

## **LEGISLATIVE COUNCIL BRIEF**

The Secretary for Information Technology and Broadcasting submits the following note for Members' information –

### Title of Note

### Date of ExCo

Protection of Youth from Obscene and  
Indecent Materials : The 2000 Review of the  
Control of Obscene and Indecent Articles  
Ordinance

18 April 2000

19 April 2000

Information Technology and  
Broadcasting Bureau

## **LEGISLATIVE COUNCIL BRIEF**

### **PROTECTION OF YOUTH FROM OBSCENE AND INDECENT MATERIALS : THE 2000 REVIEW OF THE CONTROL OF OBSCENE AND INDECENT ARTICLES ORDINANCE**

#### **INTRODUCTION**

At the meeting of the Executive Council on 18 April 2000, the Council decided that the consultation paper at Annex – Protection of Youth from Obscene and Indecent Materials : The 2000 Review of the Control of Obscene and Indecent Articles Ordinance (COIAO) – should be published for public consultation.

#### **BACKGROUND AND ARGUMENT**

##### **Background**

2. The Government's policy on the regulation of obscene and indecent articles is to strike a proper balance between protecting public morals and our young people on the one hand and preserving the free flow of information and safeguarding the freedom of expression on the other. Publication (including distribution, circulation and sale) of obscene and indecent articles is regulated by the COIAO. The Obscene Articles Tribunal (OAT) set up under the COIAO is a judicial body which is responsible for, and has exclusive jurisdiction in, determining whether an article is obscene, indecent or neither. There is no compulsory censorship on publications. Publishers may, however, voluntarily submit articles to the OAT for classification rulings if in doubt. Although newspapers by definition fall within the meaning of "article" and are therefore subject to the COIAO, professional and journalistic ethics in the publishing industry are outside the scope of the COIAO.

3. To ensure that our regulatory regime is able to meet the changing needs and expectations of the community, we conduct regular reviews of the operation of the COIAO. The last review was conducted in 1995. We undertook to conduct another review in the 1998 Policy Address. For the purpose of the review and in order to gauge public views, we conducted a public opinion survey on the operation of the COIAO (the COIAO Survey) and reported the survey findings to the Information Technology and Broadcasting Panel on 10 May 1999. The survey findings indicated a general view that there is a need to protect young people from exposure to indecent articles. Most of the respondents therefore objected to the publication of indecent articles in newspapers and publications that can be made available to persons below the age of 18. The COIAO Survey revealed that there was general acceptance of the system of classifying obscene and indecent articles according to the moral standards generally accepted by the community and of involving members of the public in the classification of articles. While there was support for the classification of articles by the OAT, which consists of a presiding magistrate and members of the public, the survey results also reflected the need to enhance the representativeness of the OAT. While the OAT's standards for classifying obscene articles were generally in line with the community's standards, its classification standards in respect of indecent articles in newspapers, magazines and comic books were generally considered to be more liberal than the moral standards of the community. There was also confusion between the system for classifying articles under the COIAO and the film classification system.

4. We have also received from time to time representations from concern groups and members of the community expressing their grave concerns about the proliferation of obscene and indecent articles and their harmful effects on the younger generation, to the extent that this is seriously affecting their development. Various community groups have been conducting seminars and surveys to highlight the problem. They have urged the Government to step up the regulation of obscene and indecent articles and proposed a number of measures to help protect the youth from obscene and indecent materials.

5. We have taken into account these views and proposals and the findings of the COIAO Survey in drawing up the policy proposals to improve the COIAO, so as to better protect our youth from obscene and indecent articles. Our proposals are set out in the consultation paper at Annex. In sum, we do not propose a complete overhaul of the present

system and legislation. However, some changes and improvements are necessary to address the inadequacies of the system and community concerns.

## **Policy Proposals**

### ***Additional Guidance to the OAT***

6. The COIAO does not provide a detailed definition of “obscenity” and “indecent” as they are abstract and relative concepts. Obscenity and indecency are merely defined in the COIAO to include violence, depravity and repulsiveness. That said, the COIAO provides a set of guidelines to the OAT for determining the classification of an article. These include the standards of morality generally accepted by reasonable members of the community, the dominant effect of the article as a whole, the class or age of the likely recipients, the location at which the matter is displayed and whether the article has an honest purpose.

