

For discussion
on 14 January 2008

**LEGISLATIVE COUNCIL
PANEL ON INFORMATION TECHNOLOGY
AND BROADCASTING**

**Effectiveness of the Existing Regulatory Regime under
the Control of Obscene and Indecent Articles Ordinance**

PURPOSE

This paper outlines the existing regulatory regime for controlling obscene and indecent articles under the Control of Obscene and Indecent Articles Ordinance (COIAO) (Cap. 390) and discusses its effectiveness.

EXISTING REGIME

Objective

2. The current regulatory framework seeks to strike a balance between protecting public morals and young people on the one hand and preserving the free flow of information and safeguarding the freedom of expression on the other.

Scope and Classification

3. The COIAO regulates the publication and public display of obscene and indecent articles. Under the COIAO, “obscenity” and “indecent” include violence, depravity and repulsiveness. The term “article” has a broad definition in the COIAO, covering anything containing material to be read and/or looked at, any sound-recording, any film, videotape, disc or other record of a picture and any articles published on the Internet¹. An article may be classified by the Obscene Articles

¹ The COIAO does not apply to films which are subject to censorship under the Film Censorship Ordinance and television broadcasts regulated under the Broadcasting Ordinance.

Tribunal (OAT) into three different classes².

OAT

4. The OAT is set up under the COIAO as part of the Judiciary which has exclusive jurisdiction to determine for the purposes of the COIAO whether any article is obscene or indecent. The Administration is not involved in the classification. An OAT comprises a presiding magistrate and two or more members drawn from a panel of adjudicators appointed by the Chief Justice. The presiding magistrate determines the number of adjudicators required on an OAT. The adjudicators are ordinary members of the public with a wide spectrum of socio-economic background. This is to ensure that the standards of morality, decency and propriety adopted by the OAT in classifying submitted articles are consistent with those prevailing in the community.

5. The OAT does not solicit any articles for classification. Neither does the COIAO require that articles have to be submitted for classification before publication. The following persons may submit articles to the OAT for classification –

- (a) the author, printer, manufacturer, publisher, importer, distributor or owner of the copyright of an article or any person who commissions the design, production or publication of an article may submit that article for classification; and
- (b) the Secretary for Justice and any public officer authorized in that regard by the Chief Secretary for Administration, including relevant officers of the Television and Entertainment Licensing Authority (TELA), may submit any article for classification.

6. The hearing procedure of the OAT for classification of articles and the factors that it takes into account when making the classification are stipulated in the COIAO. Details are set out in **Annex A**.

A

² The three classes are –

- (a) Class I (Neither Obscene nor Indecent) articles may be published without restriction;
- (b) Class II (Indecent) articles must not be published to persons under the age of 18. Publication of Class II articles must comply with certain statutory requirements, including sealing such articles in wrappers (opaque wrappers if the covers are indecent) and display of a warning notice on the front and back covers of such articles as prescribed by the COIAO; and
- (c) Class III (Obscene) articles are prohibited from publication.

Enforcement

7. The COIAO is enforced by TELA, the Hong Kong Police Force (the Police) and the Customs and Excise Department (C&ED). The Police mainly deals with the sale of articles at wholesale and retail outlets, while C&ED intercepts articles at border checkpoints and may encounter such articles in the course of copyrights enforcement work. TELA monitors publications and inspects retail outlets (such as news stands, video shops, comic book stores, computer shops, etc.) to check if there are any published articles suspected of breaching the COIAO.

8. The enforcement agents submit articles suspected of breaching the COIAO to the OAT for classification. They prosecute publishers or vendors who are found to have published articles classified by the OAT as Class III or Class II (but not published in compliance with the COIAO requirements).

Penalty

9. The penalty for violating the COIAO is determined by the court. The maximum penalty for the publication of an obscene article under the COIAO is a fine of \$1,000,000 and an imprisonment for 3 years. The maximum penalty for the publication of an indecent article in breach of the COIAO is a fine of \$400,000 and an imprisonment for 12 months on a first conviction, and a fine of \$800,000 and an imprisonment for 12 months on a second or subsequent conviction.

