

**Re: Review of the Control of Obscene and Indecent Articles Ordinance
(Cap. 390) (First Phase)**

Submission of the Hong Kong Bar Association

1. The Commerce and Economic Development Bureau (“the Bureau”) released a consultation document for the first phase of a consultation that was intended to review the Control of Obscene and Indecent Articles Ordinance (Cap 390) (“the COIAO”) comprehensively.
2. The Hong Kong Bar Association (“HKBA”) was invited by the Bureau to attend a focus group meeting in November 2008. Tentative views were exchanged during this focus group meeting of the legal sector. The HKBA’s views are now formally presented in this Submission.

General Observations

3. The HKBA considers that the present consultation presents an opportunity for the Hong Kong community to take a full and comprehensive review of the legal framework in Hong Kong for censoring publications, be they in print or electronic format, for the protection of public morals. Therefore both the Bureau and the Hong Kong community need not confine themselves only with considering and suggesting “improvements” to the framework. On the other hand, on the assumption that the demarcations and interfaces with the Film Censorship Ordinance (Cap 392), the Broadcasting Ordinance (Cap 562) and the Prevention of Child Pornography Ordinance (Cap 579) are to be preserved, proposals for the reformulation or overhaul of the framework should be encouraged.
4. The HKBA also considers that it is paramount that the reviewed legal framework for censorship of publications for the protection of public morals must be consistent with

the Basic Law of the HKSAR and the International Covenant on Civil and Political Rights. Fundamental rights, particularly the freedom of expression, are guaranteed under these instruments. The freedom of expression includes not only the right to publish but also the right to seek information, including adult oriented information, notwithstanding that such information may shock, offend or disturb some sectors of the community. International human rights jurisprudence has never dismissed such information outright as unworthy of protection. While the freedom of expression may be restricted on a legitimate ground and the protection of public morals is a legitimate ground, the measure imposed to be the restriction must be precise, legally certain, and proportionate. As the New Zealand Chief Censor has said, “[the] likelihood of injury from stitching with a needle is adequately minimized with a thimble, not a cast.”

5. Constitutional consistency required of the reviewed legal framework for censorship of publications for the protection of public morals also operates at the prescribed institutional arrangement. The independence of the judicial power under the Basic Law of the HKSAR is a fundamental underpinning of the legal system of the HKSAR and must not be compromised.

The Interconnectedness of Issues

6. Turning to the substantive issues of the review of the legal framework for censorship of publications for the protection of public morals in Hong Kong, the HKBA wishes to highlight the inter-relationship of the issues involved in the review. The *precision* in which the basic definition(s) are formulated may affect the institutional arrangement feasible for the administration of the legal framework, including the extent to which the institution(s) are to be *inclusive of public opinions*. The recognition of subtle but possibly fundamental differences in the censorship of various informational media, for example, as between images and the printed word, and the consequential *intellectual rigour* required in decision-making may affect the settlement on the nature of the censorship decision, particularly as between *expert determination* and *popular engagement or judgment*. The settlement on how the

censorship decision is to be performed may affect not only the institutional arrangement at the day-to-day and case-by-case working but also the level and extent at which the censorship criteria may be *pre-determined* (whether legislatively, judicially or administratively) or otherwise remain capable of responding to *sporadic societal demands*, while maintaining an acceptable degree of *predictability* and *accessibility*. Any institutional arrangement may have to take account of *practical* matters such as caseload¹, which in turn necessitates a *reality check* both of the usual type of case and the occasional atypical but much talked about matter to come before the decision-making body and the differing work pressure associated therewith. A ramshackle shop front peddling thousands of suspect DVDs in the store flat, a journalistic article in a mass circulating newspaper, an issue of a comic book series, and scores of images rapidly disseminated in the Internet may each call upon a distinct set of skills and resources on the part of the decision-maker and the institution(s) at which he, she or they are placed.

7. The HKBA offers the comments below in an attempt to contribute to an important public debate. In this connection, it must be made clear that the HKBA is not and does not claim to be in a position to provide the solution to the problems said to be associated with the existing COIAO.

“Obscenity” and “Indecency”

8. Section 2(2) and (3) of the COIAO provides for the definitions of “obscenity” and “indecent”. Essentially a test of suitability of publication is set. An article is considered “obscene” under the COIAO if it is considered not suitable to be published to any person by reason of obscenity of the article. An article is considered “indecent” under the COIAO if it is considered not suitable to be published to a person under the age of 18 years by reason of indecency of the article. “Obscenity” and “indecent” are further defined to *include* matters broader than the respective dictionary meanings of the two words, namely violence, depravity and reclusiveness.

¹ The Obscene Articles Tribunal was given 69,055 articles for determination and 1,157 articles for classification in 2007.

