Response to the Review of the Control of Obscene and Indecent Articles Ordinance

Submission to the Information Technology and Broadcasting Panel of the Legislative Council

1. We believe that the review of the Control of Obscene and Indecent Articles Ordinance (COIAO) is timely and necessary, due to the controversies and public outcries surrounding many decisions by the Obscene Articles Tribunal (OAT) in recent years. A review on the classification system and its operations, including law enforcement, is needed, but the motivation of the review should not be based on an assumption that more control is needed, and in particular any attempt to specifically target the new media would be misguided.

2. We believe that singling out the Internet for any kind of content control would be an improper policy direction. In general, laws and legislation should be held to be neutral in technology and media, and only in extreme cases of proven necessity would specific laws be appropriate to govern specifically any particular media or technology, such as the Internet. Otherwise, such attempts to legislate specifically for the new media would be both ineffective and unfair.

3. The proper priority questions to be examined in the current review should be about exploring whether or not society may come to a consensus on whether Government should impose more control on obscene and indecent articles, if society can agree on a common set of standards for the classification of such articles, and whether any form of control can be indeed effectively carried out. The consultation should not jump into the discussion of "how" to carry out further control, as it has apparently been drafted, especially regarding the new media.

Section 1: Definitions

4. "Translating public standards in respect of 'obscenity' and 'indecency' into clear provisions" is indeed difficult to almost impossible in an advanced and diversified cultural society like Hong Kong. As an international city, we should embrace diversity and tolerance, rather than allowing Government in impose or endorse "standards" in respect of such "values" as obscenity and indecency.

5. The reference question on how to "expand the definition of 'obscenity' and 'indecency'" is misleading as it already assumes that such definition needs to be expanded, as opposed to being kept as present or even be reduced. In a tolerant and diversified society, flexibility should take precedence over "clarity" as "values" relating to obscenity and indecency should not be "hard-coded" into legislation. Indeed, attempts in the past by law enforcement and the OAT to apply strict standards in interpreting obscenity and indecency were the real reasons causing the criticisms against the COIAO.

6. In particular, we are against the Government being directly involved in drawing up classification guidelines, as this will be perceived as undue interference by the Government on Hong Kong's freedom of information.

Section 2: Adjudication System

7. We believe that in a diversified and open society such as Hong Kong, it is virtually impossible for society to come to a consensus on issues relating the standards of obscenity and indecency, and it is again difficult if not impossible to expect the adjudication system to come to a uniform decision to all cases. Likewise, the representation of the OAT cannot be

improved merely by increasing the number of adjudicators, as a larger number may indeed make it harder for the group to come to consensus.

8. In principle, we are of the preliminary view that, as mentioned in point 2.6 of the consultation document, the court can be relied on to make classification for articles under many advanced jurisdiction, and it may be a viable option to abandon the OAT adjudication system altogether. Further consultation with more detailed examination of how this is done in other jurisdiction is necessary.

9. If we do have an adjudication system using the OAT, we believe it is fair and appropriate for the public and publishers to have the right to submit articles to the OAT to be adjudicated. Otherwise, the publishers will have to face unnecessary risk of violating the COIAO, and as a result, some may choose to self-censor. This is unfair to the public, including both the publishers and receiving public.

11. The OAT should provide higher transparency. The first adjudication now is not reasoned and this should be changed so that appeals can be facilitated and a more consistent criteria of judgment can be developed, and the public can be better educated about the rationale used by the OAT. Increasing transparency is more important and effective then increasing the number of adjudicators.

10. We believe that law enforcement should submit articles to be adjudicated before prosecution, as this appears to be a fair, basic and fundamental right that the accused should be entitled to. Concerns on efficiency is no excuse for law enforcement to sidestep this step.

Section 3: Classification System

12. We believe that the present classification system is adequate, and society is not in agreement of any urgent need to further expand the system or make it stricter. Likewise, we do not believe there is any urgent need to create any further sub-classification for Type II (indecent) articles, as it is not practical to further sub-divide the classification based on an even smaller range of ages.

Section 4: New Media

13. We reiterate that laws and legislation should be held to be neutral in technology and media, and only in extreme cases of proven necessity would specific laws be appropriate to govern specifically any particular media or technology, such as the Internet. Hence, the reference question specifically singling out the Internet to consult about the “level of regulation” it should receive is misguided and unfair.

14. For more than ten years, the self-regulatory regime for the handling of obscene and indecent articles on the Internet established between the Hong Kong Internet Service Providers Association (HKISPA) and Television and Entertainment Licensing Authority (TELA) has been functioning well and the number of complaints received has been decreasing. There is no evidence of a general consensus in society that the problem is escalating. It is best that this system of co-regulation continues to be the primary model for “regulating” the Internet.

