accuracy in general.

7.48 The structure, functions and powers of the proposed Press Council for the Protection of Privacy will be examined in the next chapter.

Chapter 8 – Independent body created by law to regulate press intrusion

Proposals and precedents in other jurisdictions

8.1 Before we go into the details of the Press Council for the Protection of Privacy (the PCPP) recommended in the above chapter, it would be helpful if we give a brief account of the proposals and precedents on press regulation in other jurisdictions. Of particular relevance to our study are those in connection with the office of press ombudsman, press complaints tribunal and press council. We are aware that the remit of the proposed PCPP would be narrower than that of a press ombudsman, press complaints tribunal and press council. But a brief examination of these proposals and precedents would give us an insight as to how the proposed PCPP could be constituted and maintained.

8.2 Press regulation on the industry level may take one of the following three forms:

- (a) a press ombudsman similar to the Press Ombudsman recommended by the National Heritage Committee of the UK Parliament in its report on *Privacy and Media Intrusion*;
- (b) a press complaints tribunal similar to the one recommended by Sir David Calcutt QC in his *Review of Press Self-Regulation*;
- (c) a press body similar to the press councils in other jurisdictions.

*Press ombudsman*¹

8.3 The National Heritage Committee of the House of Commons in the UK thought that anyone dissatisfied with the outcome of an investigation by the press industry, or whose complaint had been rejected without investigation, should have recourse to a Press Ombudsman. Since effective regulation depends on whether the newspapers are willing to co-operate and give access to their documents and information, and that the Press Ombudsman would be called upon only when voluntary regulation had proved ineffective, the Committee recommended that a statutory Press Ombudsman be appointed. The recommendations of the Committee were as follows:

- (a) The Press Ombudsman should be appointed by the Lord Chancellor in consultation with the Lord Advocate. The right of nomination should be open to anyone including journalists, their unions, their editors and their proprietors.
- (b) The office of the Press Ombudsman should be funded by the Exchequer.

¹ *Privacy and Media Intrusion, Fourth Report*, (London : HMSO, 294-I, 1993) Volume I - Report & Minutes of Proceedings, pp xxi – xxiii.

- (c) The Ombudsman should have the following functions:
 - i. to investigate complaints submitted to the voluntary Press Commission whose outcome was not satisfactory to one of the parties involved;
 - ii. to consider complaints which the Commission had declined *ab initio* to investigate; and
 - iii. to institute investigations where no complaint had been made.
- (d) The Ombudsman should have the following powers:
 - i. to require the publication of corrections, retractions or apologies and to supervise their wording, position and format;
 - ii. to publish with an adjudication the names of those responsible for a serious breach of the Press Code;
 - iii. to award compensation to those affected by breaches of the Press Code;
 - iv. to impose a financial penalty on newspapers responsible for flagrant or persistent breaches of the Press Code.
- (e) The Press Ombudsman should be required to make an annual report to Parliament.
- (f) Where a newspaper refuses to pay a fine or compensation which has been ordered by the Press Ombudsman, the Ombudsman should be able to seek an order from the High Court requiring it to be paid. Similarly, where a newspaper dissents from the Ombudsman's decision, it should be entitled to ask the High Court to discharge the order.

Press Complaints Tribunal

8.4 We are not aware of any Press Complaints Tribunal in existence in other jurisdictions but Sir David Calcutt QC has recommended in his *Review of Press Self-regulation* that a press complaints tribunal be created by law.²

8.5 The tribunal recommended by Calcutt would need to have jurisdiction over the publishers of all newspapers and magazines (except learned journals) which are published commercially, but would not extend to publishers of single publications or books. The tribunal would also need to have jurisdiction over editors, journalists and all others involved in the collection of material with a view to its publication by the media.

8.6 Since the tribunal would need judicial status, its chairman should be a judge or senior lawyer appointed by the Lord Chancellor. For hearings, the chairman would sit with two members drawn from a panel appointed by the responsible minister. It would be desirable for at least one of the members at each hearing to have experience of the press at senior level. The chairman and members would normally be appointed for renewable three-year terms. Because of its conciliation function, the tribunal would need a larger administrative staff than is usual for tribunals.

8.7 The tribunal would need to have the following functions and powers:

² D Calcutt, *Review of Press Self-Regulation* (London: HMSO, Cm 2135, 1993). See chapter 3.

- (i) to draw up and keep under review a code of practice in consultation with the press and other interested parties;
- (ii) to restrain publication of material in breach of the code of practice; but no injunction should be granted if the publisher could show that he had a good arguable defence;
- (iii) to receive complaints (including third-party complaints) of alleged breaches of the code of practice;
- (iv) to inquire into those complaints;
- (v) to initiate its own investigations without a complaint;
- (vi) to require a response to its inquiries;
- (vii) to attempt conciliation;
- (viii) to hold hearings;
- (ix) to rule on alleged breaches of the code of practice;
- (x) to give guidance;
- (xi) to warn any person who had violated the code;
- (xii) to require a publisher to print an apology, and to decide on the edition, location, and content of such an apology;
- (xiii) to require a publisher to print a correction, and to decide on the edition, location, and content of such a correction;
- (xiv) to require a publisher to print a reply from a complainant;³
- (xv) to enforce publication of its adjudications (including, when appropriate, a requirement to publish an apology and correction);
- (xvi) to award compensation, at least in cases of privacy and inaccuracy, against such person as the tribunal thinks fit;
- (xvii) to impose fines;
- (xviii) to award costs against the publisher or person concerned in cases in which a ruling has been made against it;
- (xix) to award costs against complainants if their complaints were frivolous or vexatious or they had unreasonably refused conciliation;
- (xx) to review its own procedures;
- (xxi) to publish:
 - an annual report to Parliament;
 - regular reports of complaints which it had received, and the action it had taken to deal with them; and
 - such other reports as it felt necessary, including reports of any self-initiated inquiries, and general advice given to the press; and
- (xxii) to require the press to carry, at reasonable intervals, an advertisement to be specified by the tribunal, indicating to its readers how complaints to the tribunal could be made.

8.8 Since complainants would obtain legally enforceable redress before the tribunal, they might have two overlapping remedies, one before the tribunal and one before the courts. Calcutt therefore recommended that anyone who complains to the tribunal should waive his right to sue in the courts.

8.9 A complainant may appear before the tribunal in person but legal representation would be permitted. The tribunal may take evidence on oath at a hearing and would adopt a predominantly inquisitorial approach rather than the traditional adversarial

3 It would initially be for the complainant and the editor to determine whether the reply is commensurate with the subject-matter of the complaint; but in cases where no agreement could be reached, the tribunal would have the power to adjudicate and to direct an editor to publish a reply. The tribunal should have the power to substitute an amended version of the complainant's reply if it considers that that would be more appropriate.

approach adopted by the courts. Since the tribunal would be asked to determine whether a newspaper is liable to pay compensation or fines, a certain degree of formality is expected. The proceedings of the tribunal would be conducted in public in normal circumstances. However, the tribunal may make an order restraining the press from reporting certain aspects of the case for good reason.

8.10 There should be a right of appeal, with leave, either to the High Court or to the Court of Appeal against an order restraining publication, an order for compensation, an order imposing a fine, and any rulings on which any of those orders were based, or on any point of law.

Press Council

8.11 Examples of press councils or similar bodies in other jurisdictions have been given in Chapter 3 above. After carrying out a comparative study of press councils in 16 jurisdictions, Li Zhan suggests that press self-regulation could be implemented in the following ways:⁴

- (a) The self-regulatory press council should have a high degree of autonomy and independence.
- (b) The press council should comprise of representatives elected by the editors' association, the journalists' association and the publishers' association. The three associations should enjoy equal rights in the council.
- (c) Members of the public should be represented on the council. Various sectors such as the legal profession, the education sector, the industrial and commercial sector, religious bodies, women's groups, the legislative body and academic bodies on journalism, should nominate representatives to the press council. These representatives should account for no less than half of the members of the council.
- (d) The office of the chairman of the council should be filled by an experienced judge.
- (e) The council should have authority to initiate its own investigations. Journalists and newspapers in breach of the press code should be subject to effective sanctions.
- (f) The chairman, secretary and supporting staff should act full-time.
- (g) Funds for the council should be provided by the constituent bodies. However, the Treasury should share part of the costs if the constituent bodies are unable to provide all the necessary funds.
- (h) A detailed press code covering the treatment of news, comments and advertisements should be promulgated. That code should serve as the standard against which press conduct and complaints could be judged.
- (i) The Government should render assistance to the industry for the establishment of a fair, reasonable and efficient press council, and provide legislative and financial support if necessary.
- (j) The Government should enact a law of journalists to safeguard the independence and professionalism of journalism.
- (k) The press council should publish periodicals and reports, and strengthen research on press self-regulation and problems about the press.

⁴ Li Zhan, *Hsin Wen Dao De (Journalistic Ethics)* (Taipei: San Min Bookstore, 1982), 274-275.

8.12 The Press Complaints Commission in the UK summarises the benefits of a system of self-regulation based on a press council or similar body:⁵

- (a) It aims at resolving disputes amicably and quickly.
- (b) It does not cost an individual anything to lodge a complaint.
- (c) The cost of the system is funded by the industry. There is no burden on the taxpayers.
- (d) The complaints mechanism is accessible to all.
- (e) The complainant does not need to retain a solicitor to represent him.
- (f) There is no need for the involvement of lawyers in the hearing.
- (g) The procedures are simple and easy to understand.
- (h) Because of the flexibility of the system, a dispute could be resolved in an informal manner and within a short period of time.
- (i) Since the code of practice is written by editors themselves for editors, it is imbued with such moral authority that all editors across the industry will seek to abide by it.
- (j) The regulatory body can judge complaints against a code of practice.
- (k) The public can have a clear understanding of what it can reasonably expect from the industry.
- (l) The code assists the editors and journalists in making judgments on a whole range of issues.
- (m) The complaints mechanism operates in private, away from the glare of publicity.
- (n) The emphasis is on conciliation and dispute resolution.
- (o) The vast majority of the complaints can be resolved by the newspaper publishing a correction or an apology, or publishing an article providing an opportunity to reply, or else withdrawn after an explanation by the newspaper, without the need to proceed to formal adjudication by the Council.