9. The HKBA considers that the above definitions are unsatisfactory and constitute one of the sources of the confusion and misunderstanding about the COIAO. Placing stress on the word “suitable” obscures the prior necessary step of determining the nature of the article in question. Further the concept of being “suitable” is objectively meaningless. The dictionary meanings of the two words of “obscene” and “indecent” are mainly associated with lasciviousness and prurient tendencies. Defining them to include unrelated concepts of violence, depravity and repulsiveness is again indicative of poor drafting.
10. The HKBA is of the view that there needs to be proper definition of the basic concepts involved in the legal framework of censorship for protection of public morals. If decision-makers were to know the destination they would not have to spend so much time looking a map.
11. There are a number of ways to reformulate or restructure the basic concepts. One way that may induce less change to the existing decision-making process is to restructure the basic concepts by making explicit the two steps involved. Under this approach, the first step would be the determination of whether the article is “*objectionable*” by reason of its contents and in this regard more precision *can* be achieved by identifying the *substance* of such contents, such as “being objectionable by reason of pornographic description, depiction, expression or treatment of a subject matter”²; or “being objectionable by reason of explicit and realistic description, depiction, expression or treatment of an act that threatens a person’s life”. Like objectionable contents may be described together in one category and unlike ones in separate categories. If categories of objectionable contents can be identified with precision, the need to require reference to “community’s standards of morality” would be much less and may even be *nil*. Following a determination that an article

² There are statutory definitions of “pornographic depiction” or “pornographic”, both in Hong Kong and abroad. See, for example, the Prevention of Child Pornography Ordinance (Cap 579) s 2(1); and the Criminal Justice and Immigration Act 2008 [England] s 63(3). Which formulation of the definition is the appropriate one is a matter that merits separate discussion.

has objectionable content, the next and final question is the censorship question of whether the article should be (1) banned from publication, (2) restricted in publication or (3) not subject any statutory interference in publication. *Judgment* has to be exercised and it is in connection with this process that factors relating to the article and the circumstances of the publication, including dominant effect, likely readership, honest purpose or camouflage and effect of juxtaposition, as well as claims of artistic, literary or scientific merit, will have to be considered.

12. Another way is to reformulate the legal framework around a test of injury to the public good, following the censorship scheme practiced in New Zealand. The New Zealand censors *must* identify how the public good is likely to be injured by the unrestricted availability of a publication by reference to “subject matter gateways” (such as sex, horror, crime and violence). The resulting determination will then be *tailored* to remedy the identified injury and no more. If the censors cannot identify a risk of injury to the public good if the publication is made available to described groups of people, then the publication must be made available to them. The New Zealand censorship scheme under the Films, Videos and Publications Classification Act 1993 structures this inquiry of risk of injury to the public good with three techniques. The *first* involves provisions *deeming* to be injurious to the public good publications that promote or support or tend to promote or support, the sexual exploitation of children or young persons, sexual violence, sexual conduct with the body of a dead person, the use of urine or excrement in degrading, dehumanizing or sexual conduct, bestiality, or acts of torture, extreme violence or extreme cruelty. The *second* requires *particular weight* be given in the process to the extent and degree to which, and the manner in which, the publication, for example, describes, depicts or otherwise deals with [a list of matters including torture, sexual violence, sexual coercion, sexual conduct with or by children or young persons or both, and physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain] or degrades, dehumanizes or demeans any person. The *third* mandates the consideration of factors relating to the article and the circumstances of the publication.

13. Some features in the New Zealand scheme appear to be useful. An “injury to the public good” test focus the mind of the censors to identify the risk of injury. The deeming and particular weight provisions relieve the responsible body from some workload and set some bright lines of demarcation. However, whether transplanting them would be truly useful to Hong Kong will depend on what are to be deemed injurious and what matters are to be given particular weight by those charged with formulating the Hong Kong proposals.

The Institutional Arrangement

14. The HKBA agrees with the Judiciary’s views³ that the present statutory institutional set up of the Obscene Articles Tribunal (“OAT”) under the COIAO is highly unsatisfactory; and that the present system of adjudicators of the OAT under the COIAO is highly problematic. The HKBA considers that a *new* institutional arrangement for censorship of publications for the protection of public morals should be explored and established.
15. The HKBA believes that the present review of the COIAO presents an opportunity for a *new* settlement on the nature of the censorship decision, particularly as between *expert determination* and *popular engagement or judgment*. The HKBA wishes to highlight a number of important considerations in assisting the reaching of this new settlement.
16. Firstly, a more precise definition of the basic concepts may obviate the need to refer to “the community’s standards of morality” in case-by-case decision-making.
17. Secondly, the routine or typical type of case for censorship decision such as suspect pornographic DVDs peddled at street level seldom requires input of members of the public as to whether they should not be published or restricted in publication. On the other hand, the determination of the atypical and often controversial case for

³ Contained in the document entitled “The Review of the Control of Obscene and Indecent Articles Ordinance (COIAO)” (Cap. 390) - The Judiciary’s Response” published in November 2008.

censorship, such as whether a journalistic piece parodying another more offensive article should be restricted in publication, requires a literacy beyond that of normal, ordinary or usual education. It requires cultured appreciation of literature and at least the visual arts, if not also the performing, contemporary and modern arts. Given that the responsible persons hold the line of the freedom of expression, they ought to have the outlook of a democratic society, namely pluralism, tolerance and broadmindedness.

