Legislative Council Panel on Constitutional Affairs

Consultation Paper on Stalking

INTRODUCTION

The Administration will publish today a consultation paper inviting public views on the proposal to legislate against stalking and the key elements of the proposed legislation. A copy of the Consultation Paper on Stalking ("consultation paper") is at **Annex A**. This paper highlights the major issues therein.

BACKGROUND

2. Between 1994 and 2006, the Law Reform Commission ("LRC") published six reports related to privacy[1]. In the light of these reports, the Administration has taken a number of follow up actions (including enactment of the Personal Data (Privacy) Ordinance ("PDPO"), enactment of the Interception of Communications and Surveillance Ordinance, extension of the former Domestic Violence Ordinance (now renamed Domestic and Cohabitation Relationships Violence Ordinance) to cover former spouses, former heterosexual cohabitants and their children, and other immediate and extended family members, as well as existing and former same-sex cohabitants and their children and introduction of amendments to the PDPO to empower the Privacy Commissioner for Personal Data to provide legal assistance to aggrieved data subjects in legal proceedings). Those recommendations that have yet to be followed up touch on the sensitive and controversial issue of how to strike a balance between protection of individual privacy rights and freedom of expression/ press freedom. There have been mixed responses and divergent views from different sectors of the community.

3. We have indicated that as we consider the LRC report on "Stalking" to be comparatively less controversial, we would deal with this report first and conduct a public consultation exercise to gauge views on the recommendations in the report.

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[1] These reports are "Reform of the Law Relating to the Protection of Personal Data" (published in August 1994), "Privacy: Regulating the Interception of Communications" (published in December 1996), "Stalking" (published in October 2000), "Civil Liability for Invasion of Privacy" (published in December 2004), "Privacy and Media Intrusion" (published in December 2004) and "Privacy: The Regulation of Covert Surveillance" (published in March 2006).

ISSUES ON WHICH COMMENTS ARE INVITED

Need for Legislation

4. Stalking may be described as a series of acts directed at a specific person which, taken together over a period of time, causes him to feel harassed, alarmed or distressed. A stalker may harass his victim by making unwelcome visits or unwanted communications, following the victim on the streets, watching or besetting the victim's home or place of work, sending unwanted gifts or bizarre articles to the victim, disclosing intimate facts about the victim to third parties, making false accusations about the victim, damaging property belonging to the victim, and/or physical and verbal abuse. Stalking behaviour may escalate from what may initially be annoying, alarming but lawful behaviour to the level of dangerous, violent and potentially fatal acts.

5. The LRC considered that stalking comprised a range of actions each of which on its own might not be objectionable but, when combined over a period of time, interfered with the privacy and family life of the victim, thereby causing him distress, alarm or even serious impairment of his physical or psychological well-being. Although existing civil law and criminal offences cover some aspects of stalking behaviour, they cannot address stalking as an independent phenomenon. They treat stalking behaviour piecemeal and deal with it as isolated incidents. A stalker can be prosecuted only if his act falls within the scope of a criminal offence but stalking can occur without breach of the peace or threats of violence. The LRC, therefore, proposed that anti-stalking legislation should be introduced.

6. We share the LRC's view that stalking can have a serious impact on the health, freedom and quality of life of the victim and his or her family. Most common law jurisdictions, including the United Kingdom ("UK"), Australia and New Zealand, have anti-stalking legislation. From the perspective of potential victims, creating an offence of stalking could provide them with a greater degree of protection. We, therefore, propose to pursue legislation against stalking and the consultation paper invites public views on whether such legislation should be pursued.

7. At the same time, we are mindful that how the competing rights and interests, in particular privacy of the individual and freedom of expression/press freedom, could be balanced would need to be carefully

considered and weighed. The consultation paper seeks public views on the key elements of the proposed anti-stalking legislation, as outlined below.

Offence of Harassment

8. The LRC recommended that under the proposed anti-stalking legislation, a person who pursued a course of conduct which amounted to harassment of another, and which he knew or ought to have known[2] amounted to harassment of the other, should be guilty of a criminal offence; and for the purposes of this offence, the harassment should be serious enough to cause that person alarm or distress. The consultation paper invites public views on whether stalking should be made an offence based on the LRC's recommendation above.

Collective harassment

9. The LRC's recommendation targets one-person-to-one-person conduct. In the context of some activities such as debt collection, it may be more common to see a group of people acting together to harass another, where each of the perpetrators only undertakes one act of harassment. In the situation above, it may be difficult to impute liability on the individual stalkers. The consultation paper, therefore, seeks public views on whether collective harassment by two or more people who undertake only one act of harassment each should also be made an offence. The relevant legislation in the UK (but not the other common law jurisdictions) has similar provision.

Harassment to deter lawful activities

10. In the UK, a legislative amendment was made in 2005 to provide that it is an offence for a person to pursue a course of conduct involving the harassment of two or more persons on separate occasions which he knows or ought to know involves harassment and the purpose of which is to persuade any person (whether or not one of the persons harassed) not to do something he is entitled to do or to do something he is not obliged to do.

11. The introduction of this offence in the UK aimed specifically to protect company employees from harassment by activist groups. So far there is little indication that this is a matter of major concern in Hong Kong. We are also not aware of similar provisions in the anti-stalking legislation in any other jurisdictions. However, since this is a rather recent provision, the

[2] A person ought to know that his course of conduct amounted to harassment if a reasonable person in possession of the same information would realise that the course of conduct amounted to harassment.

consultation paper also seeks views on whether the proposed anti-stalking legislation should provide for a similar offence.

Penalty

12. The LRC's recommended offence covers persons who knew or ought to have known that their course of conduct caused another person alarm or distress. On penalty, the LRC proposed a lower penalty for those who were convicted under the "ought to know" limb, i.e. a fine and 12 months' imprisonment, as they were less culpable than those who committed the offence "knowingly", for whom the proposed maximum penalty was a fine and two years' imprisonment.

13. We propose that, if the offence of harassment is introduced, there should be a single maximum penalty level. We consider it more suitable to leave it to the court to decide on the appropriate penalty having regard to the circumstances of individual cases, the strength of the *mens rea* element and the evidence available. We also propose to set the maximum penalty at a fine of Level 6 (i.e. $100,000, which is the normal maximum fine which a permanent magistrate could impose in the case of a summary offence) and imprisonment for two years to reflect the seriousness of the offence and to provide a greater deterrent effect.

Defences

14. The LRC recommended that it should be a defence for a defendant who was charged with the proposed offence to show that –

(a) the conduct was pursued for the purpose of preventing or detecting crime;

(b) the conduct was pursued under lawful authority; or

(c) the pursuit of the course of conduct was reasonable in the particular circumstances.

15. After the publication of the LRC's report, some in the media sector pointed out that what was a reasonable pursuit under the defence proposed in paragraph 14(c) above would be subject to interpretation and might not be sufficient to protect all the diverse legitimate activities of journalists. They suggested including a specific defence for news-gathering activities.

16. The LRC had in fact thoroughly considered this and was of the view that a defence of "legitimate news-gathering activities" was already subsumed under the "reasonable pursuit" defence in paragraph 14(c) above and that it was unnecessary to create a separate defence. A defence based on the reasonableness of the pursuit would provide flexibility. Replacing the general defence of reasonable pursuit by a list of specific exemptions would run the risk of excluding something that ought to have been included. A more elaborate defence was also not practicable. Whether the harassing conduct of a journalist was legitimate or not would depend on many factors, such as the purpose of the pursuit, the nature and gravity of the subject matter, the status of the subject, whether the journalist persisted in total disregard of the subject's response, the time and place at which the incidents occurred, the number of calls or visits made, and whether abusive language was used.

17. There were also suggestions that a "public interest" defence should be considered. The LRC had also considered this and was of the view that it was unnecessary to provide for a public interest defence since the public interest in a matter pursued by journalists would be taken into account by the courts if the "reasonable pursuit" defence in paragraph 14(c) was adopted. In the LRC's view, the defence of acting reasonably in the circumstances would provide greater protection to journalists and other persons who carry out legitimate activities, such as political canvassers, those who serve subpoenas or statements of claim, security guards and insurance company investigators who are retained to detect malingering.

18. We recognise that there are concerns over possible interference with press freedom. We have explored the possibility of including a specific defence of "news-gathering activities". In addition to the considerations in paragraphs 16 and 17 above, we also need to consider the implications of such a specific defence on the protection which the proposed legislation seeks to provide to victims of stalking. The question is whether the community is prepared to exempt from the proposed legislation all forms of news-gathering activities by the media irrespective of whether such activities would be considered reasonable in the particular circumstances. It is also noted that the relevant legislation of a number of common law jurisdictions (such as the UK, Australia, New Zealand and Ireland) include a general and broad exemption or defence to cover reasonable conduct but do not specify news-gathering activities as a specific defence.

19. The consultation paper seeks public views on whether a defence for news-gathering activities should be subsumed under the "reasonable pursuit" defence in paragraph 14(c) above as recommended by the LRC, or a separate,

specific defence for news-gathering activities should be provided; and if so, how the specific defence, whether qualified or not, should be framed.

Restraining orders in criminal proceedings

20. The LRC recommended that a court sentencing a person convicted of the offence of harassment might make an order prohibiting him from doing anything which would cause alarm or distress to the victim of the offence or any other person, as the court thought fit. It would be an offence to breach the order. We consider that a restraining order may protect the victim from being harmed by the convicted stalker in the future. The consultation paper seeks public views on the recommendation and details about the order, including the duration of the order, who can apply to vary or discharge the order and the penalty for breaching the order.

Civil remedies for victims

21. The LRC recommended that a person who pursued a course of conduct which would have constituted the offence of harassment should be liable in tort to the object of the pursuit. The plaintiff should be able to claim damages for any distress, anxiety and financial loss resulting from the pursuit and to apply for an injunction to prohibit the defendant from doing anything which causes the plaintiff alarm or distress. We note that none of the existing torts recognised by the courts in Hong Kong captures the full extent of a stalker's behaviour. We see merit in the LRC's recommendation. The consultation paper seeks public views on the recommendation and details regarding enforcement of the recommended injunction, for example whether the court should have the power to attach a power of arrest to the injunction.

Proposals Not to be Pursued

22. There are three other recommendations in the LRC report. We have studied them carefully and consider that it is not appropriate to pursue them, as outlined in **Annex B**.

WAY FORWARD

23. Members of the public may submit their views on the issues set out in the consultation paper from now until 31 March 2012. We will also organise public forums and meet with interested organisations to listen to

their views. After the consultation exercise, the Administration will consolidate the views received and publish a report setting out the views received and, in the light of those views, the proposed way forward.

Constitutional and Mainland Affairs Bureau
19 December 2011

Annex A

Consultation Paper on Stalking

December 2011

Contents

Chapter One : Introduction

Law Reform Commission Reports on Privacy

1.1 Between 1994 and 2006, the Law Reform Commission ("LRC") published six reports relating to different aspects of privacy :

(a) "Reform of the Law Relating to the Protection of Personal Data" (published in August 1994)

This report addressed concerns over the increasing extent to which personal information was recorded and passed on. The report's recommendations included the establishment of a regulatory agency and the introduction of a data protection law imposing security safeguards on the keeping of personal data. Moreover, personal data should not be disclosed by the data collector for purposes other than those specified at the time of collection, except with the individual's consent or where a statutory exception was stipulated;

(b) "Privacy: Regulating the Interception of Communications" (published in December 1996)

This report recommended that it should be an offence to intercept or interfere intentionally with communications (i.e. a telecommunication, a sealed postal packet or a transmission by radio on frequencies which were not licensed for broadcast), unless the interception was carried out pursuant to a warrant granted by the court;

(c) "Stalking" (published in October 2000)

The LRC noted that stalking was a problem in Hong Kong and that protection to individuals from harassment was inadequate. This report recommended, inter alia, that a person who pursued a course of conduct causing another

person alarm or distress should be guilty of an offence and should be liable in tort to the victim;

(d) "Civil Liability for Invasion of Privacy" (published in December 2004)

The LRC was of the view that every individual should be entitled to seek civil remedies for invasion of privacy that was unwarranted in the circumstances. This report recommended the creation by statute of specific torts of invasion of privacy to enable an individual to seek civil remedies for intrusion upon his solitude or seclusion in circumstances where he had a reasonable expectation of privacy, and for unwarranted publicity given to his private life;

(e) "Privacy and Media Intrusion" (published in December 2004)

The LRC considered that the self-regulatory measures adopted by the press industry and the journalistic profession had not been effective in protecting individuals from unwarranted invasion of privacy by the print media. This report recommended that an independent and self-regulating commission should be established by statute to deal with complaints of unjustifiable infringements of privacy perpetrated by the print media; and

(f) "Privacy: The Regulation of Covert Surveillance" (published in March 2006)

This report recommended the creation of two new criminal offences: obtaining personal information through intrusion into private premises, or by means of a surveillance device. The LRC also recommended that in respect of private premises used as living accommodation, there should be an express prohibition on covert surveillance in changing rooms, bedrooms, toilets, and shower or bathing facilities. The recommendations were intended to provide adequate

and effective protection and remedies against arbitrary or unlawful intrusion into an individual's privacy, as guaranteed under the Basic Law.