8.13 Out of the three options mentioned above, press council is the most attractive of all. Whereas press councils are fairly common in developed countries which have constitutional safeguards for press freedom, we are not aware of any jurisdictions which have opted for Press Ombudsman or Press Complaints Tribunal. Sweden has a Press Ombudsman but his rulings may be reviewed by the Opinion Board of the Press. Complaints by the public concerning the conduct of the press require a balancing of press interest and public interest. These complaints are best adjudicated by a group of persons with representatives from the press and the public instead of by a single person.

8.14 Representation of the press and the public is crucial to the success of the complaints mechanism. This would ensure that complainants have a fair hearing which has due regard to both press freedom and privacy interests. A body comprising representatives from both the public and the press could strike the right balance between privacy and press freedom. Press activities affecting the interests of members of the public should be subject to the scrutiny of the public. Although there are merits in appointing a person with legal background as the Press Ombudsman or as one of the three adjudicators of the Press Complaints Tribunal, the interests of the public is best represented by a group of citizens who are broadly representative of society. This is particularly so if the mechanism is to be set up as a simple and informal procedure where the complainants normally appear without

⁵ PCC, "Key Benefits of the System of Self Regulation", at <<http://www.pcc.org.uk/about/benefits.htm>> (15.1.99); PCC, "Can Self Regulation Achieve More Than Law? - Text of the Wynne Baxter Godfree Lecture by the Rt Hon Lord Wakeham, at The University of Sussex on Friday 15th May 1998", at <<http://www.pcc.org.uk/adjud/press/pr150598.htm>>.

legal representation. Likewise, even if a person with experience in the press industry could be appointed to the Press Complaints Tribunal, it would be better if various sectors of the industry could participate in the decision-making process. This would ensure that the views of proprietors, editors, reporters and academics could be taken into account when reaching a decision. A press council with representatives from various sectors of the press would be sensitive to the concerns of free speech and free press. A properly constituted press council is therefore most likely to receive the support of the press and the public.

8.15 In light of the above-mentioned, we decide that the proposed Press Council for the Protection of Privacy (PCPP) should be modelled on press councils in other jurisdictions, subject to our observations in the previous chapter, in particular, the need to ensure that it is wholly independent of the Government and is effective in providing relief to victims of press intrusion. We examine below the composition, functions and powers of the proposed PCPP.

Structure of the Press Council for the Protection of Privacy to be created by law

Guiding principles

8.16 We adhere to the following principles when determining the composition, functions and powers of the PCPP:

- (a) The Council should have jurisdiction over all publications concerning news, which are published in Hong Kong.
- (b) The Council should be autonomous and independent of the Government and other outside interference.
- (c) Its members should be appointed by an independent Appointments Commission.
- (d) The Council should consist of representatives of the public and the press.
- (e) Press Members should be drawn from the press.
- (f) Public Members should be persons of high standing who are not professionally associated with the press.
- (g) Senior civil servants should not be eligible for appointment to the Council.
- (h) The Council should have an independent chairman.
- (i) The procedures for obtaining redress should be simple, informal and inexpensive.
- (j) The Council should issue, keep under review, and implement a comprehensive code of conduct on privacy-related matters.
- (k) It may receive and adjudicate on complaints by the public about the conduct of the press in connection with the gathering and publication of personal information.
- (l) It may initiate its own inquiries.
- (m) It should have conciliation procedures to ensure that complaints can be handled speedily.

Jurisdiction

8.17 The first question to decide is whether the PCPP should have jurisdiction over magazines as well as newspapers. As it would be impossible to provide adequate and effective protection if intrusion effected by magazines is left

unregulated, we decide that both magazines and newspapers should be subject to the jurisdiction of the Council.

8.18 This brings us to the question of the definition of “newspaper” and “magazine” in the legislation. We note that the term “newspaper (報刊)” in the Registration of Local Newspapers Ordinance (Cap 268) is defined as meaning:⁶

“any paper or other publication and any supplement thereto available to the general public which -

- (a) contains news, intelligence, occurrences or any remarks, observations or comments in relation to such news, intelligence, or occurrences or to any other matter of public interest; and*
- (b) is printed or produced for sale or free distribution and published either periodically (whether half-yearly, quarterly, monthly, fortnightly, weekly, daily or otherwise) or in parts or numbers at intervals not exceeding 6 months; and*
- (c) does not comprise exclusively any item or items specified in the Schedule”.*⁷

8.19 The definition of “newspaper” in the Ordinance covers both newspapers and magazines that are published for sale or free distribution but excludes learned journals and business reports. Only “local newspapers” (本地報刊) that are “printed or produced in Hong Kong” are required to be registered under the Ordinance.⁸ It would be convenient if all “newspapers (報刊)” registered under the Registration of Local Newspapers Ordinance could be made subject to the jurisdiction of the Council. We therefore decide that all “newspapers” registered under that Ordinance should fall within the purview of the Council. Unless the context otherwise requires, the term “newspaper” in the remaining part of this chapter shall be so construed.

8.20 Newspapers published on the Internet are not required to be registered under Cap 268. The Internet version of a newspaper may be different from the hard copies that are put on sale on the streets. A publisher may update the Internet version as and when he thinks fit so as to keep the readers informed of the latest news. Anyone who has access to the Internet, be he an ordinary citizen or a newspaper publisher, may disseminate news or other information on the Internet. Although the press industry in the UK has agreed that the jurisdiction of the British Press Complaints Commission applies to publications on the Internet originating from publishers who have agreed to be bound by the Press Code, and materials uploaded to the Internet are subject to the provisions of the Control of Obscene and Indecent Articles Ordinance (Cap 390),⁹ we believe that it is impractical to regulate intrusive publications on the Internet at least for the time being.

Recommendation 5

⁶ Cap 268, s 2.

⁷ Publications excluded from the definition of “newspaper” include academic journals, collections of photographic images, consumer information, financial and economic reports, and newsletters relating to clubs, societies and other organizations. See Schedule to Cap 268.

⁸ Cap 268, section 2.

⁹ In *HKSAR v Cheung Kam Keung* [1998] 2 HKC 156, the court agreed that the uploading of computer files or electronic data to a newsgroup on the Internet constituted a “publication” under section 2(4) of the Control of Obscene and Indecent Articles Ordinance (Cap 390). In *HKSAR v Hiroyuki Takeda* [1998] 1 HKLRD 931, the defendant was found guilty of publishing obscene pictures on the Internet..

We recommend that the Council should have jurisdiction over newspapers and magazines registered under the Registration of Local Newspapers Ordinance (Cap 268).

8.21 The next question is whether the PCPP should have jurisdiction over newspaper proprietors, newspaper publishers, editors and/or reporters. The Registration of Local Newspapers Ordinance merely defines “proprietor” as including lessee. However, the High Court held that the terms “proprietor”, “publisher” and “printer” should bear the following meanings:¹⁰

- The “proprietor” of a newspaper is “the person, firm or company which *owns* the enterprise whose business is the publication of the newspaper”.
- The “publisher” of a newspaper is “the person, firm or company which *carries on* the enterprise whose business is the publication of the newspaper”.
- The “printer” of a newspaper is “the person, firm or company engaged by the publisher to print the newspaper”.

8.22 We are not aware of any study on the involvement of proprietors in the day-to-day business of a Hong Kong newspaper. But according to Bruce Hanlin, individual owners in the UK who adopt a non-interventionist approach are the exception to the rule. Examples of proprietors interfering with the editorial process are not lacking notwithstanding the existence of a strong journalists union and the presence of independent “watch-dog” directors in some British newspapers:¹¹

- (a) Robert Maxwell was a newspaper proprietor having a controlling interest in the *Daily Mirror*, the *European*, and the *New York Daily News*. He adopted an interventionist approach in running his newspapers. In a *Guardian* interview, he boasted about his ability to interfere with the editorial process, do the editor’s job, and even design the front page.¹²
- (b) In the early twentieth century, Northcliffe, with *The Times* and the *Daily Mail*, and Beaverbrook, with the *Daily Express*, exerted personal control over many areas of their newspapers, including the general content, news value, layout and day-to-day administration.
- (c) Victor Matthews, proprietor of the *Daily Express*, was quoted as saying that “By and large the editors will have complete freedom as long as they agree with the policy I have laid down.”¹³
- (d) Rupert Murdoch acquired *The Sunday Times* in 1981. He was reported to have issued instructions to the editor on the selection and balance of news and opinion.

8.23 We think that for regulation to be effective, any person who has control over the contents of a newspaper and the activities of a journalist should be held responsible for the intrusive conduct of a newspaper.

¹⁰ *Secretary for Justice v Oriental Press Group*, HCMP 407/1998, at 61.

¹¹ See B Hanlin, “Owners, editors and journalists” in A Belsey & R Chadwick (ed), *Ethical Issues in Journalism and the Media* (New York: Routledge, 1992), ch 3.

¹² *Guardian*, 5 March 1990; cited in B Hanlin, above.

¹³ Cited in S Jenkins, *The Market for Glory* (London: Faber & Faber, 1986), p 129.

8.24 Newspaper proprietors have the ultimate control over the activities of their newspapers. Ownership of a newspaper gives them every right to intervene in the editorial process. They are responsible for hiring editors to help run their business. Editors, as employees of the proprietors, are obliged to comply with orders given by proprietors. Where an editor refuses to comply with an order, it is open to the proprietor to remove him from office. It should also be noted that it is proprietors, not editors and journalists, who make the profits. We therefore decide that proprietors and publishers should be held responsible for the intrusive news-gathering activities and publications of their newspapers.

8.25 We have also examined the role of editors in a newspaper company. We consider that editors should also be held responsible because press intrusion may be effected on the instruction of an editor without any involvement of the proprietor. Although a proprietor is in full control of his newspaper, editors could also instruct reporters to act contrary to the Privacy Code. More importantly, it is the editors who decide what materials and pictures should go into a newspaper. In the news-gathering process, reporters may lawfully acquire private facts about individuals involved in a newsworthy event. Press photographers may lawfully take photographs which identify these individuals. But 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 in it, and, if so, which photographs should be used and to what extent should his appearance be obscured, always lie in the hands of an editor.