18. Thirdly, where engaging the public in the censorship process necessarily involves the taking into account of the various viewpoints in the community, that is best done in the formulation of advisory guidance than in case-by-case decision-making where participation of the various opinion groups in the public is limited, if not curtailed, by at least numerical and randomness restrictions.
19. Fourthly, the New Zealand Films, Videos and Publications Classification Act 1993 provides in section 4(1) that the question whether or not a publication is objectionable or not is a matter of expert judgment of the Office of Film and Literature Classification and evidence as to, or proof of, any of the matters or particulars that the Office is required to consider in determine that question is not essential to its determination.
20. With these considerations in mind, the HKBA is of the view that the following institutional arrangements have stronger merits:
 - (a) That the OAT be abolished and that judges and magistrates shall determine the censorship question when it arises in proceedings before them;
 - (b) That the OAT be abolished and that judges and magistrates shall determine the censorship question when it arises in proceedings before them assisted by guidance providing by an advisory committee appointed by the Chief Executive with an unofficial Chairman and a membership drawn from members of the public with the aim of being viewpoint inclusive;

(c) That the OAT be abolished and that judges and magistrates shall determine the censorship question when it arises in proceedings before them with the power to call upon the assistance of lay assessors from a panel of persons appointed on the basis of their knowledge, experience and expertise in literature, science, the arts and journalism.

(d) That the OAT be abolished and that a classification board along the lines practised in New Zealand (and thus maintaining an arms-length relationship with the Administration) be established to have exclusive jurisdiction to expertly determine the censorship question on referral from the courts or on its own motion.

The Classification Function

21. The HKBA considers that if the legal criteria for identifying whether an article is liable to censorship for protection of public morals are made clear (see above), a publisher's lawyers should be able to give appropriate advice. This removes the need for an administrative classification function.
22. The HKBA also considers that, if, contrary to its views above, it is considered that the OAT should continue to exist as a judicial body, the coexistence of a judicial jurisdiction to determine the nature of an article in connection with extant legal proceedings with an administrative function to classify submitted articles (whether pre-publication or pre-prosecution) is corrosive of the independence of the tribunal as a judicial body and the administrative function must at least be removed, if not abolished.

The Internet

23. While the HKBA does not profess any expertise on matters of information technology, it considers that censorship laws should be technology and media neutral

or that they should in this respect be as flexible as possible so as to cater for future technological development.

24. Having said that, the HKBA is attracted to the view that it is impracticable and dangerous to regulate the internet with statutory measures. Formal regulation is near impossible unless one is prepared to countenance a government that simply cuts off access to classes of sites or individual sites as a prophylactic measure. Further, it is unwise to make guard dogs or scapegoats of internet service providers, bearing in mind that the present system of self-regulation established between the Hong Kong Internet Service Providers Association and the Television and Entertainment Licensing Authority has been in place for 10 years.
25. On the other hand, the HKBA considers there are situations in the application of the COIAO in connection with the internet that may need judicial or statutory clarification.
26. The first set of questions are concerned with hyperlinking on web pages and posting on chat groups, bulletin boards and discussion forums. Is each of these acts “publishing” within the meaning of the COIAO, which includes “distribution” or “circulation”, whether or not for gain, to the public or a section of the public? The HKBA notes that while by each of these acts, an item is made available to the visitor, that alone does not necessarily establish the act as “publishing”. The circumstances in which the visitor pays his or her visit appear to be essential as well.
27. A further challenge seems to be presented by the technology of peer to peer networks. While it may be argued that by participating in the network, one puts at disposal one’s computer capacity for the benefit of the other users of the network in helping with the transfer of packets of data that form the offending item to the other users and that accordingly, every participant aids and abets the “distribution” to the other, again the circumstances of such participation must be carefully considered before “publishing” may be validly established.

Penalties

28. The HKBA considers that the maximum penalties for the offences under the COIAO are adequate.
29. The HKBA also considers that a distinction ought to be maintained in sentencing between publishing an “obscene” article (namely an article that is *prohibited* from publication) and publishing an “indecent” article (namely an article that is *restricted* in publication). This distinction was recognized in HKSAR v Yeung Chi Ping (unreported, 22 September 2006, HCMA 734, 736/2006), CFI.
30. The HKBA further considers that impact, prevalence, recidivism and deterrence are matters that courts in sentencing will take into account. Statutory prescription of factors to take account in sentencing is not warranted, and would also represent a departure from the usual practice (which departure cannot be justified). If a sentence is thought to be manifestly inadequate because these matters have not been properly taken into account, the Secretary for Justice may apply to the Court of Appeal for review of the sentence⁴.

Hong Kong Bar Association

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⁴ The Secretary for Justice had applied for review of the sentence imposed for publishing indecent articles by a newspaper as recent as 2006; see Secretary for Justice v HKDN Ltd [2007] 1 HKLRD 241, CA.