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LEGISLATIVE COUNCIL BRIEF

Control of Obscene and Indecent Articles Ordinance
(Chapter 390)

REVIEW OF THE CONTROL OF OBSCENE AND INDECENT ARTICLES ORDINANCE

INTRODUCTION

At the meeting of the Executive Council held on 10 February 2015, the Council ADVISED and the Chief Executive ORDERED that the Government should improve the regulatory regime of the Control of Obscene and Indecent Articles Ordinance (COIAO) by –

(a) amending the COIAO to –

(i) abolish the administrative classification function of the Obscene Articles Tribunal (OAT) whilst leaving the OAT to only deal with judicial determination;

(ii) increase the minimum number of adjudicators at each OAT hearing from two to four to enhance the representativeness of the OAT;

(iii) double the maximum penalty of offences relating to obscene (from $1 million to $2 million) and indecent articles (from $400,000 and $800,000 to $800,000 and $1.6 million as appropriate), and the maximum imprisonment term for subsequent convictions relating to indecent articles (from one to two years) to reinforce the deterrent effect; and

(b) implementing improvement measures in respect of the operation of the OAT and the co-regulatory approach for the control of indecent and obscene articles on the Internet, including increasing the total number of adjudicators from 500 to 1 500, and updating the Code of Practice in dealing with public complaints on the Internet.

JUSTIFICATIONS

COIAO

2. The COIAO was enacted in 1987 to provide for the establishment of the OAT and to control articles[1] which consist of or contain material that is obscene or indecent.[2] The OAT is a specialised tribunal of the Judiciary. It has exclusive jurisdiction over the determination of whether an article is obscene or indecent. It comprises a presiding magistrate and adjudicators drawn from a panel of adjudicators who are members of the public appointed by the Chief Justice (CJ). It aims to provide more consistent standards which reflect the current community views. At present, there are about 500 adjudicators.[3]

3. The OAT discharges two different functions. It is responsible for giving a classification on a submitted article, which is an

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[1] Articles under the COIAO cover anything containing material to be read and/or looked at, any sound-recording, and any film, videotape, disc or other record of a picture, which include printed publications (such as books, newspapers, magazines), DVD/CD, video games, etc. However, the COIAO does not apply to films, videotapes or laserdiscs approved for exhibition or publication under the Film Censorship Ordinance (Cap. 392) and broadcasting materials permitted to be provided under the Broadcasting Ordinance (Cap. 562).

[2] It aims to achieve the Government's long-standing policy of reflecting standards of public decency to articles (especially those intended for young and impressionable people), while preserving the free flow of information and safeguarding freedom of expression. There is no compulsory pre-censorship before the publication of an article, but the publisher is responsible for ensuring that any publication complies with the law.

[3] These adjudicators are appointed by the CJ upon application by individual citizens. There is no upper limit on the total number of adjudicators as far as the law is concerned though administratively, the Judiciary has selected a limit of 500.

administrative function [4] (hereafter referred as administrative classification function); and making a determination on whether an article is obscene or indecent upon referral by the court or magistrate concerned in civil or criminal proceedings, which is a judicial function[5] (hereafter referred as judicial determination function). When performing the judicial determination function, the OAT does so as a court, with the related powers and authority.

Two Rounds of Public Consultation

4. The Government undertook in 2008 to conduct a comprehensive review of the COIAO in response to the growing public concern over obscene or indecent materials published in newspapers and entertainment magazines, or disseminated through the Internet. Two rounds of public consultation were conducted, with the second round completed in July 2012. We consulted the public on four major areas –

(a) institutional set-up of the OAT;
(b) maximum penalty under the COIAO;
(c) definitions of "obscenity" and "indecency"; and
(d) handling of new forms of media.

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The major views and comments received are summarised in the report at **Annex A** which was published in January 2013.

5. Having considered the views received during the public consultation, and having consulted the Judiciary and the Department of Justice, we propose to implement a number of measures to improve the regulatory regime of the COIAO, as set out in paragraphs [6] to [19] below.

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[4] Under administrative classification, prospective publishers, as well as enforcement agencies, may submit articles to the OAT for classification on a voluntary basis. The OAT shall give the submitted article an interim classification within five days of receipt of the submission. Undisputed interim classifications will be taken as final, whereas disputed ones will be reviewed upon request at a full hearing in public. The classification decision made at a full hearing by the OAT shall be final under the administrative procedure.

[5] In the event that a person disputes the obscenity or indecency of an article in any civil or criminal proceedings, the court or magistrate concerned shall refer the question to the OAT, which shall then make a determination on whether the article is obscene, indecent, or neither obscene nor indecent.

Institutional Set-up of the OAT

Abolishing the administrative classification function

6. The Judiciary considers the present institutional set-up of the OAT highly unsatisfactory as the OAT is required by law to perform both administrative classification and judicial determination functions. As a matter of principle, the Judiciary regards the exercise of administrative classification function by a judicial body as undermining the fundamental principle of judicial independence. The Judiciary firmly believes that the problems with the existing set-up should be addressed by removing the administrative classification function of the OAT from the Judiciary, leaving the OAT to deal only with judicial determination. This view is strongly supported by the legal profession, including the Hong Kong Bar Association and the Law Society of Hong Kong.

7. In the second round public consultation, we consulted the public on two options to reform the OAT to address the Judiciary's concern, as follows –

(a) <u>Option 1 - segregating the administrative classification and judicial determination functions</u>

The Government would establish a statutory classification board and an appeal panel to take over the OAT's administrative classification function. The classification board would be responsible for making interim administrative classifications, while the appeal panel would review interim administrative classifications on appeal. The OAT would only handle judicial determination. Adjudication systems with similar independent classification and appeal boards to classify articles are adopted in overseas jurisdictions such as New Zealand, Australia and Germany.

