

## **PCPD's Submission in response to Public Consultation on Stalking**

### General support on more stringent regulation

Generally speaking, stalking is more a subject touching on “personal privacy” rather than “information privacy” which falls within the ambit of the Personal Data (Privacy) Ordinance (“Ordinance”). However, given its wide scope of coverage according to its meaning<sup>1</sup> in the Consultation Paper (“Paper”) a stalker may engage in a series of act like collection and dissemination of the personal data of the victim, personal data privacy issues may arise as a result of the acts or behaviour of the stalker. In this respect, we wish to express our support to the Administration for its proposal to legislate and formulate sanctions against stalking. To treat stalking as a unique issue and deal with it in an independent manner would be able to plug the loophole of insufficient coverage or protection offered by our existing civil and criminal law, and thereby enhancing the privacy protection of individuals.

### Media Intrusion and Privacy

2. As explained in detail below, we have been dealing with two types of complaints under the Ordinance which could well fall within the ambit of stalking. The first type of complaints refers to clandestine taking of photos of celebrities and artistes through systematic surveillance and using special photographic equipment such as long focus lens and magnifier. The second type of complaints refers to abusive debt collection practices. In both cases, the complainants generally felt and we agree that the existing provisions of the Ordinance are inadequate in safeguarding privacy. First, we have no authority to award compensation to aggrieved data subjects or to impose monetary penalties on data users for contraventions of the Data Protection Principles (DPPs). The aggrieved data subject is left on his own to institute legal proceedings against the data user concerned to seek compensation under the Ordinance. Secondly, contravention of the DPPs is not an offence per se. The most forceful action we may take is to issue an enforcement notice to direct the data user to take specified remedial steps within a specified period. Only if the

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<sup>1</sup> “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”, paragraph 2.1 of the Paper.

data user contravenes the enforcement notice will it commit an offence. The punitive effect of this arrangement is weak. Thirdly, we may serve an enforcement notice only when a contravention is likely to continue or be repeated. Further, in the event that a data user resumes the same contravening act shortly after compliance with the enforcement notice, we can only issue another enforcement notice.

3. If we adopt the wide definition of stalking<sup>2</sup>, a data user's persistent unfair collection of the data subject's personal data may be part and parcel of the stalking. Back in 1999, the Court of Appeal in the case of *Eastweek Publisher Limited & Another v Privacy Commissioner for Personal Data [2000] 2 HKLRD 83* ruled that a photograph of an individual could amount to personal data.

4. More recently, three artistes complained to us in June 2011 alleging that photos of their private life at home were taken surreptitiously and published in magazines. The complainants had been photographed naked or in their intimate moment, in their own living units. The photos were apparently taken from a far distance outside their premises, without their knowledge, through systematic surveillance and using special photographic equipment. We have determined that such act amounted to unfair collection of personal data contrary to DPP1(2) in Schedule 1 under the Ordinance. Please refer to [http://www.pcpd.org.hk/english/publications/invest\\_report.html](http://www.pcpd.org.hk/english/publications/invest_report.html) for details of the case.

5. This is a classic example of a scenario where a breach of personal data privacy right would overlap with the concept of stalking. The artistes could well have perceived the act of covert photography as an interference with the privacy and family life over a period of time, thereby causing them distress, alarm or even serious impairment of their physical or psychological well-being.

6. We agree with paragraph 3.43 of the Paper that the media must sometimes be persistent when trying to solicit responses from their targets who refuse to communicate over a matter of public interest. It would be reasonable for the media 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 media should not pursue the individual to

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<sup>2</sup> Ibid

the point of “alarm” or “distress”. If the media sought to obtain information about a public figure’s private life through harassment or persistent pursuit, we agree that it is only fair that the media be required to account for its conduct by convincing the court that its pursuit was reasonable.

7. The Law Reform Commission (“LRC”) as stated in paragraph 3.2 of the Paper considered that the concept of persistence should be introduced into the formulation of the new offence by utilizing the phrase “a course of conduct”. We note that the essence of time or duration is an important factor to determine whether an activity is to be classified as stalking. Hence, we agree that a single act, no matter how bizarre, should not attract criminal liability.

8. We recognize the pivotal role that the media plays in conveying information of public concern to the society. We share the view of the Administration that while attaching great importance to the protection of freedom of expression and press freedom in Hong Kong, the public concern regarding the invasion of privacy should not be undermined at the same time. A balance is needed between press freedom and other fundamental human rights, including the right to privacy.

