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MEDIA ETHICS IN ASIA

SELF-REGULATION vs STATUTORY REGULATION

POSITION IN MALAYSIA

September 11 - 13, 2000

Kuala Lumpur
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SELF-REGULATION vs STATUTORY REGULATION

1. Like many other countries, Malaysia is a constitutional monarchy. It is a Federation of Several states. The framework of the Country is provided for a Federal Constitution which is the Supreme law of the Country but each State also has its own State Constitution.

2. The law in Malaysia is derived from and based essentially on the Common Law of England except for the personal law of those professing the Islamic faith in which regards the Syariah Law applies. Though based on and linked to common law, it can be said that our entire law is with rare exceptions codified. This codification process started in the Indian sub-continent where much of what was common law was reduced to writing.

3. As the British influence spread to this part of the region many of these Codes or Codified laws were also adopted in this country. For this reason many local acts are similar or near similar to Indian Sub-Continent Legislation in the earlier stages and various other laws have many similarities. Of course with the passing of time differences and variations made necessary and required by individual and local circumstances have evolved.

4. However distribution of legislative powers is provided for by stating that Parliament may make laws for the whole or any part of the Federation and laws having effect outside as well as within the Federation. The Legislature of a state may however make laws only for the whole or any part of that State. This is supplemented by the creation of a First and Second List respectively and a concurrent list. Finally in areas of conflict it is provided that the Federal Law will prevail in its entirety or to the extent of

Kedah, Kelantan, Johore, Malacca, Negeri Sembilan, Pahang, Perak, Pulau Pinang (Penang), Sabah, Sarawak, Selangor and Trengganu and two federal territories Federal Territory Kuala Lumpur and Federal Territory of Labuan which come under the Federal Government.
the inconsistency as the case may be.  

5. In so far as the media is concerned most aspects of the law are within the scope of the Federal Constitution and the Federal Government. This again sometimes raises question because the Highway belongs to the Federal Government or is under its jurisdiction and the outdoor advertisement may be on the highway reserve.

6. As most of our laws are codified, they are contained in Acts of Parliament. These are supplemented by Rules and Regulations made by a Minister. On the occasions that there is a lacuna we do resort to the principles of Common Law but this is on the basis of the existence of the Common Law at a specific point of time.

7. The media in the country therefore operates and is restrained and restricted by provisions which are created and exist and these may be said to fall under the following main categories.

- Federal Constitution
- Acts of Parliament and Subsidiary Legislative
- Guidelines
- Codes of Ethics

8. There is a measure of overlap between Guidelines and Codes of Ethics. This is because there are different degrees of "voluntariness" involved. The word voluntary is sometimes not entirely clear in its meaning. One may voluntarily submit to a Code but having so volunteered, the voluntariness disappears. On other occasions what is said to be voluntary is enforced voluntariness. This is perhaps due to the fact that "voluntariness" just like "press freedom" and "equality" are concepts to be pursued rather than to be actually achieved.

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2 Part V, Article 73-75 and Ninth Schedule, Federal Constitution

2 The only exception would be signboards on business premises or outdoor advertising or billboards along highways and road junctions which come with the power of the local government which in turn comes under the Jurisdiction of the State Government.
9. About ten (10) years ago a discussion of media law focussed mainly on the print made apart from Radio and Television. This trend is now rapidly changing and assuming different dimensions. The electronic media with Malaysia's thrust into the Multimedia arena has required a further examination on how best to deal with the situation.

Concept of Press Freedom:

10. The starting point however is a look at the Constitutional provisions relating to Fundamental Liberties in Part II of the Federal Constitution. Of particular relevance is Article 10 dealing with Freedom of Speech, Assembly and Association. It reads:

(1) Subject to Clauses (2), (3) and (4):

(a) Every citizen has the right of freedom of speech and expression;

(b) All citizen have the right to assemble peaceably and without arms;

(c) All citizen have the right to form associations.