8.26 Provided that proprietors, publishers and editors are held responsible, it is not necessary for the PCPP to have jurisdiction over other journalists. A journalist who is found to have breached the Privacy Code may be disciplined by the newspaper. Accordingly, all complaints may be treated as being against the newspaper, not any individual editor or journalist, but that it would be the proprietor, publisher and/or editor who would be held accountable for any breach committed by the newspaper. To safeguard their legitimate interests, proprietors and publishers may add a clause in the employment contracts of editors and journalists to the effect that they agree to abide by the Privacy Code issued by the Council and comply with the rulings of the Council, so that persistent or serious breach by an editor or a journalist would be a ground for disciplinary action.

Recommendation 6

We recommend that newspaper proprietors, publishers and editors should be held responsible for breaches of the Privacy Code committed by the newspapers or their staff.

Appointments Commission

8.27 To ensure the independence of the PCPP and to keep Government at arm's length in the appointment of its members, it is necessary to create an intermediary body known as the Appointments Commission to appoint members of the Council.

Recommendation 7

We recommend that members of the Council should be appointed by an independent Appointments Commission.

8.28 The members of the Appointments Commission may be appointed in one of the following ways:

Option A

The Chief Executive invites an independent person of high standing, in consultation with the industry, to appoint an independent Appointments Commission. After that independent person has decided on the names for appointment, the Chief Executive shall appoint the members of the Appointments Commission in accordance with his recommendations.

Option B

The Appointments Commission is appointed by the Chief Executive direct. However, he is obliged to consult the news media before making his appointments.

8.29 We prefer Option A where the appointment of members of the Appointments Commission would have to undergo a two-tier process. The independent person must have credibility and acceptable to the press industry. He must be independent of the Government and is perceived to be neutral. For example, a serving or retired judge, or a vice-chancellor or president of a university, might be a suitable candidate provided that he has credibility and is acceptable to the industry.

Recommendation 8

We recommend that the Chief Executive should invite an independent person, in consultation with the press industry, to appoint the members of the independent Appointments Commission. The independent person should be someone of high standing in the community.

Recommendation 9

We recommend that:

- (a) the Appointments Commission should consist of three members including the chairman;**
- (b) persons who would be disqualified from being appointed to the Council or who are connected with the practice or teaching of journalism should be disqualified from appointment to the Appointments Commission;**
- (c) members of the Appointments Commission should be appointed for a term of 3 years;**
- (d) members of the Appointments Commission should be deemed to be a public servant within the meaning of section 2 of the Prevention of Bribery Ordinance (Cap 201) and for the purposes of that Ordinance;**
- (e) the Appointments Commission should be allowed to regulate its**

procedure;

- (f) the Appointments Commission should consult widely before appointing members of the Council; and
- (g) the Appointments Commission may discharge its functions through an officer in the public service who should do all things necessary for implementing the decisions of the Commission. The officer should be provided with such staff as may be required.

Members of the PCPP

8.30 The Council should consist of not less than 12 or more than 20 members, including the chairman. As the members should have had some knowledge of Hong Kong, the members should have been ordinarily resident in Hong Kong for at least 7 years when appointed to the Council.¹⁴

Recommendation 10

We recommend that the Council should consist of not less than 12 nor more than 20 persons who have been ordinarily resident in Hong Kong for at least 7 years when appointed to the Council.

Mode of appointment

8.31 We have considered whether PCPP members should be appointed by the Appointments Commission direct or by the Chief Executive in accordance with the recommendations of the Appointments Commission. This is not merely a question of formality but is also a question of public perception as to the degree of independence enjoyed by the Council. We believe that appointing members of the Council by the Appointments Commission would demonstrate that the Council is wholly independent of the executive authorities.

Recommendation 11

We recommend that members of the Council should be appointed by the Appointments Commission direct.

Proportion of press members and public members

8.32 We consider that both the press and the public should be represented on the PCPP. There are at least four options:

¹⁴ The Broadcasting Authority Ordinance (Cap 391) imposes a similar requirement on members of the Broadcasting Authority. Section 4(8) of the Ordinance provides that a person shall be regarded as "ordinarily resident in Hong Kong" if he is resident in Hong Kong for not less than 180 days in any calendar year; or 300 days in any 2 consecutive calendar years.

- (a) 1/3 press members & 2/3 public members (including chairman);
- (b) 1/2 press members & 1/2 public members (including chairman);
- (c) 1/2 press members, 1/2 public members (excluding the chairman who is also a public member); and
- (d) 2/3 press members & 1/3 public members (including chairman).

8.33 We decide that there should be a mix of Press Members and Public Members with a slight bias towards Public Members. We therefore prefer Option (c) where half of the members (excluding the Chairman) would be Public Members. To ensure that the Council would not be dominated by the press, the Chairman of the Council should be a Public Member.

8.34 We have also considered whether the Chairman should be appointed by the Appointments Commission or elected by all members of the Council or by the Public Members only. In line with the general practice that any person who is empowered to appoint the members of a public body may appoint the Chairman of that body,¹⁵ we decide that the Chairman should be appointed by the Appointments Commission instead of elected by members of the Council.

8.35 Since it is essential that the principle of natural justice is observed in the proceedings of the PCPP, it is desirable to have a person with legal background to be the Chairman of the Council.

Recommendation 12

We recommend that:

- (a) **half of the Council members (excluding the Chairman) should be drawn from members of the public (to be known as Public Members) and the other half from members of the press (to be known as Press Members);**
- (b) **the Chairman of the Council should be a Public Member;**
- (c) **the Chairman of the Council should be appointed by the Appointments Commission; and**
- (d) **a retired judge or a senior lawyer of at least 7 years' standing in the legal profession should be appointed to be the Chairman of the Council.**

Press members

8.36 Press Members should have had experience in the practice or teaching of journalism. It is desirable that academic journalists be represented on the Council because it is they who teach students to become journalists and provide professional training to working journalists. Press Members may be drawn from the press in one of the following ways:

¹⁵ See Cap 1, section 48.

Option A

Each of the following news associations are entitled to nominate one or two Press Members to the Council: (a) the Newspaper Society of Hong Kong; (b) the Hong Kong Chinese Press Association; (c) the News Executives' Association; (d) the Hong Kong Journalists Association; (e) the Hong Kong Federation of Journalists; and (f) the Hong Kong Press Photographers Association. The Appointments Commission shall appoint such persons as are nominated by the above associations.

Option B

Press Members are nominated by associations representing the interests of various sectors of the press industry, such as proprietors, publishers, editors and journalists, and by colleges and universities which have a department of journalism. The news associations may nominate non-members and may make such number of nominations as they think fit. The Appointments Commission can only appoint a person nominated by these associations, colleges and universities.

Option C

The Appointments Commission calls for nominations from the news associations and the general public. Any individuals, organisations and associations, whether or not they are related to the press, are entitled to make nominations for Press Membership in the Council. However, due to the requirements of a Press Member, only persons who are connected with the press can be nominated as a Press Member.

8.37 Since the associations listed in Option A do not represent all the journalists and newspapers in Hong Kong, the selection of Press Members on that basis is open to criticism. It is unlikely that the associations would nominate a non-member if they are entitled to nominate only one or two members. Furthermore, newspapers and journalists who have not joined any news associations would not be entitled to make any nominations under Option A.

8.38 Option B is an improvement of Option A because the number of nominations made by each association is not restricted and there is a greater chance of a non-union member nominated to be a Council member. Nonetheless, Option B may still be criticised on the ground that the right of nominations are restricted to the news associations and the educational institutions. Press Members appointed on this basis may be accused of not representative of the industry. Option C answers this concern to a large extent. Under that option, every person would be entitled to make a nomination, whether or not that person or organisation is a journalist, newspaper publisher or news association. We are in favour of this option because the right to nominate a Press Member should not be confined to the news associations but should be open to all organisations (including all newspaper publishers and news associations) as well as members of the public (including all journalists and academics).

8.39 We have considered the option of restricting the right of nominations to proprietors and journalists. But since journalists are not required to be registered or join a union and there are no minimum qualifications to be a journalist, it would be difficult to lay down the criteria for qualification to be a journalist for the purposes of making a nomination. In any event, we think that the right of nomination should be as wide as possible. As long as the nominee meets the requirement of a Press Member defined in the legislation, it does not matter whether the nomination comes from the press or the public. All journalists and newspapers publishers, whether or not they are members of a news association, should be entitled to make a nomination. Likewise, journalists who have not joined any news associations should also be entitled to be nominated to the Council as a Press Member.

Recommendation 13

We recommend that:

- (a) Press Members of the Council should have had experience in the practice or teaching of journalism;**
- (b) any individuals, organisations and associations, whether or not they are related to the press, should be entitled to make nominations for Press Membership in the Council; and**
- (c) Press Members should vote as individuals and not as representatives of the organisations or associations that nominated them.**

Public Members

8.40 Since Public Members should be independent of the press, they should not be engaged in or connected with the business of publishing newspapers or magazines. They should not have any financial or other interest as is likely to affect prejudicially the discharge by them of their functions as Public Members of the PCPP.

Recommendation 14

We recommend that Public Members of the Council should not be engaged in or connected with the business of publishing newspapers or magazines in the last three years prior to the appointment to the Council.

8.41 Since some of the privacy complaints handled by the PCPP would touch on data protection issues, it is desirable to provide a link between the Council and the Office of the Privacy Commissioner for Personal Data by designating the Privacy Commissioner as an ex officio member of the Council.

Recommendation 15

We recommend that the Privacy Commissioner for Personal Data should be designated as an ex officio member of the Council. He should be counted as one of the Public Members of the Council.

Eligibility for appointment as a member of the PCPP

8.42 We consider that there should be provisions in the legislation providing for disqualification from membership of the Council. The Council should not be subject to pressure from outside which would affect the proper discharge of its functions. We list out below, categories of disqualified persons which may be included in the legislation:

- (a) a person nominated as a candidate for election as the Chief Executive of the HKSAR;
- (b) a member of:
 - (i) the Executive Council;
 - (ii) the Legislative Council;
 - (iii) the Provisional Urban Council or the Provisional Regional Council; or
 - (iv) a Provisional District Board;¹⁶
- (c) a member of any national, regional or municipal congress, legislature, assembly or council of any place outside Hong Kong;
- (d) an Information Officer, a directorate officer, or an officer in the Administrative Officer grade in the civil service;
- (e) a salaried functionary of a government, whether central or local, of any place outside Hong Kong;
- (f) a person who is of unsound mind and incapable of managing himself and his affairs; and
- (g) an undischarged bankrupt.