Follow-up Work by the Administration

1.2 The Administration has carefully studied the above reports. In the light of the recommendations in the report on "Reform of the Law Relating to the Protection of Personal Data", the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO") was enacted in August 1995 to protect the privacy of individuals in relation to personal data. In the light of the reports on "Regulating the Interception of Communications" and "The Regulation of Covert Surveillance", the Interception of Communications and Surveillance Ordinance (Cap. 589) ("ICSO") was enacted in August 2006 to regulate the interception of communications and the use of surveillance devices by public officers. The enactment of the ICSO has addressed the issues raised in the two LRC reports concerning the undertaking of such activities by public officers.

1.3 The LRC recommended in the report on "Stalking", inter alia, that the Administration should consider whether the former Domestic Violence Ordinance ("DVO"), which provided for civil remedies in the form of injunctions to protect victims of domestic violence against molestation by the other party, should be reformed so that the protection provided by the Ordinance was not restricted to spouses in domestic relationships, people cohabiting in heterosexual relationships, and the children of such persons. The Administration took this recommendation forward by extending the scope of the former DVO to cover former spouses, former heterosexual cohabitants and their children, as well as other immediate and extended family members with effect from August 2008. The coverage has been further extended to existing and former same-sex cohabitants and their children with effect from 1 January 2010. The former DVO has also been renamed as the Domestic and

Cohabitation Relationships Violence Ordinance ("DCRVO") (Cap. 189).

1.4 In the report on "Civil Liability for Invasion of Privacy", the LRC recommended, inter alia, that the PDPO should be amended to enable the Privacy Commissioner for Personal Data ("PCPD") to provide legal assistance to persons who intend to institute proceedings under section 66 of the PDPO to seek compensation for damage suffered by reason of a contravention of a requirement under the PDPO by a data user. The amendments could be along the lines of section 85 of the Sex Discrimination Ordinance (Cap. 480) and section 81 of the Disability Discrimination Ordinance (Cap. 487), which empower the Equal Opportunities Commission to assist individuals to pursue compensation through legal proceedings under these ordinances. The Administration has agreed to take forward this recommendation in the legislative exercise to amend the PDPO. The Personal Data (Privacy) (Amendment) Bill 2011, introduced into the Legislative Council ("LegCo") in July 2011, proposes to empower the PCPD to provide legal assistance to an aggrieved data subject who intends to institute legal proceedings against a data user to seek compensation.

1.5 The Administration has considered carefully the parts of the reports on "Regulating the Interception of Communications" and "The Regulation of Covert Surveillance" relating to non-public officers, the recommendations in the reports on "Stalking" and "Civil Liability for Invasion of Privacy" that have yet to be followed up and the report on "Privacy and Media Intrusion". They touch on the sensitive and controversial issue of how to strike a balance between protection of individual privacy rights and freedom of expression / press freedom. There have been mixed responses and divergent views from different sectors of the community. In particular, some in the media sector have expressed concern that some of the recommendations might compromise press freedom.

1.6 The Administration attaches great importance to the protection of freedom of expression and press freedom in Hong Kong. We fully recognise the important role played by the media in imparting information of public interest to the community. At the same time, we are equally cognisant of public concern over the invasion of privacy and the call from some sectors of the community for tighter control. Given the complexity and sensitivity of the issues involved, we think it necessary to consider carefully the legitimate interests of all parties concerned and reconcile the differences as far as possible, with a view to reaching a general consensus within the community on the way forward. In mapping out the way forward, we need to strike a balance between different rights such as rights to personal privacy and freedom of expression / press freedom.

Consultation on Stalking

1.7 We consider the report on "Stalking" to be comparatively less controversial than the other reports mentioned in paragraph 1.5 above. The Administration considers it appropriate to deal with that report before turning to the more controversial issues dealt with in the other reports. Accordingly, the relevant Government bureaux and departments have examined the recommendations in that report, including the practical issues involved in implementation and any other matters that should be resolved in taking the matter forward. The Administration has also reviewed developments in overseas anti-stalking legislation which may be relevant when considering the possible introduction of similar legislation in Hong Kong.

1.8 This paper sets out the LRC's recommendations in its report on "Stalking"[1] and the relevant considerations and invites public comments on the issues involved. A number of the recommendations are controversial and will impact on various sectors of the community and members of the public. We consider that a public consultation exercise should be conducted

[1] You can find the LRC report on "Stalking" on the LRC's website at www.hkreform.gov.hk, or obtain a printed copy by writing to the Secretary, Law Reform Commission, 20/F Harcourt House, 39 Gloucester Road, Wanchai, Hong Kong.

to gauge public views on the recommendations. After the consultation exercise, the Administration will consolidate the views received and publish a report setting out the views received and, in the light of those views, the proposed way forward.

1.9 Please send us your views by mail, facsimile or email on or before **31 March 2012** :

Address: Team 4
Constitutional and Mainland Affairs Bureau
12/F, East Wing
Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Fax number: 2523 0565

E-mail address: stalking_consultation@cmab.gov.hk

1.10 It is voluntary for members of the public to supply their personal data upon providing views on this consultation paper. The submissions and personal data collected may be transferred to the relevant Government bureaux and departments for purposes directly related to this consultation exercise. The Government bureaux and departments receiving the data may only use the data for such purposes.

1.11 The names and views of individuals and organisations who/which put forth submissions in response to this consultation paper ("senders") may be published for public viewing. We may, either in discussion with others, whether privately or publicly, or in any subsequent report, cite comments submitted in response to this consultation paper.

1.12 To safeguard senders' data privacy, we will remove senders' relevant data, such as residential/return addresses, email addresses, identity card numbers, telephone numbers, facsimile numbers and signatures, where provided, when publishing their submissions.

1.13 We will respect the wish of senders to remain anonymous and/or keep the views confidential in part or in whole. If the senders request anonymity in the submissions, their names will be removed when publishing their views. If the senders request confidentiality, their submissions will not be published.

1.14 If the senders do not request anonymity or confidentiality in the submissions, it will be assumed that the senders can be named and the views can be published in their entirety.

1.15 Any sender providing personal data to this Bureau in the submission will have rights of access and correction with respect to such personal data. Any requests for data access or correction of personal data should be made in writing through the abovementioned channels to Assistant Secretary for Constitutional and Mainland Affairs (4B).

Chapter Two : Need for Legislation

2.1 As explained in the LRC report on “Stalking”, stalking may be described as a series of acts directed at a specific person that, taken together over a period of time, causes him to feel harassed, alarmed or distressed. Stalkers may come from all walks of life and socio-economic backgrounds. A stalker can be an ex-lover, ex-spouse, rejected suitor, colleague, ex-employee, neighbour, gang member, disgruntled defendant or aggrieved customer of his victim.

2.2 A stalker may harass his victim by making unwelcome visits, making unwanted communications or silent telephone calls, repeatedly following the victim on the streets, watching or besetting the victim’s home or place of work, persistently sending unwanted gifts or bizarre articles to the victim, disclosing intimate facts about the victim to third parties, making false accusations about the victim, damaging property belonging to the victim, and/or physical and verbal abuse. Stalking behaviour may escalate from what may initially be annoying, alarming but lawful behaviour to the level of dangerous, violent and potentially fatal acts.

2.3 As victims of stalking can be subjected to constant harassment at home, at their place of work and in public places, they are placed in constant fear and alarm. Even if stalking does not affect a significant number of people in Hong Kong, the LRC was of the view that it is clearly a serious problem for those affected by such conduct.

2.4 The LRC considered that stalking was a problem in Hong Kong that needed to be addressed. While some of the offensive behaviour associated with stalking can be dealt with under existing laws, the protection afforded by the civil and criminal law is spotty, uncertain and ineffective.

Existing Civil Law

2.5 The LRC had looked into the remedies available under the civil law. Where a stalker commits a civil wrong such as trespass to land, private nuisance, intimidation, defamation or trespass to the person, the victim may bring a civil suit against the stalker in tort.

2.6 However, the above torts only provide a remedy to victims of stalking in certain instances. None of the torts captures the full extent and degree of a stalker's behaviour. The protection is neither complete nor adequate. The limitations of each of these torts are set out below :

(a) Trespass to land : the law of trespass to land protects occupiers against physical intrusion into their private premises. It does not extend to occupiers where the stalking behaviour does not involve trespass to land or to persons who do not have any proprietary interests in the premises in question;

(b) Private nuisance : as nuisance is based on the right to peaceful occupation of real property, it cannot provide the legal basis for protection against stalking conduct which does not interfere with the occupation of property. Nor can it afford protection where the victim is harassed at his place of employment, education or recreation;

(c) Intimidation : the tort of intimidation covers cases in which harm is inflicted on the plaintiff by the defendant intimidating the plaintiff or a third person whereby the plaintiff or third person is compelled to act or refrain from acting in obedience to the wishes of the defendant. The essence of the tort is intentional unlawful coercion. Only coercion by way of unlawful conduct would be caught. Stalkers who seek to compel their victims into doing or not doing something by lawful means would not be liable for intimidation;

(d) Defamation : a stalker who makes a public statement which tends to injure the reputation of his object is liable in defamation. However, a private communication between the stalker and his victim cannot give rise to liability for defamation; and

(e) Trespass to the person : an assault is committed when the defendant attempts or threatens to commit a battery whereby the plaintiff is put in reasonable fear or apprehension of an immediate infliction of an unlawful physical contact. Threatening acts or statements are not actionable unless they are of such a nature as to put the victim in fear or apprehension of immediate violence. A stalker may only repeatedly make telephone calls or follow his object. Persistent following or verbal abuse does not amount to a battery even though the object suffers psychiatric illness as a result.

Existing Criminal Law

2.7 The LRC had also examined the level of protection afforded by the criminal law. Prosecution action may be taken against intrusive conduct if, and only if, it involved the following acts :

(a) Loitering causing concern, contrary to section 160(3) of the Crimes Ordinance (Cap. 200) : there must be sufficient evidence to prove that the accused loitered in a public place or in the common parts of any building and his presence there, either alone or with others, caused any person reasonably to be concerned for his safety or well-being. The maximum penalty is imprisonment for two years;

(b) Disorderly conduct in public place, contrary to section 17B of the Public Order Ordinance (Cap. 245) : there must be sufficient evidence to prove that the accused, in any public place, behaved in a noisy or disorderly manner, or used, or distributed or displayed any writing containing threatening, abusive or insulting words, with intent to provoke a breach

of peace, or whereby a breach of the peace is likely to be caused. The maximum penalty is a fine of $5,000 and imprisonment for 12 months;

(c) Outraging public decency, contrary to the common law and punishable under section 101I of the Criminal Procedure Ordinance (Cap. 221) : there must be sufficient evidence to prove that the act complained of was committed in public. Furthermore, the act must be of such a lewd, obscene or disgusting character as to constitute an act of outrage of public decency. The maximum penalty is imprisonment for seven years and a fine on conviction upon indictment[2];

(d) Offensive phone calls or messages, contrary to section 20 of the Summary Offences Ordinance (Cap. 228) : there must be sufficient evidence to prove that the accused sent a message which was grossly offensive or of an indecent, obscene or menacing character, or sent a false message for the purpose of causing annoyance, inconvenience or needless anxiety to another person, or persistently made telephone calls without reasonable cause for such purposes. The maximum penalty is a fine of $1,000 and imprisonment for two months;

(e) Sending prohibited article, contrary to section 32(1)(f) of the Post Office Ordinance (Cap. 98) : there must be sufficient evidence to prove that the accused sent any article which was obscene, immoral, indecent, offensive or libellous. The maximum penalty is a fine of $20,000 and imprisonment for six months;

(f) Common assault, contrary to section 40 of the Offences against the Person Ordinance (Cap. 212) : an assault is any act by which a person intentionally or recklessly causes another to apprehend immediate and unlawful violence.

