

**For discussion
on 10 May 2019**

**Legislative Council Panel on
Information Technology and Broadcasting**

**Update on the Review of
the Control of Obscene and Indecent Articles Ordinance (Cap. 390)**

PURPOSE

This paper updates Members on the review of the Control of Obscene and Indecent Articles Ordinance (COIAO) (Cap. 390).

BACKGROUND

2. In July 2018, the Obscene Articles Tribunal (OAT) classified a set of translated Japanese novels as Class II article (i.e. indecent article), attracting heated debate in the community, with some disagreeing with the classification and urging for enhancement of the OAT's representativeness. The case once again triggered discussions on the OAT's representativeness, its composition, and whether the current system should be replaced by a jury system.

3. Some Members of the Legislative Council are also concerned about the Government's progress in amending the COIAO. Having considered views from various parties, the Commerce and Economic Development Bureau's overarching views on the existing system and proposals to improve the regulatory system are set out below.

POLICY PRINCIPLES AND REGULATORY FRAMEWORK

(I) Policy Objective

4. The Government controls the publication of articles through the law and regulatory system with the policy objective of protecting youngsters and children from the effects of objectionable articles. As such, there is a need to maintain a system which regulates the publication of obscene and indecent articles. Of course, this system must also strike a balance between

regulation and preserving the free flow of information and safeguarding freedom of expression.

5. The COIAO provides for a three-tier classification system¹, which stipulates that Class II articles (i.e. indecent articles) must not be published to persons under 18 and the publication of such articles must comply with certain statutory requirements, including the sealing of such articles in wrappers, the display of a warning notice as prescribed by the COIAO² and the printing of the publisher's information. Class III articles are prohibited from publication.

(II) The OAT and Guidelines

6. The COIAO establishes the OAT and controls articles which consist of or contain material that is obscene or indecent. The OAT is an independent and specialised tribunal under the Judiciary and carries out two main tasks with respect to articles and matters – classification and determination. It consists of a presiding magistrate and two or more adjudicators appointed by the Chief Justice. Pursuant to the COIAO, the OAT has the jurisdiction to classify articles and to interpret the meaning of obscenity and indecency. According to the COIAO, in classifying/determining whether an article or matter publicly displayed is obscene or indecent, the OAT shall have regard to the following factors³:

- (a) standards of morality, decency and propriety that are generally accepted by reasonable members of the community;
- (b) the dominant effect of an article or of matter as a whole;
- (c) the class or age groups of persons to whom the article is intended to be published;
- (d) in the case of matter publicly displayed, the location where the matter is or is to be displayed; and
- (e) whether the article or matter has an honest purpose.

¹ Articles may be classified as Class I (neither obscene nor indecent), Class II (indecent) or Class III (obscene).

² The prescribed warning notice reads: “WARNING: THIS ARTICLE CONTAINS MATERIAL WHICH MAY OFFEND AND MAY NOT BE DISTRIBUTED, CIRCULATED, SOLD, HIRED, GIVEN, LENT, SHOWN, PLAYED OR PROJECTED TO A PERSON UNDER THE AGE OF 18 YEARS 警告：本物品內容可能令人反感；不可將本物品派發、傳閱、出售、出租、交給或出借予年齡未滿 18 歲的人士或將本物品向該等人士出示、播放或放映。”

³ The specific provisions are in section 10 of the COIAO.

7. In other words, the factors considered by the OAT when handling the classification of articles can be grouped under three broad principles: (1) community standards of morality, decency and propriety; (2) the effect of the article as a whole; and (3) the protection of a specific sector of the community (i.e. those underage) from harm.

Standards of Morality, Decency and Propriety

8. In the past consultation exercises, there was extensive and thorough discussion on how “obscenity” and “indecent” should be defined. However, such discussion also confirmed that there was no simple and unanimous public consensus on the matter. It is worth mentioning that the current system in Hong Kong is based on the common law convention. Under the common law, “obscenity” and “indecent” are relative rather than absolute concepts as they may vary and change from time to time, place to place, culture to culture, individual to individual, one class of persons to another and are also subject to the age of a person.⁴ It is essentially impossible to stipulate in the law an enduring set of standards that the entire society can unanimously agree on. We consider it appropriate for the COIAO to provide suitable guidelines and an adjudicatory panel composed of members of the general public which classifies articles having regard to the factors listed in paragraph 6(a) to (e) above.

The Effect of the Article as a Whole

9. As a matter of fact, in classifying whether an article is obscene or indecent, one does not consider only individual parts or chapters of the article, but considers the article as a whole (for example, all of the contents of a book).

