

REVIEW OF THE ORDINANCE

Public Consultation

4. We have embarked on a comprehensive review of the Ordinance with two rounds of public consultation. The first round of public consultation was conducted from 3 October 2008 to 31 January 2009, during which we engaged members of the public extensively to discuss the main issues relating to the operation of the Ordinance and possible improvement measures. To facilitate this process, we published a user-friendly and easy-to-digest consultation booklet covering various aspects of the Ordinance (i.e. definitions, adjudication system, classification system, new forms of media, enforcement, penalty, and publicity and public education) and offering a wide range of possible improvement measures. Most options were modeled on the practices of overseas developed countries.

5. In the first round of public consultation, we did not have any pre-conceived views about the direction of the review. Our intention was to draw together the public views and, as far as possible, come up with more concrete proposals for a second round of public consultation.

6. During the four-month consultation period, we consulted extensively in different formats and through different media as follows –

- (a) Focus group discussions : The Government engaged representatives from various sectors to participate in **eleven** focus group discussions, namely, District Council Chairmen/Vice-Chairmen, women, education, youth, information technology, Internet services, press and publication, arts and culture, legal, civic rights and social moral, sexual minorities, etc. Over **110** representatives from such sectors participated and had in-depth discussions on the operation of the Ordinance;
- (b) Town hall discussions : **Six** discussion forums at town halls were organised in which over **330** members of District Councils and the public attended;
- (c) Government participation in meetings/seminars organised by different associations and organisations in different sectors : The **37** seminars/symposiums with about **1 800** participants

provided a platform for the public to express their views on the review of the Ordinance;

- (d) Meetings of the Panel on Information Technology and Broadcasting of the Legislative Council : The Government attended **two** Panel meetings in November 2008 and January 2009 respectively in which nearly **90** organisations/individuals participated to voice their views regarding the review of the Ordinance; and
- (e) Internet and Media : We set up a thematic website (<http://www.coiao.gov.hk>) to provide the public with relevant consultation materials and an online discussion forum as a platform for the exchange of views. We also took note of editorials and commentaries published on newspapers and public views expressed in major discussion forums on the Internet;
- (f) Written submissions from the public : The Government invited the public to send in their views on the review of the Ordinance and over **18 800** written submissions were received through mail, fax and email; and
- (g) Public opinion survey : In order to tap the views of those who might not express their views through the above channels, the Government commissioned the Public Opinion Programme at the University of Hong Kong (HKUPOP) to conduct a telephone public opinion survey (the Public Opinion Survey).

7. All related minutes/summaries of the above meetings, written submissions sent to the Government and findings of the Public Opinion Survey have been uploaded to the thematic website (<http://www.coiao.gov.hk>) for public viewing.

Compilation of views

8. The Government commissioned an independent Consultant to help organise public engagement activities and compile/analyse the views collected through the various channels during the first round of public consultation. Having carefully considered all the views collected, the Consultant submitted to the Administration a report on the first round of public consultation of the review at *Annex*. Except for the Public Opinion Survey, all views received are evaluated in qualitative terms

having regard to the following considerations –

- (a) For the first round of public consultation, the Government engaged the public in different ways in order to raise public awareness and invite public views as far as possible. Public views were collected from various channels including meetings, seminars, focus group discussions and town hall meetings, discussion forums on the Internet, written submissions, telephone survey, commentaries in newspapers, etc. It is not appropriate to conduct quantitative analysis on views collected in different ways through different channels;
- (b) As the public were welcome to express their views in whatever format, views collected from written submissions were highly diversified in terms of format and content. Among the written submissions received, some were from organisations while others were from individuals or groups of individuals with multiple signatures. A substantial number of the written submissions were sent by individuals in similar formats, e.g. identical or nearly identical letters. It is not appropriate to treat views of such diversified formats and content in a standardised way and quantify them;
- (c) The Government's objective in the first round of public consultation was to gather as far as possible the public's expectations, views and suggestions regarding the Ordinance and analyse them with a view to coming up with more concrete proposals for a second round of public consultation; and
- (d) Both majority views and minority views will be carefully considered by the Government. The Consultant's report therefore seeks to present a comprehensive picture of views from various stakeholders.