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[2] The offence is indictable in nature. It, however, could be dealt with in the Magistracy (which is the usual venue for trial of this type of cases) summarily under section 92 of the Magistrates Ordinance (Cap. 227). The maximum penalty for the offence to be tried summarily is imprisonment for two years and a fine of $100,000.

The maximum penalty for common assault is imprisonment for one year on summary conviction or upon indictment. However, mere words cannot constitute an assault. Nor will a stalker be charged with assault if he has not committed an act which causes his victim to fear immediate unlawful violence; and

(g) Criminal intimidation, contrary to section 24 of the Crimes Ordinance (Cap. 200) : a stalker who threatens his victim with injury to the person, reputation or property of the victim or any third party, or with any illegal act, may be prosecuted under section 24, but only if the stalker acted with intent either to alarm the victim or a third party, to cause the victim or third party to do an act which he was not legally bound to do, or to omit to do an act which the victim or third party was entitled to do. The maximum penalty is a fine of $2,000 and imprisonment for two years on summary conviction and imprisonment for five years on conviction upon indictment. This offence, however, does not help in situations where the stalker harassed his victim without making any threats. Mere watching, besetting or persistently following would not render the stalker criminally liable.

2.8 As pointed out above, each of the existing criminal provisions has its limitations in addressing the problem of stalking. There are some other offences under common law that may guard against stalking behaviour but they too have limitations :

(a) False imprisonment : the offence of false imprisonment is committed where a person unlawfully and intentionally or recklessly restrains another's freedom of movement from a particular place. However, a stalker will not be guilty of false imprisonment for preventing his victim from going in a particular direction if the latter is free to go in another direction;

(b) Battery : Battery is the actual infliction of unlawful violence on another. "Violence" here includes any intentional touching of another person without that person's consent. The offence of battery does not operate until the stalker has had physical contact with the victim; and

(c) Criminal attempt : the law of criminal attempt enables the courts to punish a perpetrator at a point in time before he successfully commits an offence. It is, however, inadequate to protect victims from stalking activities which fall substantially short of a crime, such as sending unwanted gifts.

LRC's Recommendation

2.9 The LRC considered that stalking was a course of conduct which comprised a range of actions each of which on its own might not be objectionable but, when combined over a period of time, interfered with the privacy and family life of the victim thereby causing him distress, alarm or even serious impairment of his physical or psychological well-being. The LRC put forward the following considerations in supporting legislating against stalking :

(a) although existing criminal laws cover some aspects of stalking behaviour, they cannot address stalking as an independent phenomenon. They treat stalking behaviour piecemeal and deal with it as isolated incidents. A stalker can be prosecuted only if his act falls within the scope of a criminal offence but stalking can occur without breach of the peace or threats of violence;

(b) it is impractical and undesirable to await developments of the common law to provide comprehensive protection to victims of stalking. Article 12 of the Hong Kong Bill of Rights provides that no one should be held guilty of any criminal offence on account of any act which did not

constitute a criminal offence under existing law. The courts should not stretch the scope of specific offences beyond their proper limits in order to punish stalking behaviour which members of the public would consider ought to be punished. It is, therefore, undesirable to leave the problem of stalking to the courts to resolve; and

(c) stalking could have long-term and devastating effects on the private, family and business lives of the victims as well as their physical and psychological well-being. These effects are sufficiently serious to justify the imposition of criminal sanctions even though no physical violence is involved. Moreover, if not restrained at an early stage, stalking behaviour may become more frequent and intrusive and could develop and escalate into violence. Legislating against stalking would send a clear message to would-be stalkers that engaging in such behaviour is unacceptable and unlawful and would result in prosecution. Moreover, the Police, social workers and mental health professionals would be able to intervene before another more serious crime was committed.

2.10 The LRC, therefore, considered that anti-stalking legislation should be introduced which could serve the following purposes :

(a) to stop threatening and harassing behaviour which disrupts normal life for the victim;

(b) to prevent such behaviour from escalating into violence by apprehending the stalker before his conduct reaches a serious level;

(c) to deter stalkers from committing the crime;

(d) to restrain convicted stalkers from repeating the crime; and

(e) to provide mental treatment to stalkers in appropriate cases.

Considerations

2.11 Although there are no statistics on stalking *per se*, related statistics and reports on individual incidents from time to time show the extent of the problem in Hong Kong. For instance, the number of non-criminal debt collection-related harassment cases reported to the Police averaged over 14 000 each year in the last three years. There are also individual harassment cases reported in the press recently, a few of which are highlighted below :

(a) It was reported in the press in August 2011 that an engineer had been harassed by his ex-girlfriend. According to the press, the saga started after their 4-month relationship ended. The victim, his colleagues and his family started to receive numerous harassing telephone calls and spam mails. The victim's ex-girlfriend moved to live in the same building as his, obtained information about his whereabouts from his friends, and on one occasion went on hiking at the same time as he did, and on another occasion, took the same flight as he did. The ex-girlfriend also distributed defamatory leaflets to the victim's neighbours saying that the victim was an HIV carrier and was impotent. She spread rumours that the victim's father had the habit of stealing women's underwear and exposing himself in public. She sprayed red paint on the door of her ex-boyfriend's home, that of his ex-boyfriend's parents and that of his ex-boyfriend's grandparents. As a result, the victim had to install a CCTV outside his home, move to Shenzhen to avoid her, and also lost his job twice due to the constant harassment caused to his colleagues and to his work.

(b) In the same month, there was another report of a businessman being harassed after he acknowledged that he had previous business dealings with a person. He started to receive threatening telephone calls, mails and

ghost money at his office and his home asking him to repay the debt owed by his ex-business contact. He received over 300 telephone calls on one single day. Notes were also sent to his neighbours and his business contacts demanding him to repay the debt. As a result, some of his business partners refused to do business with him. It was reported that he, his wife, and his parents lived under constant fear.

(c) Another case widely reported in late 2010 involved an ex-news presenter in the electronic media. A man unknown to the victim kept sending her flowers, followed her, drove his car right behind hers, put up banners expressing love messages in public, and sent her some 600 SMSes over the course of less than two months. The harassment continued even after the victim changed jobs, moved home and changed her telephone number.

2.12 The LRC has pointed out that in determining whether stalking is a problem in Hong Kong, it is immaterial whether the number of Hong Kong residents affected by stalking behaviour is 100 or 10,000. As long as there are enough cases to show that some people in Hong Kong are being harassed by stalkers, stalking is a problem that needs to be addressed – whether these victims account for 1% or 0.01% of the Hong Kong population.

2.13 We share the LRC's view that stalking can have a serious impact on the health, freedom and quality of life of the victim and his or her family. In the cases mentioned in paragraph 2.11 above, as well as in many other cases, the victims were in a helpless situation. The stalker can only be prosecuted if his act falls within the scope of an existing common law or criminal offence, such as when the victim is physically injured. The existing law cannot address adequately all types of stalking.

2.14 Most common law jurisdictions, including the United Kingdom ("UK"), Australia and New Zealand, have anti-stalking legislation. The Protection from Harassment Act 1997

("PHA") of the UK aims to make provision for protecting persons from harassment and similar conduct. All the States in Australia make stalking a criminal offence[3]. The Harassment Act 1997 in New Zealand provides criminal and civil remedies in respect of harassment. There are also statutory prohibitions against harassment in Canada, Ireland and the United States.

2.15 Before issuing its report, the LRC had conducted a public consultation on the proposal that a person who, without lawful authority or reasonable excuse, pursued a course of conduct which amounted to harassment of another should be guilty of an offence and liable in tort. Of the 54 submissions received, the vast majority supported the introduction of anti-stalking legislation. Putting aside the submissions from private individuals, only two respondents had reservations or objected to the introduction of such legislation.

2.16 After the release of the LRC Report on "Stalking", the LegCo Panel on Home Affairs had met with deputations to listen to their views. While representatives of the media sector expressed reservations on different aspects of the LRC's recommendations, a number of other deputations particularly those representative of women's interests, expressed strong support for legislation against stalking and urged for early implementation of the LRC's recommendations.

2.17 From the perspective of potential victims, creating an offence of stalking could provide them with a greater degree of protection. Having regard to the considerations set out in paragraphs 2.11 to 2.16 above, we propose to pursue legislation against stalking. At the same time, how the competing rights and interests, in particular privacy of the individual and freedom of the press, could be balanced would need to be carefully considered and weighed. This issue, as well as other elements of the proposed

[3] The Crimes Act 1900 of the Australian Capital Territory, the Crimes Act 1900 of the New South Wales, the Criminal Code Act of the Northern Territory of Australia, the Criminal Code Act 1899 of Queensland, the Criminal Law Consolidation Act 1935 of South Australia, the Crimes Act 1958 of Victoria, the Criminal Code of Western Australia and the Criminal Code Act 1924 of Tasmania.

legislation, will be addressed in Chapter Three of this consultation paper.

Invitation of Comments

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

Chapter Three : Elements of Proposed Anti-stalking Legislation

Offence of Harassment

LRC's Recommendation

3.1 The LRC recommended that :

(a) a person who pursued a course of conduct which amounted to harassment of another, and which he knew or ought to have known amounted to harassment of the other, should be guilty of a criminal offence;

(b) for the purposes of this offence, the harassment should be serious enough to cause that person alarm or distress; and

(c) a person ought to know that his course of conduct amounted to harassment of another if a reasonable person in possession of the same information would think that the course of conduct amounted to harassment of the other.

3.2 The LRC considered that the concept of persistence should be introduced into the formulation of the new offence by utilising the phrase "a course of conduct", and that the ordinary meaning of the phrase "a course of conduct" was sufficiently clear to render further elaboration unnecessary. A single act, no matter how bizarre, should not attract criminal liability. However, if the conduct was repetitive, it could start to assume a threatening character. That said, whether conduct on two or more occasions amounted to harassment would depend on the circumstances of the case. To achieve flexibility, the LRC suggested that the legislation should neither specify the number of incidents involved nor the period of time within which the incidents should occur.

3.3 The LRC considered that the victim's state of mind is another important component of the anti-stalking legislation. It was the harmful effect which the behaviour had on the victim that

turned what would otherwise be legitimate behaviour into criminal conduct. Although harassing behaviour might be frightening and objectionable, there were cases where the victim was subject to constant harassment but knew that the stalker was unlikely to put his safety at risk. On the other hand, there might be hypersensitive victims who would be alarmed or put in a state of distress in circumstances where a reasonable person would not. The LRC suggested that the activities engaged in by the stalker should have caused the victim alarm or distress (which is a subjective test) before the stalker could be charged with the offence of harassment.

3.4 The LRC considered that it was unnecessary to define harassment in the legislation, "harassment" being an ordinary word that could easily be understood by the courts and the ordinary public[4]. The LRC also found it impossible to enumerate all the behaviour that could constitute harassing conduct. The LRC considered that by criminalising conduct which constituted harassment without specifying a list of prohibited activities, all kinds of activities that cause harassment could be caught.

3.5 The LRC pointed out that the stalker might engage in a course of conduct that was directed against a person or persons known to the victim in order to harass the latter. A person could be alarmed or distressed without himself being the direct target of the course of conduct. The LRC, therefore, suggested that the target of the pursuit did not have to be the same person as the one who was subjected to harassment.

3.6 Regarding the mental element of the proposed offence, the LRC suggested that intention to harass should not be included as an element of the proposed offence. If the stalking offence requires specific intent on the part of the stalker, the anti-stalking provisions would not be able to help victims who suffer at the hands of stalkers who are delusional and not

[4] The LRC cited the example of section 264 of the Canadian Criminal Code, which does not contain a definition of the word "harass".

capable of forming the necessary intent. A delusional stalker may be acting out of "love" for the victim, or out of a belief that he was, or was meant to be, bonded to the victim. He may truly believe himself to be loved by the victim, and is incapable of realising that the victim is harassed as a result of his pursuit. In order to catch stalkers who were reckless as to whether their victims were alarmed or put in a state of distress, the LRC suggested that the proposed offence should ensure that a person who pursued a course of conduct, which a reasonable person in possession of the same information would realise amounted to harassment of the victim (i.e. the person ought to know that his course of conduct amounted to harassment), could not escape liability.

Considerations

Definition of Harassment

3.7 The term "harassment" under the PHA includes "alarming the person or causing the person distress"[5]. Similar elements are found in the law of Ireland[6]. The element of "fear for safety" is found in the anti-stalking legislation in Australia, Canada and New Zealand[7].

3.8 We have considered whether the term "harassment" should be

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[5] Under section 7(2) of the PHA, "[r]eferences to harassing a person include alarming the person or causing the person distress".