7. We have received views and representations from time to time that the lack of a detailed definition of obscenity and indecency might hamper the work of the OAT and directly affect its decisions. As obscenity and indecency are not matters of exact science and the accepted standards of propriety in any community change and develop with time, we are not in favour of providing in the law a rigid definition of obscenity and indecency by enumerating what is obscene or indecent. That said, we consider that we can adopt the approach in the Film Censorship Ordinance (Cap. 392) by providing the OAT (but see paragraph 18 below about the proposed setting up of a new statutory classification body) with further guidance on the parameters on what may constitute obscenity or indecency. We recognise that there are strong community concerns about publications depicting acts of violence with themes glorifying triad and criminal activities and which are targeted at young people, and the presence of articles advertising prostitution services in newspapers. We propose that the guidance to the OAT could be strengthened by adding the following parameters –

- (a) whether an article describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty or violence in manners that are not accepted by reasonable members of the community;

- (b) whether an article advertises services which are not considered acceptable to reasonable members of the community in terms of public decency; and
- (c) whether an article is considered by reasonable members of the community to be harmful to persons below the age of 18.

### ***Nomenclature of the Classification System***

8. Under the COIAO, an article may be classified as Class I (neither obscene nor indecent), Class II (indecent) or Class III (obscene). Class I articles may be published without restrictions. Class II articles must not be published or sold to persons under the age of 18. Class III articles are prohibited from publication.

9. The nomenclature of the classification system under the COIAO is often confused with that used for the classification of films under the Film Censorship Ordinance, namely, Category I (suitable for all ages), Category II<sub>A</sub> (not suitable for children), Category II<sub>B</sub> (not suitable for young persons and children), and Category III (for persons aged 18 or above only). Most of the respondents (some 70%) of the COIAO Survey considered that there was confusion between the classification system under the COIAO and the film classification system. While Category II films are considered unsuitable for watching by young people below the age of 18, the decision is left for parents to make as to whether they would allow their children to watch such films. However, Class II (indecent) articles on the other hand are not allowed to be circulated and made available to the underage and it is an offence to do so. In order to distinguish the two systems and address the public concern, we propose to give the classification system under the COIAO a new set of nomenclature which is distinctly different from that of film classification. Articles could be classified as “unrestricted”, “restricted to 18 and above” and “banned” as appropriate.

### ***Statutory Requirements for Publication of Indecent Articles***

10. Under the COIAO, publication of indecent articles must comply with certain statutory requirements, including the sealing of such articles in wrappers (opaque wrappers if the covers are indecent) and the

display of a warning notice as prescribed by the COIAO<sup>1</sup> on no less than 20% of the front and back covers of such articles. These requirements apply to newspapers and other printed publications alike. In the case of newspapers which contain indecent materials, however, in view of their wide circulation and for the purpose of clear identification, we propose the adoption of alternative means of identification, for instance, to require these newspapers to have a certain identification mark printed on every page (such as a red line printed diagonally across the page) and the statutory warning printed on the front page. This will be more environmentally friendly as compared with the present requirement to have the publication wrapped and sealed. If this proposal is adopted and the wrapper requirement is dispensed with for newspapers containing indecent materials, the front pages of such newspapers will not be permitted to contain any indecent materials.

### ***Penalties under the COIAO***

11. Under the COIAO, a person who publishes or possesses/imports for the purpose of publication an obscene article, whether or not the person knows that it is an obscene article, is liable to a maximum fine of \$ 1 million and imprisonment for three years. A person who publishes an indecent article to a juvenile, publishes or possesses for the purpose of publication an indecent article not in compliance with the statutory requirements, or publicly displays an indecent matter, whether or not that person knows that it is an indecent article/matter or that the person whom the article is published to is a juvenile, is liable to a maximum fine of \$ 400,000 and imprisonment for one year on first conviction and a maximum fine of \$ 800,000 and imprisonment for one year on a second or subsequent conviction.