Major findings

Views collected in the Public Opinion Survey

9. The Public Opinion Survey was conducted in January 2009 by HKUPOP to gauge the public's knowledge of and views towards the Ordinance. Target respondents were the Cantonese-speaking population aged 15 or above and about 1 500 of them responded, representing 64.3% of the sample covered. The detailed report of the Public Opinion Survey

is at the *Appendix of the Annex* and the major findings are summarised as follows (these are the views received in the Public Opinion Survey and do not represent the position of the Government) -

- (a) the respondents' knowledge of the Ordinance is fair;
- (b) over 80% of the respondents considered that legislation was needed to regulate the publication of articles, and some 60% of the respondents considered the existing three-tier classification system under the Ordinance appropriate;
- (c) most respondents (i.e. over 90%) were aware of the existence of the Obscene Articles Tribunal (OAT) but only less than one-tenth regarded the work of the OAT as "well done" and nearly half of them regarded its effectiveness to be "neither good nor bad";
- (d) among the six proposals for improving the adjudication system listed in the consultation document, the respondents seemed to be highly supportive of increasing the number of adjudicators in each hearing and requiring each hearing to include adjudicators from specified sectors. Both proposals captured almost 80% support. About 60% of respondents supported the establishment of a new independent adjudication system and the replacement of adjudicators by jurors. About 40% of the respondents were in favor of the abolition of the OAT and the classification of articles by a magistrate while another 40% were in opposition;
- (e) as regards the regulation of the Internet, three-quarters of the respondents urged the Government to step up its regulation, mainly to improve the existing regulatory system and to increase the penalty;
- (f) three-quarters of the respondents considered that the court should increase the penalty for violating the Ordinance; and
- (g) nearly three-quarters of the respondents considered that the Government should educate the public through television.

Views collected from other channels and the Consultant's recommendations

10. Having consolidated and analysed the views collected, the Consultant concludes that views on different issues are highly diverse and no consensus has been reached. It is only on the importance of publicity and public education that members of the public are close to a consensus. Nevertheless, the Consultant considers that the views collected have provided valuable insight for the Government to draw upon as it develops concrete proposals to improve the regulatory regime and other issues for inclusion in the second round of public consultation. The analysis and recommendations of the Consultant are summarised below which do not represent the position of the Government.

(a) Need of the Ordinance

11. While some members of the public had reservations on the need for the Ordinance at all and taking the view that it might hinder the free flow of information, others considered that there was a need to keep the Ordinance and there was no apparent support for an overall abolition of the Ordinance. The Consultant suggests the Government should continue to encourage further public discussions with a view to exploring a set of standards generally acceptable by members of the public.

(b) Definitions

12. Currently, the Ordinance provides that “obscenity” and “indecentcy” include “violence, depravity and repulsiveness”. There were considerable public discussions on the definitions, and public views collected are diverse. Some members of the public supported expanding the definitions so that the public would know clearly under what circumstances one might breach the law. However, they also agreed that it would be impractical to list out all possible situations. On the other hand, some considered that the existing definitions were adequate and the Government should not be too prescriptive in interpreting terms like “obscenity” and “indecentcy” in the legislation to avoid inflexibility. They would prefer the Government to consider establishing a set of administrative guidelines for the public and stakeholders instead.

13. The Consultant considers that there must be support and understanding from the majority of the public before a decision can be made on whether and how to amend the definitions of “obscenity” and “indecentcy”. The Consultant further suggests that the Government

should carefully consider the public views and draw up recommendations for discussions in the second round of public consultation.

(b) Adjudication System

14. Members of the public have expressed concerns about the transparency and representativeness of the OAT¹ as well as the consistency in OAT's rulings. There were a lot of discussions on various measures to improve the operation of the OAT, which included increasing the total number of adjudicators of the OAT, increasing the number of adjudicators at each hearing, selecting adjudicators from different sectors and inviting jurors as adjudicators. Many people supported increasing the number of adjudicators at each hearing, e.g. from two to four at interim hearing, and from four to six at full hearing.

15. The Judiciary and some members of the legal profession have proposed to remove the administrative classification function from the OAT, leaving it to deal with judicial determinations² only, and to replace the adjudicators system in the OAT with the jury system. There was however little deliberation of this issue among the public.

16. Some people suggested abolishing the OAT and asking the court to take up the classification role, though this might greatly increase the workload of the court. Some people have pointed out that, among the many cases handled by the OAT every year, only the classification of a very small number of them was controversial. Overall there did not appear to be a strong demand for abolishing the OAT.