[6] Under the Non-fatal Offences against the Person Act 1997 of Ireland, "harassment" occurs where an act seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other.

[7] Under section 35(1) of the Crimes Act 1900 of the Australian Capital Territory, a person must not stalk someone with intent to, inter alia, "cause apprehension, or fear of harm, in the person stalked or someone else". Section 189 of the Criminal Code Act of the Northern Territory of Australia, section 359B of the Criminal Code Act 1899 of Queensland, section 19AA of the Criminal Law Consolidation Act 1935 of South Australia, section 21A of the Crimes Act 1958 of Victoria, section 192 of the Criminal Code Act 1924 of Tasmania and section 2 of the Harassment Act 1997 of New Zealand have similar provisions prohibiting any person from engaging in conduct that includes repeated instances of, inter alia, acting in a way that could reasonably be expected to arouse apprehension or fear in the victim for his or her own safety or that of another person. Section 264(1) of the Criminal Code of Canada prohibits repeated conduct that "causes the other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them".

defined under the proposed anti-stalking legislation, if taken forward. The LRC considered it unnecessary as the term could be easily understood by the courts and the ordinary public. Moreover, criminalising harassment without specifying a list of prohibited activities would help ensure that all kinds of activities that cause harassment can be caught. We tend to agree.

"Alarm" and "Distress"

3.9 We have deliberated on a suggestion that conduct that causes alarm should be made a criminal offence, while behaviour that causes distress should be made a civil wrong. Taking into account the following considerations, we agree to the LRC's recommendation that any course of conduct that causes another person alarm or distress should be made a criminal offence, if the anti-stalking legislation is pursued :

(a) if only conduct causing alarm is made a criminal offence, the victim would be given less protection;

(b) the suggestion seems to imply that alarm is more serious than distress. However, according to psychiatric literature, distress could have more serious effects in that it could be more lasting which leads to protracted psychological morbidity. Alarm could instead be a state that lasted for a few minutes that the victim would soon forget about; and

(c) there is no established definition or criteria to define or to measure distress and alarm. Furthermore, symptoms of distress might only surface a few days after the event. An examination of the victim's mental state some time after the event may not be reliable in assessing the degree of alarm or distress at the time. If only conduct causing alarm is made a criminal offence, the proposed legislation would miss out a substantial number of victims whom it is intended to protect.

3.10 We have also considered the need to define the terms "distress" and "alarm". These are terms that could be understood by ordinary people. The two terms have been used interchangeably in medical literature. There is no established definition or criteria to define or measure distress and alarm. Legally, these terms are questions of fact for the court to decide, taking into account the circumstances of each particular case. The anti-stalking legislation of overseas jurisdictions provides no definition of "distress" or "alarm". We, therefore, do not consider it appropriate to define the two terms in the proposed legislation, if taken forward.

Collective Harassment

3.11 We have also considered whether collective harassment should also be made offences.

3.12 The offence of harassment recommended by the LRC targets one-person-to-one-person conduct. However, in the context of some activities such as debt collection (which was the subject of a separate LRC report[8]), it may be more common to see a group of people acting together to harass another, where each one of the perpetrators only undertakes one act of harassment.

3.13 In the situation above, it may be difficult to impute liability on the individual stalkers. Possible liability may be established under the doctrine of joint enterprise, or pursuant to section 89 of the Criminal Procedure Ordinance (Cap. 221) if they are secondary parties in the commission of the offence. The former basis requires proof of the existence of a joint enterprise or a common design and the parties' participation in it, while the latter basis requires proof of the individual secondary

[8] In addition to the LRC report on "Stalking" in which the LRC has expressed some views over the harassment of debtors by debt collection agencies, the LRC published the report on "the Regulation of Debt Collection Practices" in July 2002. The report's recommendations include the creation of a criminal offence of harassment of debtors and others. The Administration responded in September 2005 that there were already various effective legislative provisions to combat illegal debt collection practices of debt collection agencies. There was thus no need to introduce any new legislative provisions. The elements of stalking undertaken by debt collectors and their associates should be covered under a general offence of harassment along the lines of the proposed offence in the LRC report on "Stalking".

party's act(s) of aiding, abetting, counselling or procuring the commission by another person of any offence. In the situation mentioned in paragraph 3.12 above, due to the individual parties' limited role or limited extent of participation, there is often difficulty in proving their guilt under the existing mechanism.

3.14 The UK amended the PHA in 2001 by inserting a new section 7(3A)[9] to make it clear that the legal sanctions that apply to a campaign of harassment by an individual against another individual also apply to a campaign of collective harassment by two or more people. It also confirms that one person can pursue a "course of conduct" by committing one act personally and arranging for another person to commit another act. This plugs the loophole where the stalker could not be alleged to have pursued a "course of action" if he acts only once personally and then arranges for other people to commit numerous other stalking acts on the victim.

3.15 We are not aware of any similar provisions in the anti-stalking legislation in other jurisdictions.

3.16 It is for consideration whether a provision should be included in the proposed anti-stalking legislation, if taken forward, to protect an individual from collective harassment by two or more people who undertake only one act of harassment each.

Harassment to Deter Lawful Activities

3.17 The UK's PHA also provides for an offence to deal with a single stalker on multiple victims (e.g. employees of the same company). The UK introduced in 2005 a provision which makes it an offence for a person to pursue a course of conduct involving the harassment of two or more persons on separate

[9] Section 7(3A) provides that "[a] person's conduct on any occasion shall be taken, if aided, abetted, counselled or procured by another – (a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and (b) to be conduct in relation to which the other's knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring."

occasions which he knows or ought to know involves harassment and the purpose of which is to persuade any person (not necessarily one of the persons being harassed) not to do something he is entitled to do or to do something he is not obliged to do. Section 1(1A) of the PHA provides that :

"A person must not pursue a course of conduct—

(a) which involves harassment of two or more persons, and
(b) which he knows or ought to know involves harassment of those persons, and
(c) by which he intends to persuade any person (whether or not one of those mentioned above) —
(i) not to do something that he is entitled or required to do, or
(ii) to do something that he is not under any obligation to do."

3.18 Before the introduction of section 1(1A) in 2005, there had been a number of companies which were granted injunctions under the PHA to protect their employees from harassment by animal rights protestors. It, however, remained unclear how far the offence of harassment under the PHA could be used to protect employees of a company or a company itself as it had to be proven that there was a course of conduct in which one person had harassed another on at least two occasions to secure a conviction of harassment under section 1(1) of the PHA. The UK courts applied a strict interpretation of the word "another" which had confined the application of that provision to harassment of single individuals. So, without evidence that any individual employee had been harassed on more than one occasion, the charge that the corporation had been harassed on more than one occasion through conduct directed at different employees could not be sustained. Employees of a company would not be protected if they themselves had not previously been harassed, even though a fellow employee had been.

3.19 The purpose of the introduction of section 1(1A) of the PHA was to protect company employees from harassment by activist groups. The definition of "a course of conduct" was expanded to include conduct in relation to two or more persons on at least one occasion in relation to each of those persons.

3.20 This offence was created to capture behaviour which caused alarm or distress to two or more persons to the extent that any person (whether or not one of those persons, and not limited to individuals) was deterred from carrying out his lawful business. The sort of behaviour which will engage the offence is activity involving threats and intimidation which forces a person or persons to stop carrying out their lawful business.

3.21 The introduction of section 1(1A) of the PHA aimed specifically to protect company employees from harassment by activist groups. So far there is little indication that this is a matter of major concern in Hong Kong. We are also not aware of similar provisions in the anti-stalking legislation in any other jurisdictions.

Invitation of Comments

3.22 Comments are invited on :

(a) whether stalking should be made a criminal offence based on the LRC's recommendation that :

(i) a person who pursues a course of conduct which amounts to harassment of another, and which he knows or ought to know amounts to harassment of the other, should be guilty of a criminal offence;

(ii) for the purposes of this offence, the harassment should be serious enough to cause that person alarm or distress; and

(iii) a person ought to know that his course of conduct

amounts to harassment of another if a reasonable person in possession of the same information would think that the course of conduct amounted to harassment of the other; and

(b) whether collective harassment and harassment to deter lawful activities should be made offences.

Penalty

LRC's Recommendation

3.23 The LRC recommended that :

(a) a person who was guilty of the proposed offence of pursuing a course of conduct which amounted to harassment of another, and which he knew amounted to harassment of the other, should be liable to a fine and to imprisonment for two years; and

(b) a person who was guilty of the proposed offence of pursuing a course of conduct which amounted to harassment of another, and which he ought to have known amounted to harassment of the other, should be liable to a fine and to imprisonment for 12 months.

3.24 The LRC pointed out that incarceration would not only protect the victims by preventing stalkers from committing a second offence, but also give the victim time to rearrange his personal affairs or escape to a safe place. It would assure victims that they could be safe at least while the stalker was in prison. Stalkers could also receive counselling or mental treatment in jail.

3.25 The LRC proposed that a person who knew or ought to have known that his course of conduct caused another person alarm or distress should be guilty of the offence of harassment. On

penalty, the LRC proposed a lower penalty for those who were convicted under the "ought to know" limb, i.e. a fine and 12 months' imprisonment, for they were less culpable than those who committed the offence knowingly, for whom the proposed maximum penalty was a fine and two years' imprisonment.

3.26 The LRC suggested that a distinction should be drawn between stalkers who knew that their pursuits amounted to harassment, and stalkers who did not have this knowledge but, when viewed objectively according to the standard of a reasonable person in possession of the same information, ought to have known that their pursuits amounted to harassment. Offenders in the latter category did not normally act with malice. They were usually delusional and were merely obsessed with their victims. These stalkers might act under the mistaken, but honest, belief that their actions were harmless and were welcomed by the victims. The LRC considered that whilst these stalkers should also be subject to criminal sanctions, they were less culpable than those who committed the offence knowingly. The law should hence prescribe a lower penalty for those who were convicted under the "ought to know" limb.

Considerations

Two-limbed Penalty

3.27 We note that it is not uncommon in stalking cases that the stalker is of sound mind, but has not thought about the consequences of causing his victim alarm or distress. The LRC's recommendation to provide for the "ought to know" limb would ensure that victims in such cases can be adequately protected.

3.28 As far as the distinction in penalty is concerned, we note that some jurisdictions (including the UK, Canada, and Victoria in Australia) provide in their anti-stalking legislation that the stalking offence may be committed either knowingly or recklessly (or in circumstances where the perpetrator ought to

know that his pursuit has the prescribed effect) but do not make a distinction between the two categories of offenders in terms of penalty.

3.29 If two limbs of penalty are provided for, there would be a need to show proof of knowledge before prosecution under the "knowingly" limb could be made. While intentional offenders may be more culpable, we consider it more suitable to leave it to the court to decide on the appropriate penalty having regard to the circumstances of individual case, the strength of the *mens rea* element and the evidence available. It would be for the court to consider if intentional offenders should be given heavier punishment.

Maximum Penalty

3.30 For the offence committed knowingly, the LRC recommended that the maximum penalty should be set at a fine and two years' imprisonment. The LRC did not recommend any particular amount of fine. Section 97 of the Magistrates Ordinance (Cap. 227) empowers magistrates to impose a fine even if the relevant legislation is silent on this. In the case of a summary offence, the normal maximum fine which a permanent magistrate could impose is Level 6 ($100,000).

3.31 In determining a fine for an offence, it is desirable to maintain consistency in the levels of fine for similar offences. The maximum fine level for similar offences ranges from $1,000 (for making / sending offensive phone calls / messages contrary to section 20 of the Summary Offences Ordinance (Cap. 228)) to $20,000 (for sending a prohibited article contrary to sections 32(1)(f) and 38 of the Post Office Ordinance (Cap. 98)). Maximum fines in anti-stalking legislation in overseas jurisdictions should also be a useful reference : they range from US$1,000 in California to £5,000 in the UK.

3.32 Many overseas jurisdictions[10] provide for imprisonment only, but not fines, in their anti-stalking legislation. However, noting that some victims may be spouses of the stalkers and there may be financial considerations (see paragraph 3.75 below), it may be appropriate to provide for a fine as well which could serve as another penalty option open to the court. Consideration could be given to setting the fine at, say, $100,000 for the proposed offence to reflect the seriousness of the proposed offence and to provide a greater deterrent effect in view of the distress that may be caused to the victims. The court will take into account the ability of the offender to pay in each particular case when the court is minded to impose a fine.