(b) <u>Option 2 - abolishing the administrative classification function altogether</u>

The administrative classification function of the OAT would be abolished and the OAT would be left to only deal with the

judicial determination function. In overseas jurisdictions such as the United States, Canada and the United Kingdom, no separate bodies are responsible for administrative classification of publications and the Court determines whether a publication is obscene or not.

8. During the second round public consultation, while almost all respondents agreed that the administrative classification function should be removed from the Judiciary, there was no clear consensus on the preferred option. Respondents who preferred Option 1 were of the view that it would provide the industry with a classification avenue before publication. Respondents who supported Option 2 considered it to be a more streamlined and efficient structure requiring less resources. Some also expressed concern that the freedom of speech could be undermined under Option 1. Despite that the reform of the institutional set-up of the OAT would impact upon the publishing industry, the industry did not seem to have reached a clear consensus. Some respondents from the industry supported Option 2 while others supported Option 1 or did not take a clear stance on which option to go for.

9. Having considered the public views received, we recommend that the Administration should adopt Option 2 and the COIAO should be amended to abolish the administrative classification function. Nonetheless, we note that there may be concerns over the removal of the administrative classification, for example –

(a) while indecent and obscene articles can be quickly classified and sanctions be imposed for their illegal publication thereafter under the current administrative classification system, there will no longer be such an avenue for authorities to impose immediate control of publication, in particular repeated or copycat publication, of obscene and indecent articles upon the revamp of the COIAO;

(b) parties concerned would no longer have the avenue to seek classification in advance to ensure compliance with the law. Unfamiliarity with the latest adjudication standards of the OAT may put publishers in a greater danger of being prosecuted and may ultimately lead to self-censorship (in particular for small publishers with limited financial and legal capability); and

(c) the dwindling demand for administrative classification (see para 10(a) below) may be due to the fact that the existing regime renders its decisions predictable to the publishers. Amid the gradual change of the attitude towards obscenity and indecency with the evolution of social culture, without an administrative classification mechanism in place, publishers may attempt to publish more explicit articles to test the bottom lines of the OAT, leading to an upsurge in the publication of such articles.

10. We have carefully considered the above concerns. On balance, Option 2 is preferred for the following reasons –

(a) the demand for administrative classification has decreased significantly in recent years. The number of articles submitted to the OAT for administrative classification has dropped from some 3 000 in 2002 to about 300 in 2013 (i.e. a decrease of about 90%). This suggests that the publishing industry has a reasonable understanding of the prevailing classification standards of the OAT, and that the existing administrative classification system is not the key safeguard in ensuring that exhibited articles are not indecent or obscene;

(b) we shall continue to maintain a repository open for public inspection to enable publishers to keep themselves abreast of the prevailing standards of convicted cases under the COIAO (see paragraph 19(b) below) for indecent articles. This will address the problem of unfamiliarity with prevailing standards;

(c) while doing away with administrative classification, we are proposing to increase the maximum penalty under the COIAO at the same time to increase the deterrent effect against offenders. This provides a clear signal to publishers that abolishing the administrative classification system does not imply any relaxation of control over the publication of indecent and obscene articles. Instead of seeking administrative classification, authorities may take direct prosecution action for articles that are likely to be indecent or obscene;

(d) Option 2 is administratively more efficient, as there would be no need to create a separate body to carry out the administrative classification function. All decisions on the obscenity or indecency of an article would be made by the Court;

(e) concerns about the Government being perceived as attempting to censor freedom of expression would not arise under this option as only the Court would be responsible for ruling on the indecency or obscenity of articles; and

(f) regarding Option 1, the presence of both a statutory classification board and an OAT at the same time may give rise to concerns on the consistency of views and standards given in respect of similar cases passed to them for determination because while the nature of the board and OAT would be different (i.e. the former would be administrative in nature whereas the latter would be judicial), both of them would be required to decide on the obscenity and indecency of articles.

Adjudicator System

11. The existing adjudicator system of the OAT has been in operation for many years. Adjudicators are appointed by the CJ upon application by individual members of the public (i.e. on a self-nomination basis)[6]. Generally speaking, it is a workable system with proven record. However, there is concern that under the present process of self-nomination, the panel of adjudicators is not representative enough of the community standard, and that the decisions of the OAT are left to a limited group of adjudicators who may not fully reflect the prevailing community standard. Some suggest adopting a jury system, where members of the OAT are drawn from the list of jurors, to increase the representativeness of the OAT.

12. In the second round public consultation, we invited the public to provide views on whether we should keep the existing adjudicator system, or replace it with a jury system. More respondents supported keeping the adjudicator system as they considered that adjudicators had the knowledge required for carrying out classification. Some also suggested implementing measures to improve the existing system.

13. We have carefully considered the feasibility of replacing the current adjudicator system with a jury system in consultation with the Judiciary. The Judiciary envisages that the proposal would have several major implications –

[6] Under section 5(3) of the COIAO, a person shall be eligible to be appointed to the panel of adjudicators if, in the opinion of the CJ, he is (a) ordinarily resident in Hong Kong and has so resided for at least 7 years; and (b) proficient in written English or written Chinese.