(2) Parliament may by law impose:

(a) On the right conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation or incitement to any offence;

(3) ... restrictions on the right to form associations conferred by paragraph (c) of Clause (1) may also be imposed by any law relating to labour or education.

The basic principles of law and ethics still and will remain unchanged. However what is required is to familiarise and adapt to dealing with a change in the means of communications.
(4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2)(a), Parliament may pass laws prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

11. There is a basic and fundamental difference between our law and the American position where Amendment 1 to the United States constitution declares:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

12. At the same time it is useful to look at the European Convention in Article 10(1)(2) provide as follows:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

The Law

13. Given the audience and the occasion it is neither necessary nor practical to examine all the statutory provisions that govern the media, you all are already familiar
with. Neither is more important than the other and therefore I list them out alphabetically namely Copyright Contempt of Court, Defamation, Official Secrets, Printing Licences, Sedition and a host of other connected in not so connected provisions.

14. The principles of law that apply are based on and derived from the common law of England. They are therefore similar in spirit and content though not necessarily in their exact wording identical to the Laws of Other Commonwealth Countries that have their legal style based on the English Law as it has evolved. Therefore I shall only make a brief reference to them and add my views to the extent that the law differs or varies and requires specific comments.

Defamation

15. The law on defamation is essentially as it is in other Commonwealth countries. The only aspect that requires attention is the mega claims that have been filed in recent years. These have grown in numbers in stating a huge amount in the claim itself so that when the claim is filed it receives great media attention - so that the focus moves to the amount claimed than what it was claimed for.

16. As we all know, when a person is defamed such a person claim general damages. It is for the Courts to assess what the damage is and in consequence make an award of money for general damages that is suitable and appropriate.

17. In the strict legal sense the stating of the amount serves little purpose. In fact it constitutes a limit to what is being claimed. The Court is not bound to award such a sum. As such as an upper limit it serves no purpose because the amount stated in all cases, where it is sensational enough, becomes by the same token absurd and unrealistic.
16. Nevertheless, this continues to be done. Our Court of Appeal has held that a party can set out the amount in its pleadings. Therefore legally it is permissible to state the amount. On the other hand it serves a non-legal effect.

It sends down a chill in the spine of the person directly involved.

Where the defendant is a public listed company it requires an announcement to the Stock Exchange as being material litigation.

It stands in the way of drawing up of accounts. Some company auditors want to treat such figures as a contingent liability and would rather take the amount on the face of it so that they are absolutely safeguarded in performing their own responsibility.

19. The other aspect is the growing quantum of awards that have been awarded in defamation suits. From four figure awards in the 1970s the Courts have moved to make eight figure awards. Yet it is difficult to say that they represent awards made in other case where the facts and injury is not that different. Whilst they rightly stand as decisions of the Courts yet the amounts awarded give rise to many difficulties in understanding and appreciating them.

Copyright

20. Our copyright law is drawn up along the lines of the WIPO Model. There is as much protection as can be. If there be shortcomings these would be in enforcement. Even here we are not lacking and can be said to have a high level of enforcement.
Sedition

21. What is seditious and what is not is to be found stated very clearly in a book written by a very learned judge Mr. Justice Stephens. That learned Judge defines seditious words and libels as meaning:

"Words or writing used or written for the purpose of bringing into contempt the Crown or the Constitution of the Country, or administration of Justice, or to excite her Majesty's subjects to alter existing laws otherwise then by lawful and constitutional means as well as to incite feelings of ill-will and hostility between different classes of Her Majesty's subjects."

22. Sedition in Malaysia is governed by the Sedition Act 1948. This Act which uniformy applies throughout the whole of Malaysia, came into force in West Malaysia on the 19th July 1948 and in respect of Sabah on 28th May 1964 and Sarawak on 20th November 1968. In its appearance it is a short Act comprising some thirteen pages and listing out eleven sections but its implications are far reaching.

