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Panel on Information Technology and Broadcasting

Meeting on 14 January 2008

**Background brief on issues relating to the
control of obscene and indecent articles**

Purpose

This paper provides a background of the regulatory regime for the control of obscene and indecent articles under the Control of Obscene and Indecent Articles Ordinance (COIAO) (Cap. 390) as well as the difficulties encountered in enforcing COIAO. It also summarizes Members' latest concerns about the subject.

The regulatory regime under the COIAO

2. The COIAO regulates the publication and public display of obscene and indecent articles. The term "article" defined in the COIAO includes any thing consisting of or containing material to be read and/or looked at, any sound-recording, and any film, videotape, disc or other record of a picture or pictures. Articles published on the Internet are also subject to the regulation of the COIAO. Nevertheless, the COIAO does not apply to films which are subject to censorship under the Film Censorship Ordinance (Cap. 392) and television broadcasts regulated under the Broadcasting Ordinance (Cap. 562).

3. Under the COIAO, "obscenity" and "indecent" include violence, depravity and repulsiveness. An article may be classified as one of the following three classes:

- (a) Class I article (neither obscene nor indecent) which may be published without restriction.
- (b) Class II article (indecent) which must not be published to persons under the age of 18 and, when published, must carry a statutory warning notice and be sealed in a wrapper; or

(c) Class III article (obscene) which is prohibited from publishing.

4. Obscene Articles Tribunals (OATs) are set up under the COIAO as part of the Judiciary to classify submitted articles. They have exclusive jurisdiction to determine for the purposes of the COIAO whether any article is obscene or indecent, and any publicly displayed matter is indecent. An OAT comprises a presiding magistrate and two or more members drawn from a panel of adjudicators who are ordinary members of the public appointed by the Chief Justice. As at 30 May 2007, there were 320 adjudicators with a wide spectrum of socio-economic background.

5. In classifying an article, an OAT should 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 or matter;
- (c) the persons, classes of persons, or age groups intended or likely to be targeted by an article's publication;
- (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 whether instead it seeks to disguise unacceptable material.

Penalty under the COIAO

6. Regarding penalty for violating the COIAO, the maximum penalty for publication of a Class III article is a fine of \$1,000,000 and an imprisonment for 3 years. For Class II articles, non-compliance of COIAO is subject to a fine of \$400,000 and an imprisonment for 12 months on first conviction, and a fine of \$800,000 and an imprisonment for 12 months on a second or subsequent conviction.

7. In May 2000, the Administration published a consultation paper on "Protection of Youth from Obscene and Indecent Materials: The 2000 Review of the COIAO", and proposed to, inter alia, raise the maximum fine on publication of obscene articles (Class III) to \$2 million and the publication of indecent articles (Class II) to a maximum fine of \$800,000 on first conviction and a maximum fine of \$1.6 million and imprisonment for two years on a second or subsequent conviction with a view to enhancing deterrent effect. Serious doubts on the effectiveness of the proposal were expressed at that time as it was noted the convictions in 1999 only resulted in fines ranging from \$500 to \$90,000 despite the penalties prescribed in the COIAO. Besides, there was concern about the impact of the Administration's proposals which might have on press freedom. The

Administration had then decided not to take forward the above proposals.

Enforcement of the COIAO

8. The COIAO is enforced by the Television and Entertainment Licensing Authority (TELA), the Hong Kong Police Force (the Police) and the Customs and Excise Department (C&ED). TELA monitors publications and inspects retail outlets (including bookshops, newspaper stalls, video shops and computer shops) to check if there are any published articles suspected of breaching the COIAO. The Police mainly deals with the sale of articles at wholesale and retail outlets such as video and computer shops, while C&ED intercepts articles at border checkpoints and may encounter such articles in the course of copyrights enforcement work.

9. To tackle the publication of obscene and indecent articles on the Internet, TELA has, together with the Hong Kong Internet Service Providers Association (HKISPA), developed a self-regulatory Code of Practice in October 1997 to provide guidance for Internet Service Providers (ISPs) on the handling of obscene and indecent materials published on the Internet. The Police and HKISPA may block access to or remove obscene articles from the Internet and prosecute those responsible for the breach.

