

立法會
Legislative Council

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Panel on Information Technology and Broadcasting

Meeting on 20 November 2008

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

Purpose

This paper describes the regulatory regime for the control of obscene and indecent articles under the Control of Obscene and Indecent Articles Ordinance (COIAO) (Cap. 390), and gives a summary of concerns raised by Members during previous discussions.

The regulatory regime under the COIAO

2. The COIAO regulates the publication and public display of obscene and indecent articles. The term "article" as 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 or sold without restriction;
- (b) Class II article (indecent) which must not be published or sold to persons under the age of 18 and, when published or sold, must carry a statutory warning notice and be sealed in a wrapper; or

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

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 or neither, 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. Currently, there is a pool of some 300 adjudicators serving the OAT.

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.

6. The maximum penalty for the publication of an obscene article (Class III) is a fine of \$1 million and an imprisonment for 3 years. The maximum penalty for the publication of an indecent article (Class II) is 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. The COIAO does not set out factors which the court should take into consideration when meting out a penalty and the court has full discretion to determine the level of penalty in individual cases. So far, the heaviest penalties handed down by the court for cases involving obscene articles are imprisonment for 30 months in one case, and a fine of \$100,000 in another case. For cases involving indecent articles, the heaviest penalty is imprisonment for 8 months in one case, and a fine of \$100,000 in another case.

7. 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 on sale in the market 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 while carrying out copyrights enforcement work.

8. TELA also deals with indecent articles transmitted on the Internet through monitoring websites and following up on complaints. Together with the Hong Kong Internet Service Providers Association (HKISPA), TELA has 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.

Previous discussions in the Legislative Council and Panels

9. There was wide public concern about the dissemination of obscene and indecent materials in print media such as entertainment magazines and the new media such as the Internet. Questions on the classification criteria and the enforcement of COIAO were raised at Council meetings. A motion was also passed at the Council meeting on 19 October 2006 urging the Administration to introduce legislation on the regulation of clandestine photo-taking and to review the imposition of sentence under the COIAO. The wording of the motion as proposed by Hon Andrew LEUNG and amended by Hon Albert HO is in **Appendix I**. The Panel on Information Technology and Broadcasting (the ITB Panel), the Panel on Security and the Panel on Administration of Justice and Legal Services had also discussed relevant issues in the last term.

Protection of young people from exposure to objectionable materials

10. In the past years, the ITB Panel had reviewed with the Administration and invited public 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.

11. In view of the pervasiveness of Internet service and its popularity in Hong Kong families, the ITB Panel was concerned about the prevalence of indecent/obscene Internet content easily accessible by young people and students. The Panel considered that measures should be taken to protect the youth from being exposed to objectionable materials transmitted on the Internet.

12. Members were also concerned 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). According to the Administration, the Home Affairs Bureau had 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. However, the Administration had no plan to introduce legislation to

regulate ICSC.

Inconsistency in the classification of articles by OATs

13. In April 2007, the OAT gave an interim classification as indecent articles to three local newspapers for publishing the same nude photo of a female soldier. TELA subsequently instituted prosecution against the three newspapers for the relevant offence. The first two newspapers pleaded guilty and were fined, whereas the third newspaper denied the charges. Following a review, the photo was re-classified as a Class I article by the OAT with different membership, and the charges against the third newspaper were therefore dismissed. At the ITB Panel meeting held on 14 January 2008, members expressed the concern about the basis and standard for making classifications arising for the above incident. They considered that OATs should maintain consistency in classification as far as practicable in order to avoid giving the public an impression of differential treatment. They urged the Administration to provide clear and objective criteria as basis for classification, and to put in place an internal control mechanism to avoid repeated occurrence of inconsistent classifications which led to or was perceived to be selective prosecution. Some members suggested that the same set of articles should be classified by the same OAT members, who should also be informed of any precedent or similar cases to facilitate consistency in making classification.

Enforcement and penalty

14. At the ITB Panel meeting on 11 September 2006, members expressed grave concern about the clandestine photo-taking behaviour of the media for publication which violated the COIAO and infringed personal privacy. Members noted that a media organization had a record of over 100 convictions for publishing indecent articles and called on the Administration to improve the existing penalty provisions to enhance the deterrent effect.