Recommendation 16

We recommend that there should be provisions in the legislation providing for disqualification from membership of the Council.

Terms of office

Recommendation 17

We recommend that members of the Council should be appointed for a period of 3 years and should be eligible for reappointment.

Remuneration

8.43 Members of public bodies are normally entitled to such remuneration and allowances as may be determined by the Chief Executive. We think that the Chairman and members of the PCPP should be treated in the same way as those of other public bodies. One would expect that other public bodies would be used as a yardstick in determining whether the Chairman and members of the Council should be entitled to receive remuneration and allowance, and in determining the amount of remuneration and type of allowance payable to them if they are so entitled.

¹⁶ The interests of these members in increasing their electoral appeal may work against the impartiality required of a PCPP member.

8.44 Since the Chairman would bear the primary responsibility for the successful running of the regulatory system and would be expected to devote a significant proportion of his time to the Council, it is only reasonable that he should receive a substantial amount of remuneration to compensate for his service, particularly if we are to attract a distinguished person with legal background to lead the Council in performing the unenviable task of balancing privacy with press freedom.

Removal from office

Recommendation 18

We recommend that a member of the Council should be removed from office if he is, or becomes, ineligible or incapable of carrying out his duties as a Public or Press Member of the Council.

Temporary appointment

8.45 We decide that it is unnecessary to make a temporary appointment when a Council member resigns or the office of a member becomes vacant before the expiry of his period of appointment.¹⁷ We think that it is preferable for the Appointments Commission to appoint a newcomer to fill the vacancy. Such an arrangement would have the added advantage of maintaining continuity by minimising the impact of a reshuffle at the end of the 3-year term.

Meetings

8.46 We decide that the PCPP should be allowed to regulate its procedure except that the person presiding at a PCPP meeting should always be a Public Member and that the Council should be under an obligation to ensure that the complaints procedure is fair to the parties. The Council may wish to note the following when drafting the rules of procedure:

- (a) The quorum for any meeting of the Council should be not less than half of its members for the time being and, while a member is disqualified from taking part in a decision or a deliberation of the Council in respect of a matter, he should be disregarded for the purpose of constituting a quorum of the Council for deciding, or deliberating on, that matter.
- (b) All matters for determination at a meeting of the Council should be decided by a majority of votes of the members present and voting thereon. In the event of an equality of votes the Chairman or other member presiding should have a casting vote in addition to his original vote.
- (c) For the purposes of any meeting of the Council, if the Chairman is absent or vacates the chair, those members present at that meeting may by resolution appoint any Public Member to act in his place.

Recommendation 19

¹⁷

But see Cap 1, section 50.

We recommend that the Council should be allowed to regulate its procedure except that the person presiding at a Council meeting should always be a Public Member and that the Council should be under an obligation to ensure that the complaints procedure is fair to the parties.

Declaration of interest

8.47 We decide that there should be provisions requiring PCPP members to declare their interest in specified circumstances. The following is an example illustrating how such provisions may be drafted:

“If a member of the PCPP has -

- (a) a pecuniary interest, whether direct or indirect; or
- (b) a personal interest greater than that which he has as a member of the public, in any matter under discussion at a meeting of the Council,
 - (i) the member shall disclose the nature of his interest at the meeting;
 - (ii) the disclosure shall be recorded in the minutes;
 - (iii) where the disclosure is made by the member presiding, he shall vacate the chair during the discussion;
 - (iv) the member (including one who has vacated the chair under paragraph (iii)) shall, if so required by the majority of the other members present at the meeting, withdraw from the meeting during the discussion and shall not in any case, except as otherwise determined by the majority of the other members present at the meeting, vote on any resolution concerning the matter or be counted for the purpose of establishing the existence of a quorum.”

Recommendation 20

We recommend that there should be provisions requiring Council members to declare their interest in specified circumstances.

Code of conduct on privacy-related matters

8.48 Under the Television Ordinance and the Broadcasting Authority Ordinance, the Broadcasting Authority may issue Codes of Practice relating to programme and advertising standards for television and sound broadcasters.¹⁸ The Authority’s Codes of Practice Committee is charged with the responsibility of reviewing existing codes and drawing up new codes for new services. New codes and amendments to existing codes have to be endorsed by the Authority before they are put into effect.

8.49 We consider that the PCPP should prepare and issue a code of conduct for the guidance of both the press and the public in relation to the gathering and publication of personal information by newspapers. The Council should consult the general public, the industry and other interested persons, including the Office of the Privacy Commissioner for Personal Data, before it finalises the Code.

¹⁸ Television Ordinance (Cap 52), section 28; Broadcasting Authority Ordinance (Cap 391), sections 9A and 19.

Recommendation 21

We recommend that the Council should have power to draw up and keep under review a code of conduct on privacy-related matters (“the Privacy Code”).

Complaints procedure

8.50 Where a person complains to the PCPP alleging that a newspaper has breached the Privacy Code, the Council would investigate if there is *prima facie* evidence of a breach. If so, the complaint would be referred to a Complaints Committee for further investigation. However, the Council may, before referral to a Complaints Committee, attempt to conciliate the parties if they have no objection. The Council may decide not to undertake or continue an investigation if the complaint is frivolous or vexatious or is for any other reason unwarranted.

8.51 We consider that a Complaints Committee should consist of 5 members of the Council.¹⁹ Three members of the Committee, including the chairman, should be Public Members.

8.52 We decide that the PCPP should also receive complaints from third-parties. Where a third-party complaint is received in a case where the individual directly affected has not made a complaint, the Council should be required to seek that individual’s views as to whether he has any objection to the Council investigating the matter. The Council should normally respect his wish if he raises any objection but it may make general comments on the case without revealing his identity.

8.53 Where the PCPP has reasonable grounds to believe that an act may be a breach of the Code, it should have power to carry out an investigation on its own initiative to ascertain whether the act constitutes a breach of the Code.

Recommendation 22

We recommend that the Council should have power:

- (a) to receive complaints (including third-party complaints) of alleged breaches of the Privacy Code;**
- (b) to initiate its own investigations if the Council has reasonable grounds to believe that an act is a breach of the Privacy Code;**
- (c) to attempt conciliation before a complaint is referred to a Complaints Committee for investigation; and**
- (d) to rule on alleged breaches of the Privacy Code.**

¹⁹

The Complaints Committee of the Broadcasting Authority has 5 members.

Recommendation 23

We recommend that:

- (a) a Complaints Committee should consist of 5 members including the chairman;**
- (b) three members of a Complaints Committee, including the chairman, should be Public Members;**
- (c) a Complaints Committee may appoint other persons to be members of the Committee to advise generally or on any particular matter. These members should not have a vote on matters before the Committee; and**
- (d) the quorum for any meeting of a Complaints Committee should be four members of whom two should be Press Members and two should be Public Members.**

Recommendation 24

We recommend that upon receipt of a complaint, the Complaints Committee should:

- (a) give the parties a reasonable opportunity to make representations;**
- (b) consider any representations made by or on behalf of the parties;**
- (c) consider any evidence received by it, whether tendered on behalf of the complainant or otherwise, which it considers relevant to the complaint; and**
- (d) advise the Council whether there has been a breach of the Privacy Code and, if so, make recommendations to the Council which would then adjudicate on the complaint.**

8.54 We decide that the PCPP and the Complaints Committees should be able to receive evidence that are relevant to the complaint even though the evidence is inadmissible at law. Neither the provisions of the Evidence Ordinance (Cap 8) nor any other rule of law relating to the admissibility of evidence should apply in proceedings before the Council or Committee.

8.55 The Council and the Complaints Committees should be able to obtain any information, document or thing from such persons, and make such inquiries, as they think fit. However, no individual or organisation should be compelled to provide information to the Council. It would be up to the parties to a complaint to co-operate with the Council in its investigation.

8.56 Since the proceedings should be informal, we consider that the parties should not be represented by lawyers in any hearings before the Council and the Complaints Committee unless the Council or Committee decides otherwise.

8.57 Provided that the parties have been given an opportunity to make representations and the procedure is otherwise fair to the parties, it is not necessary for the Council to hold any hearing and no person should be entitled to be heard by the Council. Any hearings to be held by the Council need not be conducted in public.

Recommendation 25

We recommend that:

- (a) **neither the provisions of the Evidence Ordinance (Cap 8) nor any other rule of law relating to the admissibility of evidence should apply in proceedings before the Council and the Complaints Committees;**
- (b) **the Council and the Complaints Committees may obtain any information, document or thing from such persons, and make such inquiries, as they think fit; and**
- (c) **the parties should not be represented by lawyers in any hearings before the Council and the Complaints Committees unless the Council or a Complaints Committee decides otherwise.**

Recommendation 26

We recommend that the Council may 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, or a complaint of a substantially similar nature, has previously initiated an investigation as a result of which the Council was of the opinion that there had been no breach of the Privacy Code; or**
- (d) **any investigation or further investigation is for any other reason unwarranted.**

Recommendation 27

We recommend that no appeal may be made against any decision not to undertake or continue an investigation. If the Council decides not to undertake or continue an investigation, it should inform the complainant of that decision and of its reasons.

8.58 We decide that the PCPP should have discretion to undertake or continue an investigation into a complaint even though the complainant has withdrawn the complaint, provided that such investigation is warranted in the public interest. This power is necessary because the complainant may withdraw his complaint in consequence of pressure or inducement from the offending newspaper but the Council may nevertheless find that a matter of public interest is at stake such that it would be proper for the Council to continue with the investigation. One would expect that the Council would protect the identity of the complainant from disclosure if this is in his interest.

Recommendation 28

We recommend that the Council may undertake or continue an investigation into a complaint notwithstanding that the complainant has withdrawn the complaint, provided that the investigation can be justified in the public interest.

Waiver of legal rights

8.59 Since some complainants might have a remedy by way of proceedings in court against the newspaper concerned, it has been argued that the PCPP should not adjudicate unless a complainant has signed a waiver agreeing not to take any legal action in respect of the subject matter giving rise to the complaint.

8.60 Both the Younger Committee and the Press Council in the UK were in favour of the waiver requirement. They argued that without a waiver:²⁰

- newspapers might refuse to co-operate in the complaints proceedings which involved disclosing their defence to a legal action;
- the Press Council might be used as a stalking horse for an action;
- a favourable adjudication might be cited in support of a legal action;
- the complaints process would become lengthier, legalistic and costly; and
- newspapers and editors would be subject to double jeopardy as they would have to defend their case twice on the same sets of facts.