9. To cater for the specific concern of the media that the proposed legislation on stalking would jeopardize their legitimate journalistic activities, we support creation of a separate defence rather than having it subsumed under the general defence of the “pursuit of a course of conduct that is reasonable in the particular circumstances”. This should be restricted to “legitimate news-gathering activities”, not “all forms of news-gathering activities”. To meet the media’s expressed need to define clearly “legitimate news-gathering activities”, the Administration may wish to consider drawing up a non-exhaustive list of subjects for which news-gathering would serve the public interest, in the sense of being of legitimate concern to the public. In this regard, reference could be made to the list included in the judgement of Harrison, J in *CanWest TV Works Ltd v. XY* [2008] NZAR:-

- \* criminal matters;
- \* issues of public health and safety;
- \* matters of politics, government or public administration;
- \* matters relating to the conduct or organizations which impact on the public;
- \* exposing misleading claims made by individuals or organizations; and

\*exposing seriously anti-social and harmful conduct.

### Debt collection–related activities

10. Abusive debt collection practices are other forms of stalking behaviour which interfere privacy and may be collateral to a breach of personal data privacy rights. Our experience in handling enquires and complaints from the public supports the view expressed in the Paper that abusive debt collection practices including repeated telephone calls are serious social problems infringing the privacy of individuals. We note that in paragraph 2.11 of the Paper, 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, indicating that these harassment cases do possess significant threat to the community involving privacy infringement that should be properly addressed. Malpractices alleged in complaints involving debt collecting agencies included dispatching debt recovery letters to a complainant's workplace or neighbours, posting copies of a complainant's identity card with abusive message and demanding repayment of a debt from a referee who was not a guarantor.

11. While the above mentioned activities may be caught under the Ordinance, establishing stalking as a criminal offence is a more direct sanction and will deter activities which cause harassment and annoyance to the victims.

12. Insofar as the requirements of the Ordinance apply to individual cases involving debt collection agencies, this Office has taken action to enforce compliance with the requirements concerned. However, the requirements of the Ordinance are by no means applicable to the whole range of abusive behaviour that debt collection agencies are alleged to engage in. Even where the requirements do apply, they may not always be an effective means of protecting individuals from the abusive practices concerned. Hence, legislating against stalking and making it a criminal offence with civil remedies available to victims would be an effective way to tackle against the independent phenomenon.

### Civil Remedies for Victims

13. With respect to attributing civil remedies for victims, section 66 of the Ordinance confers a right on an aggrieved individual who suffers damages such

as injury to feelings by reason of a contravention of a requirement under the Ordinance to seek compensation from a data user. Similarly, there is no reason why victims to stalking should not be entitled to civil remedies which the perpetrator should be liable in tort to the object of the pursuit. After all, 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.

#### Certificate for matters related to Serious Crime and Security

14. Paragraph 4.1 of the Paper recites the LRC recommendation 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. Paragraph 4.4 of the Paper goes on to say that there is no similar certificate mechanism under the Ordinance which also provides for exemption for the prevention and detection of crime as well as safeguarding security in respect of Hong Kong.

15. In this connection, we would like to clarify that similar certificate mechanism is provided under section 57 of the Ordinance. This section provides for an exemption from the data protection principle 3 (section 57(2) refers) and data protection principle 6 (section 57(1) refers) in respect of personal data concerning the safeguard of security, defence or international relations in respect of Hong Kong. Specifically, section 57(3) of the Ordinance stipulates that any question whether an exemption under the section 57(1) is at any time was required in respect of any personal data may be determined by the Chief Executive or Chief Secretary for Administration; and a certificate signed by the Chief Executive or Chief Secretary for Administration certifying that this exemption is or at any time was so required shall be evidence of that fact. Moreover, section 57(4) provides that for the purpose of section 57(2), a certificate signed by the Chief Executive or Chief Secretary for Administration certifying that personal data are or have been used for the purpose of safeguarding security, defence or international relations in respect of Hong Kong shall be evidence of that fact. Section 57(5) goes further to say that the Privacy Commissioner shall comply with a direction not to carry out an inspection or investigation given by the Chief Executive or the Chief Secretary

for Administration under a certificate issued pursuant to section 57(3) or (4).

*Office of the Privacy Commissioner for Personal Data*  
*31 March 2012*