---

<sup>1</sup> The warning notice as prescribed by the COIAO is as follows:

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。

12. Notwithstanding the maximum penalties prescribed in the COIAO, the convictions in 1999 only resulted in fines ranging from \$500 to \$90,000 and terms of imprisonment from 7 days to 16 months. To achieve the desired deterrent effect, we propose to increase the maximum fine on publication of obscene articles and possession/import of obscene articles for the purpose of publication to \$2 million (with no change to the term of imprisonment for three years). We also propose to increase the penalties for offences relating to the publication of indecent articles and display of indecent matters to a maximum fine of \$800,000 (with no change to the term of imprisonment for one year) on first conviction and a maximum fine of \$1.6 million and imprisonment for two years on a second or subsequent conviction.

### ***Gifts Distributed with Publications***

13. Under the COIAO, the term “article” means any thing consisting of or containing material to be read or looked at or both read and looked at (which includes publications such as newspapers and comic books), any sound-recording, and any film, video-tape, disc or other record of a picture or pictures. Gifts given out with publications, discs, etc. are outside the scope of the COIAO unless they fall under the definition of “article” or are themselves indecent matters.

14. There have been community concerns about publishers distributing with their publications, in particular comic books, gifts that are potentially offensive or have harmful effects on children and young people. In response to such concerns, one of the industry associations has issued guidelines to urge its members to take into account safety considerations for readers of different age groups in designing gifts for distribution with their publications. However, some publishers continue to give out with their publications gifts that are considered by members of the community to have harmful effects on children and young people. There are calls for the Government to bring such gifts under the control of the COIAO.

15. To address these community concerns, we propose to revise the definition of the term “article” in the COIAO to the effect that if a gift, prize or thing is supplied in any manner, whether simultaneously or separately and whether for consideration or not, with a publication, a sound-recording, or a film, video-tape, disc or other record of a picture or pictures, the gift, prize or thing together with the publication, sound-

recording, or film, video-tape, disc or other record of a picture or pictures as a whole will be considered as an article. With such a revised definition of the term “article”, if a gift is distributed with a publication (whether the gift is wrapped together with the publication as a package, given out separately by the vendor upon purchase of the publication, redeemed with a stamp or coupon enclosed with the publication or distributed in any other manner), the gift together with the publication as a whole will be considered as an “article”. As required under the COIAO, all indecent articles must not be published to persons under the age of 18 and have to comply with the statutory requirements for publication of indecent articles.

### *The OAT System*

16. The OAT was established under the COIAO enacted in 1987 to replace the system under the Objectionable Publications Ordinance whereby the determination of whether an article was objectionable was made by a single magistrate who was expected to reflect the community’s standards. That system was severely criticised for its lack of representativeness of the community’s views. The OAT system is firmly grounded in the judicial process with community involvement in the determination of obscenity and indecency of an article. The OAT comprises a presiding magistrate and two or more members of the public drawn from the community to serve as lay adjudicators in first hearings<sup>2</sup> (in full hearings, the OAT comprises a presiding magistrate and at least four adjudicators). It provides a simple and efficient mechanism to deal with the publication of articles which may need to be restricted to adults or prohibited from publication.

17. However, the representativeness of the composition of the OAT has been a concern of the community. The COIAO Survey results reflected the need to enhance the representativeness of the composition of the OAT. Also, the role and performance of the OAT have intermittently been a subject of media attention: some directed at the calibre and representativeness of the adjudicators, and others at the lack of transparency of its operations as well as its rulings on the classification of certain publications. We agree that there is room for improvement in the classification mechanism.

---

<sup>2</sup> Under the existing system, the OAT will conduct a first hearing in private and give an interim classification on a submitted article. The results of the interim classification are published in two newspapers for general information and requests for review of classification may be lodged within five days. If the interim ruling is not disputed, it will be confirmed as the final classification.

18. Having regard to overseas experience, we propose to replace the existing classification system by a two-tier classification mechanism. A statutory obscene articles classification board will be set up to classify articles. The OAT will remain as a judicial body to consider appeals against the classification decisions of the board and deal with the determination of articles referred to it by a court or a magistrate. For the purpose of making classification decisions, the Chief Secretary for Administration (CS) will appoint a Chairman, a small number of Deputy Chairmen and a panel of advisers to constitute the classification board. The advisers will be drawn from some broad sectors of the community, e.g. education, social work, professionals, media and cultural services, academic institutions and district organisations. Insofar as the advisers are concerned, the Administration will invite nominations from relevant bodies in these sectors for consideration for appointment by the CS to the classification board. Articles submitted for classification will be considered at a classification board meeting chaired by either the Chairman or one of the Deputy Chairmen and supported by four members drawn from the panel of advisers. The classification board will classify articles by reference to section 10 of the COIAO (i.e. guidance to the OAT), supplemented by administrative guidelines consistent with the COIAO issued by the Secretary for Information Technology and Broadcasting and published in the Gazette. Classification rulings handed down by the board will have the same legal effect as interim rulings made by the OAT under the existing system. The classification board will be required to provide reasons for its rulings. The classification board will be serviced by the Television and Entertainment Licensing Authority (TELA).