3.33 As regards imprisonment term, the range of the maximum terms of imprisonment for similar offences in Hong Kong is quite large : from two months (for making / sending offensive phone calls / messages contrary to section 20 of the Summary Offences Ordinance (Cap. 228)) to seven years (for outraging public decency, contrary to the common law and punishable under section 101I of the Criminal Procedure Ordinance (Cap. 221)). Taking into account the above and the LRC's recommendations, we propose setting the maximum penalty level for the proposed criminal offence, if taken forward, at a fine at Level 6 ($100,000) and imprisonment for two years.

3.34 We also need to consider whether collective harassment and harassment to deter lawful activities, if made offences, should be subject to the same level of penalty taking into account the magnitude of potential alarm and distress caused by these types of harassment. We are mindful that one-person-to-one-person harassment may not necessarily cause less alarm and distress than that caused by collective harassment and harassment to deter lawful activities. By the same token, collective harassment and harassment to deter lawful activities may not necessarily be more alarming and distressing than

[10] These jurisdictions include New Zealand (imprisonment for two years), Australian Capital Territory (imprisonment for two years), Northern Territory of Australia (imprisonment for two years), South Australia (imprisonment for three years), Queensland (imprisonment for five years), Victoria in Australia (imprisonment for ten years) and Canada (imprisonment for ten years).

one-person-to-one-person harassment. By way of reference, the penalty for collective harassment and harassment to deter lawful activities under the PHA is set at the same level as one-person-to-one-person harassment, which is on summary conviction imprisonment for a maximum term of six months and a fine not exceeding Level 5 (£5,000). Our inclination is to propose the same level of penalty for collective harassment and harassment to deter lawful activities, if they are made offences.

Time Limitation for Institution of Court Proceedings

3.35 Unless specified, the institution of court proceedings for summary offences is limited to six months from the day of the offence. From the law enforcement perspective, there is a need to extend the limitation period as in some cases, the victim may not know the identity of the offender. It may take time for the investigation authority to identify and locate the offender. In the light of the above, it is for consideration whether a longer period, say two years, should be provided for making a complaint or laying information in respect of the offence of harassment.

3.36 As the proposed offence involves a course of conduct, we need to consider the appropriate point from which the limitation period starts to run. This can be based on the LRC's proposal that time should begin to run when the actions taken by the stalker constituted a course of action and the cumulative effect of these actions was such that the victim was alarmed or put in a state of distress.

Invitation of Comments

3.37 Comments are invited on the following issues, if the proposed offences are pursued :

(a) whether a single maximum penalty level for the proposed offence of harassment should be provided, irrespective of

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

(b) whether the maximum penalty for the proposed offence of harassment should be set at a fine at Level 6 ($100,000) and imprisonment for two years;

(c) whether the maximum penalty for the offences of collective harassment and harassment to deter lawful activities should be set at the same level as in (b) above; and

(d) whether the limitation period for institution of court proceedings should be specified as two years from the time when the actions taken by the stalker constituted a course of action and the cumulative effect of these actions was such that the victim was alarmed or put in a state of distress.

Defences

LRC's Recommendation

3.38 The LRC recommended that it be a defence for a defendant who was charged with the offence of harassment to show that :

(a) the conduct was pursued for the purpose of preventing or detecting crime;

(b) the conduct was pursued under lawful authority; or

(c) the pursuit of the course of conduct was reasonable in the particular circumstances.

3.39 The LRC also recommended that the courts should take into account the rights and freedoms provided in Article 17 (privacy,

family, home and correspondence)[11], Article 19 (freedom of expression)[12] and Article 21 (peaceful assembly)[13] of the International Covenant on Civil and Political Rights ("ICCPR") when determining whether the pursuit in question was reasonable in the particular circumstances.

3.40 Regarding paragraph 3.38(a) and (b) above, the LRC recommended that the defences of prevention or detection of crime and lawful authority should be made available so as to exclude these activities from the scope of the offence. The latter was to ensure that the law would not put in jeopardy the freedom of others to pursue lawful activities.

3.41 As for paragraph 3.38(c) above, the LRC was mindful that it was incumbent upon the press to impart information and ideas on matters of public interest. Without some protection for seeking out such information and ideas, the press would not be able to fulfil its checking function. Likewise, political canvassers, those who served subpoenas or statements of claim, security guards, insurance company investigators who were retained to detect malingering, and private investigators who were hired to gather evidence in civil disputes, might cause harassment which was legitimate if undertaken reasonably. In order to safeguard all these activities, there should be a defence of acting reasonably in the circumstances of the case. A defence based on the reasonableness of the pursuit would

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[11] Article 17 of the ICCPR provides that "(1) [n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks".

[12] Article 19 provides that "(1) [e]veryone shall have the right to hold opinions without interference. (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".

[13] Article 21 provides that "[t]he right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others".

provide flexibility. Replacing the general defence of reasonable pursuit by a list of specific exemptions would run the risk of excluding something that ought to have been included.

3.42 During the LRC's consultation, some in the media sector had expressed concern that journalists engaged in legitimate news-gathering activities would be at risk of arrest or imprisonment if they were persistent in their pursuit. One example quoted was a reporter who had the phone number of a business executive accused of cheating his customers. The business executive might have made clear to the reporter that he did not want to speak to the press. But as new allegations emerged, an ethical reporter had to ring and try to put the allegations to the executive and invite his response. The action could easily be construed as harassing behaviour. Similarly, journalists who waited day and night outside the homes of responsible officials to obtain their views and other information on a major incident might be considered unreasonable. The LRC pointed out in its report that in its view, the conduct of the journalists in these examples was reasonable in the circumstances even if their conduct was found by the courts to have amounted to harassment.

3.43 The LRC agreed that journalists must sometimes be persistent when trying to solicit responses from their targets who refused to talk to them over a matter of public interest. It was reasonable for a journalist to pursue a course of conduct in order to report on a matter of public interest. However, if the story was about the private facts of an individual with no public interest involved, the journalists should not pursue the individual to the point that he or she was alarmed or put in a state of distress. If a journalist sought to obtain information about a public figure's private life through harassment or persistent pursuit, it was only fair that the journalist was required to account for his conduct by convincing the court that his pursuit was reasonable.

Considerations

LRC's Proposed Defences

3.44 The defences recommended by the LRC largely follow those provided for under the PHA. Under section 1(3) of the PHA, defences are provided for the defendant to show that (a) the course of conduct was pursued for the purpose of preventing or detecting crime, (b) the course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or (c) in the particular circumstances the pursuit of the course of conduct was reasonable. We agree to the LRC's recommendation that these defences should be provided, if the proposed offence of harassment is pursued. Our consideration of the defence for news-gathering activities is set out in paragraphs 3.45 to 3.50.

News-gathering Activities

3.45 After the release of the LRC report, some in the media sector again expressed concerns about the possibility of the proposed legislation, if pursued, being exploited to interfere with press freedom. They commented that it was difficult to draw a line between stalking and just following someone for the purpose of news-gathering. There were concerns that a journalist who pursued an individual with persistence in the course of news gathering might be found guilty of harassment.

3.46 Some in the media sector also pointed out that what was a reasonable pursuit under the defence proposed in paragraph 3.38(c) would be subject to interpretation. They saw a need to define clearly the circumstances under which the pursuit of the course of conduct was considered unreasonable so that journalists would have a clear idea of what they could not do. Some considered that the proposed defence might not be sufficient to protect all the diverse legitimate activities of journalists. They therefore suggested including a specific

defence for news-gathering activities in the proposed legislation, if pursued.

3.47 The points raised in paragraphs 3.45 and 3.46 had in fact been thoroughly considered by the LRC. In the LRC's view, a defence of "legitimate news-gathering activities" was already subsumed under the defence of reasonable pursuit and it was unnecessary to create a separate defence. A more elaborate defence for legitimate news-gathering activities was also not practicable. Whether the harassing conduct of a journalist was legitimate or not would depend on many factors, such as the purpose of the pursuit (e.g. whether the matter investigated by the journalist was a matter of public importance), the nature and gravity of the subject matter, the status of the subject (e.g. whether he was a public officer, a celebrity or a victim of crime), whether the journalist persisted in total disregard of the subject's response, the time and place at which the incidents occurred, the number of calls or visits made, and whether abusive language was used.

3.48 There have been suggestions that a "public interest" defence should be considered. The LRC had also considered this and was of the view that it was unnecessary to provide for a public interest defence since the public interest in a matter pursued by journalists would be taken into account by the courts if the defence of "the pursuit of the course of conduct was reasonable in the particular circumstances" in paragraph 3.38(c) was adopted. In the LRC's view, the defence of acting reasonably in the circumstances would provide greater protection to journalists and other persons who carry out legitimate activities.

3.49 Of note is that the relevant legislation of a number of overseas jurisdictions (including the UK, Australia, New Zealand and Ireland) also includes a general and broad exemption or defence to cover reasonable conduct without specifying news-gathering activities as a specific defence.

3.50 We recognise that there are concerns from some stakeholders over possible interference with press freedom. We have explored the possibility of including a specific defence of "news-gathering activities". In addition to the considerations in paragraphs 3.47 to 3.49, we also need to consider the implications of such a specific defence on the protection the proposed legislation seeks to provide to victims of stalking. The question is whether the community is prepared to exempt from the proposed legislation all forms of news-gathering activities by the media irrespective of whether such activities would be considered reasonable in the particular circumstances. We would welcome views on whether a defence for news-gathering activities should be subsumed under the "reasonable pursuit" defence in paragraph 3.38(c) above as recommended by the LRC, or a separate, specific defence for news-gathering activities should be provided. If the latter, we would welcome views on how the specific defence, whether qualified or not, should be framed.

Courts' Consideration of Reasonableness

3.51 The LRC also recommended that the courts should take into account the rights and freedoms provided in Article 17 (privacy, family, home and correspondence), Article 19 (freedom of expression) and Article 21 (peaceful assembly) of the ICCPR when determining whether the pursuit in question was reasonable in the particular circumstances. The purpose of the LRC's recommendation was to remind the courts of the need to take into account the relevant human rights when determining whether the pursuit in question was reasonable in the circumstances.

3.52 As provided for under Article 39 of the Basic Law, the provisions of the ICCPR as applied to Hong Kong shall remain in force and shall be implemented through the laws of Hong Kong. The rights and freedoms mentioned above are guaranteed respectively by Articles 14, 16 and 17 of the Hong Kong Bill of Rights in section 8 of the Hong Kong Bill of

Rights Ordinance (Cap. 383).

3.53 Various rights and freedoms are also guaranteed by the Basic Law, including Article 27 (freedom of speech, of the press and of publication; freedom of assembly, of procession and of demonstration), Article 29 (prohibition of arbitrary or unlawful search of or intrusion into home or other premises) and Article 30 (freedom and privacy of communication).

3.54 Since the court is duty-bound to have regard to the Basic Law and the Hong Kong Bill of Rights in considering a case, it is not necessary to set out in the proposed legislation that the court should take into account the relevant provisions in its decision. The court would also be free to consult the LRC report and use it as an extrinsic aid to interpret the legislation. It is, therefore, not necessary to make specific reference to the relevant provisions of the ICCPR in the proposed legislation.

Invitation of Comments

3.55 Comments are invited on :

(a) whether the following defences proposed by the LRC for the offence of harassment, if pursued, should be provided :

(i) the conduct was pursued for the purpose of preventing or detecting crime;

(ii) the conduct was pursued under lawful authority; or

(iii) the pursuit of the course of conduct was reasonable in the particular circumstances;

(b) whether a defence for news-gathering activities should be subsumed under the "reasonable pursuit" defence in sub-paragraph (a)(iii) above as recommended by the LRC, or a separate, specific defence for news-gathering activities should be provided for the offence of harassment, if

pursued;

(c) if a specific defence for news-gathering activities should be provided, how the defence, whether qualified or not, should be framed;

(d) whether any other defences should be provided for the offence of harassment, if pursued; and

(e) whether, and if so what, defences should be provided for the offences of collective harassment and harassment to deter lawful activities, if pursued.

Restraining Orders in Criminal Proceedings

LRC's Recommendation

3.56 The LRC recommended that :

(a) a court sentencing a person convicted[14] of the offence of harassment might make an order prohibiting him from doing anything which would cause alarm or distress to the victim of the offence or any other person, as the court thought fit;

(b) the restraining order might be made in addition to a sentence imposed on the defendant convicted of the offence of harassment, or in addition to a probation order or an order discharging him absolutely or conditionally[15];

(c) the restraining order might have effect for a specified period or until further notice;

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[14] The LRC's recommendation is that a court may make a restraining order on a convicted person, but not an acquitted person.