Reviews of the enforcement actions conducted by the Director of Audit in 1999 and 2004

10. In 1999, the Audit Commission (Audit) completed a review on the efficiency and effectiveness of TELA in monitoring the publication and public display of obscene and indecent articles and to ascertain whether there was room for improvement in its enforcement of the COIAO. In its Report No. 32 published in March 1999, the Audit criticized, inter alia, that TELA had not provided systematic training on article classification standards to its inspection staff and had not adopted a strategic planning for the inspections to ensure that publication outlets which were prone to contravene the provisions of the COIAO would be inspected more frequently than others. To this end, the Audit recommended TELA to formulate a strategic plan for inspecting more frequently publication outlets in high-risk areas and to establish a performance standard for routine surveillance inspections to facilitate the monitoring of the performance of the TELA inspection staff.

11. After considering the aforesaid Audit report, the Public Accounts Committee (PAC) published its Report No. 32 in July 1999. In its Report, the PAC urged TELA to promptly put in place measures and mechanisms for performing its entrusted duties under the COIAO. It also urged the Administration to conduct a thorough investigation into the Audit's findings, such as the lack of strategic planning for routine surveillance inspections and the absence of performance standard on the number of inspections to be carried out by each inspection staff, in order to ascertain whether it was caused by corruption, triad influence or simply dereliction of duty, and to consider, in the light of the

investigation results, the need for disciplinary action or criminal prosecution. In this connection, the Panel has noted that since 2001, the Administration has substantially increased TELA's manpower to enforce the provisions of the COIAO. As a result, the numbers of inspections conducted and obscene and indecent articles seized by TELA have increased by more than four and 16 times respectively in 2003, as compared to the corresponding figures in 2000.

12. The Audit further conducted a follow-up review of TELA's control of obscene and indecent articles in 2004. In its Report No. 42 published in April 2004, the Audit referred to the performance targets set by TELA in 2000 for inspecting high-risk retail outlets at least once a month and inspecting low-risk outlets at least once every three months. The Audit considered that a more risk-based approach should be adopted whereby the number of inspection on low-risk convenience shops should be reduced to achieve savings. The Audit also found that TELA's inspection pattern of conducting surveillance inspections during office hours in the afternoon too regular and predictable, and recommended TELA to introduce a surprise element in the surveillance inspection programme to improve its effectiveness.

Follow-up by the Panel

13. When the subject was discussed by the Panel in June 2004, members expressed concern about the ineffective inspection pattern. It was noted that shops of relatively lower risk of contravention were inspected more frequently than those which were primarily engaged in selling dubious VCDs. Moreover, most inspections were conducted between 2 p.m. and 6 p.m., making inspections more predictable. In reply, the Administration advised that a code of practice would be developed with the relevant association of VCD retail shops to facilitate compliance by the trade. TELA had also arranged to conduct inspections in the morning or at night to enhance effectiveness.

Latest issues relating to the COIAO

Dereliction of duties of TELA staff

14. Following a media report on the dereliction of duties of a number of inspection staff of TELA while on field duties, an oral question was raised at the Council meeting on 5 December 2007. The Administration advised that disciplinary actions had been taken against the officers concerned. Measures were taken by TELA to monitor its staff on field duties by increasing the number of surprise checks by supervisors and more frequent use of the automatic location identification feature of 3G phones to monitor the whereabouts of its inspection staff. On the enforcement of the COIAO, the Administration explained that given the large number and broad variety of local and foreign newspapers and magazines being sold in Hong Kong and the huge number of outlets all over Hong Kong, there was genuine practical difficulty to inspect all the retail outlets. As such, the strategy adopted by TELA was to focus on monitoring those publications that were

available at newsstands and convenient stores that were readily accessible by the public.

Protection of young people from exposure to objectionable materials

15. Between 2000 and 2006, the Panel had reviewed with the Administration and invited views on the appropriate measures to protect young people from being exposed to objectionable materials classified under the COIAO. Members noted deputations' views that in regulating the publication/transmission of materials in the mass media, a balance should be struck 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.