(a) it would fundamentally change the long-established practice and culture of the jury system by extending its scope from serious crimes or deaths during custody to cover obscene and indecent articles, which will have implications including a heavy drain on judicial resources and sufficiency of eligible jurors;

(b) as compared with the present adjudication system, some jurors, who would be invited to OAT hearings on a random basis, may not like to perform OAT functions which involve examination of potential obscene and indecent articles;

(c) it would significantly lengthen OAT hearings and lower the OAT's efficiency, as extra time would be needed for the jurors (who are likely to have little previous experience in OAT hearings) to be briefed in detail on each step, for them to discuss the case to make a verdict, and for the presiding magistrate to sum up and give directions on law; and

(d) the number of jurors to be required is likely to increase. Some quarters of the community may be concerned that this will lower the productivity and efficiency of the society.

14. Having regard to the above concerns and practical difficulties as pointed out by the Judiciary, we recommend maintaining the current adjudicator system and implementing the following improvement measures to meet public expectation for greater representativeness and transparency of the OAT –

(a) increase the total number of adjudicators from about 500 to a maximum of 1 500 on an incremental basis to allow more people to participate in the adjudication process;

(b) increase the minimum number of adjudicators at each OAT hearing from two to four to increase the representativeness of the OAT through amending the COIAO; and

(c) enhance briefings for adjudicators who have been selected for article determination work to bring about greater consistency of the adjudication standards and efficiency of the OAT. Same as

serving as a member of the OAT, the adjudicators would be remunerated for attending such briefings.

Increasing Maximum Penalty

15. In the second round public consultation, we invited the public to give views on whether the maximum penalty under the COIAO should be increased to the following levels in order to enhance deterrence against publication of obscene and indecent articles –

Offence	Current maximum penalty	Proposed maximum penalty
Obscene articles	A fine of $1 million and Imprisonment for 3 years	A fine of $2 million and Imprisonment for 3 years
Indecent articles		
First conviction	A fine of $400,000 and Imprisonment for 1 year	A fine of $800,000 and Imprisonment for 1 year
Subsequent conviction(s)	A fine of $800,000 and Imprisonment for 1 year	A fine of $1.6 million and Imprisonment for 2 years

The proposed increase in penalty provides a clear indication that the abolition of the administrative classification function is not a relaxation of the control regime against the publication of obscene and indecent articles. The proposal has received public support in the consultation exercise.

Definition of "Obscenity" and "Indecency"

16. Under the COIAO, "obscenity" and "indecency" include "violence, depravity and repulsiveness". In the second round public consultation, we consulted the public on whether we should maintain the current approach in the COIAO and not to stipulate detailed definitions of "obscenity" and "indecency" in law. There was no consensus on how the terms should be defined. Some suggested adopting much stricter definitions to tighten the control of obscene and indecent materials, while others considered that only very specific types of articles should be classified as obscene or indecent in order to protect freedom of expression. There were also a significant number of respondents supporting the status quo of not stipulating detailed definitions. They

were of the opinion that "obscenity" and "indecency" were not matters of exact science capable of objective proof but concepts that changed over time and differed among individuals, making it difficult to come up with definitions that the society could agree upon.

17. Given that there is no public consensus on how "obscenity" and "indecency" should be defined, we do not consider it appropriate to stipulate detailed definitions in the legislation. We have studied the experience of overseas jurisdictions and have not been able to identify any overseas jurisdiction where precise definitions of "obscenity" and "indecency" are set out in legislation. We therefore recommend to maintain the current approach in the COIAO.

18. For the reasons set out in paragraphs 16 and 17 above and having regard to the Judiciary's position that a set of administrative guidelines or standards for the OAT should not be drawn up to avoid interfering with the fundamental principle of judicial independence, we do not find it desirable or practical to draw up administrative guidelines or code of practice on the definitions of "obscenity" and "indecency".

Other Improvement Measures

19. Taking into account the views received in the second round public consultation, we would seek to implement the following improvement measures –

(a) establish a liaison group with information technology professionals, representatives of internet service providers (ISPs) and government representatives to enhance the existing co-regulatory framework[7] and to update the Code of Practice in dealing with public complaints on the Internet;

(b) establish a new repository under the Office for Film, Newspaper and Article Administration (OFNAA) to replace the existing

[7] A complaint-driven and co-regulatory approach to regulating the Internet is currently adopted to deal with obscene and indecent Internet content. OFNAA has been working with the Hong Kong Internet Service Providers Association to implement a Code of Practice which was promulgated in 1997 following public and industry consultation. Under the Code of Practice, if the content under complaint is likely to be indecent, the ISP concerned will request the webmaster to add a warning notice or remove the indecent article. If the content under complaint is likely to be obscene, the ISPs concerned will block access to the article or request the webmaster to remove it. The ISPs may also cancel the account of repeated offenders. OFNAA/ISPs will refer cases involving obscene articles to the Police for follow-up enforcement action.

repository under the Judiciary for articles submitted to the OAT for classification. This is necessary because following the abolition of the administrative classification function of the OAT, the Judiciary should no longer be charged with the management of the existing repository, which is an administrative function. Members of the public (including the publishing industry) may apply to OFNAA to inspect indecent articles seized by OFNAA for convicted cases under the COIAO. The publication of obscene articles is prohibited under the COIAO. In keeping with this requirement, the repository covers only indecent articles. This will provide an avenue for members of the public to take reference of the prevailing standards of convicted cases under the COIAO;

(c) conduct periodic surveys among parents and teachers on the awareness and adequacy of filtering service, and share the feedback collected with the IT industry to help them develop filtering service in the market to cater for local needs; and

(d) enhance publicity and public education programmes. The main targets of these publicity and educational programmes are youngsters and children as they are particularly vulnerable to obscene and indecent articles. In view of the increasing popularity of the Internet, OFNAA has been putting more emphasis on the positive use of the Internet in recent years. The publicity programmes aim to promote the public awareness and understanding of the provisions of the COIAO; to equip parents with knowledge of how to use the Internet properly so that they can guide their children accordingly; and to educate children and youngsters and develop their critical thinking to help them deal with the harmful materials to which they may be exposed.