10. As for suggestion from cultural and publishing sectors organisation to enhance staff training, the Office for Film, Newspaper and Article Administration (OFNAA) will make arrangements for enriching the knowledge and broadening the vision in arts and literature of staff responsible for enforcement work on an on-going basis. This would help them stay more attuned to the latest trends and facilitate them in conducting more holistic assessments in handling relevant complaints. OFNAA will consider inviting speakers from relevant sectors to arrange thematic talks/sharing sessions on visual arts and literature for its law enforcement staff.

⁴ Paragraph 2.3.3 of the consultation document for the second round of public consultation on the review of the Control of Obscene and Indecent Articles Ordinance.

Protecting Specific Sector of the Community

11. As mentioned in paragraph 4 above, our policy objective as a whole is to protect youngsters and children from the effects of objectionable articles. As such, whilst taking into account other factors such as literary arts or creative elements, the regulatory framework must also not ignore this important principle. It is by no means easy to strike the appropriate balance and, given divergent views, it is inevitable that cases may arise in the future in which different sectors of the community hold different views on classifications. However, we hope that these divergent views can converge upon the interests of those intended to be addressed by this policy, and that the most appropriate considerations and classifications be made.

(III) Adjudicator System

12. The classification system and standards under the COIAO is intended to reflect standards of morality, decency and propriety that are generally accepted by reasonable members of the community, and a panel of adjudicators consisting of members of the general public aligns with this policy intent. Suggestions to alter the composition and background of the adjudicators, such as imposing certain educational attainment requirements and adding representation from specific cultural, artistic or other professional backgrounds will run contrary to the policy intent.

13. In the past public consultation exercises, we had consulted the Judiciary on the feasibility of replacing the current adjudicator system with a jury system. The Judiciary envisaged that the proposal would have several major implications, including: the proposal would fundamentally change the long-established practice and culture of the jury system by extending its scope, which will have implications including a heavy drain on judicial resources and sufficiency of eligible jurors; some jurors may not like to perform OAT functions; it would significantly lengthen OAT hearings and lower the OAT's efficiency; and the number of jurors to be required is likely to increase possibly causing concerns in some quarters of the community.⁵

(IV) Review Mechanism

14. Further, other than setting out a classification system, the COIAO also establishes review and appeal mechanisms. With respect to its administrative classification function, the OAT considers an article in private for the purpose of making an interim classification. If a relevant

⁵ Please refer to paragraph 13 of LC Paper No. CTB/A 235-5/1 (C) Pt.1.

party⁶ requests a review, the OAT will arrange for a presiding magistrate and four or more adjudicators to conduct a full and public hearing. The COIAO also stipulates that the OAT may, of its own motion or at the request of a relevant party, reconsider the classification of an article. As for judicial determination, the OAT will arrange for public hearing to determine whether an article is obscene or indecent. Any party may appeal to the Court of First Instance on a point of law.

15. While individuals in the community may have taken divergent views on the OAT's classification results in the past, it is critical that we have in place a clear and effective mechanism for review and appeal that handles each case fairly to properly balance the interests of all sectors of society and protect public morals. Further, the review and appeal procedures are highly transparent, which allow the public to fully appreciate that the classification of articles is relative and not absolute.

(V) Implementation of the COIAO

16. In the last ten years, there has been a significant decrease of about 80% in the OAT's total caseload, both in terms of the number of articles submitted to the OAT for administrative classification as well as judicial determination. To illustrate, the figures for 2008 and 2018 are set out in the table below:

	2008	2018 (% change)
Total number of articles classified by the OAT, of which:	933	167 (-82.1%)
(1) <i>Articles for classification</i>	931	167
(2) <i>Articles for review in a full hearing</i>	2	0
(3) <i>Articles for reconsideration</i>	0	0
Total number of articles for judicial determination	43 533	9 073 (-79.2%)

17. Although fluctuations in the OAT's annual caseload may be caused by a variety of factors, there has been an obvious drop in the OAT's total

⁶ Includes the person who submitted the article and/or the author, printer, manufacturer, publisher, importer, distributor or owner of the copyright of the article or any person who commissions the design, production or publication of the article.

caseload in recent years, which reflects the market conditions for the print media and audiovisual discs publishing industries, as well as the declining demand of publishers for classification of articles under the COIAO.

18. In light of this, we do not consider it justified or appropriate to introduce urgent and fundamental changes to the adjudicatory system. Moreover, there is no common and broad public consensus in respect of the regulatory system and standards. That said, in response to calls from the community to expand the OAT, the Government has explored with the Judiciary adjustments to the OAT's operations in order to enhance its representativeness (see paragraph 25 below).