16. At the Council meeting on 24 October 2007, a question was raised about the prevalence of objectionable contents of Internet games and computer games easily accessible by young people and students in Internet computer services centre (ICSC). In response, the Administration advised that TELA conducted 2 257, 2 579 and 1 981 inspections at ICSC in 2005, 2006 and 2007 (January to September) respectively to enforce the COIAO but no prosecution for breach of the Ordinance had been instituted. In this connection, Members noted that the Home Affairs Bureau has issued the "Code of Practice for ICSC Operators" to provide guidelines on the operation of ICSC, including crime prevention and filtering of Internet content, for voluntary compliance by the operators. It was also noted that the Administration had no plan to introduce legislation to regulate ICSC.

Clandestine photo-taking

17. At the Panel meeting on 11 September 2006, members also expressed grave concern about the clandestine photo-taking behaviour of the media for publication, hence violating the COIAO and infringing personal privacy. Despite existing legal frameworks to combat objectionable materials and intrusive behaviour, there was a general consensus among Members and the public that the Administration should tighten enforcement actions for non-compliance of the COIAO and deter intrusive acts of the media. The Administration undertook to review the provisions in the COIAO, in particular the penalty provisions related to repeated offenders, to see if those provisions need to be strengthened.

18. A motion was passed at the Council meeting on 18 October 2006 urging the Administration to introduce legislation on the regulation of clandestine photo-taking. Members expressed grave concern about some media organizations' intrusive acts which seriously invaded personal privacy and called on the Administration to review the imposition of sentence under the COIAO and to study the relevant proposals made by the Law Reform Commission (LRC) on the protection of personal privacy. The wording of the motion as proposed by Hon Andrew LEUNG and amended by Hon Albert HO is at **Appendix I**. In its progress report, the Administration has undertaken to take into account the suggestions put forward by Members, such as raising the maximum penalties under the COIAO and setting out in the COIAO some specific factors for consideration

by the court when meting out sentences. In this connection, Members have noted that a media organization has a record of over 100 convictions for publishing indecent articles so far. A Council question was raised on the effectiveness of the COIAO in deterring repeated offenders on 31 October 2007. In reply, the Administration re-iterated the factors taken into account by the OAT in classifying submitted articles. It also advised that whether the past records of a defendant should be considered was a matter for the Court to decide.

Inconsistency over the classification of articles by OATs

19. An oral question was also raised on 17 October 2007 about the inconsistent classification results of OATs. For instance, the same nude photo of a female soldier was published by three local newspapers. While all three newspapers were prosecuted, only two of them were fined and the prosecution of the remaining one was subsequently discharged. In reply, the Administration explained that the OAT consists of different presiding magistrates and adjudicators when exercising its administrative function to classify submitted articles and judicial function to determine on the ground of defence. While all the three concerned articles were submitted for classification by TELA, they were classified as Class II (indecent) articles by the OAT. Based on the classification, TELA instituted prosecution against the three newspapers concurrently. Two of the newspapers pleaded guilty, whereas one of the newspapers pleaded not guilty. Another OAT was formed to consider the ground of defence put forth by that newspaper, and re-classified the concerned photo as Class I (neither obscene nor indecent). Therefore, the prosecution was dropped. Noting the public's confusion over the classification and determination regime adopted by the OAT, the Administration has undertaken to review the provisions of the COIAO and the current mechanism and will then consider making necessary improvements as appropriate.

Latest position

20. The Administration will brief the ITB Panel on the outcome of a regular opinion survey on the COIAO and the effectiveness of the existing regulatory regime under the COIAO at the Panel meeting to be held on 14 January 2008.

Relevant papers

21. A list of relevant papers is at **Appendix II**.

(Translation)

**Motion on
“Introducing legislation to regulate
clandestine photo-taking”
moved by Hon Andrew LEUNG Kwan-yuen
at the Legislative Council meeting
of Wednesday, 18 October 2006**

Motion as amended Hon Albert HO Chun-yan

“That, as there are from time to time complaints about serious invasion of personal privacy by some media organizations and earlier on, peep photos of a female artiste changing her clothes had been taken and published by a magazine which seriously invaded the privacy of the artiste and trampled on women’s dignity, thereby causing a great public outcry; this Council urges the Government to expeditiously take measures, including:

- (a) reviewing the imposition of sentence under the existing Control of Obscene and Indecent Articles Ordinance and its overall implementation so that penalty with deterrent effect is imposed on the offenders;
- (b) studying the proposals on criminalizing the invasion of privacy, establishing a self-regulating commission and enacting additional civil tort law on privacy on the basis of the recommendations made by the Law Reform Commission on the protection of personal privacy in March this year and December 2004, and encouraging in-depth discussion among the media, the performing arts sector and the general public about the contents of the bill concerned; and
- (c) urging the media to exercise more self-discipline,

so as to strike a proper balance between protection of personal privacy and freedom of the press.”