15. The ITB Panel discussed the public opinion survey results on the COIAO commissioned by TELA at the meeting held on 14 January 2008. Referring to the survey findings in which the majority of the respondents who regarded the penalties not appropriate considered them too lenient, members expressed their concern about the low level of penalties imposed upon conviction, in particular those relating to media organizations which had repeated records of publishing indecent articles. In this connection, members urged the Administration to consider strengthening the deterrent effect of COIAO by increasing the maximum penalty on repeated offenders and imposing harsher penalties on them.

16. Following a media report on the dereliction of duties of a number of TELA inspection staff while on field duties, Members had concerns about the monitoring of the performance of the TELA inspection staff. Members suggested that the Administration should step up staff supervision and establish a performance standard on the number of inspections to be carried out by each inspection staff.

17. Arising from the prosecution of a member of the public for publishing on the Internet a nude photograph purported to be of artistes in late January 2008, the Panel on Security and the Panel on Administration of Justice and Legal Services held a meeting on 29 February and 19 March 2008 respectively to discuss the prosecution policy and law enforcement against cyber crimes relating to obscene and indecent articles. As there was no legal requirement under the COIAO that an article had to be classified before prosecution against a publisher/individual was made, members of the two Panels considered that the Police and the Department of Justice should invariably obtain an interim classification from the OAT before charge.

Latest position

18. The first round of public consultation on a comprehensive review of the COIAO has been launched on 3 October 2008. The Administration will brief the ITB Panel on details of the consultation at the Panel meeting to be held on 20 November 2008. Representatives of the Office of the Privacy Commissioner for Personal Data and relevant deputations/interested parties have also been invited to provide submissions and attend the meeting to give their views.

Relevant papers

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

Council Business Division 1
Legislative Council Secretariat
14 November 2008

(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."

Appendix II

List of relevant papers

Committee	Paper	LC Paper No.
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
Meeting of ITB Panel on 14 June 2004	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	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	Administration's paper : Enforcement of the COIAO Administration's paper : Protection of Privacy	CB(1)2174/05-06(01) CB(1)2175/05-06(01)

Committee	Paper	LC Paper No.
	<p>Executive Summary of the Report on Privacy : The Regulation of Covert Surveillance published by the Law Reform Commission of Hong Kong</p> <p>Submissions from deputations</p> <p>Follow-up paper : Entertainment Magazines Submitted to the Obscene Articles Tribunals for Classification</p> <p>Minutes of meeting</p>	<p>CB(1)2174/05-06(03)</p> <p>Please refer to the agenda</p> <p>CB(1)525/06-07(01)</p> <p>CB(1)249/06-07</p>
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 : "Enforcement of the COIAO"	Hansard
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
Meeting of ITB Panel on 14 January 2008	<p>Administration's paper: Public opinion survey on the operation of the COIAO</p> <p>Administration's paper: Effectiveness of the existing regulatory regime under the COIAO</p> <p>Legislative Council Brief: Issues relating to the control of obscene and indecent articles</p> <p>Minutes of meeting</p>	<p>CB(1)544/07-08(04)</p> <p>CB(1)544/07-08(05)</p> <p>CB(1)573/07-08(02)</p> <p>CB(1)943/07-08</p>

Committee	Paper	LC Paper No.
Meeting of Panel on Security on 29 February 2008	Administration's paper: Law enforcement against cyber crimes relating to obscene and indecent articles and Internet security issues Minutes of meeting	CB(2)1179/07-08(02) CB(2)2732/07-08
Meeting of Panel on Administration of Justice and Legal Services on 19 March 2008	Administration's paper: Mr Chung Yik-tin's case Minutes of meeting	CB(2)1203/07-08(02) CB(2)2007/07-08
Council meeting on 5 March 2008	Oral question no. 4: Enforcement of COIAO Oral question no. 5: Prosecution against publishing obscene articles on Internet	Hansard Hansard
Council meeting on 12 March 2008	Written question no. 15: Proper use of Internet	Hansard