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Panel on Information Technology and Broadcasting

Meeting on 9 March 2015

**Updated background brief on the review of the
Control of Obscene and Indecent Articles Ordinance**

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 on issues relating to the control of obscene and indecent articles 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- (b) Class II article (indecent) which must not be published or sold to persons under the age of 18 and, when published or sold, must carry a statutory warning notice and be sealed in a wrapper; or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 Tribunal ("OAT") is 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. 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 500 adjudicators serving OAT.

5. In classifying an article, 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 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 imprisonment for 3 years. The maximum penalty for the publication of an indecent article (Class II) is a fine of \$400,000 and imprisonment for 12 months on first conviction; and a fine of \$800,000 and 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.

7. The COIAO is enforced by the Office for Film, Newspaper and Article Administration ("OFNAA") (formerly known as the Television and Entertainment Licensing Authority ("TELA")), the Hong Kong Police Force ("the Police") and the Customs and Excise Department ("C&ED"). OFNAA monitors all articles (including free newspapers) published in the market, and refers any article suspected of contravening the COIAO to the OAT for classification after consideration of those factors mentioned in paragraph 5(c) and (d) above. Appropriate follow-up actions, including prosecution, will be taken against articles classified as indecent or obscene. 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. OFNAA 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"), the then TELA had developed a self-regulatory Code of Practice ("CoP") 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

9. There had been 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 in recent years. Related issues (e.g. protection of

young people from exposure to objectionable materials, enforcement and penalty, etc.) were also discussed at the Panel on Information Technology and Broadcasting ("the ITB Panel") in the past years.

Panel on Information Technology and Broadcasting

10. In response to public concern over the prevalence of indecent and obscene articles in various media and the operation of the regulatory regime, the Administration commenced a comprehensive review of COIAO in 2008 and proposed two rounds of public consultation. The first round of public consultation was conducted from October 2008 to January 2009, and the second round was conducted from April to July 2012. Members of the public were consulted on four major areas, including the institutional set-up of the OAT, maximum penalty under the COIAO, definitions of "obscenity" and "indecent", and handling of new forms of media.

First round of public consultation on the review of COIAO

11. Subsequent to the launch of the first round of public consultation exercise on the review of COIAO on 3 October 2008, the ITB Panel held two meetings to receive public views on the subject in November 2008 and January 2009. The Panel noted that the community had divergent views on the review of COIAO.

12. Some members of the ITB Panel opined that the Administration should strike a balance between protecting the youth from indecent and obscene materials on one hand and preserving the free flow of information and the freedom of expression on the other in reviewing COIAO. Given the transient and extraterritorial nature of the massive information flow on the Internet which would not be subject to the laws of Hong Kong, some members called on the Government to carefully address the legal and technical problems involved in Internet control. The Administration noted the views expressed by deputations and Panel members and undertook to further discuss with the ITB Panel when proposals were ready for the second round of public consultation.

13. On 13 July 2009, the ITB Panel noted that the Government had commissioned an independent Consultant to help organize public engagement activities and compile/analyse the views collected through the various channels during the first round of public consultation. The Consultant had submitted to the Administration a report on the first round of public consultation (LC Paper No. CB(1)2180/08-09(05) issued on 8

July 2009). Regarding the consultation findings on the adjudication system, some members of the ITB Panel considered that it was not appropriate for OAT to carry out both the administrative and judicial functions. These members supported the removal of the administrative classification function from OAT, and urged the Administration to discuss with the Judiciary to improve the operation of OAT.

Second round of public consultation on the review of COIAO

14. On 16 April 2012, the Government launched the second round of public consultation on the review of COIAO. At the ITB Panel meeting on 14 May 2012, some members objected to the setting up of a statutory classification board and a statutory appeal panel to carry out the administrative classification function of OAT. These members preferred to abolish the administrative classification function of OAT.