IMPLICATIONS OF THE PROPOSAL

20. The proposal has financial and civil service implications as set out in **Annex B**. The proposed measures are in conformity with the Basic Law, including the provisions concerning human rights. They have no economic, productivity, environmental or sustainability implications. We do not consider that the proposals have any significant

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or direct impact on families.

PUBLIC CONSULTATION

21. Two rounds of public consultation were conducted for this review exercise. The proposed improvement measures are worked out having regard to the views collected in the public consultations conducted in 2008-2009 and 2012 as well as consultation with stakeholders such as the Judiciary.

PUBLICITY

22. A press release will be issued. We will also brief the Legislative Council Panel on Information Technology and Broadcasting on the proposed improvement measures. A spokesman will be available to handle media and public enquiries.

ENQUIRIES

23. Any enquiry about this brief may be directed to Mr Edward To, Principal Assistant Secretary for Commerce and Economic Development (Communications and Technology) A at 2810 2708 or ewhto@cedb.gov.hk.

Communications and Technology Branch
Commerce and Economic Development Bureau
February 2015

Annex A

REPORT ON SUBMISSIONS RECEIVED IN THE SECOND ROUND OF PUBLIC CONSULTATION ON THE REVIEW OF THE CONTROL OF OBSCENE AND INDECENT ARTICLES ORDINANCE

SUMMARY

1. In response to public concern over the prevalence of obscene and indecent articles in various media and the operation of the regulatory regime, the Government commenced a comprehensive review of the Control of Obscene and Indecent Articles Ordinance (Cap. 390) (COIAO) in 2008 and conducted two rounds of public consultation on a number of key issues covered in the review.

2. The first round of public consultation completed in 2009 confirmed general support for retaining the COIAO regulatory regime. The majority of the public who had responded to the consultation supported the imposition of heavier penalties in order to enhance the deterrent effect of the COIAO, but could not forge consensus on three issues, namely –

   (a) the definitions of "obscenity" and "indecency";

   (b) the institutional set-up of the Obscene Articles Tribunal (OAT); and

   (c) the handling of new forms of media.

3. On 16 April 2012, we launched the second round public consultation on the proposed improvement measures or options for tackling the above issues, having regard to public views collected from the first round of public consultation, advice from the Judiciary and overseas practices. A public consultation document was published to provide a basis for the consultation. The second round public consultation lasted for three months until 15 July 2012.

4. For the second round public consultation, the consultation document was distributed to the public through the 18 District Offices and uploaded onto the dedicated thematic website for the review of the COIAO. We also launched Announcement in the

Public Interest on television and radio and wrote to nearly 3,000 interested organisations and stakeholders to invite their views.

Written Submissions

5. We received 722 submissions[1] within the consultation period. We have further received 276 late submissions[2], making a total of 998 submissions. Among these 998 submissions –

(a) 78 were made by individuals;

(b) 41 were made by organisations/groups. Among them, one submission from a local education workers' federation is made under 1 442 signatures, and another submission from a secondary school comprises views of its students. As these two submissions were each made in the names of the organisations concerned, they are treated as a single submission from each of the organisations concerned; and

(c) 879 were made in four template formats with largely similar contents. Amongst them, 753 were made in a template posted on the website of a local non-governmental organisation; 116 in a template used by individuals supporting the submission made by a concern group for COIAO; and 5 were in a template posted on an online forum. The remaining 5 were made from another template with no clear identifiable source.

If we were to group the template submissions under (c) above as a single submission for each template, there are 123 submissions in total.

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1 Repeated submissions from the same person with the same contents would be counted as a single submission. Submissions that are not related to the review of COIAO are not included in the analysis.

2 Position as at 31 December 2012.

Views Gathered Through Other Channels

6. Apart from inviting written submissions, we held two public fora on 23 May and 6 June 2012 to gauge public views on the review. About 50 people attended the two fora.

7. We also briefed the Legislative Council (LegCo) Panel on Information Technology and Broadcasting (ITB Panel), the Women's Commission, and District Council Chairmen/Vice Chairmen during the public consultation on the observations and proposals set out in the consultation document.

Brief Summary of Views Collected

8. In this report, we separately analyse the written submissions submitted by individuals and groups/organisations, and views expressed in the public fora. We have taken into account different views expressed by individuals, groups/organisations (including template submissions) and attendees to the public fora in determining the general views of the community collected during the public consultation. The term "respondents" used in this report refers to either individuals or groups/organisations (submissions in the same template are also treated as a group/organisation submission for the purpose of the analysis) that submitted views during the public consultation.

9. There is no consensus on how "obscenity" and "indecency" should be defined among those who expressed views on the issue of definition. Slightly more individual submissions supported maintaining the status quo on definitions. For submissions from groups/organisations, more respondents considered it desirable to clearly define "obscenity" and "indecency".

10. Most respondents agreed to reform the institutional set-up of the OAT to remove the administrative classification function from the Judiciary. However, there is no clear consensus on which

approach should be adopted to reform the OAT. While more respondents supported the setting up of a statutory classification board and an appeal panel by the Government to perform the administrative classification function, as it would provide the industry with a classification avenue before publication, there were also a considerable number of respondents who supported abolishing the administrative classification function altogether, as they considered that this approach would result in a more streamlined and efficient structure and require less resources. On the other hand, there were also a considerable number of respondents who only indicated their support on the removal of administrative classification function from the Judiciary without a clear indication on which reform options they preferred.