23. Whilst it was originally framed to incorporate and reflect the common law concept of sedition the historic riots of May 13, 1969 which had a severe impact on the Country also left an indelible mark on the Sedition Act in terms of a fundamental amendment by way of Section 3 (f) as well as the judicial perception to its interpretation accepted as necessitated by the special needs and circumstances of the time.

23A. Words are seditious when they have a seditious tendency. However sedition need not occur only in respect of words. It can take place in relation to an act, speech or publication and the term "word" includes for the purposes of the offence of sedition "phrase, sentence or other consecutive number or combination of words, oral or written". To be seditious, the words must have a seditious tendency. Section 3 provides that a seditious tendency is a tendency:

(a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;
(b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter by law established;

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;

(d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any state or amongst the inhabitants of Malaysia or of any state, or

(e) to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia;

(f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of part III of the Federal Constitution.

24. The crux and essence of the offence is whether the words have a seditious tendency. If they have a seditious tendency then the offence of sedition is committed. On the other hand if they do not have a seditious tendency the offence is not made out. The determination revolves around the question of whether a seditious tendency exists.

Official Secrecy

25. The Official Secrets Act declares itself to be an Act to revise and consolidate the law relating to the protection of official secrets. The Act however goes much further and touches on "spying", unauthorised use of uniforms, powers of search and seizure, interfering with Police Officers, etc. Nevertheless the Act is known more in relation to the aspect of "official secrets".

26. A government in a democratic society needs the trust and confidence of the government. It must explain its action provide the justification by giving the facts both
for and against the action taken. This requires disclosure of as much information as is possible.

27. Even if an individual has access to government information it will not have the ability to make full and effective use of this right to the extent that the press can. So the question arises whether journalist should have any special rights for obtaining and disseminating information on account of their "special role" in the democratic enterprise?

Classification

28. The task of classification and declassification is entrusted to a Minister, Menteri Besar or Chief Minister or a Public Officer appointed for the purpose. Once declassified the document ceases to be an Official Secret.

29. A practical difficulty is in determining whether a document is classified or declassified. If an endorsement to the appropriate extent exists the position would be clear. However the time at which an endorsement comes to exist may be difficult to determine and this may pose difficulties.

Contempt of Court

30. Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt or lower his authority is a contempt of Court. This happens by either a publication which throw scurrilous abuse on a judge as a judge or on the Court or which attacks the integrity or impartiality of a judge or court.

Acts Calculated to Prejudice Trial

31. It is a contempt of court to publish any matter which is calculated to prejudice the
fair trial of a pending cause. The phrase 'pending cause' is given a rather broad connotation because not only is it contempt to so publish if the proceedings are pending but also if the proceedings are imminent.

32 There is no better way in this regard except then to look at examples of articles and reports where contempt proceedings have been instituted and pursued and to examine the matter in which the courts have dealt with them.

Self Regulation:

33 The term "self regulation is used to refer to situations where there are not in place any laws to govern conduct but the parties voluntarily create restraints based on propriety and proper conduct. Depending on the area of activity and the nature of the industry different levels of self regulation exist. It ranges from self imposed regulation to enforced self regulation. Where a particular type of self regulation falls can only be determined by looking at a specific scenario.

Advertisements:

34 Broadcasting and Television are now in the process of being reorganised in view of the convergence that is taking place under the Communications and Multimedia Act 1998. Licences of Broadcasters involving Radio and Television are in a migration stage.

35 However as far as the regulation of advertisements is concerned it continues to be governed by the Advertising Code for Radio and Television published by the Ministry of Information, issued in 1990. This is an update of the Kode Iklan Kementerian Penerangan 1983.[Bahagian Pengiklanan, Kementerian Penerangan Rujukan (6) dlm BP/S/0047. JLD II dated 25th January 1990] The Code applies with regards to a wide range of topics.
36. Under the guidelines, which are included to be supplementary, it goes on to cover areas which do not strictly come within the scope of the Act. An example of how a topic is looked can be appreciable by how "dandruff" is dealt with. [Advertisements for a product or treatment offered for the control of dandruff should not contain any claim or implication that the condition can be permanently prevented. Nor should such advertisements contain any exaggerated claims or implications as to effectiveness.]

