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Panel on Information Technology and Broadcasting

Meeting on 10 May 2019

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

Purpose

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

The regulatory regime under Cap. 390

2. Cap 390 was enacted in 1987 to provide for the establishment of the Obscene Articles Tribunal ("OAT") and to control articles¹ which consist of or contain material that is obscene or indecent. OAT is a specialized tribunal of the Judiciary. It has exclusive jurisdiction over the

¹ Articles under the Control of Obscene and Indecent Articles Ordinance (Cap. 390) 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, Cap 390 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).

determination of whether an article is obscene or indecent.² It comprises a presiding magistrate and adjudicators drawn from a panel of adjudicators who are members of the public appointed by the Chief Justice. It aims to provide more consistent standards which reflect the current community views. At present, there are about 500 adjudicators.³

3. OAT discharges two different functions. It is responsible for giving a classification on a submitted article, which is an administrative function⁴ (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 function⁵ (hereafter referred as judicial determination function). When performing the judicial determination function, OAT does so as a court, with the related powers and authority.

4. In response to the growing public concern over obscene or indecent materials published in newspapers and entertainment magazines, or disseminated through the Internet, the Administration had conducted a comprehensive review of Cap. 390 and two rounds of public consultation, with the second round completed in July 2012. The Government

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 Chief Justice 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.

⁴ Under administrative classification, prospective publishers, as well as enforcement agencies, may submit articles to the Obscene Articles Tribunal ("OAT") for classification on a voluntary basis. 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 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 OAT, which shall then make a determination on whether the article is obscene, indecent, or neither obscene nor indecent.

consulted the public on four major areas:

- (a) institutional set-up of OAT;
- (b) maximum penalty under Cap. 390;
- (c) definitions of "obscenity" and "indecent"; and
- (d) handling of new forms of media.

The major views and comments received are summarized in the report published in January 2013.

5. Having considered the views received during the two rounds of public consultation, and having consulted the Judiciary and the Department of Justice, the Administration proposed in February 2015 that the administrative classification function of OAT would be abolished and OAT would be left to only deal with the judicial determination function. The Administration also proposed to maintain the current adjudicator system and implement the following improvement measures:

- (a) increase the total number of adjudicators from about 500 to a maximum of 1 500;
- (b) increase the minimum number of adjudicators at each OAT hearing from two to four; and
- (c) enhance briefings for adjudicators to bring about greater consistency of the adjudication standards and efficiency of OAT.

6. The Administration proposed to increase the maximum penalty under Cap. 390 to increase the deterrent effect against offenders. The maximum penalty was proposed to be doubled for 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). The maximum imprisonment term for subsequent convictions relating to indecent articles was also proposed to be increased from one to two years.

7. The Administration also recommended establishing a liaison group with information technology professionals and the industry to

enhance the existing co-regulatory approach for the control of indecent and obscene articles on the Internet.

8. The above proposed legislative amendments concerning the regulatory framework under Cap. 390 have not yet been implemented. The Administration explained that it had been liaising with the relevant government departments and the Judiciary with a view to resolving the legal issues related to these amendments.

Previous discussions

9. Several related issues (e.g. abolishing OAT's administrative function, adjudicator system, etc.) were previously discussed at the meetings of the Panel on Information Technology and Broadcasting ("the Panel").

Panel on Information Technology and Broadcasting

Abolishing the administrative function of the Obscene Articles Tribunal

10. Panel members had expressed concerns that if OAT's administrative function was to be abolished, the publication industry would be deprived of a classification avenue before publication and might face a higher risk of being prosecuted. The Administration explained that most publishers were already familiar with the adjudication standards adopted by OAT, and were unlikely to face a higher risk of prosecution after the abolition of the administrative function. The Administration would establish a repository for indecent articles seized by the Administration and convicted under Cap. 390, so that members of the public (including the publishing industry) could take reference of the prevailing standards of convicted cases.

Adjudicator system

11. Panel members had queried about the system of appointing adjudicators to OAT, including the adjudicators' age, gender and social background, the percentage of adjudicators who attended multiple hearings in a year, as well as the way of arriving at a decision at a hearing when there were different opinions among adjudicators. There was also a suggestion to shorten the term of adjudicators from 12 years to 6 years to

speed up the turnover and increase the representativeness of OAT. The Administration advised that hearings of OAT were attended by different groups of adjudicators, with only 28% of them attended two or three hearings in a year. In the event of any difference in opinion between the members, the decision of that OAT shall be that of the majority of them or, in the event that they are equally divided, that of the presiding magistrate.

12. Some Panel members commented that the existing self-nomination system of OAT adjudicators would inevitably lead to bias, as people who nominated themselves were likely to adopt strict moral standards with regard to obscenity and indecency. To enhance the diversity of members of OAT, members suggested that the Judiciary should consider reforming the OAT system from one which was based on self-nomination to one based on nomination by the authorities.

13. The Administration was of the view that the self-nomination system had generally worked well over the years with proven record, and the adjudicators were drawn from all walks of life in the community. As regards the suggestion of replacing the current adjudicator system with a jury system, the Judiciary was concerned that the suggestion would drain judicial resources and would add burden on the deployment of eligible jurors. Some jurors might not like to perform OAT functions which involved examination of potentially obscene and indecent articles. The Judiciary was also concerned that the suggestion, if implemented, would significantly lengthen OAT hearings and lower the OAT's efficiency, as extra time would be needed for the jurors who were 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. The number of jurors to be required was likely to increase.

Internet co-regulation

14. Panel members noted the Administration's proposal to establish a liaison group consisting of information technology professionals, representatives of Internet Service Providers ("ISPs") and government representatives to review and enhance the existing co-regulatory framework and update the existing Code of Practice for the control of indecent and obscene articles on the Internet. Some Panel members commented that representatives of Internet users should also be present in

the liaison group; and that safe harbour provisions should be introduced in Cap. 390 to limit ISPs' liability for the publication of obscene and indecent articles through their services in case ISPs had met certain prescribed conditions. The Administration undertook to consider these suggestions during the review of the co-regulatory framework.

Council meetings

15. Mr MA Fung-kwok raised a question on classification of articles by OAT at the Council meeting on 31 October 2018. Details of the question and the Administration's reply are given in the hyperlink in the **Appendix**.

Latest position

16. The Administration will brief the Panel on 10 May 2019 on the updated position concerning the review of Cap. 390.

Relevant papers

17. A list of the relevant papers is set out in the Appendix.

Council Business Division 1
Legislative Council Secretariat
7 May 2019

List of relevant papers

Issued by	Meeting date/ Issue date	Paper
Panel on Information Technology and Broadcasting	9 March 2015	<p>Legislative Council Brief on review of the Control of Obscene and Indecent Articles Ordinance File Ref.: CTB/A 235-5/1(C) Pt.1</p> <p>Paper on the review of the Control of Obscene and Indecent Articles Ordinance prepared by the Legislative Council Secretariat (Updated background brief) LC Paper No. CB(4)590/14-15(05)</p> <p>Administration's response to issues raised at the meeting on 9 March 2015 LC Paper No. CB(4)413/15-16(01)</p> <p>Minutes of meeting LC Paper No. CB(4)916/14-15</p>
Council	31 October 2018	<p>Question No. 3 raised by Mr MA Fung-kwok Classification of articles by Obscene Articles Tribunal</p>