



SUBMISSION TO THE COMMERCE AND ECONOMIC DEVELOPMENT BUREAU ON REVIEW THE CONTROL OF OBSCENE AND INDECENT ARTICLES ORDINANCE

January 31, 2009

In the light of the ongoing review of the Control of Obscene and Indecent Articles Ordinance, Amnesty International takes this opportunity to put forward our views and concerns regarding the process.

Amnesty International is disappointed that the consultation paper published by the Commerce and Economic Development Bureau on the review the Control of Obscene and Indecent Articles Ordinance is severely deficient in several important areas. These areas are the consideration of the human rights impact on banning and limitation of the free flow of information as guaranteed by the Basic Law, the Bill of Rights Ordinance and International Human Right laws.

The freedom of speech of expression is enshrined in Article 19 of the Universal Declaration of Human Rights (UDHR) which states "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." It guarantees the right all to express their views and opinions freely. The protection of this right is of utmost importance as it is the cornerstone of a vibrant democracy, and it enhances informed public participation in the decision making process, empowering the people to have a hand in determining matters that will impact on their daily lives.

Article 27 of the Basic Law states that, "Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike."

The rights to freedom of speech; press and publication, is also a guaranteed in Article 16 of the Bill of Rights Ordinance and Article 19 of the ICCPR (International Convention of Civil and Political Rights) that states: "(1) Everyone 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."

These rights however, are not absolute, but subject to limitations in the context of varied, and sometimes contending principles and standards. So it is of utmost importance that these principles and standards should be "generally accepted by reasonable members of the community."

The ongoing review on the ordinance will cover seven areas. The objectives enunciated by the review are clear: to safeguard the free flow of information and freedoms of expression", and at the same time "to provide parents and guardians with the means to protect minors from harmful obscene and indecent materials". And the objective of the ordinance constitutes a valid limitation on the freedom of expression.

Unless the standards are such, then the freedom of speech, of press and of publication would be seriously limited, or even violated, if government excessively limits publication by classifying the same as Obscene and thus banned from publication. What is important to emphasize is that, while the government uses "protection of children" as its reason for limitation, adults should not be affected by the government's strong hand in limiting the free flow of information. In a diverse and open society, not all information may be suitable for children, and any limitation should be evaluated against its impact on the adults of the society. Adults then should not be prevented from viewing any materials that is not violating other laws already in place, like child pornography.

The limitation of this freedom could be subjected to certain restriction as states in Article 16 (3) (ICCPR Article 19) that "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; or (b) for the protection of national security or of public order (*ordre public*), or of public health or morals." This restriction should not be an excuse



for government to limit the freedom of expression and press on materials. The greatest among of freedom should be allowed to encompass the whole spectrum of society, and leaving the consumerism to individuals who would consume the materials of their choosing without much interference from the government.

The restriction has been further elaborated by the UN Human Rights Committee, General Statement 10 on Article 19, paragraph 4 which states "when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 lays down conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must be justified as being "necessary" for that State party for one of those purposes."

Based on the above human rights principles, Amnesty International Hong Kong recommended the government to allow the greatest degree of freedom possible for the people of Hong Kong, subjected only to laws that are specific in protection of children.

AI's concerns however revolve primarily on the following:

1. the ambiguous definition of what is obscene and indecent, and how to strike the "balance" or remain "flexible" in the context of the rapid changes in our global community which is best reflected and communicated through internet communications;
2. modifying the adjudication system to improving the quality of its performance;
3. the lack of guidelines for the members of the Obscene Articles Tribunal (OAT) on making judgments or decisions on obscenity and indecency, exposing the judgments to criticism on its subjectivity;
4. the proposal for Internet Service Providers (ISP) to install a filtering software, purportedly to block obscene and indecent materials, but can be a vehicle for censorship of online content which is normally accessible to internet users; and
5. increase in the penalties imposed by the Ordinance for it to be an effective deterrent.

On defining what is obscene and indecent, is not at all clear in the present law. The classification rely almost solely on the subjectivity of the adjudicators assigned according to Section 10 of the current COIAO, which led to criticism that a small groups of people are now in charge of limited the freedom of expression, press and publication, and the general public freedom of obtaining information. The law has to be clear in order to be followed and any restrictions to the freedom of general public should be justifiable in the court of law. The law should be written as specific as possible so that the ordinary reasonable persons would know what the law means in order to prevent breaking the law, and know the limit of restriction that is apply to their freedom.

The freedom to engage in academic research, literary and artistic creation and other cultural activities should also be put into the law as given exemptions to the restriction of the COIAO, as the rights is guaranteed in Article 34 of the Basic Law which states, "Hong Kong residents shall have freedom to engage in academic research, literary and artistic creation, and other cultural activities."