37. Even though it is a Code and not in the nature of law or regulation or act it is a Code that must be followed and complied with. As the Ministry of Information has ultimate control over what is transmitted through Radio and Television, the Code must be obeyed. Otherwise the advertisement may not see the light of day in its existing form if found unacceptable by RTM.

**Code of Advertising Practice**

38. A framework for a measure of self regulation is also provided vis-a-vis advertisements in the print media. This is through the Malaysian Code of Advertising Practice and the existence of the Advertising Standard Authority of Malaysia. This is an attempt at self regulation and acts to complement and supplement special and specific conditions and restriction placed by individual media owner and other Codes of other organisations. Same parts of the Preamble of the Code declare:

1.1 All advertisements shall be legal, decent, honest and truthful.

1.7 All advertisements shall be prepared with a sense of responsibility to the consumer.

1.8 All advertisements shall conform to the principles of fair competition as generally accepted in business.

1.9 No advertisement shall bring advertising into disrepute or reduce confidence in advertising as a service to the industry and to the public.
Advertisements must be clearly distinguishable as such.

39. The Code has been drawn up by organisations representing advertisers, advertising agencies and media. It is administered by the Advertising Standards Authority Malaysia whose members, all experienced in advertising, are drawn from Malaysian Newspapers’ Publishers Association, Association of Accredited Advertising Agents Malaysia, Malaysian Advertisers Associations, TV3 and the Outdoor Advertisers Associations.

40. The Code otherwise deals with amongst others the subject of honesty, fear superstition, illegality, truthful presentation comparisons, Disparagement and Denigration, Exploitation of Name or Goodwill, Imitation, Testimonials, Protection of privacy and exploitation of the Individual Identification of advertisements, Guarantee Money back situations.

41. The sanction is the withholding of advertising space or time from advertisers. This sanction is applied by media. To this can be added the sanction of adverse publicity. This is wielded by the Advertising Standards Authority of Malaysia, which publishes from time to time details of the outcome of investigations it has undertaken.

42. The Code as an example has specific guidelines on slimming. It states that the only way for a person to lose weight other than temporarily, is by burning up the excess fat his body has stored. A diet is the only practicable self-treatment for achieving a reduction in this excess fat. Advertisements should not suggest that it is desirable to be underweight. Advertisers should be able to show that their diet plans are nutritionally well-balanced. Crash diets plans without direct medical supervision should not be advertised. General claims that precise amount of weight can be lost from specific parts of the body should not be contained in an advertisement. Apart from that:

- Vitamins may be offered as a safeguard but should not suggest that there is widespread vitamin or mineral deficiency that it is necessary to augment a well-balanced diet. Serious vitamin and minerals depletion caused by illness should be diagnosed and
treated by a doctor. Self medication should not be promoted on the basis that it will influence the spree or extent of recovery.

Should not suggest that any product is safe or effective merely because it is "natural" or that it is generally safer because it omits an ingredient in common use. Unqualified claims such as "cure" and "rejuvenation" are generally not acceptable. Particular care is required to avoid encouraging through advertisements the adoption of any unsafe practices, especially by children. Impressions of professional advise or support should not be exaggerated.

43. These Codes to a considerable extent course initially set out the need to be ethical. According to Minette E Drumwright, ethical issues are embedded in the practice of advertising, mostly involving truthfulness. Some ethical issues involve the essence of advertising itself - its social and economical appropriateness and potentially beneficial or harmful effects on individuals and society at large. There is a distinction between "having a right" and "the right thing to do."

Other Guidelines:

44. There are also different guidelines that are issued by various authorities that publishers are bound to take note even if not completely comply with. Whilst it is not possible to examine such of these in more detail it is helpful to refer to them briefly.