19. As regards the composition of the OAT, there have been suggestions that we should adopt the jury system for OAT adjudicators. We propose to adopt such a system, under which the OAT will comprise a presiding magistrate and at least five adjudicators who will be selected from the list of jurors. The role of the presiding magistrate would be to explain the law and to give the necessary directions for the adjudicators to make a decision. The presiding magistrate will not vote on the decision. With some 270 000 persons on the Judiciary's list of jurors, the system will enhance the representativeness of the adjudicators. With the adoption of the jury system, parties to the appeal will be informed of the presiding magistrate's directions to the adjudicators which cover legally relevant considerations concerning the classification of an article.

20. The above proposals will help to address the various concerns of the community about the OAT. The promulgation of administrative guidelines for the classification board by the Secretary for Information Technology and Broadcasting can enhance consistency of classification rulings and help to ensure that classification standards will reflect changing community standards and concerns. The proposed two-tier classification system can also enhance transparency as well as the community's understanding of the classification rulings which, be they handed down by the classification board or the OAT, will be supported by reasons or the presiding magistrate's directions to the adjudicators, as the case may be.

### ***Indecent Materials in Class I Publications***

21. There has been widespread community concern about newspapers carrying indecent materials in the form of "sex-pages" supplements. Given the wide circulation of newspapers, the unrestricted circulation of these "sex-pages" would have serious adverse effects on the healthy development of our younger generation. In such circumstances, we consider it necessary to introduce a mechanism which will deter publishers from publishing in newspapers and Class I publications articles harmful to young persons and prevent young persons from being exposed to harmful publications. Having reviewed the regulatory regimes of overseas jurisdictions, we propose setting up a serial publication order system, modelled on the New Zealand system in regulating serial publications (which are printed publications published at regular intervals but do not include newspapers). In our case, "sex-pages" in newspapers which have wide circulation within the community have aroused serious concerns and we consider it important that any proposed arrangement should also encompass newspapers. We therefore propose to suitably modify the New Zealand system to cater for the circumstances particular to Hong Kong and expand the scope of the proposed serial publication system to cover newspapers as well as other serial publications.

22. Under the proposed system, a serial publication order may be issued by the obscene articles classification board on a serial publication (the definition of which would be broadened to include daily newspapers) if a specified number of issues of the publication published within a certain period have been found by the classification board or the OAT to be obscene or have not been published in accordance with the

statutory requirements for publication of indecent articles. The proposed benchmark for triggering the obscene articles classification board to consider the issue of a serial publication order is three offending issues within three months for daily publications and three offending issues within 12 months for other serial publications. Alternatively, the benchmark for daily publications can be set at three offending issues within six months.

23. We propose that, if the obscene articles classification board is satisfied that subsequent issues of the publication may contain offensive materials, it may impose a serial publication order on the publication. The order will require issues of the serial publication published within the duration of the order to be clearly identified by, for example, having a red line printed diagonally and prominently on the front page or cover and every page of the publication and a statutory notice printed on the front page or cover stating that the publication is subject to a serial publication order for a specified period of time. Publications subject to a serial publication order cannot be sold to persons below the age of 18.

24. Publications subject to a serial publication order will not be absolved from compliance with any other provisions of the COIAO, including the statutory requirements for indecent publications if the content of the serial publication is indecent. If the serial publication is obscene, it is prohibited from publication under the law.

25. The serial publication order will last for no more than three months for daily publications and no more than 12 months for other publications. Failure to comply with the order will be an offence. If the proposed system is adopted, a publicity programme will be launched to educate the community on the serial publication order.

26. The proposal for a serial publication order system is punitive in nature. However, in view of the grave concern of the community on inclusion of indecent materials in supposedly Class I publications, we have decided to put forth this approach as an option for public consultation.

