

## **The Hong Kong Bar Association's Position Paper on the Proposed Anti-Stalking Legislation**

1. The Hong Kong Bar Association (HKBA) supports the proposals by the Administration. This is subject to the reservations expressed below.
2. The starting point is that the conduct characterized as stalking (that is a series of acts directed at a specific person which, taken together over a period of time, causes that person to feel harassed, alarm, distress, or causes the person to fear for their safety can cause real harm to an individual going about his or her ordinary life) is a social problem which is sufficiently important to be addressed in a unified fashion as opposed to the piecemeal response of the law which presently operates.
3. The harassment may have been brought about through no fault of the victim of the harassment. No doubt there are also cases where the victim of the harassment has been chosen arbitrarily. That said, no doubt the examples of the persons who might be stalkers contained in paragraph 2.1 of the Consultation Paper are some of the most common.
4. The HKBA recognises that there are a multitude of criminal offences and civil remedies which can be invoked to protect an individual from some aspects of harassment as defined above. Those offences are the product of a multitude of policy responses to a multitude of different concerns. Criminal law examples include anti-loitering provisions under section 160(3) the Crimes Ordinance, Cap 200 (a person loiters in a public place or in the common parts of any building and his presence there, either alone or with others, causes any person reasonably to be concerned for his safety or well-being), and the offence of disorderly behavior under section 17B(2) of the Public Order Ordinance, Cap.245 (a person who in any public place behaves in a noisy or disorderly manner). These attack the problem obliquely. Perhaps the best example of this is using the disorderly conduct provision to penalize "under the skirt" photographers. The rationale for resorting to that offence is that such conduct might excite strong reactions on the part of the victim or another and thus it is a threat to public order. Generally speaking, the coverage by the existing criminal law is better in relation to conduct in a public place as opposed to conduct in private places. But, to summarise, it is the view of the HKBA that none of the offences in our existing law are designed to meet the specific problem of stalking.
5. One concern of the HKBA about the proposal is the suggestion that a possible basis of liability is that the person ought reasonably to have known that his conduct would cause distress. In the view of the HKBA this reflects the same kind of legislative thinking which lay behind section 25 of the Organised and Serious Crimes Ordinance, Cap 455, and which, in the view of many, has caused a good deal of injustice. It seems to us that a more balanced and reasonable approach would be to

explicitly invoke liability on the basis of recklessness as it is understood under our current law. In other words, the person would be liable if he was reckless as to the consequences of his act in the sense that he thought about the consequences but nevertheless went ahead with the conduct. There would be very few circumstances where it would not be possible to infer recklessness of this kind.

6. The defences which are proposed by the Administration are based on those suggested by the Law Reform Commission. It would appear that the first line of defence, that is, that the conduct was pursued for the purpose of preventing or detecting crime is largely otiose because it seems that any conduct which would be acceptable on the part of members of a law enforcement agency would be covered by the second proposed defence: that the conduct was pursued under lawful authority. In a practical sense it is difficult to conceive of any circumstances in which it would be acceptable for a law enforcement agency to undertake conduct in the course of investigating an offence which was not pursued under lawful authority.
7. It would appear that any concerns on the part of news-gathering agencies would be met by the third proposed defence: the pursuit of a course of conduct which was reasonable in the circumstances. We would be opposed to any separate defence for the press and which would give them, in effect, a free hand to follow whomsoever and by whichever mode they chose to employ. Such a special defence could easily be abused. The revelations that are emanating from the Leveson Enquiry in respect of phone tapping by reporters of the News of the World would militate strongly against the provision of such a defence. The example of the conduct meted out to the late Mr. Justice Godfrey should also be recalled. If the conduct is not "reasonable" within the meaning of the proposed defence then it is unworthy of being such as to be exempt from criminal liability.
8. Whilst we support the concept of having restraining orders we would also suggest a mechanism to require the court to review any order made from time to time to ensure that it continues to be reasonable and necessary.
9. We note there might be public concerns that a harassment offence/tort or anti-stalking legislation might be used by the rich (corporate or individual) to restrict or further restrict the exercise of freedom of expression (inclusive of the right to seek and impart information) and the right to demonstrate. In our view, the concerns are capable of being addressed by the defence of reasonableness as discussed above: it is difficult to see how demonstrations, even if they cause alarm to the target, would not come within the defence of reasonableness contemplated in the proposed law.

10. The concept of reasonableness in the proposed defence must be understood to take into account constitutional rights of freedom of expression and the right to peaceful public assembly. The rights to freedom of the press must also be respected
11. If there is a real threat to the right to demonstrate, we propose that the answer, might be to carve out a specific exception to the crime created such as to make it plain that this does not apply to lawful assemblies in a public place. We prefer an exception to the law as opposed to a defence along these lines because if it is a defence then a person is liable to arrest subject to establishing the defence in court whereas, if it is an exception, such a person is not, on the face of it, liable to arrest. (Such a person might be liable for other crimes, but that is a separate matter.)
12. With the above reservations the Hong Kong Bar Association supports the proposed legislation.

Dated the 23<sup>rd</sup> of March 2012

The Hong Kong Bar Association