EFFECTIVENESS OF THE EXISTING REGULATORY REGIME

10. We focus our analysis of the effectiveness of the COIAO regulatory mechanism on areas which have attracted recent public concerns.

Enforcement of the COIAO

11. Public expectation of the enforcement of the COIAO may vary from time to time depending on the prevailing moral standards and general perception and acceptance towards sensitive content published in different types of media. To meet public expectation, and in response to new forms of media and publications brought about by new technologies,

TELA needs to adopt modus operandi that are appropriate and will need to deploy its resources to best meet its enforcement targets and adjust such priorities from time to time so as to focus on areas of greater public concern.

12. TELA has all along taken a proactive approach in monitoring the sale of publications and VCDs/DVDs. During the peak period in 2002 and 2003, there were hundreds of shops selling obscene/indecent VCDs/DVDs in Mongkok alone. The sale and rental of obscene/indecent comic books, particularly to persons under the age of 18, had also been a problem. The public also expressed great concern over the publication of indecent materials on covers or inside pages of local entertainment magazines³ in the past few years. Since these articles are readily accessible to youngsters below the age of 18, TELA has stepped up enforcement of the COIAO, focusing on news stands and convenient stores selling local entertainment magazines, shops selling indecent/obscene VCDs and DVDs as well as comic book stores. The overall number of inspections conducted by TELA increased from 26 000 in 2000 to 78 000 in 2006, of which the number of inspections to such targeted outlets increased from 37 000 in 2004 to 49 000 in 2006.

13. Enforcement was particularly effective in combating the problem of indecent/obscene DVDs and VCDs. There had been a substantial reduction in the number of shops selling such types of DVDs/VCDs as well as the quantity of such articles seized in enforcement operation. To avoid breaching the COIAO, more publishers and vendors submitted such DVDs/VCDs to the OAT for classification before putting them on sale. On the other hand, the number of COIAO-related complaints against local entertainment magazines has also dropped significantly from over 3 600 in 2004 to about 70 in 2007 (up to November).

14. Due to the broad coverage of “articles” under the COIAO and the huge number of outlets all over Hong Kong, TELA has practical need to focus its limited enforcement resources on priority areas. This inevitably leads to the situation of certain articles (e.g. imported entertainment magazines published in foreign languages and books) being inspected and monitored less vigorously as resources were deployed to cover the priority areas. TELA has to closely monitor trends and

³ The problem was particularly serious in 2004 and 2005, and persisted in 2006. One notable case was a magazine publishing photos of an artist which were taken without knowledge while the artist was changing clothes.

developments as well as public concerns so as to adjust its priorities flexibly. We intend to consult the public on the appropriateness of the existing priorities in the coming review on COIAO.

15. Recently, there have been some concerns over the quality and management of the inspectorate staff of TELA responsible for the COIAO enforcement work. TELA has about 40 Inspectors and Assistant Inspectors, who are mainly responsible for carrying out inspections at news stands, convenient stores, video shops, etc. with reference to the classification guidelines stipulated in the COIAO as well as the OAT's past rulings. They also assist in dealing with COIAO-related public enquiries and complaints. Given the nature of their work, the incumbents are not required to be university graduates.

16. Some members of the public have questioned whether these staff have the necessary knowledge to handle difficult or borderline cases, such as distinguishing between indecency/obscenity and art. To better equip its staff to carry out their duties, TELA has enhanced staff training in the past year, e.g. arranging courses on art appreciation and discussion sessions on OAT's classification rulings among staff to enable them to keep abreast with the prevailing standards. TELA will continue to step up training for its inspectorate staff in the coming year. There are also concerns over the effectiveness of the existing monitoring mechanism over such staff's performance in field duties. TELA reviews the measures which monitor its inspectorate staff on field duties from time to time and has taken measures to strengthen the monitoring work. In view of public concerns over the effective management and performance of TELA's inspectorate staff, we plan to examine this area in the forthcoming COIAO review.