List of relevant papers

Committee	Paper	LC Paper No.
March 1999	✧ Report No. 32 of the Director of Audit (Chapter 3 - Control of Obscene and Indecent Articles by the Television and Entertainment Licensing Authority)	Summary and key findings http://www.aud.gov.hk/eng/pubpr_orpt/rpto_32c3.htm
Meeting of Panel on Information Technology and Broadcasting (ITB Panel) on 10 May 1999	✧ Administration's paper : Public Opinion Survey on the Operation of the Control of Obscene and Indecent Articles Ordinance ✧ Minutes of meeting	CB(1)1263/98-99(05) CB(1)265/99-00
July 1999	✧ Report No. 32 of the Public Accounts Committee	http://www.legco.gov.hk/yr99-00/english/pac/report/pac-r32.pdf
Meeting of ITB Panel on 8 May 2000	✧ Legislative Council Brief : Protection of Youth from Obscene and Indecent Materials : the 2000 Review of the Control of Obscene and Indecent Articles Ordinance (COIAO) ✧ Minutes of meeting	File Ref.: ITBB(CR) 8/7/1 (00) CB(1)1720/99-00
Meeting of ITB Panel on 20 June 2000	✧ Submissions from deputations ✧ Minutes of meeting	Please refer to the agenda CB(1)2060/99-00
Meeting of ITB Panel on 16 January 2004	✧ Minutes of meeting	CB(1)1163/03-04
April 2004	✧ Report No. 42 of the Director of Audit (Chapter 1 – Follow-up Review of the Television and Entertainment Licensing Authority's Control of Obscene and Indecent Articles)	Full report http://www.aud.gov.hk/pdf_e/e42ch01.pdf Summary http://www.aud.gov.hk/pdf_e/e42ch01summary.pdf

Committee	Paper	LC Paper No.
Meeting of ITB Panel on 14 June 2004	<ul style="list-style-type: none"> ✧ Administration's paper : Control of Obscene and Indecent Materials in the Mass Media ✧ Submission from deputation ✧ Administration's paper : Enforcement and Regulatory Framework of Obscene and Indecent Articles ✧ Minutes of meeting 	<ul style="list-style-type: none"> CB(1)2102/03-04(03) CB(1)2102/03-04(05) CB(1)2102/03-04(04) CB(1)2319/03-04
Meeting of ITB Panel on 11 September 2006	<ul style="list-style-type: none"> ✧ Administration's paper : Enforcement of the COIAO ✧ Administration's paper : Protection of Privacy ✧ Executive Summary of the Report on Privacy : The Regulation of Covert Surveillance published by the Law Reform Commission of Hong Kong ✧ Submissions from deputations ✧ Follow-up paper : Entertainment Magazines Submitted to the Obscene Articles Tribunals for Classification ✧ Minutes of meeting 	<ul style="list-style-type: none"> CB(1)2174/05-06(01) CB(1)2175/05-06(01) CB(1)2174/05-06(03) Please refer to the agenda CB(1)525/06-07(01) CB(1)249/06-07
Council meeting on 19 October 2006	✧ Motion on "Introducing legislation to regulate clandestine photo-taking"	Hansard
Council meeting on 30 May 2007	✧ Written question no. 9 : "Obscene Articles Tribunal"	Hansard
Council meeting on 17 October 2007	✧ Oral question no. 4 : "Operation of the COIAO"	Hansard

Committee	Paper	LC Paper No.
Council meeting on 24 October 2007	✧ Oral question no. 4 : "Internet Computer Services Centres"	Hansard
Council meeting on 31 October 2007	✧ Written question no. 8 : "Enforcement of the COIAO"	Hansard
Council meeting on 5 December 2007	✧ Oral question no. 2 : "Enforcement of the COIAO"	Hansard