15. Some Panel members opined that the term of office of the adjudicators of OAT should be shortened, so that the composition of the adjudicators would be changed more frequently to provide plurality, and would more accurately reflect the prevailing public standards of morality. According to the Administration, adjudicators were recruited through open invitation of the Commerce and Economic Development Bureau. Eligible persons from all walks of life could apply to become adjudicators. The Judiciary had been improving the existing operations of OAT in response to public concerns. To enhance the representativeness of OAT adjudicators and to allow more opportunities for members of the public to serve as adjudicators, the Judiciary decided in 2010 to increase the total number of adjudicators from 280 to 500 and to apply the nine-year rule in the re-appointment of serving adjudicators.

16. At the ITB Panel meeting on 14 January 2013, the Administration briefed the Panel on the findings of the second round of public consultation on the review of COIAO. Members noted the difficulties in obtaining public consensus on the definitions of the terms "obscenity" and "indecent" as different sectors of the community might hold different views and the definitions might change as time elapsed. These members opined that clear, specific and objective criteria should be used in defining "obscenity" and "indecent", taking into account artistic, cultural and religious consideration to avoid repeated occurrence of famous art works being classified as "indecent". The Administration advised that the independent Consultant commissioned by the Administration considered that there must be sufficient support and consensus amongst the community before a decision could be made on

whether and how to amend the definitions of "obscenity" and "indecenty".

17. The Panel noted that the Administration consulted the public specifically on the two options for reforming the OAT institutional set-up, viz. by either segregating the administrative classification and judicial functions of OAT through the establishment of a statutory classification board and an appeal panel (i.e. Option 1), or abolishing the administrative classification function so that OAT would only be responsible for judicial determination (i.e. Option 2). As there was no clear public consensus on the preferred reform option, the Administration would carefully study the views received and continue to work with the concerned parties, including the Judiciary, on the issue.

18. Some members indicated strong objection to any form of mandatory classification before publications as this would impose content control and censorship, and expressed concern about the selection, appointment, composition and turnover of the adjudicators of the OAT. The Administration advised that there was no mandatory classification requirement. Some respondents however considered that an avenue should be retained for publishers to seek classification before publications on a voluntary basis, and this would also be a means to help curb circulation of harmful articles. The Administration would continue to work with the concerned parties, including the Judiciary, with a view to mapping out the way forward.

19. In reply to some members' concern on Internet co-regulation and the process of updating the existing CoP which provided guidance for ISPs, the Administration advised that the Government would 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 CoP to meet the changing needs of the community when necessary.

20. Some members relayed the objection of the HKISPA to the proposal to change the existing CoP as the current regime had been functioning properly and the CoP should not be changed until detailed directions and plans on the various improvement proposals set out in the consultation document became available. HKISPA had proposed that the Government should invite proposals from the public for developing filtering software specially designed to suit the needs of Hong Kong families. HKISPA had also expressed concern on the operation of filtering service such as the determination and maintenance of a filter list

and the relevant appeal procedure. However, some members of the public felt that the development of filtering service was a commercial activity and thus should not be funded by public money. Some others considered that the Government should obviate the need for the industry to develop filtering software as such software was already widely available in the market. Some were also concerned that the Government's involvement in the provision of filtering service would harm freedom of speech on the Internet. In reply, the Administration said that filtering service providers should put in place an appropriate appeal mechanism on the blockage of websites in their services.

Council meetings

21. At the Council meeting on 13 November 2013, Dr Hon Elizabeth QUAT raised a written question on, inter alia, the regulation of electronic game products under the COIAO, and whether the authorities would amend the Ordinance to increase the relevant penalties so as to curb the sale of gory and violent electronic games which are classified as Class II (indecent) articles to minors. The Administration advised that it was considering the views of the public and relevant stakeholders on the review of the COIAO, including the proposal to increase the maximum penalty under the COAIO, with a view to mapping out the way forward.

Latest position

22. The Administration will brief the Panel on 9 March 2015 on the progress of the review of COIAO.

Relevant papers

23. A list of the relevant papers with their hyperlinks is at:

http://www.legco.gov.hk/yr15-16/english/panels/itb/papers/itb_b.htm
<http://www.info.gov.hk/gia/general/201311/13/P201311130332.htm>

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