11. Most respondents supported the proposals regarding maintaining the current co-regulatory approach on new media, enhancing public education and increasing the penalty level.

12. A list of respondents that submitted written submissions for the second round public consultation is at **Appendix**. Written submissions and summaries of views expressed at the public fora have been uploaded to the thematic website (http://www.coiao.gov.hk) for public viewing.

CHAPTER 1 DEFINITIONS

1.1. We asked the public to respond to the following question in the consultation document –

Do you agree that we should maintain the current approach in the COIAO and not to stipulate detailed definitions of "obscenity" and "indecency" in law? Under the COIAO, "obscenity" and "indecency" include "violence, depravity and repulsiveness" and the OAT is responsible for classifying whether an article is obscene, indecent or neither. The terms are not exact science capable of objective proof. It would be extremely difficult, if not impossible, for the public to reach a consensus on the items to be included in the definitions.

1.2. **Overview**

1.2.1. There is no consensus on how to clearly define "obscenity" and "indecency" among those who expressed views on this issue. Slightly more respondents supported having clearer definition. This is particularly so for submissions from groups/organisations and views expressed in the public fora discussion. In the case of individual submissions, slightly more supported maintaining the status quo in the COIAO. Moreover, there was no consensus as to how "obscenity" and indecency" should be defined. Some considered that much stricter definitions should be adopted in order to further tighten the control of obscene and indecent materials, while others suggested only very specific types of articles should be classified as obscene and indecent to ensure that freedom of expression would not be undermined.

1.3. Summary of the Views Received

Written Submissions

1.3.1. More respondents from groups/organisations supported to have clearer definition of "obscenity" and "indecency", while slightly more individual submissions agreed to maintain the status quo, i.e. not to stipulate detailed definitions.

Views Supporting Clearer Definitions

1.3.2. Supporters for clearer definitions considered that this would help ensure consistent standards in the classification of articles and enable publishers to have a clearer understanding of the legal requirements. Only some of them commented on the manner the definitions should be set out. A few felt that such definitions should be stipulated in law while others considered that they should be set out in guidelines.

1.3.3. Those who expressed views on how "obscenity" and "indecency" should be defined had very diverse views. Some considered that the current standards should be stricter, particularly to stop the proliferation of harmful materials in newspapers, the Internet and mobile phone applications. Some said that the artistic, literary and educational values of articles should be taken into account. Some proposed to supplement the definitions based on the types of "obscenity" and "indecency" involved (e.g. inappropriate use of sex, horror, cruelty and violence). Some suggested reference could be drawn from definitions adopted in other overseas jurisdictions. Some however considered that only limited types of articles should be considered as obscene and indecent. For example, obscene articles should only include items relating to sexual violence, terrorism, extreme pornography (like intercourse with animal or human corpse), or sex crime records.

Views Supporting the Status Quo

1.3.4. Those who advocated maintaining the status quo agreed that "obscenity" and "indecency" were not exact science capable of objective proof. Both concepts would change over time and differ among individuals. They considered that it was impossible to come up with definitions that the society could agree upon, and detailed definitions could give rise to loopholes in the regulatory regime. Some were also worried that it would not be possible for the ordinance to be amended in pace with the changing needs.

1.3.5. Some were of the view that the adjudicators should be able to make judgments as reasonable men, and referred to the Miller Test approach[3] adopted in the United States.

Others

1.3.6. Some considered the current classification system confusing and suggested renaming the categories as "unrestricted", "for aged 18 or above", and "banned". Some proposed to have only two categories, viz. "unrestricted" and "for adults only", as no material should be banned from publication for adults and they should have the freedom to choose what to read.

1.3.7. Some suggested that the community should be allowed to continue to discuss the issue in order to forge a consensus. Others considered it necessary to align the classification systems under the COIAO and the Film Censorship Ordinance.

Views Collected at Public Fora

1.3.8. Many attending the fora had expressed a view on the question. Among them, more tended to support having clearer definitions.

[3] In the United States, the court applies the Miller test to determine whether a work is obscene by considering: i) whether an average person would find it appeals to the prurient interest; (ii) whether it depicts or describes sexual conduct in a patently offensive way; and (iii) whether it lacks serious literary, artistic, political or scientific value.

Some participants considered that if detailed guidelines on indecency and obscenity could be set out under the Broadcasting Ordinance and the Film Censorship Ordinance, there was no reason why COIAO could not adopt the same approach. Some considered that vague definitions could create a loophole to allow the Government to control freedom of expression. Some opined that the lack of clear definitions would make it difficult for publishers to understand the legal requirements.

1.3.9. A few suggested that the two classification systems under the COIAO and Film Censorship Ordinance should be aligned.

CHAPTER 2 ADJUDICATION SYSTEM

2.1. We asked the public to respond to the following question in the consultation document –

What are your views on the two options for reforming the OAT institutional set-up?

(a) ***Option 1*** *– to segregate the administrative classification and judicial determination functions of the OAT. This will be achieved by the establishment of a statutory classification board and appeal panel to take over the OAT's administrative classification function. The revamped OAT will focus only on the judicial determination function, and the current system of OAT adjudicators may be retained, or replaced by a jury system.*

(b) ***Option 2*** *– to abolish the administrative classification function such that the OAT would be responsible for determining whether an article is obscene/ indecent or not in criminal and civil proceedings.*

2.2. Overview

OAT Reform

2.2.1. Almost all respondents, individuals and groups/organisations alike, agreed that the administrative classification function should be removed from the Judiciary, but there is no clear consensus on the preferred reform option. More respondents preferred Option 1 as it would provide the industry with a classification avenue before publication. There were also a considerable number of respondents who supported Option 2 as they considered it a more streamlined and efficient structure, and required less resources. There was also the concern that

the freedom of speech could be undermined under Option 1. Supporters for Option 2 considered that it would better protect freedom of expression and publication since the Government would not be involved in the classification of articles under this option. Apart from those who had expressed a clear preference on the reform options, quite a significant number of respondents either held no clear stance or were neutral over the two options.