### ***Internet***

27. Generally speaking, content which is regulated by the COIAO and published via the Internet comes within the ambit of the

COIAO. Since January 1996, the COIAO has been tested on 12 occasions on its applicability to electronic publications. Ten cases resulted in conviction (with the defendant pleading guilty in nine cases). One case was dismissed on the ground that the evidence available could not indicate whether the accused was guilty or innocent and the benefit of the doubt should go to the defendant. The remaining case was unsuccessful because it involved publication of obscene articles originating from overseas which was outside the jurisdiction of the Hong Kong Special Administrative Region.

28. Bearing in mind the impracticality of actively monitoring information uploaded onto, downloaded from, or transmitted over the Internet given its vast volume and transient nature, and having regard to the Government's policy objectives to promote the development of the Internet and to establish Hong Kong as the Internet hub in the Asia-Pacific region, we decided to adopt a co-regulation regime in 1997 following public and industry consultations in 1996. Apart from legislative control, the Government and the Hong Kong Internet Service Providers Association (HKISPA) have jointly developed a Code of Practice: Practice Statement on Regulation of Obscene and Indecent Material which uses the operation and standards of the COIAO as a basis for regulation of the transmission of obscene and indecent materials over the Internet. The Code of Practice was promulgated in October 1997.

29. A review of the HKISPA's Code of Practice was conducted in January 1999. We concluded that we should build on our co-operation with the Internet industry and strengthen the co-regulation regime. To cater for the special nature of Internet transmission, we propose to clarify the legal liabilities of Internet service providers (ISPs) as conveyors of information under the COIAO. Under sections 21(1)(a) and 24(1) of the COIAO, a person who publishes an obscene article or publishes an indecent article not in accordance with statutory requirements commits an offence, whether or not he knows that it is an obscene or indecent article. In view of the nature of transmission of information on the Internet, it is not reasonable to expect ISPs as conveyors of information to screen all information that may be uploaded onto or downloaded from the Internet by users or that may be transmitted to and from their servers by other servers on the Internet. We therefore propose that ISPs should be provided with a defence to such charges, namely that they should not be held responsible for any article that they were not aware of, or had reasonable grounds for believing to be not obscene or indecent. In the same vein, other conveyors of information

in electronic form should be given the same defence. Also, other print publishers such as newspaper vendors, bookstore operators and distributors should be provided with a similar defence to charges under sections 21(1)(a) and 24(1) that they should not be held responsible for any article that they have had no reasonable opportunity to inspect and had reasonable grounds for believing to be not obscene or indecent.

30. Corresponding to the above proposal and in recognition of the special nature of content transmission over the Internet, we propose to clarify the liabilities of ISPs, in line with the practices set out in the HKISPA's Code of Practice, as follows –

- (a) if an ISP is aware of or has been notified that a user of his services has placed obscene articles on the Internet to which the public have access, he must take prompt action to remove or block access to the obscene articles; and
- (b) if an ISP is aware of or has been notified that a user of his services has placed indecent articles on the Internet to which the public have access, he must promptly ask the user to post an on-screen fore-warning indicating that the article contains material which may offend and may not be published to a person under the age of 18. If the user fails to post the warning notice within a specified period, the ISP must block access to the offensive articles or cease to provide services to the user.

Failure to do so will be a breach of the COIAO. For obscene articles hosted overseas, as local ISPs cannot remove them, we propose that if an ISP is aware of or has been notified of obscene articles hosted overseas, he must take prompt action to block access to the articles. Failure to do so will also be a breach of the COIAO.

31. Furthermore, in view of the increasing popularity and prevalence of the Internet and community concerns about publication of offensive materials online, there may be a need for further measures for us to have recourse to in case the ISPs fail to take the actions required of them in respect of obscene articles. One option is, for obscene material hosted locally, to empower the enforcement agencies to seek an authorisation/order from a magistrate directed at the ISPs hosting the material to remove or block access to the material. For obscene material hosted overseas, blockage is proposed because we do not have

jurisdiction over overseas ISPs and what we can do is to require all local ISPs to block access to the obscene materials.