19. OFNAA is one of the enforcement departments for the COIAO. In addition to handling public complaints, OFNAA also conducts inspections at different retail outlets in the market (e.g. bookstores, computer and video shops, comic book shops, figurine shops, etc.) and takes appropriate follow-up actions. In the past three years, OFNAA conducted about 218 000 inspections and inspected some 993 000 articles.

20. At the same time, OFNAA has been organising various publicity and public education programmes to promote public awareness of the COIAO, to educate children and youngsters on the importance of healthy information and enhance their awareness and ability to resist objectionable materials, and to strengthen parents' role in guiding their children on the proper use of the Internet. In 2018, OFNAA conducted over 200 school talks for students and their parents on the safe and smart use of the Internet and promoted the use of filtering software through talks and workshops.

THE GOVERNMENT'S PROPOSALS IN 2015

21. Consolidating the views from two rounds of public consultation completed in 2009⁷ and 2013⁸, the Government briefed this Panel⁹ on the proposed legislative amendments and implementation of administrative measures to improve the regulatory framework under the COIAO. With respect to amending the COIAO, the Government proposed to:

- (a) abolish the administrative classification function of the OAT,

⁷ vide LC Paper No. CB(1)2180/08-09(05)

⁸ vide LC Paper No. CB(4)292/12-13(05)

⁹ vide LC Paper No. CTB/A 235-5/1 (C) Pt.1

leaving the OAT to make judicial determinations only;

- (b) increase the minimum number of adjudicators at each OAT hearing from two to four to enhance its representativeness; and
- (c) 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.

22. As for administrative measures, the Judiciary and the Government proposed to implement improvement measures in respect of the operation of the OAT and the co-regulatory approach¹⁰ for the control of indecent and obscene articles on the Internet respectively, 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 Internet¹¹.

WORK PROGRESS OF LEGISLATIVE AMENDMENTS

23. The key amendments proposed in 2015 were to increase the maximum penalty under the COIAO to increase its deterrent effect and to abolish the OAT's administrative classification function, the latter reflecting the consensus of the Judiciary and the legal sector then. In the past four years, we have been working on amending the law along these directions, including resolving relevant legal issues and exploring the arrangements for abolishing the OAT's administrative classification function.

¹⁰ With respect to information on the Internet, the Government has been adopting a complaint-driven and co-regulatory approach with the industry to deal with complaints concerning obscene and indecent contents published on the Internet. In this connection, the Government and the Hong Kong Internet Service Providers Association (an industry organisation) have jointly drawn up the "Code of Practice – Practice Statement on Regulation of Obscene and Indecent Material" (Code of Practice).

¹¹ Following consultation with the Hong Kong Internet Service Providers Association and the other two enforcement departments (viz. the Hong Kong Police Force and Customs and Excise Department), OFNAA updated the Code of Practice in December 2016 to reflect more clearly the arrangements for handling complaints concerning the Internet. The Code of Practice, worked out jointly with the industry, provides guidelines for the industry to follow in their provision of services insofar as the regulation of obscene and indecent material transmitted on the Internet is concerned in order to protect young people and public morals.

24. On the classification system, we take the view that it is appropriate for the adjudicator system to be composed of community members so that it reflects community standards of morality, decency and propriety. However, given it is difficult to avoid some degree of subjective judgment in classifying articles and cultural and social standards change with the passage of time, we foresee that there is no statutory amendment or improvement measure that can completely guarantee that controversial cases will never arise again in the future. This is a practical issue that we have encountered in the course of our work with the legislative amendments.

OTHER FOLLOW-UP ACTIONS

25. In response to the public's views on the OAT's operations and before enactment of the proposed legislative amendments proposed in 2015, the Judiciary has proposed the following measures (which are to be implemented gradually) to increase the OAT's representativeness:

- (a) increasing the usual number of adjudicators for interim classification and determination hearings from two to four on an administrative basis;
- (b) increasing the total number of adjudicators from 500 to 750 in light of the latest developments¹²; and
- (c) reducing the maximum term for adjudicators from nine years to six years.

ADVICE SOUGHT

26. Members are invited to give views on the aforementioned policy direction, regulatory framework, and various amendment suggestions and proposals.

Commerce and Economic Development Bureau
Judiciary
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May 2019

¹² While it was the Judiciary's earlier intention to increase the total number of adjudicators from 500 to 1 500 as indicated in paragraph 22 of the paper, the Judiciary has recently reviewed the need for such a large number of adjudicators in the light of the decreasing number of cases. The Judiciary considers it prudent to increase the size from 500 to 750 first. The Judiciary will continue to closely monitor the situation and see if there is a need to further adjust the size.