2.2.2. Despite that how the institutional set-up of the OAT is to be reformed would impact upon the publishing industry, the industry did not seem to have a consensus on whether the administrative classification function should be preserved as proposed in Option 1. Some respondents from the publishing industry supported Option 2 while others supported Option 1 or did not give a clear stance on which option to go for.

System of Adjudicators

2.2.3. Some of the respondents expressed a view on how to improve the system of adjudicators. Among them, most (including individual and group/organisation submissions) were inclined to keep the existing adjudication system but improve on it, instead of replacing it with a jury system. There are, however, different proposals on how to improve the adjudication system.

2.2.4. Those in support of a jury system considered it more representative, and could function with sufficient instructions from the presiding magistrate. Those against however considered the jury system unsuitable as classification would require specific knowledge.

2.3. Summary of Views Received

Written Submissions

OAT Reform - Views Supporting Option 1

2.3.1. Those advocating Option 1 mainly considered that an avenue should be retained for publishers to seek classification before publications, and this would also be a means to help curb circulation of harmful articles.

2.3.2. Some, out of concern that the administrative classification would harm freedom of speech, opined that administrative function should be limited to handling articles voluntarily submitted by publishers.

OAT Reform - Views Supporting Option 2

2.3.3. Those who preferred Option 2 considered it a more streamlined and efficient set-up as compared to Option 1. It incurred lesser operational expenditure and resources saved would be better utilised in other aspects, such as public education.

2.3.4. There would be less concern on intervening freedom of speech, information and publication under this option. Some considered the arrangement of abolishing the administrative classification function in line with the practice used in certain overseas jurisdictions (such as the UK and the US).

2.3.5. Some considered that the abolition of the administrative classification function would be in pace with other legal obligations (e.g. libel or copyright-related offences) imposed on publishers who also would not have an administrative avenue to ascertain the legality of their publications before publication.

System of Adjudicators

2.3.6. Respondents in support of keeping the existing system of adjudicators suggested different measures to improve the system, including enhancing selection and adjudication transparency, increasing the pool of adjudicators, increasing the number of adjudicators at hearings, limiting their terms of office, enhancing training, striking a balance on gender ratio, appointing adjudicators of different backgrounds, etc.

2.3.7. As for those in support of the jury system, they considered it more representative and that a jury system would be feasible if sufficient instructions would be given by the presiding magistrate.

Others

2.3.8. Other suggestions raised in relation to the adjudication system include –

(a) fees for the administrative classification should be lowered so as to facilitate small publishing businesses and individuals to use the service;

(b) reasons should be given for articles to be classified as Class II and III; and

(c) all OAT hearings should be open to the public.

Views Collected at Public Fora

2.3.9. Only a handful of attendees commented on this issue and their views were diverse. Some considered that the classification function should be abolished, while some found the separation of judicial and administrative functions agreeable.

2.3.10. There was no clear consensus on whether the adjudication system should be replaced by the jury system. Some suggested that a smaller pool of adjudicators vis-à-vis jury might be more efficient because these adjudicators were more experienced. Some voiced concern on the difficulty in getting appointed as adjudicators. Some opined that adjudicators should come from more diverse backgrounds.

2.3.11. Some expressed the view that the existing fees charged for administrative classification could discourage publishers to submit their articles to the OAT.

CHAPTER 3 INTERNET CO-REGULATION

3.1. We asked the public to respond to the following question in the consultation document –

Do you agree that the Government should keep track of local and overseas developments, and establish a standing liaison group, consisting of information technology professionals, representatives of Internet Service Providers (ISPs), government representatives, etc. to review and enhance the existing co-regulatory framework and update the existing Code of Practice to meet the changing needs of the community?

3.2. **Overview**

3.2.1. Only some respondents commented on this topic. Among them, most were generally content with the proposal set out in the consultation document, i.e. the Government should keep track of local and overseas developments, and establish a standing liaison group, consisting of information technology professionals, representatives of ISPs, government representatives, etc. to review and enhance the existing co-regulatory framework and update the existing Code of Practice to meet the changing needs of the community. On the other hand, the Hong Kong Internet Service Providers Association (HKISPA), the body with which the Office for Film, Newspaper and Article Administration has worked together to implement the said Code of Practice since 1997, objected to the proposal to change the Code. It submitted that the current regime had been functioning properly and the Code should not be changed until detailed directions and plans on the various improvement proposals set out in the consultation document became available. Only a minority of the respondents considered it necessary to tighten the control of the Internet.

3.3. Summary of Views Received

Written Submissions

Views Supporting the Proposal

3.3.1. Most respondents (including both individual and group/organisation submissions) who commented on the subject generally welcomed the proposal as set out in the consultation document. They agreed that the co-regulatory approach should continue, and deemed it an appropriate time to review the Code of Practice as it was last reviewed back in 1999.

Views Opposing the Proposal

3.3.2. Some others however considered it necessary to tighten the control on the Internet. Yet there were some who were not in favour of any form of Internet regulation in general.

Others

3.3.3. There were other proposals on the co-regulatory regime but there was no consensus. Such proposals include encouraging the trades to block and remove illegal sites and that the composition of the standing liaison body should also include parents, sexual minorities, sex workers and adult shop owners, etc.