8.61 However, the Calcutt Committee remarked that such an attitude was old-fashioned because the trend in dispute resolution has been to expose one's hand for the sake of speed and lower costs. If a newspaper has a reasonable defence, a complainant might withdraw his complaint. If the newspaper has a weak case, it would agree to an early settlement.²¹

8.62 We consider that it would be unfair to victims of press intrusion to elect between lodging a complaint with the PCPP and bringing a legal action in the courts of law. Only if the Council has authority to award compensation or grant an injunction should the signing of a waiver be made a condition precedent to the investigation of complaints.²²

²⁰ Summarised in *Report of the Committee on Privacy and Related Matters* (London: HMSO, Cm 1102, 1990), paras 15.26 – 15.27.

²¹ *Report of the Committee on Privacy and Related Matters*, above, para 15.30.

²² Where the complainant has brought a legal action when lodging a complaint, the law of contempt of court would apply.

Recommendation 29

We recommend 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 Council.

Powers of the PCPP

Recommendation 30

We recommend that where the Council has decided on a complaint, it may:

- (a) declare that the newspaper has acted in breach of the Privacy Code;**
- (b) reprimand the newspaper;**
- (c) require the newspaper to publish on one or more occasions:**
 - (i) an apology, and to decide on the form, content and location of such an apology;**
 - (ii) a correction, and to decide on the form, content and location of such a correction;**
 - (iii) the following matters in such manner as may be determined by the Council:**
 - (1) a summary of the complaint;**
 - (2) the Council's findings on the complaint or a summary of them;**
 - (3) any decision of the Council;**
 - (4) any observations by the Council on the complaint or a summary of any such observations;**
- (d) publish the matters referred to in (c)(iii) above in one or more newspapers circulating in Hong Kong.**

8.63 It is necessary to give the Council a power to publish its findings and observations in a Hong Kong newspaper because the offending newspaper might refuse to publish the same as required by the Council.

Compensation

8.64 We decide that the PCPP should not have power to award compensation for the following reasons:

- (a) The primary purpose of the Council is to regulate press intrusion, not to compensate victims of press intrusion for any harm done to them. Only if a newspaper is found to have committed a tort that it should be required to pay compensation to the victim. If the Council had power to award compensation, it would have the effect of widening the scope of the privacy torts proposed in the consultation paper on *Civil Liability for Invasion of Privacy*.
- (b) We have recommended that complainants should not be asked to sign a waiver agreeing not to take civil proceedings in respect of the same subject matter. If a complainant could seek compensation by lodging a complaint with the Council as well as bringing civil proceedings in tort for damages, the newspaper would be subject to double jeopardy.
- (c) Council members who are not lawyers would have difficulties developing the principles governing the award of compensation. Although the members may make reference to the law of damages in developing these principles, the issues involved are complicated and difficult to understand.
- (d) If individuals were entitled to claim compensation by making a complaint to the Council, the Council would be required to decide not only whether there has been a breach of the Privacy Code, but also whether the breach has caused any harm to the complainant, and, if so, how the compensation should be assessed. Since it is likely that the Council would require the assistance of lawyers and expert witnesses to resolve these issues, the complaints procedure would become more formal, lengthy and costly.

Recommendation 31

We recommend that the Council should not have power to award compensation to complainants.

Financial penalty

8.65 To ensure that the mechanism will be effective in regulating press intrusion, the PCPP should have power to impose sanctions on the offending newspapers. The sanctions should not be confined to a reprimand and the publication of adjudications, apologies and corrections.

8.66 Under section 37 of the Television Ordinance (Cap 52), the Broadcasting Authority may impose a financial penalty on a commercial television company if it fails to comply with any Code of Practice issued by the Authority, or fails to comply with any direction issued by the Authority under the Ordinance. A financial penalty cannot exceed

\$50,000 for the first occasion on which a penalty is imposed, cannot exceed \$100,000 for the second occasion on which a penalty is imposed, and cannot exceed \$250,000 for any subsequent occasion on which a penalty is imposed.²³ The above penalties were fixed in 1988. Given that the advertising revenue received by a television company is enormous, the penalties have been criticised as being too low in a notorious case.

8.67 We note that the maximum penalties that may be imposed under the Control of Obscene and Indecent Articles Ordinance (Cap 390) are as follows:

- publishing an obscene article - \$1,000,000 and 3 years' imprisonment;²⁴
- publishing an indecent article to a juvenile - \$400,000 and 12 months' imprisonment for a first offence; \$800,000 and 12 months' imprisonment for a second or subsequent offence;²⁵
- publishing an indecent article without following the requirements set out in section 24(1) of the Ordinance - \$400,000 and 12 months' imprisonment for a first offence; \$800,000 and 12 months' imprisonment for a second or subsequent offence;²⁶
- publishing an article classified by an Obscene Articles Tribunal as a Class III article - \$1,000,000 and 3 years' imprisonment.²⁷

8.68 Compared with radio and television broadcast, publications in the print media can have a more lasting effect. News stories in newspapers are recorded in a permanent form. Copies of newspapers may be filed or microfilmed for future reference. Members of the public who are interested in a story about a particular individual could retrieve the relevant issue and make copies if they wish. Moreover, the number of readers of a mainstream newspaper may be greater than the number of audience of a popular television or radio programme. According to the 1998 AC Nielson-SRG Media Index Hong Kong General Report, *Oriental Daily News* and *Apple Daily* had an average daily readership of 2.1 million and 1.9 million respectively during the period from July 1997 to June 1998.²⁸

8.69 We decide that the PCPP should have power to impose a fine in cases of serious intrusion on privacy. This would send a clear message to the offending newspaper that the community treats such conduct seriously. It would also convince the public that it is worth making an effort to make a complaint. To be effective in punishing and deterring the offending newspaper, the maximum penalty should be substantial in amount. Our preliminary view is that the maximum fine should be \$500,000 for a first offence and \$1,000,000 for a second or subsequent offence, with no time restriction on the application of the enhanced penalty for a second or subsequent offence. We welcome any views as to whether the proposed level of fine is too high or too low.²⁹

²³ For the financial penalties that may be imposed on a commercial radio company, the figures are \$20,000, \$50,000 and \$100,000 respectively: Broadcasting Authority Ordinance (Cap 391), section 24.

²⁴ Section 21(1).

²⁵ Section 22(1).

²⁶ Section 24(2).

²⁷ Section 26.

²⁸ The figures are quoted in The HKJA and ARTICLE 19, *The Ground Rules Change - 1999 Annual Report*, pp 19-21. The Report points out that a comparison by circulation is not possible because the Oriental Press Group is not a member of the Hong Kong Audit Bureau of Circulation.

²⁹ Calcutt recommended that the maximum level of fine which the proposed press complaints tribunal could award against a publisher should be equivalent to 1% of the publication's net annual revenue. Sir David Calcutt QC, *Review of Press Self-regulation*, above, para 6.20. We have considered linking the level of penalty to the level of circulation of the newspaper concerned, but a difficulty with this approach is that a significant portion of a newspaper's

8.70 We acknowledge that the sum is small to big newspapers but huge to small newspapers. However, the maximum fine would only be imposed on a widely circulated mainstream newspaper which had committed a very serious breach of the Code. The amount of fine imposed by the Council would be commensurate with the seriousness of the breach, with special regard to the harm, offence or risk which the intrusive conduct involved, and the intentions and motives of the newspaper. Hence, if the Council decides that an offending newspaper should be fined, the amount of fine actually imposed by the Council would be very small if it is a small newspaper with limited circulation and influence.

8.71 To ensure that the parties would be fairly treated, consideration may be given to allow the parties to be represented by lawyers whenever the Council finds it necessary to consider whether a fine should be imposed in a particular case. As far as financial penalty is concerned, we believe that the Council is as good a judge on the level of fine as a court of law.

Recommendation 32

We recommend that the Council may impose a fine on a newspaper which is found to be in serious breach of the Privacy Code. The maximum fine should be \$500,000 for a first offence and \$1,000,000 for a second or subsequent offence.

8.72 It has been suggested that the PCPP should have power to make an interim injunction prior to the Council adjudicating on a complaint. Such an injunction may require a newspaper not to engage in intrusive behaviour or republish a picture before the Council announces its findings. We agree that it is possible that an aggressive newspaper with massive power might subject a complainant to a campaign of intrusion or harassment which lasts for a number of days. But a complainant whose privacy has been intruded a second time could lodge another complaint to the PCPP. Each intrusion would be counted as a fresh offence which could be made the subject of an investigation by the Council. The Council would be in a position to fine the offending newspaper for each and every breach committed by it against the complainant over a period of time. If the conduct of a newspaper is serious enough to constitute the tort of harassment, intrusion or public disclosure of private facts proposed in our consultation papers on *Stalking* and *Civil Liability for Invasion of Privacy*, the complainant may apply for an injunction by bringing civil proceedings against the newspaper.

Enforcement of adjudications

8.73 The next question is whether it would be necessary to seek powers to enforce the adjudications. The Press Council in the UK rejected the suggestion that its adjudications should be enforceable by judicial or contractual means on the ground that this would involve a fundamental change to an informal investigatory process:³⁰

³⁰ income derives from advertising. The reliability of circulation figures is also a matter of concern. Not all newspapers are members of the Hong Kong Audit Bureau of Circulation. *Report of the Committee on Privacy and Related Matters*, above, para 15.13.

“[The Press Council] did not see this as necessary or desirable for a simple, speedy and fair complaints procedure. If journalists, editors or proprietors risked having to obey a court order to comply with a Press Council adjudication, they would be likely to insist on all the procedural safeguards of a legal system. Investigations of complaints might well become increasingly formalised. The process might well become lengthier, legalistic and costly, not least because the Press Council would need to employ staff to carry out the enforcement procedure.”

8.74 We are of the view that unless there is reason to believe that every newspaper against which an adverse ruling has been made will be willing to pay a fine and/or publish the critical adjudication, an apology or a correction as required by the PCPP, all decisions of the Council should be enforceable against the newspapers which have defaulted in complying with the requirements. In the absence of any enforcement power, a maverick newspaper would flout the Privacy Code and persistently refuse to comply with the adjudications, leaving the Council in disrepute.