Guidelines on Prohibited Pictures and Advertisements:
[Garis Panduan Gambar-Gambar dan Iklan-Iklan yang di Larang] [Issued by the Unit Kawalan Penerbitan, Kementerian Dalam Negeri, Tingkat 11, Bangunan AMDB, No. 1, Jalan Lumut, 50400 Kuala Lumpur].

45. These declare themselves to be the Guidelines regarding pictures and

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Ethical Issues in Advertising and Sales Management in Ethics in Marketing "Referred to in 4A'S USA Newsletter"
advertisements which are prohibited from being published in Newspapers and Magazines.

46. These Guidelines relate to what kind of pictures can be published and specifically prohibit nudity, wearing of G-strings, limited or total exposure of bras, women in bikinis, woman in see through, women in arousal pose, indecent poses. These also prohibit use of verses from the Quran, any advertisement from Israel, showing of picture of the Kaaba or mosque in the background. Apart from this the Guidelines make reference to other requirements of the law as well as other regulatory procedures.

General

47. When a Government Department or Ministry or any other authority issue Guidelines one would think that these are either to assist in a better understanding of the law or to provide for guidance in areas where the law does not reach. However in some cases the Guidelines appear to be inadequate suggesting that those making the Guidelines do not themselves appreciate what needs to be done. A close examination of some of those guidelines sometimes seem to indicate:

* a mere repetition on what the law requires
* go further then what the law requires

Gans Panduan Penapisan Bahan-Bahan Penerbitan Berunsur Islam:

48. There is also set of guidelines relating to censoring material which is based on Islam or having Islamic element. These guidelines are intended to Guide all those involved in writing, publishing and distribution of publications with Islamic elements in it. For the purpose of this Guidelines the meaning of “publication” in the Printing Presses
Medical Advertisements:

49. Medical Advertisements are subject to great statutory regulation in comparison to many if not most other products. Such regulation is brought about through the Medicine's (Advertisement and Sale) Act 1956 (Revised - 1983). It declares itself in the preamble to be an Act to prohibit certain advertisements relating to medical matters and to regulate the sale of substances recommended as a medicine. The Act came into force in West Malaysia on 1st October 1956 and in Sabah and Sarawak on 1st January 1976.

50. The objective of regulating medical advertisements is to ensure responsible advertising in promoting the sale of medicines, appliances and remedies. The underlying philosophy is that advertisements should help the public to make rational decisions, whilst taking into account the people's desire for information and at the same time not taking undue advantage of people's concerns for their health.

51. The Act which comprises seven (7) somewhat elaborate Sections has four sections which prohibit advertisements. These are Sections 3, 4, 4A and 4B. Section 3 prohibits advertisements relating to certain diseases. Section 4 deals with prohibition of advertisements relating to abortion, Section 4A deals with advertisements relating to skill or service and Section 4B relates to advertisement of medicine which must be approved. Section 3(1) are reproduced below:

3.(1) Subject to this Act, no person shall take any part in the publication of any advertisement referring to any article or articles of any description, in terms which are calculated to lead to the use of that article or articles of that description as a medicine or an appliance or a remedy for the purpose of...
(a) prevention or treatment of the diseases and conditions of human beings as specified in the Schedule.

(b) practising contraception among human beings

(c) improving the condition or functioning of the human kidney or heart, or improving the sexual function or sexual performance of human beings

(d) diagnosis of a disease as specified in the Schedule

Provided that this subsection shall not apply to any advertisement published by the Federal Government or any State government or any local or public authority, or by the governing body of the public hospital or by any person authorized to publish such advertisement by the Minister.

52. In Earp v Roberts, the appellant inserted in a periodical an advertisement with regard to a medicine which he said was efficient in almost every form of disease and stated that full information would be given on application. In reply to a letter from the respondent he sent a circular regarding the use of the medicine and a letter in which he stated that the medicine cured tuberculosis.

The Advertisement:

"Despite recent discoveries, Tassa still contains the only antiseptic both harmless and efficient in almost every form of disease which chemical science has yet produced. Restores and preserves health. Full information on application."