Regulation of materials transmitted on the Internet

17. TELA adopts a complaint-driven approach to deal with indecent/obscene Internet content given the impracticability of actively monitoring information transmitted over the Internet in view of its vast volume and transient nature. In addition, we work closely with the Hong Kong Internet Service Providers Association (HKISPA) to implement the requirements in a Code of Practice which was promulgated in 1997 following public and industry consultation. Major requirements in the Code are set out in **Annex B**.

18. Upon receipt of a complaint related to Internet content, TELA

will examine the content to see if the complaint is in possible breach of the COIAO. If the content is likely to be indecent, TELA will advise the service provider to ask the webmaster to add the required statutory warning in the entry page if this has not been done, or to remove or block access to the articles. The webmasters are so far highly co-operative. However if the content being complained is likely to be obscene, TELA will refer the case to the Police for follow-up enforcement action. As we do not have jurisdiction over overseas Internet service providers, our enforcement work mainly focuses on Internet content in **local websites**.

19. We have taken legal action in cases involving obscene articles and have 17 conviction cases so far. The penalty of convictions ranged from a fine of \$1,000 plus Community Service Order for 100 hours to 30 months' imprisonment.

20. We note that some members of the public have growing concerns over indecent/obscene Internet content⁴. We appreciate the concerns due to the pervasiveness of Internet service in Hong Kong families and its popularity among youngsters. Like regulators in many other jurisdictions, we are tackling a service with proliferation of information transmitted in a globalized and transient way by users who are not required to reveal their identities. This poses both difficulties and constraints on the regulatory work. We plan to consult the community on feasible ways to improve our existing regulatory approach in the context of the coming COIAO review.

21. Meanwhile, TELA and the HKISPA are liaising closely on additional measures to address public concerns. TELA has recently requested the HKISPA to remind the Internet service providers and their customers of the provisions of the COIAO. The HKISPA has also agreed to seek cooperation from Internet service providers that, when TELA has identified specific websites containing indecent materials without displaying the statutory warning notice, they would help forward TELA's warning letter to their customers as appropriate.

22. Apart from law enforcement, we consider that **education and publicity** is of equal if not greater importance in combating the problem of indecent/obscene Internet content. "Healthy use of the Internet" has been an important theme of TELA's publicity and public education activities. We have regularly arranged school talks and seminars on the use of

⁴ The number of complaint cases related to the Internet received by TELA grew from 72 in 2005 to 82 in 2006 and to 220 during January to November 2007.

filtering software for students and their parents. Large scale activities such as the Meritorious Websites Contest are held to promote the positive use of the Internet. In 2003/04 and 2004/05, we sponsored the HKISPA to implement the Internet Content Rating System Project⁵. TELA will further step up public education on positive use of the Internet and the wider use of filter softwares in the coming year.

Penalty provisions

23. The level of penalties imposed by the courts in respect of breaches under the COIAO during 2000 to 2007 ranges from \$100 to \$100,000 for publishing indecent articles. We are aware that there are concerns in the community about the low level of penalties imposed upon conviction⁶. To enhance the deterrent effect of the COIAO, TELA and the Department of Justice have kept in view the penalty levied against breaches by the court and apply to the court to review the penalty decision where appropriate. In 2006, TELA has requested for the review of penalties in three cases.

24. There are calls in the community for reviewing the penalty provisions in the COIAO, particularly those relating to repeat offenders. While the COIAO already stipulates fairly high maximum penalty on repeat offenders, there are suggestions to increase the maximum penalty and to impose other sanction measures. We will include these suggestions in the coming review of the COIAO.

OAT

25. While the findings of the recent survey on the operation of COIAO conducted by TELA show that a majority of the respondents consider the composition of the OAT appropriate, some members of the

⁵ The Project aimed to further promote the awareness of the general public against undesirable content on the Internet and to translate and customize the system developed by the Internet Content Rating Association (ICRA) in the UK into Chinese for local adoption. Under this Project, we encouraged local webmasters to label their websites using ICRA's system. We also encouraged parents to download the free filters provided by the ICRA.