8.75 We therefore decide that (a) where a newspaper was fined by the Council for committing a serious breach of the Privacy Code but has defaulted in payment, the fine should be recoverable as a civil debt in a court of law, and (b) where a newspaper was required by the Council to publish an apology, correction or other matters but has failed to do so, the Council should have power to impose a fine on the newspaper in default. Our preliminary view is that the maximum fine should be in the order of \$500,000.

Recommendation 33

We recommend that:

- (a) any newspaper which failed to publish an apology, correction or other matters required by the Council should be liable to a fine; and**
- (b) any fine imposed by the Council should be recoverable as a civil debt in a court of law.**

Right of appeal

8.76 The decisions of the Council may be subject to judicial review in exceptional circumstances under general principles of law. A question arises as to whether judicial review would be sufficient to meet the requirements of Article 14 of the ICCPR. Article 14 provides procedural guarantees in civil and criminal trials.³¹ It stipulates, *inter alia*, that “in the determination of any criminal charge against him, or 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.” Our preliminary view is that the Council would

³¹ See generally Manfred Nowak, *U. N. Covenant on Civil and Political Rights – CCPR Commentary* (1993), chapter on Article 14; P van Dijk & G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), section on Article 6; D J Harris, M O’Boyle & C Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995), chapter 6.

be involved in the determination of “criminal charges” and “rights and obligations in a suit at law” because of the following reasons:

- (a) A dispute concerning a breach of the Privacy Code involves legal rights and obligations because (i) the critical adjudications of the Council would be enforceable against the offending newspapers in a court of law; (ii) the right of privacy and freedom of expression under the ICCPR are implicated; and (iii) the decisions of the Council may affect the right to property enjoyed by newspapers.
- (b) The sanction attached to a breach of the Privacy Code or non-compliance with a decision of the Council has a deterrent and punitive effect. The maximum fine that may be imposed on an offending newspaper is severe enough to render the sanction criminal in the sense of Article 14. The penalty is therefore of a punitive character which makes it similar to criminal sanctions as to its nature and consequences.

8.77 Although we are satisfied that the Council could satisfy the requirements of a “competent, independent and impartial tribunal established by law”, we are of the view that hearings to be held by the Council could not meet the requirements of a “fair and public hearing” under Article 14. The availability of judicial review is generally insufficient because on an application of judicial review, the courts do not review the merits of the decision but confine themselves to determining whether the authority has acted illegally, unreasonably or unfairly.

8.78 There are three options available to ensure that the proposals comply with Article 14 of the ICCPR:

Option A

The Council shall not have power to impose a fine for breach of the Privacy Code. In addition, all decisions of the Council affecting the newspapers found in breach of the Privacy Code shall not be enforceable at law. In other words, an offending newspaper which fails to publish an apology, correction or other matters specified by the Council shall not be liable to a fine. Any fines imposed by the Council shall not be recoverable as a civil debt.

Option B

The decisions of the Council shall be subject to the control of a judicial body that provides all the guarantees of Article 14 and has full jurisdiction on the law and the facts of the case, such as the Court of Appeal or the Administrative Appeals Board. Provided that the last stage of the proceedings fulfils all the requirements of Article 14, it is unnecessary for the Council to give a fair and public hearing.

Option C

The proceedings of the Council shall have all the guarantees of Article 14.

8.79 Since a regulatory body without any sanctions would not be effective in regulating press intrusion, and Option C would render the proceedings formal and complicated, we prefer Option B and decide that any person aggrieved by a decision of the Council may appeal to the Court of Appeal. The inclusion of the Court of Appeal in the complaints procedure would facilitate oversight by senior judges. Judgments handed down by the Court of Appeal might also develop into a body of principles for the guidance of the press and the public.

Recommendation 34

We recommend that any person aggrieved by any decision of the Council or anything contained in the Privacy Code may appeal to the Court of Appeal.

Education

8.80 The press and the academics have stressed that media education for the press and the public can improve the professional standards of the news media, raise the standard of public debate on media ethics, and increase public awareness of their right to be protected from media abuse. We consider that the PCPP should be under an obligation (a) to increase the awareness of the public of their right to be protected from arbitrary interference with their privacy under Article 17 of the ICCPR, and (b) to increase the awareness of the press of their responsibility to exercise the freedom of the press under the Basic Law in accordance with Article 19 of the ICCPR, in particular, the responsibility to respect the right of privacy under Article 17 of the Covenant when exercising press freedom. In addition, the Council should make an effort in promoting awareness and understanding of the Privacy Code and its complaints procedure. Since the Council would have a duty to keep the Privacy Code under review, it should also have power to commission research into matters relating to press intrusion.

Recommendation 35

We recommend that the Council should have the following functions and powers:

- (a) to promote awareness and understanding of the Privacy Code and the complaints procedure of the Council;**
- (b) to raise the awareness of the general public of their right to be protected from arbitrary interference with their privacy under Article 17 of the International Covenant on Civil and Political Rights;**
- (c) to raise the awareness of the press of their responsibility to respect the right of privacy when exercising press freedom in accordance with Article 19 of the Covenant;**
- (d) to give general comments on matters arising from the Privacy Code; and**
- (e) to commission research into matters relating to press intrusion.**

Reports

8.81 Although the PCPP should be independent of the Government, it should nevertheless be accountable to the public especially if the Council is funded by public revenue.

Recommendation 36

We recommend that the Council should publish an annual report of its activities and lay copies of that report before the Legislative Council. In addition to annual reports, the Council may publish periodic reports each containing, as regards every complaint which has been dealt with by it in the period covered by the report,

- (a) a summary of the complaint and the action taken by the Council on it;**
- (b) where the Council has adjudicated on the complaint, a summary of its findings and decisions;**
- (c) where a newspaper is required to implement a decision of the Council, a summary of any action taken by the newspaper; and**
- (d) any recommendations and comments it thinks fit to make.**

Indemnity

8.82 We decide that the PCPP and its committees should be immune from legal action in the exercise of their powers. An indemnity provision would render statements, reports and other publications made by the Council and its members, privileged for purposes of the law relating to defamation.

Recommendation 37

We recommend that no liability should be incurred by:

- (a) the Council;**
- (b) any member of the Council;**
- (c) any member of any committee of the Council; and**
- (d) any employee of the Council**

in respect of anything done by the Council or such member or employee in good faith in the exercise of powers conferred or functions imposed by or under the legislation.

Funding

8.83 Adequate funding of the PCPP on a guaranteed basis is essential to the success of the scheme. In the UK, all funds required for the operation of the Press Complaints Commission are provided by the industry through the Press Standards Board of Finance (Pressbof). The Board operates a scheme which levies publishers on the basis of turnover. The costs of the Commission are shared among the different sectors of the press industry,

namely, national newspapers, regional / local / free newspapers, major Scottish newspapers, and magazines. The relationship between the UK Press Complaints Commission and Pressbof is that “their budget has been met without demur on the footing that the Commission remain wholly independent in their necessary expenditures but are required to satisfy the board that their income has been spent on the purposes for which the levy was raised.”³²

8.84 If the press in Hong Kong is concerned that Government funding would undermine the autonomy of the PCPP, the Council may be financed by contributions from the industry. The press may set up a foundation or trust similar to Pressbof to ensure that the Council has all the financial support to make it a success. Most press councils in other jurisdictions are funded by newspaper publishers association and other press-related associations that participate in the voluntary system. However, since three of the best-selling newspapers are not members of the Newspaper Society of Hong Kong, it would be unfair if the Society has to meet all the costs of the Council.

8.85 As an alternative, the costs may be paid by the publications through a statutory levy. This option is not without precedent. For example, the Office of the Telecommunications Authority is funded by licence fees paid by the service providers. The actual amount paid by a service provider depends on the number of subscribers to its service. In the case of the PCPP, a convenient way would be for the Registration of Local Newspapers Ordinance (Cap 268) to require all newspapers and magazines to pay a fee as an appropriate contribution towards all or part of the expenses of the Council as a condition of registration. The amount of fee payable by a newspaper or magazine may be based on the proportion of its circulation to the total circulation of all newspapers and magazines registered under the Ordinance. Since company accounts are liable to be manipulated, it is preferable to base the amount of the fee on circulation figures which have been examined by external auditors rather than on the annual profits stated in company accounts. As for newly registered newspapers, they may be required to pay a flat fee as a start.

8.86 We consider that the PCPP should be funded by the industry and not by the general public because the need for the creation of such a body arises from the activities of the press. The levy should not be an undue burden on the newspapers because they may recover their share of the costs from the selling price.

8.87 If for any reason it is impractical to levy a fee on newspapers, the costs of setting up and maintaining the Council might be paid by the Government out of money appropriated for that purpose by the Legislative Council.³³

Recommendation 38

We recommend that the Council should be funded by way of a statutory levy on all newspapers and magazines registered under the Registration of Local Newspapers Ordinance (Cap 268). The amount of fee payable by a newspaper or magazine should be based on the proportion of its circulation to the total circulation of all newspapers and magazines registered under the Ordinance.

³² David Calcutt, *Review of Press Self-Regulation* (London: HMSO, Cm 2135, 1993), para 3.91.
³³ For instance, the expenses incurred by the Solicitors Disciplinary Tribunal and by the Law Society in connection with proceedings before the Disciplinary Tribunal are payable out of general revenue: Legal Practitioners Ordinance (Cap 159), section 25.

Administrative support

Recommendation 39

We recommend that the Council should be provided with funds to appoint or employ a principal executive officer and such other persons as may be necessary for the efficient carrying out of its functions. In addition, the Council should be allowed to engage the services of technical or professional advisers to assist it in the discharge of its functions. Subject to the approval of the financing body, the Council may determine the remuneration and terms of employment or engagement of any person who may be so employed or engaged.

8.88 As an interim measure, the first secretary of the Council may be seconded either from the Government or the secretariat of the Legislative Council with a tenure of six months. His main duty would be to provide administrative support to the Chairman and other members of the Council, particularly in the establishment of an office and the recruitment of supporting staff.

Conclusion

8.89 We reiterate that press freedom will not be undermined simply because publishers are not free to intrude into privacy without justification. On the contrary, our proposals will:

- enhance respect for press freedom;
- promote journalistic responsibility;
- encourage ethical reflection within the media;
- encourage professional conduct;
- foster dialogue between journalists and the public about responsible journalism; and
- protect editors and journalists from instructions which are contrary to professional ethics.

