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Hong Kong Human Rights Monitor

Submission to
LegCo Panel on Information Technology and Broadcasting

Freedom of Expression and Protection of Privacy

(11 September 2006)

The Hong Kong Human Rights Monitor notes that the recent discussion was triggered by an incident. Since the parties involved will have the chance to have the court to adjudicate in the said case, we will not be focusing on the details. We, however, note that the case may give the court to chance to look at the evolving common law on breach of confidence, and that any emotional discussions of the laws and any regulatory institutions may be counter productive.

The Monitor recognises that privacy is an important right which requires protection, especially from public authorities.

However, it is not easy to strike a balance between the competing of the rights to freedom of expression (which include the freedoms of information and the press) and the right to privacy even in a democracy, not to mention here in Hong Kong.

In Hong Kong the lack of democratic control and the vulnerability of the free press under one country two systems mean that the freedom of expression has to be very jealously guarded. One should not easily jump to any quick fixes which may have serious or adverse impact on the press or other freedoms. Once we embark on a slippery slope of action by allowing the authorities to bring the media under their control or substantially undermining the effectiveness of the media in discharging its important obligation to inform, educate and entertain, we will be hurting the important basis for sustaining a free, just and autonomous society.

While we agree that it is important to find ways to protect privacy in a way which will not adversely affect our freedoms, such discussions may not be very productive in the heat of the moment which has been triggered by the rather sensational and emotive discussions.

When we look at our existing laws, there are established controls in place on obscene and indecent articles. A person who for the first time published category II articles as category I is punishable for a maximum fine of HK\$400,000 and imprisonment for a year. While such penalties in the law are more than adequate, there are concerns that the level of penalty actually handed down by the court is at present too lenient. In the right cases, such concerns should be addressed by the court itself with the assistance of a more diligent and competent Secretary for Justice by way of an appeal with cogent arguments and evidence adduced before the court. Nonetheless, we should respect the court's refusal to deliver a penalty lighter than what the general public expects if the judges find that justice prevails after taking into consideration all facts and circumstances.

It is important to state here that the rule of the law requires that the laws on obscene and indecent articles should not be bent to cover cases which the laws should not apply in cases merely to fit public sentiment.

On media publication of information or materials of privacy by the press, we noted that the House of Lords have ventured into expanding the common law on the issue of breach of confidence.¹ Judicial notice of such a development may well be found in Hong Kong, especially in a recent case. We should keep an eye on its development. The counsels for all parties concerned will probably be of great importance to us in finding the right balance in Hong Kong's context.

On the intrusion of privacy by the media, there are a number of common law and / or statutory offences such as assault, loitering causing concern,² disorderly conduct in public place³ and outraging public decency.⁴ With these laws in place, the acts of intrusion, say, the taking of photos in toilets, changing or other enclosed rooms without good reason are caught by the provisions. The sensitive issue actually lies in the publication of the photos. We submit that such publication may be dealt with by the court in the light of the development in the law relating to breach of confidence.

The Monitor continues to oppose the establishment of a press council, including a press privacy council with jurisdiction only in privacy. It is too risky an option to take for the protection of the more important freedom of expression in Hong Kong's particular context.

¹ Campbell v. MGN [2004] LRLR 5 (See <http://www.studywizard.org/first/reports/2004/campbell2004.html>)

² Section 160(3), Crimes Ordinance, Cap. 200.

³ Section 17B, Public Order Ordinance, Cap. 245.

⁴ Section 101I, Criminal Procedure Ordinance, Cap. 221.