The problem does not end with the ambiguity in the definition of what is obscene and indecent; it goes beyond this, into issues on whether the definitions if amended to make it more precise, would reflect the rapid changes in society, and the development of social construct and concepts in our "post-modern" society.

Amnesty International then objects to any further classification of indecent article, as the classification of indecent is hard to define and it would only lead to further confusion and undue restriction of freedom of the public.

Permissible restriction is allowed for the reasons of public morals. However, there should be clear link between the exercise of the right and the resulting harm which may come out of such exercise, otherwise restrictions, when crafted vaguely and broadly, especially in the name of public morals, will render the existence and exercise of the right meaningless.



ON ADJUDICATION SYSTEM

According to the current adjudication system, an article being classified does not even get a reason for the classification it receives. It is only when the person responsible finds the classification unjust and brings the matter to appeal would the reason be revealed during appeal. The way in which the present system works does not accord the person responsible/writer/creator the presumption of innocence. He is immediately placed in a situation where he has to come up with a defense, if the article in question is related to one of the exemptions.

This is a very glaring violation of basic rights. The onus of presenting of proof of guilt should be on the government, and the person entitled to be presumed innocent until proven otherwise. Exemptions on freedom of expression, press and publication should not limit the rights of individuals to literary and artistic expression, nor should it restrict academic research. These reasons should be already considered before anything is being classified as indecent or obscene.

As the current adjudication system allows self applications and only 321 persons are on the current system, this is not enough representation to reflect the view of the reasonable person in the general public.

Amnesty International HK recommended abolishing the adjudication appointment system. The administration part of the classification could be taken up by individuals from the jurists list or any large pool of individuals that would be in better position in reflecting the view of the public. The individuals would be given the task to give an article a "suggestion" in classification that individual publisher would recommend to comply, and would not limited it from being published or circulated with the notice of classification. Only when such suggestion is not being complied would the matter be taken up the court and allows a fair hearing of its reason for non compliant.

From the public hearings set up by the Bureau, this topic has motivated a small sector of society that is mostly anti-porn and has very conservative view on what is fitted for publication. While their views are being respected, it is also understandable that they do not represent the majority of the public. The limitation of freedom of expression, press and publication is a very serious matter, and for a free, progressive and international city, the greatest among of freedom is recommended for diversity in a free society.

Another concern pertains to the need to separate the adjudication and regulatory powers of the Obscene Articles Tribunal. Side by side with this concern is the need for a clear criteria in the selection of jurors in the OAT, and transparency in their selection, considering that those who will be chosen to sit in the tribunal will have the power to limit the exercise of a right which is of such significance to the development and progress of any society, and that they should be have a clear understanding of such principles and standards "generally accepted by reasonable members of the community", which is the benchmark of an acceptable basis for the limitation of the right. Those who sit in the Tribunal should share values that would most preferably not lead to such differences and discrepancies in judgment.

NEW MEDIA

Internet technology has opened up new frontiers of information, anchored on the freedom of information. Any attempt by government to regulate it for the purpose of blocking harmful and illegal content poses a threat and an ever present danger of the limitation or curtailment of the right. The need to regulate and create balance between the freedom of expression and protection of minors will always pose such a threat, and the limitations may in the end bring more far reaching negative effect when the regulation or limitation fails to keep the balance.

Amnesty International is then against any restriction in the free flow of information via the Internet. Any current technology that allow filtering and restriction of free flow of information on the Internet require not only a lot of resources, but have violated the freedom of expression as states in the General Comment paragraph 1 on Article 19 of the ICCPR.



ON THE INCREASE IN PENALTIES

The proposal to increase penalties is intended to be a deterrent. But to focus and efforts towards prevention, absent a common standard or guideline in the making judgments on what is or is not obscene or indecent, can have a chilling effect on the production and distribution of articles thereby affecting the exercise of the right, considering the wide and varied range of perspectives and viewpoints.

In this context, Amnesty International opposed any increase in penalty. The current punishment with fine of a million and 3 years imprisonment is harsh enough. To put an individual in jail for publication would create prison of conscience, if the publication is latter found justifiable.

ON EDUCATION

The consultation paper only mention about complaining without the balance of education of balancing in tolerance and respect for diversity. This is alarming by way of development. The society should teach members to be respectful tolerant, if not accepting, of views that are different from that which they hold, even accepting things that they might found distasteful at first. Later, these views may have value in itself from another point of view, and can thus contribute to the enrichment of a diverse and open society.

This need so much emphasis, as education on respect for diversity and healthy attitude toward sex and sexuality might be lacking in the Hong Kong society.

Amnesty International recommends that the government put more resources in educating children as well as public on respecting individual human rights, especially the freedom of expression, press and publication as the foundation before mentioning of any restriction of such freedom.

These are out initial concerns on the amendment of the legislation. Amnesty International however, reserves the right to submit its position on other concerns while the consultation is ongoing.