Views Collected at Public Fora

3.3.4. Those respondents who spoke on the subject were generally supportive of tightening Internet control. Some suggested that an age or ID identification system should be implemented to block sites with harmful contents. They opined that Internet Service Providers (ISP) should regularly inform parents the sites visited by their children's accounts or provide a choice to

their subscribers to block inappropriate sites. The Government should also consider how to control availability of harmful materials in the smart phone platforms. Some, on the other hand, opposed the control of information published on the Internet.

CHAPTER 4 FILTERING SERVICE

4.1. We asked the public to respond to the following question in the consultation document –

Do you agree that the Government should conduct periodic surveys on parents and teachers on the awareness and adequacy or otherwise of filtering service to help the industry develop and fine-tune different packages of filtering service in the market? The Government would also disseminate information on filtering technologies to educate the public.

4.2. **Overview**

4.2.1. Many respondents commented on this subject. Most agreed to the proposal as set out in the consultation document. A few respondents felt that the development of filtering service was a commercial activity and thus should not be funded by public money; and that filtering software was already widely available in the market, obviating the need for the industry to develop filtering software. Some were concerned that the Government's involvement in the provision of filtering service would harm freedom of speech on the Internet. There were also a considerable number of respondents who made specific comments on the subject but did not give a clear indication on whether they agreed or disagreed with the proposal in the consultation document.

4.3. **Summary of Views Received**

Written Submissions

Views Supporting the Proposal

4.3.1. More respondents (including both individual and group/organisation submissions) took the view that the Government should help software companies to develop filtering service by conducting regular surveys to gauge parents' awareness as proposed, and agreed that the Government should further promote the use of filtering service.

Views Objecting to the Proposal

4.3.2. A few were concerned about the use of public money to assist software companies in developing filtering software, and were worried that such filters would block political opinions. Some considered that schools should be responsible for educating parents through trained teachers, and such burden should not be shifted to the Government.

Others

4.3.3. HKISPA proposed that the Government should invite proposals from the public for developing filtering software specially designed to suit the needs of Hong Kong families.

4.3.4. Some commented that the Government should subsidise parents and schools to install suitable and effective filtering software, and dish out free filtering software.

4.3.5. A few respondents proposed to implement age verification system for adult websites.

Views Collected at Public Fora

4.3.6. Only a few respondents commented on this subject. Among them, some indicated that they were glad to see that the Government had dropped the idea of requiring compulsory installation of filtering software.

CHAPTER 5 PUBLIC EDUCATION AND PUBLICITY

5.1. We asked the public to respond to the following question in the consultation document –

Do you agree that the Government should continue to work closely with teachers, social workers and the ISPs, etc. to develop comprehensive publicity and public education programmes?

5.2. Overview

5.2.1. Many respondents commented on this issue. Those who expressed a view on this subject generally supported the proposal on public education and publicity. A number of suggestions were also raised regarding the programme formulation process, emphasis and implementation.

5.3. Summary of Views Received

Written Submissions

Views Supporting the Proposal

5.3.1. There was a general agreement to this proposal among those who expressed a clear view on the subject (including both individual and group/organisation submissions). Respondents deemed education an important and effective measure. There were different suggestions on the emphasis of the education programmes, including educating parents on the use of new media, providing more guidance to young users, and respecting and tolerating pluralism.

5.3.2. Views were mixed among those who had made specific suggestions with regard to whom to consult when drawing up and implementing the public education and publicity programme. A wide spectrum of bodies were suggested, ranging from sexual minorities, adult shop owners, parent-teacher associations, art and cultural groups, women groups to the mass media.

Views Objecting to the Proposal

5.3.3. There were however a few respondents objecting to the proposals. One respondent considered that the Government should remain neutral on publicity and public education issues and let non-governmental organisations take the lead.

Views Collected at Public Fora

5.3.4. Many attendees expressed a view on this subject. Among them, most agreed that public education was important and essential. Some suggested that the Government should allocate more resources and work with non-government organisations on public education programmes.

CHAPTER 6 INCREASE MAXIMUM PENALTY

6.1. We asked the public to respond to the following question in the consultation document –

Do you agree that the Government should increase the maximum penalty under the COIAO to enhance the deterrent effect on prospective publishers?

6.2. Overview

6.2.1. Most respondents commented on this subject. Among them, the majority concurred with the proposal to increase the penalty, seeing it as a means to curb circulation of harmful articles; whereas some others considered that the penalty level should be lowered as heavy penalty would be unfair to small publishers and individuals.

6.3. Summary of Views Received

Written Submissions

Views Supporting the Proposal

6.3.1. Among the written submissions, most (including both individual and group/organisation submissions) considered that raising the maximum penalty could increase the deterrent effect of the COIAO and curb circulation of harmful materials.

Views Objecting to the Proposal

6.3.2. Those objecting however commented that the penalty level should not be set only with the big publishers in mind. Heavy penalty would affect freedom of expression, induce

self-censorship and limit creativity. It would be unfair to small publishers and individuals.

Others

6.3.3. Some suggested tying the penalty level to the size of circulation and offenders with repeated convictions, and setting a minimum penalty level. Some even proposed more drastic measures such as banning the publications of convicted offenders.

Views Collected at Public Fora

6.3.4. Some attendees commented on this subject. Those who expressed a view generally agreed that it was necessary to impose heavier punishment to enhance the deterrent effect. Some, while not objecting to it, opined that raising the maximum penalty level in the law might not be too effective given the light punishment meted out by the court. Some suggested stipulating a minimum penalty. However, some others voiced concerns that doubling the maximum penalty level would suppress freedom of expression.