15. We are against making it mandatory for Internet service providers (ISPs) to provide filtering software or services at the server level. First, no filtering is totally foolproof and such mandatory requirement may only cause the public to have a false sense of security. Second, it will add cost to ISPs' operation, including those many ISPs which do little to no residential

business, thereby adding cost to all ISPs and charges for all users, including business and residential.

16. More importantly, it must be noted that server-side filtering services targeting youth are already available from some ISPs but the adoption rate is not high. The Government and society as a whole must recognize this and determine the true cost of why parents are not choosing these available services, rather than mandating all ISPs to provide services that few parents are choosing at present anyway. Are parents not choosing these services because of cost, lack of information or knowledge that these services are available, or because these services are shown to be ineffective, inaccurate or slow? These questions must be answered before any attempt to even start to discuss mandatory filtering by ISPs.

17. A better alternative would be for the Government to – based on the finding of the answers to the above questions – provide the necessary assistance to parents who may need to be informed or subsidized to adopt these services. And instead of mandating ISPs to provide filtering by law, the provision of these services can continued to be market-driven, but ensuring that parents do have a choice, and assisting them in being informed or subsidized where necessary and appropriate. The Government can work with and assist the industry (e.g. HKISPA) and concerned NGOs or the educational sector to provide such filtering services in a market-driven manner.

18. Since the Internet is global in nature, measures taken in Hong Kong, including legislative and mandatory measures taken over ISPs and other online service providers (OSPs) would be ineffective and incomplete – including proposed measures mentioned in the consultative document such as warning messages, age verification, etc. Thus we are against imposing specific measures to regulate obscene and indecent articles on the Internet.

19. On the question of the definition of "public" in the context of distribution of articles, it must be recognized that the Internet as a form of new media comes with a usage culture that is different from other media. It would be unnatural and even objectionable to many Internet users if the communications between users of a forum, for example, will be deemed as distribution of articles to members of the public. It would be very difficult to draw a line between users who are indeed sharing articles with acquaintances, which should not be inhibited in any way.

20. While the Government has mentioned recent legislations in Australia as an example of using some forms of mandatory filtering and age verification, it should be noted that those schemes are still highly controversial in Australia, have been cited as failure in technology, and the Government is already under a lot of criticisms for pushing forward with these controls. Also, many other countries are taking a much more light-handed approach, such as the U.K. The Government should provide a more complete and balanced view if we are to compare with other countries and regions.

Section 5: Enforcement

21. We believe that uncertainty in the enforcement of COIAO is indeed a bigger problem than the need for further legislation. Most previous and recent controversies surrounding COIAO has to do with selective enforcement, or the OAT following its own internal guidelines to operate as opposed to following exactly the letter of the law.

22. We believe the Police should take a minimalist role in the enforcement of COIAO, as there should be crimes that should be dealt with under higher priority, or causing more serious harm to society. It is highly resource-consuming and simply impossible for law

enforcement to try to monitor all activities, let alone the concerns over privacy. Hence law enforcement should follow the principles of primarily acting on complaints, and focusing on more extreme cases such as child pornography, although such materials are covered by other legislations.

23. We agree that the scope of the review can be expanded to cover other forms of electronic media that have an effect on young people, including electronic games.

Section 6: Penalty

24. We believe current penalties for offenses under COIAO is adequate for deterrence purpose.

Section 7: Publicity and Public Education

25. While we believe that education is the most important aspect in the handling of the issues relating to obscene and indecent articles, we do not agree with the apparent "assumption" made in the first reference question in this section, that "XXXXX"

Conclusion

24. This consultative document lacks detailed discussions about legal, social and economic impacts of the proposed measures mentioned, and does not contain any references to practices in other jurisdictions internationally. This does not help the public being informed as to making a more informed response to the consultation. Instead, the public is asked to make responses based on their instincts and existing positions, and this is not conducive to a productive consultation.

25. It is easy for some members of the public who does not understand or are not even active users of the new media to propose imposing a double standard on regulating content on the new media, but this phenomenon should be carefully guarded against.

26. We are in particular concerned about any attempts to impose specific or mandatory screening or filtering mechanisms over the Internet. It must be remembered that currently the only articles which are mandated to be pre-screened are movies to be shown in cinemas. Otherwise, no pre-screening mechanism exists for any other articles. However, introducing a mandatory filtering requirement for the Internet through the ISPs would in fact make the Internet even more "censored" than those movies to be shown in cinemas. Just as the public would most likely not support a black list for books to be imported or published in Hong Kong, mandatory filtering of the Internet should be treated equally and opposed.

27. We uphold the freedom of information as a core value of the highest priority in Hong Kong, and one that is most critical even for our economic development and sustainability – one core value that cannot be traded lightly for other concerns. We are concerned that over-regulation would harm the image and reality of information freedom in Hong Kong. Any actions to exert further control would cause damage to Hong Kong's reputation in information freedom.

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