⁶ During 2005 and 2006, there was an increasing trend for entertainment magazines to attract readership by publishing indecent materials in contravention of the COIAO. The community expressed concern that the relatively low penalties imposed upon conviction had not been effective in deterring publishers from publishing indecent articles, especially in the case of repeat offenders. According to the findings of the recent opinion survey commissioned by TELA, among those respondents who were aware of the penalties under the COIAO, 45.8% considered the penalties imposed too lenient.

public have expressed concern about the representativeness of the OAT given the relatively small number of adjudicators on its panel. Campaigns were launched in 2004 and 2006 to recruit adjudicators to enlarge the panel. Invitations for application to be adjudicators were sent to District Councils, professional bodies, etc. As a result, the number of members on the Panel of adjudicators has significantly increased from around 100 in 2004 to 300 in 2007.

26. At present, a presiding magistrate usually draws only two adjudicators to form an OAT to make interim classification and four adjudicators to form an OAT at a full hearing. Where appropriate, a presiding magistrate may consider increasing the number of adjudicators on an OAT. There are suggestions to enhance the effectiveness of the OAT, including increasing the number of adjudicators on each OAT hearing and replacing those OAT adjudicators who have served for a long time, say, over six years, so that there would be turnover in the adjudicators to better reflect the prevailing standards of the community.

27. Recently, there have also been some concerns in the community over different classification results for the same articles made by the OAT at different stages of its hearings. This is largely arising from the requirement that different stages of OAT hearings should not be heard by the same adjudicators to ensure fairness. Some sectors of the community have also commented that the reasons for the OAT's decision made at the interim hearing should be spelt out more clearly to enhance transparency. In view of various public concerns over the operation of the OAT, we plan to look at the issues together with the Judiciary in the coming review.

WAY FORWARD

28. In view of the community's concerns about the various aspects of the operation of the COIAO, we will conduct a comprehensive review of the provisions of the COIAO and the current classification mechanism focusing on areas which have greater public concern as described above and seek the community's views on what improvements are required. Subject to comments from Members on the areas to be covered in the review, we will proceed to conduct the review in the first half of 2008.

Hearing Procedure of the OAT

An OAT shall make an interim classification in respect of any article submitted to it. Where an OAT makes an interim classification in respect of an article, any person who submitted, or would have been entitled to submit the article, may request an OAT to review that interim classification at a full hearing if he is not satisfied with that interim classification. If there is no objection to the interim classification, it will be taken as the final classification. If there is a request for a review of the interim classification, the OAT is required to set a date for a full public hearing. In conducting a full hearing, the OAT is required to consist of a presiding magistrate and four or more adjudicators who are not previously involved in the interim classification.

Factors for consideration by OAT in making COIAO classifications

2. In classifying an article, an OAT is required by the COIAO to have regard to –
 - (a) the standards of morality, decency and propriety that are generally accepted by reasonable members of the community;
 - (b) the dominant overall effect of an article;
 - (c) the persons, classes of persons, or age groups intended or likely to be targeted by an article;
 - (d) in the case of matter publicly displayed, the location of such display and the persons, classes of persons, or age groups likely to view it; and
 - (e) whether the article or matter has an honest purpose or is designed to disguise unacceptable material.

Major requirements in the Code of Practice for HKISPA Members

- (a) Members will inform their users that they shall not place on the Internet or transmit materials likely to be classifiable as Class III (Obscene) and/or Class II (Indecent) without putting up the statutory warning notice at the entry page;
- (b) when a Member becomes aware that a user has placed on the Internet or transmitted using the Internet material likely to be classifiable as Class II (Indecent) without putting up the statutory warning notice at the entry page, the Member shall –
 - (i) promptly advise the user to place a statutory warning notice;
 - (ii) promptly inform the user that the user's conduct may constitute an offence under the COIAO and if the user is a subscriber, such conduct is a breach of the subscriber's service conditions; and
 - (iii) promptly cancel the account of any subscriber that repeats offending conduct despite being informed that the subscriber's conduct may constitute an offence under the COIAO and is a breach of the subscriber's service conditions.
- (c) when a Member becomes aware that a user has placed on the Internet or transmitted using the Internet material likely to be classifiable as Class III (Obscene) which remains at a Website or other content database within its control, the Member shall promptly block access to the Website or database which contains offending material and take action as in items b(ii) and b(iii) above.