Reply to enquiry

"It (Tassa) is much superior to penicillin, for the latter is not like Tassa by any means harmless, nor is it of the least use for curing cancer or tuberculosis, both of which Tassa does cure."

Negligence Issues: Tortious Liability

53. An item that is published in a newspaper may be an "advertisement" within the meaning of the Act. And in consequence the newspaper may be liable to be prosecuted.
for contravening the provisions of the Act. However can this be the basis of a claim against the newspaper by a reader who has used the product and has suffered some injuries or damage.

54. An example would be an advertisement relating to medicines. Without securing the requisite approvals, the manufacturer places an advertisement as a result of which a reader uses the drug and suffers side effects. Can such a person sue the Newspaper based on a breach of duty of care?

55. Some guidance may be obtained from a New Zealand case [Flemming v Securities Commission and Another (1995) 1 LRC 535] where the facts were as follows:

Taranaki Newspapers Ltd published the advertisements of a company offering high interest securities to the public. The Securities Commission were alerted that the advertisements did not comply with the Securities Act 1978. It did not contact the company advertising but did obtain Taranaki's admission of breach of regulation 17 of the Securities Regulations 1983 as there was no certificate of compliance with the Act from the company's directors. Taranaki also assured the Commission there would be no repetition, but 14 similar advertisements appeared. The Plaintiff investors subsequently lost their investments when the company went into liquidation and issued proceedings alleging breaches of duties of care to potential investors by Taranaki (by failing to ensure advertisements complied with the Act).[There was also a claim against the Commission (for failing to ensure the company complied with the Act but that does not have relevance to the subject at hand)].

56. The Plaintiff had invested after reading the advertisement. The advertisement was in the following terms:

"Invest before February 28, 1987
And, we will give you $50 to spend
Investment made into our Investments Bonds
Guarantee 24% for 1 year
Minimum $1,000.00
Phone Star Investments
87910 NP Mrs Olsen."
57. The action was struck out as disclosing no reasonable cause of action. On appeal this decision was upheld and it was said that "A newspaper publisher had no duty of care to potential investors to ensure advertisements complied with the Act since although there was proximity with readers by publication, the publisher was a medium exercising no skill or judgement and could not be relied on for accuracy of advertisements."

58. In so holding the Richardson J in the Court of Appeal went on to make the following observation with regard to the role of the newspaper which is relevant:

"As between advertiser and the general public the newspaper is the conduit for the flow of information. There should be no assumption by the readership that the newspaper exercises any skill or judgement as to the content of advertisements. In proximity and reliance terms the role of the mass media in disseminating information of that kind to the general public is narrowly limited."

59. The decision was reinforced by an examination of the securities legislation which specifically provided for civil and criminal liability to a person offering securities in breach of the Securities Act 1987 but only provided for statutory criminal liabilities for a breach by a failure such as the newspaper. Cooke P decided on the causation issue. He however was reluctant to dismiss any possibility of establishing any duties of care though he was inclined to take the view that in this field the law will lean against imposing liability on even a careless newspaper.

The New Medium:

60. Given this background and State of Affairs new challenges are posed to efforts to control and regulate all forms of communications by reason of the proliferation of interest in the internet.
61. With the new Multimedia & Communication policy much of the present regulatory framework has been affected and altered by the coming into force of the Communications and Multimedia Act 1998 with the declared objective that there will be no censorship of the internet. The Act seeks to encourage the formulation of a Quasi Voluntary Content Code to be prepared and agreed to by Industry Players. ¹

62. Once agreed to and adopted by the industry and registered with the Communications and Multimedia Commission it will have to be complied with. It will become where applicable part of the Licensing Conditions. The Code is in the process of being drafted and is divided into parts such as General Guidelines, Specific Broadcasting Guidelines, Specific Online Guidelines, Specific Premium Rate Services Guidelines, Specific Advertising Guidelines.

¹ Section 211-213, Communications and Multimedia Act 1998