As a result, the public will become more aware of the media's concern for responsible journalism, journalists will become more sensitive to potential problems involving media ethics, and people will hold the profession in high regard.

8.90 We are satisfied that our proposals:

- will not undermine the values and functions of freedom of expression;
- will not unreasonably inhibit free speech;
- will not have a chilling effect on the exercise of the right to free speech;
- will not restrict the freedom of the press to perform the role of a public watchdog;
- will not undermine journalistic autonomy in the investigation of matters of public concern;
- will not deter journalists from contributing to the discussion of public affairs;
- will not induce editors to suppress stories of public interest;

- will not enable the Government to use any authority for improper purposes;
- will not give the Government a tool with which to interfere with the internal workings of the press;
- will not result in censorship of news;
- will not destroy or undermine the operations of the press; and
- will not lessen the capacity of the press to perform its functions under the Basic Law.

Chapter 9 - Summary of recommendations

Recommendation 1

We recommend that the Privacy Commissioner for Personal Data issues 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. *(Chapter 5)*

Recommendation 2

We recommend that the Broadcasting Authority adopts 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. *(Chapter 6)*

Recommendation 3

We recommend that when drafting the privacy provisions, the Broadcasting Authority and the Privacy Commissioner for Personal Data should take into account the Press Code issued by the German Press Council, the Code of Practice ratified by the British Press Complaints Commission, the Code on Fairness and Privacy adopted by the Broadcasting Standards Commission in the UK, the Producers' Guidelines issued by the BBC, and the codes of conduct adopted in other jurisdictions. *(Chapter 6)*

Recommendation 4

We recommend that an independent body to be known as the Press Council for the Protection of Privacy ("the Council") should be created by law to deal with complaints from members of the public about breaches of a press code on privacy-related matters ("the Privacy Code"). *(Chapter 7)*

Recommendation 5

We recommend that the Council should have jurisdiction over newspapers and magazines registered under the Registration of Local Newspapers Ordinance (Cap 268). *(Chapter 8)*

Recommendation 6

We recommend that newspaper proprietors, publishers and editors should be held responsible for breaches of the Privacy Code committed by the newspapers or their staff. *(Chapter 8)*

Recommendation 7

We recommend that members of the Council should be appointed by an independent Appointments Commission. *(Chapter 8)*

Recommendation 8

We recommend that the Chief Executive should invite an independent person, in consultation with the press industry, to appoint the members of the independent Appointments Commission. The independent person should be someone of high standing in the community. *(Chapter 8)*

Recommendation 9

We recommend that:

- (a) the Appointments Commission should consist of three members including the chairman;
- (b) persons who would be disqualified from being appointed to the Council or who are connected with the practice or teaching of journalism should be disqualified from appointment to the Appointments Commission;
- (c) members of the Appointments Commission should be appointed for a term of 3 years;
- (d) members of the Appointments Commission should be deemed to be a public servant within the meaning of section 2 of the Prevention of Bribery Ordinance (Cap 201) and for the purposes of that Ordinance;
- (e) the Appointments Commission should be allowed to regulate its procedure;
- (f) the Appointments Commission should consult widely before appointing members of the Council; and
- (g) the Appointments Commission may discharge its functions through an officer in the public service who should do all things necessary for implementing the decisions of the Commission. The officer should be provided with such staff as may be required. *(Chapter 8)*

Recommendation 10

We recommend that the Council should consist of not less than 12 nor more than 20 persons who have been ordinarily resident in Hong Kong for at least 7 years when appointed to the Council. *(Chapter 8)*

Recommendation 11

We recommend that members of the Council should be appointed by the Appointments Commission direct. *(Chapter 8)*

Recommendation 12

We recommend that:

- (a) half of the Council members (excluding the Chairman) should be drawn from members of the public (to be known as Public Members) and the other half from members of the press (to be known as Press Members);
- (b) the Chairman of the Council should be a Public Member;
- (c) the Chairman of the Council should be appointed by the Appointments Commission; and
- (d) a retired judge or a senior lawyer of at least 7 years' standing in the legal profession should be appointed to be the Chairman of the Council. (*Chapter 8*)

Recommendation 13

We recommend that:

- (a) Press Members of the Council should have had experience in the practice or teaching of journalism;
- (b) any individuals, organisations and associations, whether or not they are related to the press, should be entitled to make nominations for Press Membership in the Council; and
- (c) Press Members should vote as individuals and not as representatives of the organisations or associations that nominated them. (*Chapter 8*)

Recommendation 14

We recommend that Public Members of the Council should not be engaged in or connected with the business of publishing newspapers or magazines in the last three years prior to the appointment to the Council. (*Chapter 8*)

Recommendation 15

We recommend that the Privacy Commissioner for Personal Data should be designated as an ex officio member of the Council. He should be counted as one of the Public Members of the Council. (*Chapter 8*)

Recommendation 16

We recommend that there should be provisions in the legislation providing for disqualification from membership of the Council. (*Chapter 8*)

Recommendation 17

We recommend that members of the Council should be appointed for a period of 3 years and should be eligible for reappointment. (*Chapter 8*)

Recommendation 18

We recommend that a member of the Council should be removed from office if he is, or becomes, ineligible or incapable of carrying out his duties as a Public or Press Member of the Council. (Chapter 8)

Recommendation 19

We recommend that the Council should be allowed to regulate its procedure except that the person presiding at a Council meeting should always be a Public Member and that the Council should be under an obligation to ensure that the complaints procedure is fair to the parties. (Chapter 8)

Recommendation 20

We recommend that there should be provisions requiring Council members to declare their interest in specified circumstances. (Chapter 8)

Recommendation 21

We recommend that the Council should have power to draw up and keep under review a code of conduct on privacy-related matters (“the Privacy Code”). (Chapter 8)

Recommendation 22

We recommend that the Council should have power:

- (a) to receive complaints (including third-party complaints) of alleged breaches of the Privacy Code;**
- (b) to initiate its own investigations if the Council has reasonable grounds to believe that an act is a breach of the Privacy Code;**
- (c) to attempt conciliation before a complaint is referred to a Complaints Committee for investigation; and**
- (d) to rule on alleged breaches of the Privacy Code. (Chapter 8)**

Recommendation 23

We recommend that:

- (a) a Complaints Committee should consist of 5 members including the chairman;**
- (b) three members of a Complaints Committee, including the chairman, should be Public Members;**
- (c) a Complaints Committee may appoint other persons to be members of the Committee to advise generally or on any particular matter. These members should not have a vote on matters before the Committee; and**

- (d) the quorum for any meeting of a Complaints Committee should be four members of whom two should be Press Members and two should be Public Members. (*Chapter 8*)

Recommendation 24

We recommend that upon receipt of a complaint, the Complaints Committee should:

- (a) give the parties a reasonable opportunity to make representations;
- (b) consider any representations made by or on behalf of the parties;
- (c) consider any evidence received by it, whether tendered on behalf of the complainant or otherwise, which it considers relevant to the complaint; and
- (d) advise the Council whether there has been a breach of the Privacy Code and, if so, make recommendations to the Council which would then adjudicate on the complaint. (*Chapter 8*)

Recommendation 25

We recommend that:

- (a) neither the provisions of the Evidence Ordinance (Cap 8) nor any other rule of law relating to the admissibility of evidence should apply in proceedings before the Council and the Complaints Committees;
- (b) the Council and the Complaints Committees may obtain any information, document or thing from such persons, and make such inquiries, as they think fit; and
- (c) the parties should not be represented by lawyers in any hearings before the Council and the Complaints Committees unless the Council or a Complaints Committee decides otherwise. (*Chapter 8*)

Recommendation 26

We recommend that the Council may 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, or a complaint of a substantially similar nature, has previously initiated an investigation as a result of which the Council was of the opinion that there had been no breach of the Privacy Code; or
- (d) any investigation or further investigation is for any other reason unwarranted. (*Chapter 8*)

Recommendation 27

We recommend that no appeal may be made against any decision not to undertake or continue an investigation. If the Council decides not to undertake or continue an

investigation, it should inform the complainant of that decision and of its reasons. *(Chapter 8)*

Recommendation 28

We recommend that the Council may undertake or continue an investigation into a complaint notwithstanding that the complainant has withdrawn the complaint, provided that the investigation can be justified in the public interest. *(Chapter 8)*

Recommendation 29

We recommend 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 Council. *(Chapter 8)*

Recommendation 30

We recommend that where the Council has decided on a complaint, it may:

- (a) declare that the newspaper has acted in breach of the Privacy Code;
- (b) reprimand the newspaper;
- (c) require the newspaper to publish on one or more occasions:
 - (i) an apology, and to decide on the form, content and location of such an apology;
 - (ii) a correction, and to decide on the form, content and location of such a correction;
 - (iii) the following matters in such manner as may be determined by the Council:
 - (1) a summary of the complaint;
 - (2) the Council's findings on the complaint or a summary of them;
 - (3) any decision of the Council;
 - (4) any observations by the Council on the complaint or a summary of any such observations;
- (d) publish the matters referred to in (c)(iii) above in one or more newspapers circulating in Hong Kong. *(Chapter 8)*

Recommendation 31

We recommend that the Council should not have power to award compensation to complainants. *(Chapter 8)*

Recommendation 32

We recommend that the Council may impose a fine on a newspaper which is found to be in serious breach of the Privacy Code. The maximum fine should be \$500,000 for a first offence and \$1,000,000 for a second or subsequent offence. *(Chapter 8)*

Recommendation 33

We recommend that:

- (a) any newspaper which failed to publish an apology, correction or other matters required by the Council should be liable to a fine; and
- (b) any fine imposed by the Council should be recoverable as a civil debt in a court of law. (*Chapter 8*)

Recommendation 34

We recommend that any person aggrieved by any decision of the Council or anything contained in the Privacy Code may appeal to the Court of Appeal. (*Chapter 8*)

Recommendation 35

We recommend that the Council should have the following functions and powers:

- (a) to promote awareness and understanding of the Privacy Code and the complaints procedure of the Council;
- (b) to raise the awareness of the general public of their right to be protected from arbitrary interference with their privacy under Article 17 of the International Covenant on Civil and Political Rights;
- (c) to raise the awareness of the press of their responsibility to respect the right of privacy when exercising press freedom in accordance with Article 19 of the Covenant;
- (d) to give general comments on matters arising from the Privacy Code; and
- (e) to commission research into matters relating to press intrusion. (*Chapter 8*)