[15] After a person is convicted, the court may make a probation order or an order to discharge the offender absolutely or conditionally (see section 3 of the Probation of Offenders Ordinance (Cap. 298) and section 36 of the Magistrates Ordinance (Cap. 227)).

(d) the prosecutor, the defendant or any other person mentioned in the restraining order might apply to the court for it to be varied or discharged; and

(e) a person who, without reasonable excuse, did anything which he was prohibited from doing by a restraining order should be guilty of an offence, which would be punishable by imprisonment for 12 months.

3.57 The LRC considered it necessary not only to punish stalkers for their actions but also to protect the victim from being harmed by the convicted stalker in the future. For example, the stalker might be restrained from coming within 100 metres of the victim. Although the victim might seek injunctive relief in the civil courts, it would be unfair to him if he is required to go through another hearing in order to obtain an injunction to protect his legitimate interests. This would not only be a duplication of judicial procedure, but also an additional burden on the victim in both emotional and financial terms.

3.58 The LRC was of the view that to provide maximum protection to the victims, a breach of the restraining order without reasonable excuse should be an arrestable offence. The benefit of having an additional offence of breach of a restraining order was that the victim would not have to bring proceedings himself to enforce the order.

<u>Considerations</u>

Restraining Order

3.59 In considering this proposal, we have made reference to the anti-stalking legislation in other jurisdictions. The laws of the UK and Queensland in Australia have specifically empowered their courts to make restraining orders. Other jurisdictions have framed such orders in the form of prohibition orders (Ireland), apprehended violence orders (New South Wales in Australia) or intervention orders (Victoria in Australia).

3.60 A restraining order may protect the victim from being harmed by the convicted stalker in the future. Empowering the court to grant such an order would save victims from having to seek civil injunctive reliefs. As a restraining order serves a unique protective purpose as described above, if this proposal is pursued, the court should be empowered to grant such an order irrespective of whether a sentence of imprisonment has been imposed on the convicted stalker or whether other types of order have already been imposed on him.

Duration of Restraining Order

3.61 The LRC suggested that the duration of the restraining order could be open-ended (until further notice) where the harassment was serious and the stalker was recalcitrant, or where the court was not yet in a position to judge how long the restraint should last. Allowing the orders to be open-ended would provide the court with flexibility and offer better protection to the victims. We note that such an arrangement is in line with that in the UK. Moreover, a restraining order would only prohibit defendants from doing anything which causes alarm or distress to the victims or others, and would not affect the other rights and freedoms of the defendants.

3.62 On the other hand, since the restraining order would be made as part of the sentencing process, a defendant convicted of the proposed stalking offence is entitled to know the duration of the restraining order under the principle of legal certainty. We note that restraining orders granted in Queensland may prohibit particular conduct, for example, contact for a stated period by the person with a stated person or the property of a stated person.

3.63 Injunctions granted under the DCRVO have a maximum validity of 24 months[16] though the Court may extend the

[16] These injunctions mainly contain provisions restraining the respondent from molesting the applicant, restraining any person from using violence against another person, prohibiting any person from entering or remaining in / requiring the respondent to permit the applicant to enter or remain in any premises or area.

validity period on application. However, injunctions under the DCRVO are civil remedies. It may not be appropriate to compare these directly with the restraining orders proposed for the anti-stalking legislation, which would be granted by a criminal court.

3.64 In considering the duration of a restraining order, a balance has to be struck between ensuring the victims' safety and respecting the defendants' privacy and right to liberty of movement. We would like to listen to public views on this issue.

Varying or Discharging a Restraining Order

3.65 The LRC recommended that the prosecutor, the defendant or any other person mentioned in the restraining order might apply to the court for it to be varied or discharged. Section 5(4) of the PHA provides that the prosecutor, the defendant or any other person mentioned in a restraining order may apply to the court which made the order for it to be varied or discharged. Section 359F(7) of the Criminal Code Act 1899 of Queensland provides that a restraining order may be varied or revoked by the court, and if the order provides, by another court.

3.66 Since circumstances may change over time, we agree with the LRC that if restraining orders are introduced, all interested parties, including the prosecutor, the defendant and any other persons mentioned in the order, should be allowed to apply for the order to be varied or discharged.

Breach of Restraining Order

3.67 If restraining orders are introduced, we consider that, to ensure compliance, it should be made an offence if the defendant, without reasonable excuse, does anything which he is prohibited from doing by a restraining order. The LRC recommended a penalty of imprisonment for 12 months. For reference[17], the

[17] As the requirements of a restraining order in different jurisdictions are different, the maximum penalties quoted here are just broad indicators and are not meant to be direct comparisons.

maximum penalty for breaching a restraining order under the PHA is a fine and imprisonment for five years[18] while that for the offence of harassment is a fine not exceeding Level 5 (i.e. £5,000) and imprisonment for six months. In Queensland, the maximum penalty for a person who knowingly contravenes a restraining order is 40 penalty units (i.e. AUS$4,000) or one year's imprisonment, while the maximum penalty for the offence of unlawful stalking is imprisonment for five years.

3.68 Breaching a restraining order may not be less serious than committing an offence of harassment. We propose that the maximum penalty for breaching a restraining order, if introduced, should be set at the same level as that for the offence of harassment (i.e. a fine at Level 6 ($100,000) and imprisonment for two years as proposed in paragraph 3.37(b)).

Order on Acquittal

3.69 The UK amended the PHA in 2004 to provide for restraining orders on acquittal. This amendment has been in force since 30 September 2009. Courts can consider making a restraining order when a person has been acquitted of any offence, where the court considers that a restraining order is necessary to protect a person from harassment by the defendant.

3.70 It is worth noting that the UK has widened the circumstances under which any evidence that would be admissible in civil

[18] Under the PHA, the penalty for breach of a restraining order is a maximum term of five years' imprisonment and / or a fine on conviction on indictment, or a maximum term of six months' imprisonment and a fine not exceeding Level 5 (i.e. £5,000) on summary conviction. It is, however, worth noting that the restraining order under the PHA would prohibit a person convicted of "an offence" (which may be an offence of harassment under section 2 of the PHA or an offence of putting another in fear of violence under section 4 of the PHA) from doing anything described in the restraining order for the purpose of protecting the victim from conduct which amounts to harassment or will cause a fear of violence. In other words, a restraining order under the PHA may restrain a convicted person from engaging in conduct that is more serious than just causing the victim alarm or distress. The English Court of Appeal set out certain guidelines for sentencing a person convicted of an offence under the PHA and one of the considerations for sentencers to bear in mind is whether the offence is a section 2 or a section 4 offence.

proceedings for an injunction (e.g. hearsay evidence[19]) can be adduced in considering the making of a restraining order in criminal proceedings. This is different from the existing rule in Hong Kong where hearsay evidence is admissible in criminal proceedings only in certain specific circumstances[20]. If a breach of a restraining order is made an offence, we consider it prudent to apply the existing rule against the admission of hearsay evidence to the proposed restraining order proceedings. With such a rule, it should be rare for the court to consider a restraining order necessary when the defendant has been acquitted, because in such cases the court has not been convinced that the allegations were true.

3.71 We note that the prohibition order in Ireland and the intervention order in Victoria in Australia can be made in respect of convicted stalkers only. The LRC did not recommend that restraining orders could be made on acquittal, but only following conviction. We do not intend to pursue order on acquittal at this stage.

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[19] A simple explanation of the term "hearsay" as described in the LRC report on "Hearsay in Criminal Proceedings" published in November 2009 is that "when A tells a court what B has told him, that evidence is called 'hearsay'".

[20] The rule against hearsay renders hearsay evidence inadmissible in criminal proceedings, unless it falls within one of the exceptions to the rule, including confession of an accused and statements of persons now deceased.

The LRC recommended in its report on "Hearsay in Criminal Proceedings" published in November 2009 that, as a general rule, the present rule against the admission of hearsay evidence should be retained but there should be greater scope to admit hearsay evidence in the following circumstances –

- if it falls within an existing statutory exception;
- if it falls within one of several common law exceptions to be preserved;
- if the parties agree; or
- if the court is satisfied that it is "necessary" to admit the hearsay evidence and that it is "reliable".

The Department of Justice is responsible for this report. In its interim response made in December 2010, the Department advised that "[t]he Department of Justice is studying the complex issues raised in the Law Reform Commission's report on Hearsay in Criminal Proceedings. The Department has asked the Law Society and the Bar Association for their views and will consider their responses carefully before reaching a conclusion on the report's recommendations".

Invitation of Comments

3.72 Comments are invited on :

(a) whether or not a court sentencing a person convicted of the offence of harassment, if pursued, should be empowered to make a restraining order prohibiting him from doing anything which causes alarm or distress to the victim of the offence or any other person as the court thinks fit; and

(b) if so :

(i) whether the restraining order may be made in addition to a sentence imposed on the defendant convicted of the offence of harassment, a probation order or an order discharging him absolutely or conditionally;

(ii) whether the duration of the order has to be specified or the order may have effect either for a specified period or until further notice;

(iii) whether the prosecutor, the defendant or any other person mentioned in the restraining order should be allowed to apply to the court for it to be varied or discharged; and

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

Civil Remedies for Victims

LRC's Recommendation

3.73 The LRC recommended that :

(a) a person who pursued a course of conduct which would have constituted the offence of harassment should be liable in tort to the object of the pursuit; and

(b) the plaintiff in an action for harassment should be able to claim damages for any distress, anxiety and financial loss resulting from the pursuit and to apply for an injunction to prohibit the defendant from doing anything which causes the plaintiff alarm or distress.

3.74 The LRC considered that the criminal law should not be the exclusive method for preventing and restraining harassment. The LRC pointed out that not all victims would like to see their stalkers convicted. A victim may not wish to put the stalker in jail and may not want to see the stalker's career and future ruined by a criminal conviction.

3.75 Moreover, arresting the stalker might worsen an already volatile situation and provoke him to take aggressive action against the victim and his family members. Where the victim is the spouse of the stalker, the victim may wish to continue to live or maintain a relationship with the stalker before deciding whether to proceed with divorce proceedings. There may also be financial considerations particularly when there are children to look after. Imprisonment results in loss of employment and may lead to financial hardship for the family. Prosecution may do more harm than good in these cases and may precipitate the final break up of the family with all the adverse consequences for any children. Some victims, therefore, may prefer civil remedies that are designed to protect them from further harassment and to compensate for their losses.

3.76 The LRC considered that a person who had suffered distress or financial loss as a result of having been harassed by a stalker should have a remedy at civil law. In addition to passing the appropriate sentence for the conviction of the proposed offence of harassment, the court may order the convicted stalker to pay to the victim compensation for any personal injury or loss of property under the existing section 73 of the Criminal Procedure Ordinance (Cap. 221) and section 98 of the Magistrates Ordinance (Cap. 227). However, a victim who has suffered only emotional distress but not personal injury or loss of property is not entitled to receive any compensation in a criminal court. Likewise, a victim who has incurred removal expenses or counselling fees in consequence of his being stalked cannot recover these expenses in criminal proceedings. He has to seek remedies in tort in civil proceedings.

3.77 However, none of the existing torts recognised by the courts captures the full extent and degree of a stalker's behaviour. Providing a civil remedy by way of a distinct tort of harassment would enable a victim to claim compensation, not just in respect of personal injury and loss of property, but also in respect of damages arising from any distress, anxiety and other financial loss. The victim would not be required to show bodily harm or psychiatric illness before he could obtain relief. Proof of alarm or distress caused by harassment would suffice. A civil remedy would be more appropriate in circumstances where the stalker's behaviour is not sufficiently serious to warrant the intervention of the criminal law.

Considerations

3.78 The LRC pointed out that since the existing civil law only protected the person and property of an individual rather than his state of mind or mental health, it was necessary to specifically provide for civil remedies in the proposed anti-stalking legislation. A similar civil remedy is provided under the PHA, under which victims can claim damages for any anxiety caused by, and any financial loss resulting from, the

harassment. The Domestic Violence and Stalking Act of Manitoba also creates a tort of stalking, enabling persons subjected to stalking to claim damages if they wish to do so.

3.79 None of the existing torts recognised by the courts in Hong Kong captures the full extent and degree of a stalker's behaviour. Creating a distinct tort of harassment would enable the victim to claim relief by proving only alarm or distress caused by harassment even though no bodily harm or psychiatric illness can be shown. It would also allow him to apply for an injunction. Furthermore, this avenue of redress may be pursued on its own or in addition to the criminal proceedings, even in cases where the accused is discharged. This would provide greater protection to victims.