17. The Consultant considers that maintaining the OAT, improving the composition of its membership and adjudication procedures would enhance the OAT's transparency, representativeness and consistency of its decisions. Regarding the administrative and judicial functions of the

¹ Currently, the OAT, a judicial body presided over by a magistrate and comprising adjudicators appointed by the Chief Justice, has exclusive jurisdiction in classifying articles. Those who are ordinarily resident in Hong Kong and have been so resided for seven years and are proficient in written English or Chinese are eligible for appointment as adjudicators. There are now around 300 adjudicators.

² - It is an **administrative function** for the OAT to perform its statutory duty to make an interim classification and, upon appeal, a final classification on a submitted article. In performing such classification duty, the OAT does not possess the power and authority of a court.

- The OAT is also required to perform a **judicial function**. Upon referral by a court or a magistrate arising from a civil or criminal proceeding, the OAT determines whether an article is obscene or indecent. The OAT does so as a court, possessing the powers and authority of a court.

OAT, the Consultant considers it necessary for the Government to conduct further in-depth discussions with the relevant stakeholders.

(c) Classification System

18. The Ordinance provides for a three-tier classification system³. The respondents had less interest in this topic. Of those who expressed views, many supported the existing classification system and did not see a need for change. Some cautioned that introducing sub-classes under Class II would create confusion, cause enforcement problems and increase the cost of adjudication work. A few called for the abolition of Class III or the whole classification system but others disagreed. As the public do not seem to have a major concern about the existing classification system, the Consultant proposes that the Government may consider not covering this in the second round of public consultation.

(d) New Forms of Media

19. Regulation of new media has attracted extensive public discussions during the first round of consultation⁴. On the one hand, industry members and Internet users strongly opposed, both in principle and on technical grounds, any increased control over the Internet, particularly regarding verification of Internet users' age and requiring ISPs to provide filtering services. On the other hand, many members of the public, especially parents and educators, expressed concern about the impact of the Internet on youngsters through dissemination of obscene and indecent information and they supported enhanced regulation of the Internet.

20. The Consultant considers that in view of the public's concern and diverse views about the dissemination of information on the Internet, the Government should not make any decision in the absence of a clear tendency and sufficient discussion in the community, but should conduct

³ At present, articles can be classified as Class I (neither obscene nor indecent), Class II (Indecent) and Class III (Obscene). Class I articles may be published without restriction. Class II articles must not be published to persons under the age of 18 and publication of such must comply with statutory requirements including sealing in wrappers and displaying a warning notice. Class III articles are prohibited from publication at all.

⁴ Currently, Television and Entertainment Licensing Authority (TELA) adopts a complaint-driven approach to deal with obscene and indecent content online. It works closely with the Hong Kong Internet Service Providers Association to implement a self-regulatory code of practice on the handling of indecent articles on the Internet. The code was promulgated in 1997 following industry and public consultation. If the content under complaint is likely to be obscene, TELA will refer it to the Police for follow up enforcement action, including prosecution.

further discussions on the subject with the stakeholders and members of the public in the second round of consultation.

(e) Enforcement

21. Enforcement work and priority are relatively technical on which the public have expressed relatively few views. The Consultant suggests that the relevant enforcement agencies should discuss this issue among themselves with a view to seeking operational improvement and the Government may consider not to cover this area in the second round of consultation.

(f) Penalty

22. There were not a lot of public discussions in this area. Of those who have expressed views, the majority supported heavier penalties in order to enhance deterrent effect against repeated offenders. Some pointed out that the penalties handed down by the court were usually lower than the maximum penalty set out in the Ordinance. The Consultant suggests that the Government should consider the feasibility of this approach, taking into account the discretionary power of the court in imposing sentences for individual cases.

(g) Publicity and public education

23. Almost all recognised the importance of publicity and public education, even though some people opined that publicity and public education could not replace legislation. The Consultant considers that the Government should follow up on how to step up educational efforts.

WAY FORWARD

24. The Government's policy objectives are clear: to safeguard the free flow of information and freedom of expression on one hand, and to protect minors and impressionable people from obscene and indecent materials on the other. We have taken note of the Consultant's findings and recommendations and will consider them carefully. Taking into account all the views received, we will map out possible concrete improvement proposals for the second round of public consultation. As recommended by the Consultant, we will carefully consider focusing the second round of consultation on areas of major public concerns where more diverse public views were received. Meanwhile, we would discuss

within the Government and with the relevant stakeholders how to follow up public views on possible improvement measures for other areas not to be covered in the second round of public consultation. We intend to commence the second round of public consultation before the end of the year.

Commerce and Economic Development Bureau
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