Recommendation 37

We recommend that the Council should publish an annual report of its activities and lay copies of that report before the Legislative Council. In addition to annual reports, the Council may publish periodic reports each containing, as regards every complaint which has been dealt with by it in the period covered by the report,

- (a) a summary of the complaint and the action taken by the Council on it;
- (b) where the Council has adjudicated on the complaint, a summary of its findings and decisions;
- (c) where a newspaper is required to implement a decision of the Council, a summary of any action taken by the newspaper; and
- (d) any recommendations and comments it thinks fit to make. (*Chapter 8*)

Recommendation 37

We recommend that no liability should be incurred by:

- (a) the Council;
- (b) any member of the Council;
- (c) any member of any committee of the Council; and

(d) any employee of the Council

in respect of anything done by the Council or such member or employee in good faith in the exercise of powers conferred or functions imposed by or under the legislation.
(Chapter 8)

Recommendation 38

We recommend that the Council should be funded by way of a statutory levy on all newspapers and magazines registered under the Registration of Local Newspapers Ordinance (Cap 268). The amount of fee payable by a newspaper or magazine should be based on the proportion of its circulation to the total circulation of all newspapers and magazines registered under the Ordinance. *(Chapter 8)*

Recommendation 39

We recommend that the Council should be provided with funds to appoint or employ a principal executive officer and such other persons as may be necessary for the efficient carrying out of its functions. In addition, the Council should be allowed to engage the services of technical or professional advisers to assist it in the discharge of its functions. Subject to the approval of the financing body, the Council may determine the remuneration and terms of employment or engagement of any person who may be so employed or engaged. *(Chapter 8)*

Annex 1

Code of Ethics of the Hong Kong Journalists Association

1. A journalist has a duty to maintain the highest professional and ethical standards.
2. A journalist shall at all times defend the principle of the freedom of the press and other media in relation to the collection of information and the expression of comment and criticism. He/She shall strive to eliminate distortion, news suppression and censorship.
3. A journalist shall strive to ensure that the information he/she disseminates is fair and accurate, avoid the expression of comment and conjecture as established fact and falsification, by distortion, selection or misrepresentation.
4. A journalist shall rectify promptly any harmful inaccuracies, ensure that correction and apologies receive due prominence and afford the right of reply to persons criticised when the issue is of sufficient importance.
5. A journalist shall obtain information, photographs and illustrations only by straight forward means. The use of other means can be justified only by over-riding considerations of the public interest. The journalist is entitled to exercise a personal conscientious objection to the use of such means.
6. Subject to justification by over-riding considerations of the public interest, a journalist shall do nothing which entails intrusion into private grief and distress.
7. A journalist shall protect confidential sources of information.
8. A journalist shall not accept bribes nor shall he/she allow other inducements to influence the performance of his/her professional duties.
9. A journalist shall not lend himself/herself to the distortion or suppression of the truth because of advertising or other considerations.
10. A journalist shall not originate material which encourages discrimination on grounds of race, colour, creed, gender or sexual orientation.
11. A journalist shall not take private advantage of information gained in the course of his/her duties, before the information is public knowledge.

Annex 2

Taiwan's Code of Ethics for the Press (1992)

1. General

- 1) The ethics in this Code are prescribed in accordance with the basic principles set out in the Canon of China Journalists.
- 2) Press journalists should understand the characteristics of the news profession; put public interest as the prime consideration; not to pursue the self-interest of a particular group or a particular individual at the expense of public interest.
- 3) Materials published in a newspaper should not offend good custom, undermine social order, or infringe private interests.
- 4) News-gathering must be carried out with impartiality, and not intervene in news event. News reporting should strive to be accurate, objective and balanced.
- 5) The press must respect the judiciary and avoid interfering with the independent judgment of judges.
- 6) If the materials published in a newspaper were incorrect, take the initiative to correct them and give a clear explanation. ...

2. News-gathering

- 1) News should be gathered by legitimate means. Do not obtain information by intimidation, misrepresentation or payment.
- 2) Refuse to accept gifts, bribes or inappropriate treatment from the source.
- 3) Respect hospital regulations or obtain the consent of the subject when gathering news in hospitals or obtaining information about a tragedy. Do not obstruct the treatment and rescue process; in particular, pictures should not be taken against the wish of the subject.
- 4) Maintain order when gathering information about a celebration, marriage ceremony, funeral service, conference, gathering etc.

3. News reporting

- 1) ...
- 3) Do not report the private lives of individuals unless it relates to a public interest.
- 4) The accuracy of news about the reporting, exposure or condemnation of individuals or organisations should be checked. These information should not be reported unless they relate to a public interest. Furthermore, the principle of balanced and precise reporting should be observed. ...

4. News about crime

- 1) ...
- 3) Do not report the method and technicalities of a crime, erotic event and suicide.
- 4) Do not publicise the name, address and other related information which might lead to the identification of a minor who is suspected of committing an offence or who has already been convicted of an offence.
- 5) Do not report on the usual cases involving gross violence. As for those gross violence cases which have serious implications for public security or relate to a

serious crime, do not disclose the name, address or other information which might to the identification of the victim.

- 6) The physical security of the victim is the prime consideration when reporting kidnap cases. Do not report before the victim has been released.

5. News commentary

- 1) Commentary should be strictly distinguished from news so that opinion and facts would not be confused.
- 2) Commentary in the form of criticism of an individual should not be based on hearsay which has not yet been proven to be true.
- 3) Commentary should strive to be impartial. Avoid prejudices and arbitrary comments.
- 4) Do not comment on the private life of an individual if this is not related to a public interest. ...

7. Pictures

- 1) Do not falsify or make changes to news photographs by modification or any other means.
- 2) The explanatory remarks of news photographs should not make any implication or insinuation which is not based on facts.
- 3) Do not publish horrible, erotic or obscene pictures.
- 4) Do not publish, without the consent of the individual concerned, photographs depicting his private life which is not related to a public interest.
- 5) Do not publish photographs of minors who are suspected of committing an offence or have been convicted of an offence, or victims of gross violence etc, or witnesses who give evidence in camera. ...

Annex 3

Code of Practice ratified by the Press Complaints Commission in the United Kingdom (1998)

Introduction

All members of the press have a duty to maintain the highest professional and ethical standards. This code sets the benchmarks for those standards. It both protects the rights of the individual and upholds the public's right to know.

The code is the cornerstone of the system of self-regulation to which the industry has made a binding commitment. Editors and publishers must ensure that the code is observed rigorously not only by their staff but also by anyone who contributes to their publications.

It is essential to the workings of an agreed code that it be honoured not only to the letter but in the full spirit. The code should not be interpreted so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it prevents publication in the public interest.

It is the responsibility of editors to co-operate with the PCC as swiftly as possible in the resolution of complaints.

Any publication which is criticised by the PCC under one of the following clauses must print the adjudication which follows in full and with due prominence.

1. Accuracy

- (i) Newspapers and periodicals should take care not to publish inaccurate, misleading or distorted material including pictures.
- (ii) Whenever it is recognised that a significant inaccuracy, misleading statement or distorted report has been published, it should be corrected promptly and with due prominence.
- (iii) An apology must be published whenever appropriate.
- (iv) Newspapers, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact.
- (v) A newspaper or periodical must report fairly and accurately the outcome of an action for defamation to which it has been a party.

2. Opportunity to Reply

A fair opportunity for reply to inaccuracies must be given to individuals or organisations when reasonably called for.

3. Privacy

- (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.

4. **Harassment**

- (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.
- (iii) Editors must ensure that those working for them comply with these requirements and must not publish material from other sources which does not meet these requirements.

5. **Intrusion into Grief or Shock**

In cases involving personal grief or shock, enquiries should 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.

6. **Children**

- (i) Young people should be free to complete their time at school without unnecessary intrusion.
- (ii) 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.
- (iii) Pupils must not be approached or photographed while at school without the permission of the school authorities.
- (iv) There must be no payment to minors for material involving the welfare of children nor payments to parents or guardians for material about their children or wards unless it is demonstrably in the child's interest.
- (v) 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.

7. **Children in Sex Cases**

- 1. 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.
- 2. In any press report of a case involving a sexual offence against a child -
 - (i) The child must not be identified.
 - (ii) The adult may be identified.
 - (iii) The word "incest" must not be used where a child victim might be identified.
 - (iv) Care must be taken that nothing in the report implies the relationship between the accused and the child.

8. **Listening devices**

Journalists must not obtain or publish material obtained by using clandestine listening devices or by intercepting private telephone conversations.

9. **Hospitals**

- (i) Journalists or photographers making enquiries at hospitals or similar institutions should 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.

10. **Innocent Relatives and Friends**

The press must avoid identifying relatives or friends of persons convicted or accused of crime without their consent.

11. **Misrepresentation**

- (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.

12. **Victims of sexual assault**

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.

13. **Discrimination**

- (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.

14. **Financial Journalism**

.....

15. **Confidential Sources**

Journalists have a moral obligation to protect confidential sources of information.

16. **Payment for Articles**

- (i) Payment or offers of payment for stories or information must not be made directly or through agents to witnesses or potential witnesses in current criminal proceedings except where the material concerned ought to be published in the public interest and there is an overriding need to make or promise to make a payment for this to be done. Journalists must take every possible step to ensure

that no financial dealings have influence on the evidence that those witnesses may give.

(An editor authorising such a payment must be prepared to demonstrate that there is a legitimate public interest at stake involving matters that the public has a right to know. ...)

- (ii) Payment or offers of payment for stories, pictures or information, must not be made directly or through agents to convicted or confessed criminals or to their associates - who may include family, friends and colleagues – except where the material concerned ought to be published in the public interest and payment is necessary for this to be done.

The public interest

There may be exceptions to [clauses 3, 4, 6, 8, 9, 10, 11 and 16] where they can be demonstrated to be in the public interest.

1. The public interest includes: (i) detecting or exposing crime or a serious misdemeanour; (ii) protecting public health and safety; and (iii) preventing the public from being misled by some statement or action of an individual or organisation.
2. In any case where the public interest is invoked, the PCC will require a full explanation by the editor demonstrating how the public interest was served.
3. In cases involving children, editors must demonstrate an exceptional public interest to over-ride the normally paramount interests of the child.