3.80 An added advantage of providing a civil remedy for harassment identified by the LRC is that the standard of proof is lower in civil cases. A conviction in criminal proceedings requires the courts to be satisfied beyond reasonable doubt that the defendant committed the offence. Criminal law cannot provide protection where the evidence does not satisfy the criminal standard of proof. In civil proceedings, the courts only need to be satisfied on the balance of probabilities that the defendant committed the wrongful act. The creation of a tort of harassment could therefore provide protection in cases where the evidence has not reached the standard of proof required in criminal proceedings. We see merit in including this in the anti-stalking legislation, if pursued.

Invitation of Comments

3.81 Comments are invited on whether :

(a) a person who pursued a course of conduct which amounted to harassment serious enough to cause alarm or distress of another should be liable in tort to the object of the pursuit; and

(b) the plaintiff in an action for harassment should be able to claim damages for any distress, anxiety and financial loss resulting from the pursuit and to apply for an injunction to prohibit the defendant from doing anything which causes the plaintiff alarm or distress.

Enforcement of Injunctions

LRC's Recommendation

3.82 The LRC recommended that :

(a) where a civil court granted an injunction in an action for harassment, it should have the power to attach a power of arrest to the injunction;

(b) a police officer should be able to arrest without warrant any person whom he reasonably suspected to be in breach of an injunction to which a power of arrest was attached;

(c) the court dealing with the breach should have the power to remand the defendant in custody or release him on bail;

(d) where the court had not attached a power of arrest to the injunction, the plaintiff should be able to apply to the court for the issue of a warrant for the arrest of the defendant if the plaintiff considered that the defendant had done anything which he was prohibited from doing by the injunction; and

(e) if the defendant was arrested under such a warrant, the court dealing with the breach should have the power to remand him in custody or release him on bail.

3.83 In the LRC's opinion, unless the above recommendation is adopted, a person who wants to enforce an injunction obtained pursuant to anti-stalking legislation would have to apply to the

court to commit the defendant to prison for contempt of court, and to serve the notice to commit on the defendant. This procedure is expensive and cumbersome and the stalker may evade service of court documents. Offenders who are in breach of an injunction are likely to repeat the breach. Given that victims of stalking were in a similar position to victims of domestic violence, the LRC recommended that the law should assist the former as well in enforcing injunctions granted in their favour.

Considerations

Authority of the Court to Attach a Power of Arrest to an Injunction

3.84 The LRC's recommendation in paragraph 3.82(a) would allow the court in a civil action for harassment to have the authority to attach a power of arrest to an injunction. This serves to enforce an injunction granted in favour of the plaintiff.

3.85 Under section 5 of the DCRVO, a police officer may arrest without warrant any person whom he reasonably suspects of being in breach of an injunction attached with an authorisation of arrest, and the police officer shall have all necessary powers (including the power of entry by the use of reasonable force) to effect that arrest. The arrested person should be brought before the court before the expiry of the day after the day of his arrest. We consider that similar arrangements should be adopted in the proposed anti-stalking legislation, if taken forward.

3.86 Nevertheless, consideration should be given to whether the court's power should be circumscribed. Making reference to section 5(1A) of the DCRVO[21], the following specific provision may be included in the proposed legislation :

[21] Under section 5(1A) of the DCRVO, a court shall not attach an authorisation of arrest to an injunction granted against a person unless (a) it is satisfied that the person has caused actual bodily harm to the protected person; or (b) it reasonably believes that the person will likely cause actual bodily harm to the protected person.

"If the court is satisfied that the defendant has pursued a course of conduct which has caused the plaintiff alarm or distress or it reasonably believes that the defendant will likely cause the plaintiff alarm or distress, it may attach a power of arrest to an injunction."

3.87 To facilitate the Police's enforcement work in terms of verifying the particulars of an injunction issued by a civil court, we propose that the anti-stalking legislation, if taken forward, should provide for arrangements similar to those under the DCRVO, under which a copy of any authorisation of arrest and the injunction to which it is attached shall be served on the Commissioner of Police.

Court's Power to Detain

3.88 It should be noted that the court has no power to detain a defendant in civil proceedings unless specifically provided for in the legislation. Section 5(3) of the DCRVO states that where a person is arrested pursuant to the authorisation of arrest attached to an injunction, i.e. when he is suspected of breaching the injunction by reason of his use of violence or his entry into the premises specified in the injunction, he shall be brought before the court and not be released before the expiry of the day after the day of his arrest unless the court directs otherwise. The provision also states that the person may not be detained at any time after the expiry of the day after the day of his arrest. It is justifiable to provide for a similar power to the court under the proposed anti-stalking legislation, if pursued. If the anti-stalking legislation is taken forward, we intend to adopt the LRC's recommendation in paragraph 3.82(c) above so that the court will have the power to remand the defendant in custody or release him on bail when dealing with a breach of an injunction granted in an action for harassment to prevent the defendant from harassing the plaintiff.

Warrant for Arrest

3.89 The recommendations in paragraph 3.82(d) and (e) are modelled on the UK's Family Law Act 1996 ("FLA"). Under section 47(8) of the FLA, if the court has made an occupation order but has not attached a power of arrest, then if at any time the applicant considers that the respondent has failed to comply with the order, he may apply to the relevant judicial authority for the issue of a warrant for the arrest of the respondent. Under section 47(9) and (10) of the FLA, the relevant judicial authority shall not issue a warrant unless the application is substantiated on oath and there are reasonable grounds for believing that the respondent has failed to comply with the order; and if a person is arrested under such a warrant, the court dealing with the contempt proceedings should have the power to remand him in custody or release him on bail if the matter is not disposed of forthwith. We suggest that similar arrangements should be adopted if the proposed anti-stalking legislation is taken forward.

Whether Breaches of Civil Injunction should be Made a Criminal Offence

3.90 The LRC did not recommend making a breach of a civil injunction a criminal offence. A breach of a civil injunction to which an authorisation of arrest is attached under the DCRVO is not a criminal offence either. This is different from the PHA which provides that a defendant who is found to have done anything which he is prohibited from doing by an injunction is guilty of a criminal offence.

3.91 The LRC pointed out in its report that it was unnecessary to create a further offence to deal with breaches of civil injunctions. Whereas a person would commit the offence of harassment only if he has engaged in a series of acts which amount to harassment of another, one single act would suffice to constitute a breach of a civil injunction. Imposing criminal sanctions for breach of a civil injunction would be too harsh and the absence of an additional offence of breach of a civil

injunction would not expose the victim to a significant risk of harm because the breach is punishable as a contempt of court and the court has power to order committal or sequestration in any case where contempt is found. The court may also require a person guilty of contempt of court to pay a fine or to give security for his good behaviour.

3.92 As a civil injunction is part of the civil remedy, it may be disproportionate to criminalise its breach. The attached power of arrest would serve the purpose of bringing the defendant before the court again if the civil injunction is breached. We agree with the LRC that a breach of a civil injunction should not be made a criminal offence.

Invitation of Comments

3.93 Comments are invited on :

(a) whether the following LRC recommendations should be taken forward :

(i) where a civil court grants an injunction in an action for harassment, it should have the power to attach a power of arrest to the injunction;

(ii) a police officer should be able to arrest without warrant any person whom he reasonably suspects to be in breach of an injunction to which a power of arrest is attached;

(iii) the court dealing with the breach should have the power to remand the defendant in custody or release him on bail;

(iv) where the court has not attached a power of arrest to the injunction, the plaintiff should be able to apply to the court for the issue of a warrant for the arrest of the defendant if the plaintiff considers that the defendant

has done anything which he is prohibited from doing by the injunction; and

(v) if the defendant is arrested under such a warrant, the court dealing with the breach should have the power to remand him in custody or release him on bail; and

(b) our view that a breach of a civil injunction should not be made a criminal offence.

Chapter Four : Law Reform Commission's Recommendations Not to be Pursued

Certificate for Matters related to Serious Crime and Security

LRC's Recommendation

4.1 The LRC recommended that :

(a) a certificate issued by the Chief Executive or his designate stating that anything carried out by a specified person on a specified occasion related to security or the prevention or detection of serious crime should be conclusive evidence that the provisions of the anti-stalking legislation did not apply to the conduct of that person on that occasion; and

(b) the term "serious crime" referred to in (a) above should be defined in the legislation with reference to the maximum sentence applicable to the offences that could be considered as falling within that description.

4.2 The LRC considered that there should be procedures in place to facilitate proof of a specified defence where the pursuit related to serious crime or security matters. Security work might be compromised if intelligence agents were required to testify before the court and were cross-examined by the prosecutor. Likewise, an investigation in relation to a serious crime might be frustrated if a police officer had to adduce evidence in open court showing that the purpose of his pursuit was to prevent or detect crime.

Considerations

4.3 The PHA provides that the Secretary of State may certify, retrospectively, that a course of conduct carried out by a specified person on a specified occasion related to national security, the economic well-being of the UK, or the prevention

or detection of serious crime and was done on behalf of the Crown.

4.4 The certificate proposed by the LRC would be conclusive evidence that the provisions of the proposed legislation do not apply. This would in effect render certain actions of executive agencies immune from liability and place the final say on the facts in the hands of the executive instead of the judiciary. This may not be compatible with the right of access to the courts under the Basic Law and the Hong Kong Bill of Rights. There is no similar certificate mechanism under the PDPO which also provides for exemption for the prevention and detection of crime as well as safeguarding security in respect of Hong Kong. Apart from the PHA, we are not aware of any anti-stalking legislation in other jurisdictions providing for a similar certificate mechanism. We do not intend to pursue the proposed certificate mechanism.

Mental Evaluation and Treatment for Offenders

LRC's Recommendation

4.5 The LRC recommended that the courts might require any person convicted of the offence of harassment to receive counselling, undergo medical, psychiatric or psychological evaluation, and receive such treatment as was appropriate in the circumstances.

4.6 While the LRC considered that mental evaluation and psychiatric treatment for mentally disordered stalkers were essential to prevent recurrences of harassment, it opined that it was unnecessary for the anti-stalking legislation to impose a requirement that all persons charged with or convicted of the proposed offence must be subject to mental evaluation or psychiatric treatment.

Considerations

4.7 Imposing only retributive penalties on offenders may not adequately protect the victims as it may not address fully the root of the problem. A multi-disciplinary approach may be more effective in dealing with some stalkers who may need assistance in rehabilitation and in avoiding a recurrence of stalking behaviour.

4.8 There are already procedures for the courts to obtain expert medical opinion where necessary. If there are indications that an offender has an unstable mental state, or if the court has doubts about the mental health of the offender, the court could commit a person to a medical assessment and call for a report to assist it in determining whether the person should be dealt with in accordance with the Mental Health Ordinance ("MHO") (Cap. 136). One purpose of the MHO is to deal with an accused person who is medically assessed as "mentally incapacitated"[22]. Under the MHO, there are three different court orders for dealing with offenders with mental health problems : the hospital order[23], the guardianship order[24] and the supervision

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[22] A "mentally incapacitated person" is defined in the MHO as a person who is incapable, by reason of mental incapacity, of managing and administering his property and affairs or a patient or a mentally handicapped person. A "patient" is further defined as a person suffering or appearing to be suffering from mental disorder.

[23] Under sections 45 and 54 of the MHO, the court or magistrate may, by a "hospital order", authorise the admission of a person to, and detention in, a mental hospital or the Correctional Services Department Psychiatric Centre if it is satisfied on the written or oral evidence of two registered medical practitioners that, inter alia, the person is mentally disordered and the nature or degree of the mental disorder warrants his detention in a mental hospital or the Correctional Services Department Psychiatric Centre for medical treatment.

[24] Under section 44A of the MHO, if the court or magistrate is satisfied on the written or oral evidence of two or more registered medical practitioners that, inter alia, the person is mentally incapacitated to a nature or degree which warrants his reception into guardianship, and it is necessary in the interests of the welfare of the person or for the protection of other persons that the person should be so received, the court or magistrate may by a "guardianship order" place the person under the guardianship of the Director of Social Welfare, or a person authorised by the Director of Social Welfare for a specified period.

and treatment order.[25] We, therefore, agree with the LRC's view that it was unnecessary to impose a requirement that all persons charged with or convicted of the proposed offence must be subject to mental evaluation or psychiatric treatment (paragraph 4.6 above).

4.9 While there seems to be sufficient measures under the MHO to take care of offenders who are "mentally incapacitated", the LRC's recommendation in paragraph 4.5 above aims to grant the court additional power to compel offenders who are not "mentally incapacitated", but who would nonetheless benefit from medical, psychiatric or psychological treatment, to receive such treatment so as to prevent recurrence of acts of stalking.