Commerce and Economic Development Bureau
January 2013

Appendix

List of Individuals and Organisations Submitted Written Submissions for the Second Round Public Consultation

(A) Submissions by individuals

No.	Name of respondent
1	Ivan
2	[Respondent requested anonymity]
3	SHELLY LOK
4	Herman Li
5	WET
6	Tom Lam
7	[Respondent requested confidentiality of name and view]
8	[Respondent requested anonymity]
9	吳
10	George Belshaw
11	Szeto, HK
12	鄭先生
13	Shelly Lok
14	Shelly Lok
15	Shelly Lok
16	一五十歲香港市民
17	劉堅偉
18	蘇子斌
19	[Respondent requested anonymity]
20	Jonas Chung
21	朱建熹
22	M. LO
23	[Respondent requested anonymity]
24	Liu Tina
25	潘兆文 MH
26	鄭先生
27	[Respondent requested confidentiality of name and view]
28	LAI SHEUNG HO
29	鄭先生
30	鄭先生
31	Chow Sai Kiu Karin
32	Alfred Wu
33	蘇智航
34	黃國桐
35	William W. Y. Lee
36	曾銀鐘
37	廖為樂
38	Charles CHAN Yiu Kwong
39	[Respondent requested anonymity]

No.	Name of respondent
40	Anonymous
41	[Respondent requested confidentiality of name and view]
42	林志傑
43	張秀蓮
44	周妙嫦
45	蕭惠娟
46	劉淑薇
47	Lo Lan
48	黃香珍
49	梁楚蘭
50	何秀芳
51	楊大華
52	Anonymous
53	卓珍珠
54	Anonymous
55	黎瑩瑩
56	蕭亮美
57	陳湖清
58	郭錦鴻
59	LO WOON BOR HENRY
60	楊位醒
61	香港市民
62	林藹雲
63	鄭浩熹
64	徐潔美
65	Chu Kim Long Matthew
66	Fung
67	趙翠盈
68	CHONG Yiu Kwong
69	方富潤
70	蘇艷芳
71	topisgoog topisgoog
72	Gladys Lam
73	袁小敏
74	吳氏一眾人
75	[Respondent requested anonymity]
76	蘇孝恒
77	Chiang Sai Yuen
78	丁毓珠

(B) Submissions by organisations

No.	Name of Organisation
1.	Hong Kong Federation of Education Workers
2.	The Law Society of Hong Kong
3.	The Newspaper Society of Hong Kong
4.	Ng Wah Catholic Secondary School
5.	Rainbow Action
6.	The Judiciary
7.	Hong Kong Evangelical Church School Services Team
8.	The Confucian Academy
9.	Democratic Alliance for the Betterment and Progress of Hong Kong
10.	The Boys' & Girls' Clubs Association of Hong Kong
11.	Society for Community Organization Ltd
12.	The Association for the Advancement of Feminism
13.	Against Child Abuse
14.	Hong Kong Federation of Women
15.	The Hong Kong Federation of Youth Groups
16.	The Society For Truth and Light
17.	Microsoft
18.	Wen Wei Po
19.	Anti-Pornographic & Violence Media Campaign
20.	Women's Voice Alumni Association
21.	LibertarianHK
22.	Constitutional and Mainland Affairs Commmittee Association of Hong Kong Professionals
23.	New People's Party
24.	Nu Tong Xue She
25.	Hong Kong Internet Service Providers Association
26.	Hong Kong In-media
27.	Keyboard Frontline
28.	Hong Kong Sex Culture Society Limited
29.	Hong Kong Sex Education Association
30.	Parents for The Family Association
31.	The Hong Kong Federation of Trade Unions Women Affairs Committee
32.	Hong Kong Human Rights Monitor
33.	Cross-sectoral Concern Alliance for COIAO
34.	Internet Society Hong Kong
35.	PCCW
36.	Hong Kong Women Development Association Limited
37.	Hong Kong Comics and Animation Federation Limited
38.	Hong Kong Bar Association
39.	Young Lawyers Social Concerns Group (Children)
40.	Young Lawyers Concern Group on Obscene and Indecent Articles Ordinance
41.	Hong Kong Press Council Limited

(C) Submissions in Template Formats

A total of 879 submissions were received in four template formats. 753 were made in a template posted on the website of a local non-governmental organisation; 116 in a template used by individuals supporting the submission made by a concern group for COIAO; 5 were in a template posted on an online forum; and 5 were made from another template with no clear identifiable source.

Annex B

Financial and Civil Service Implications

The Judiciary may incur additional costs on, among others, remuneration for OAT adjudicators arising from the proposed increase in the minimum number of adjudicators at each OAT hearing from two to four and the proposal to remunerate them when they attend the proposed briefings for article determination work. With the abolition of the administrative classification function, the Judiciary is of the view that there is likely to be an increase in the number of judicial determination cases which are normally more complicated than the administrative classification ones. These additional costs may however be partly offset by the reduced expenditure due to the proposed abolition of the administrative classification function of the OAT and the repository from the Judiciary. In line with the usual funding arrangements between the Administration and the Judiciary, the Administration should provide the Judiciary with the necessary manpower and financial resources should such needs arise in future.

2. Additional resources may also be required for OFNAA to operate the new administrative repository, implement proposals to enhance publicity and public education, and conduct periodic surveys on filtering services. However, we are unable to provide an estimate at this stage. We will assess the manpower and financial implications when the implementation details of our proposals are worked out. CEDB and OFNAA will endeavour to absorb additional workload arising from the implementation of the revised legislation within their existing resources as far as possible and where necessary, the Administration will justify and seek resources required for the enforcement of the revised legislation in accordance with the established mechanism.