4.10 From the legal policy point of view, there has to be very strong justification for putting a person who is not mentally incapacitated under compulsion to receive medical, psychiatric or psychological treatment against his will. Two basic principles must be satisfied: the interference must be in furtherance of a legitimate aim and the interference must be proportionate to the pursuit of that aim. In order to satisfy the proportionality test in this context, there has to be strong evidence of a need for the power to make an order of compulsory medical, psychiatric or psychological treatment. If the court were to be so empowered in the proposed legislation, appropriate safeguards for the convicted person, such as objective criteria for triggering the order, should be built in.

4.11 It would be very difficult to justify interference with a person's liberty in the form of compulsory treatment if the condition is not considered serious enough to trigger the avenues available under the MHO. There might be suggestion that the court

[25] Under section 44D of the MHO, if the court or magistrate is satisfied on the written or oral evidence of two or more registered medical practitioners that, inter alia, the person is mentally incapacitated to a nature or degree which warrants his receiving supervision and treatment, the mental incapacity is susceptible to treatment, and it is necessary in the interests of the welfare of the person or for the protection of other persons that the person should be so supervised and treated, the court or magistrate may by a "supervision and treatment order" require the person to be under the supervision of the Director of Social Welfare or any person acting under his authority for a specified period and to submit to treatment.

might be empowered to impose compulsory treatment on a convicted stalker upon recommendation from medical, psychiatric or psychological professionals that the stalker and the victim would benefit from such treatment / intervention. However, there might not be a clear medical reason for enforcing compulsory treatment on stalkers if they do not meet the relevant criteria under the MHO. It is also very difficult to provide a safeguard mechanism in the form of objective criteria.

4.12 There are also conflicting views about the practical benefit of mandatory treatment. An important factor in the success of psychological counselling is the acceptance of this type of counselling by the patient and his rapport with the counsellor. Without the consent and co-operation of the person involved, the usefulness of psychological treatment is doubtful. This is different from some of the treatments available under the MHO where anti-psychotic drugs may be used.

4.13 We are not aware of any anti-stalking legislation in other jurisdictions with specific provision for compulsory treatment of persons convicted of stalking.

4.14 For the reasons set out in paragraphs 4.7 to 4.13 above, we do not intend to pursue the LRC's recommendation set out in paragraph 4.5 above.

Certain Offences under the Landlord and Tenant (Consolidation) Ordinance

LRC's Recommendation

4.15 The LRC recommended that the Administration should give consideration to including the offences created under sections 70B and 119V of the Landlord and Tenant (Consolidation)

Ordinance (Cap. 7) ("LTO")[26] as specified offences under the Organized and Serious Crimes Ordinance (Cap. 455) ("OSCO").

4.16 In responding to the public consultation conducted by the LRC, the Police categorised the harassing behaviour of debt collectors and landlords as "harassment for financial gain". To address the problems arising from such harassment, the Police suggested that offences in this category should fall within the scope of the OSCO. They considered that this could send a clear message to those corporations which employed abusive debt collectors and to the organised criminal gangs which terrorised residents that their abusive practices might incur severe penalties if they were caught harassing debtors or tenants.

4.17 By virtue of the OSCO, the court may authorise the Secretary for Justice to require a person to furnish information or produce material relating to any matter relevant to the investigation of an "organised crime", or order a particular person to make certain material available to an authorised officer. The court may also make an order confiscating the proceeds of an offence specified under the OSCO.

Considerations

4.18 "Specified offence" under the OSCO means any of the offences specified in Schedule 1 or 2 to the OSCO; conspiracy, inciting another or attempting to commit any of those offences; or aiding, abetting, counselling or procuring the commission of any of those offences. Examples of those offences include murder, kidnapping, false imprisonment, trafficking in dangerous drugs, robbery, prostitution, manslaughter and bribery, which are all generally more serious in nature than

[26] Sections 70B and 119V of the LTO protect the right of tenants to the peaceful occupation of their premises. The wording of the offences under the two sections is largely the same, except that they apply to domestic tenancies created in different times. Section 70B applies to domestic tenancies with rent control, while section 119V applies to all domestic tenancies after the abolition of rent control in 1998. There are very few, if any, tenancies still bound by rent control, and hence section 70B is no longer of practical relevance.

harassment.

4.19 After the publication of the LRC's report in 2000, section 119V of the LTO was amended in 2002 to better ensure that there is no interference with the right of tenants to the peaceful occupation of their premises by imposing heavier penalties on harassment of tenants and unlawful eviction. The maximum penalties under section 119V have been increased, on first conviction, from only a fine of $500,000 to a fine of $500,000 and imprisonment for 12 months; and on a second or subsequent conviction, from only imprisonment for 12 months to a fine of $1 million and imprisonment for three years. The Administration considers that this has effectively enhanced the deterrent effect of the penalties for harassment of tenants or sub-tenants and there is no compelling justification to take forward the LRC's recommendation.

Chapter Five : Issues on which Comments are Invited

Need for Legislation

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

Offence of Harassment

2. Comments are invited on :

   (a) whether stalking should be made a criminal offence based on the LRC's recommendation that :

      (i) a person who pursues a course of conduct which amounts to harassment of another, and which he knows or ought to know amounts to harassment of the other, should be guilty of a criminal offence;

      (ii) for the purposes of this offence, the harassment should be serious enough to cause that person alarm or distress; and

      (iii) a person ought to know that his course of conduct amounts to harassment of another if a reasonable person in possession of the same information would think that the course of conduct amounted to harassment of the other; and

   (b) whether collective harassment and harassment to deter lawful activities should be made offences.

Penalty

3. Comments are invited on the following issues, if the proposed offences are pursued :

   (a) whether a single maximum penalty level for the proposed offence of harassment should be provided, irrespective of

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

(b) whether the maximum penalty for the proposed offence of harassment should be set at a fine at Level 6 ($100,000) and imprisonment for two years;

(c) whether the maximum penalty for the offences of collective harassment and harassment to deter lawful activities should be set at the same level as in (b) above; and

(d) whether the limitation period for institution of court proceedings should be specified as two years from the time when the actions taken by the stalker constituted a course of action and the cumulative effect of these actions was such that the victim was alarmed or put in a state of distress.

Defences

4. Comments are invited on :

(a) whether the following defences proposed by the LRC for the offence of harassment, if pursued, should be provided :

(i) the conduct was pursued for the purpose of preventing or detecting crime;

(ii) the conduct was pursued under lawful authority; and

(iii) the pursuit of the course of conduct was reasonable in the particular circumstances;

(b) whether a defence for news-gathering activities should be subsumed under the "reasonable pursuit" defence in sub-paragraph (a)(iii) above as recommended by the LRC, or a separate, specific defence for news-gathering activities should be provided for the offence of harassment, if pursued;

(c) if a specific defence for news-gathering activities should be provided, how the defence, whether qualified or not, should be framed;

(d) whether any other defences should be provided for the offence of harassment, if pursued; and

(e) whether, and if so what, defences should be provided for the offences of collective harassment and harassment to deter lawful activities, if pursued.

Restraining Orders in Criminal Proceedings

5. Comments are invited on :

(a) whether or not a court sentencing a person convicted of the offence of harassment, if pursued, should be empowered to make a restraining order prohibiting him from doing anything which causes alarm or distress to the victim of the offence or any other person as the court thinks fit; and

(b) if so :

(i) whether the restraining order may be made in addition to a sentence imposed on the defendant convicted of the offence of harassment, a probation order or an order discharging him absolutely or conditionally;

(ii) whether the duration of the order has to be specified or the order may have effect for a specified period or until further notice;

(iii) whether the prosecutor, the defendant or any other person mentioned in the restraining order should be allowed to apply to the court for it to be varied or discharged; and

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

Civil Remedies for Victims

6. Comments are invited on whether :

(a) a person who pursued a course of conduct which amounted to harassment serious enough to cause alarm or distress of another should be liable in tort to the object of the pursuit; and

(b) the plaintiff in an action for harassment should be able to claim damages for any distress, anxiety and financial loss resulting from the pursuit and to apply for an injunction to prohibit the defendant from doing anything which causes the plaintiff alarm or distress.

Enforcement of Injunctions

7. Comments are invited on :

(a) whether the following LRC recommendations should be taken forward :

(i) where a civil court grants an injunction in an action for harassment, it should have the power to attach a power of arrest to the injunction;

(ii) a police officer should be able to arrest without warrant any person whom he reasonably suspects to be in breach of an injunction to which a power of arrest is attached;

(iii) the court dealing with the breach should have the power to remand the defendant in custody or release him on bail;

(iv) where the court has not attached a power of arrest to the injunction, the plaintiff should be able to apply to the court for the issue of a warrant for the arrest of the defendant if the plaintiff considers that the defendant has done anything which he is prohibited from doing by the injunction; and

(v) if the defendant is arrested under such a warrant, the court dealing with the breach should have the power to remand him in custody or release him on bail; and

(b) our view that a breach of a civil injunction should not be made a criminal offence.

Appendix

List of Abbreviations

DCRVO	–	Domestic and Cohabitation Relationships Violence Ordinance
DVO	–	Domestic Violence Ordinance
FLA	–	Family Law Act 1996
ICCPR	–	International Covenant on Civil and Political Rights
ICSO	–	Interception of Communications and Surveillance Ordinance
LegCo	–	Legislative Council
LRC	–	Law Reform Commission
LTO	–	Landlord and Tenant (Consolidation) Ordinance
MHO	–	Mental Health Ordinance
OSCO	–	Organized and Serious Crimes Ordinance
PCPD	–	Privacy Commissioner for Personal Data
PDPO	–	Personal Data (Privacy) Ordinance
PHA	–	Protection from Harassment Act 1997 of the United Kingdom
UK	–	United Kingdom

Annex B

Proposals Not to be Pursued

Certificate for Matters related to Serious Crime and Security

The LRC recommended that a certificate mechanism should be established so that a certificate issued by the Chief Executive or his designate stating that anything carried out by a specified person on a specified occasion related to security or the prevention or detection of serious crime should be conclusive evidence that the provisions of the anti-stalking legislation did not apply to the conduct of that person on that occasion.

2. This recommendation would in effect render certain actions of executive agencies immune from liability and place the final say on the facts in the hands of the executive instead of the judiciary. This may not be compatible with the right of access to the courts under the Basic Law and the Hong Kong Bill of Rights.

Mental Evaluation and Treatment for Offenders

3. The LRC recommended that the courts should be granted additional power to compel offenders who are not "mentally incapacitated" under the Mental Health Ordinance (Cap. 136) ("MHO")[1], but who would nonetheless benefit from medical, psychiatric or psychological treatment, to receive such treatment.

4. It would be very difficult to justify interference with a person's liberty in the form of compulsory treatment if the condition is not considered serious enough to trigger the avenues available under the MHO. We are not aware of any anti-stalking legislation in other jurisdictions with specific provision for compulsory treatment of persons convicted of stalking.

Certain Offences under the Landlord and Tenant (Consolidation) Ordinance

5. The LRC recommended that the Administration should give

[1] Under the MHO, there are three different court orders for dealing with offenders with mental health problems : the hospital order, the guardianship order and the supervision and treatment order.

consideration to including the offences created under sections 70B and 119V of the Landlord and Tenant (Consolidation) Ordinance (Cap. 7) ("LTO")[2] as specified offences under the Organized and Serious Crimes Ordinance (Cap. 455) ("OSCO").

6. Examples of "specified offences" under the OSCO include murder, kidnapping and trafficking in dangerous drugs, which are all generally more serious in nature than harassment. Moreover, section 119V of the LTO was amended in 2002 to impose heavier penalties on harassment of tenants and unlawful eviction[1], which the Administration considers has effectively enhanced deterrence against harassment of tenants or sub-tenants. There is no compelling justification to take forward this recommendation.

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[2] Sections 70B and 119V of the LTO (Cap. 7) protect the right of tenants to the peaceful occupation of their premises. The wording of the offences under the two sections is largely the same, except that they apply to domestic tenancies created in different times. Section 70B applies to domestic tenancies with rent control, while section 119V applies to all domestic tenancies after the abolition of rent control in 1998. There are very few, if any, tenancies still bound by rent control, and hence section 70B is no longer of practical relevance.

[1] The maximum penalties under section 119V have been increased, on first conviction, from only a fine of $500,000 to a fine of $500,000 and imprisonment for 12 months; and on a second or subsequent conviction, from only imprisonment for 12 months to a fine of $1 million and imprisonment for three years.