32. However, this proposal has its limitations as the obscene material found on the Internet may have been altered or moved elsewhere by the time the authorisation/order is issued. The blocking of access to obscene material hosted overseas may not result in total blockage given that users can still access it through overseas servers. Also, where the removal or blocking of the obscene material or the concerned sections of the Web site is not practicable, the entire Web site will have to be removed or blocked. In such cases, other material on the Web site that may not be objectionable will also be removed or blocked. Notwithstanding these limitations, we would like to seek public comments on this proposal.

### ***Enforcement***

33. At present, TELA's inspection officers are vested with the power of seizure to deal with offences relating to the display of indecent articles and publication of indecent articles not in compliance with the statutory requirements, but not in respect of offences relating to prohibition of the sale of indecent articles to juveniles. To increase the effectiveness of enforcement, we propose that TELA's inspectors should be empowered to seize articles so as to prohibit the sale of an indecent article to a juvenile and to check the identity cards of purchasers of indecent articles and vendors in order to establish collaborative evidence.

### ***Community's Role***

34. Legislative control and enforcement action by the Government alone cannot prevent young people from buying and reading indecent publications. We need the concerted efforts of publishers, vendors, schools and parents to work together for the wider community interest and in particular for our younger generation. Publishers can help by taking responsibility for the content of their publications. Vendors can help by not selling indecent articles to children and young people. Schools can help by strengthening their educational efforts on both students and parents. Parents can help by being more vigilant in exercising parental guidance. For instance, parents can choose suitable reading materials for their children and refrain from buying newspapers and publications with repugnant, salacious or repulsive content. Schools and other non-governmental organisations can also be

encouraged to draw up lists of publications recommended to be bought by parents for their children.

## **BASIC LAW IMPLICATIONS**

35. The Department of Justice advises that the proposals in the consultation paper are consistent with those provisions of the Basic Law carrying no human rights implications.

## **HUMAN RIGHTS IMPLICATIONS**

36. The Department of Justice advises that the proposals in the consultation paper are consistent with the human rights provisions of the Basic Law.

## **FINANCIAL AND STAFFING IMPLICATIONS**

37. Non-recurrent and recurrent expenditures of \$1.6 million and \$9.0 million respectively are required to provide a secretariat with six full time staff to service the classification board, to run the serial publication order system, and to pay honoraria to members of the board. Part of the recurrent requirement (\$3.5 million) would be released by Judiciary as a result of transferring the interim classification function to the proposed classification board. On the enforcement front, TELA will need additional inspection staff at non-recurrent and recurrent cost of \$0.2 million and \$2.9 million respectively to patrol newspaper and magazine outlets on a random basis to ensure that publications under a serial publication order comply with the requirements of the order.

38. The adoption of a jury system by the OAT to handle appeals on classification decisions made by the classification board and determination of articles entails additional work for the presiding magistrate who is required to give explanations and directions to adjudicators at every sitting. Enhancement of supporting staff is also required for the smooth empanelling of adjudicators. The additional resources required will be absorbed within the global allocation of the Judiciary.

39. In line with Government policy on fee charging, the fees for classification of obscene and indecent articles by the classification board will be set on a full-cost recovery basis.

## **PUBLIC CONSULTATION**

40. The public will be given two months to comment on the consultation paper.

## **PUBLICITY**

41. We will hold a press conference on 19 April 2000 to announce the commencement of the public consultation. A press release will also be issued on the same day. The consultation paper will be posted on the Home Page of the Information Technology and Broadcasting Bureau on 19 April 2000. Printed copies will be available at the Information Technology and Broadcasting Bureau from 19 April 2000 and at the District Offices from 28 April 2000. We will brief the Legislative Council Information Technology and Broadcasting Panel at the panel meeting on 8 May 2000.

## **ENQUIRIES**

42. For any enquiries relating to this Brief, please contact Miss Adeline Wong, Principal Assistant Secretary for Information Technology and Broadcasting at telephone number 2189 2229 (fax number: 2511 1458).

Information Technology and Broadcasting Bureau  
19 April 2000

# **Protection of Youth from Obscene and Indecent Materials**

**The 2000 Review of the Control of Obscene and  
Indecent Articles Ordinance**

**A Consultation Paper**

**Information Technology and Broadcasting Bureau  
The Government of the Hong Kong Special Administrative Region**

**April 2000**

# Table of Contents

		<u>Page No.</u>
I.	Prologue	1
II.	Summary of Proposals	4
III.	The Regulatory Framework under the Control of Obscene and Indecent Articles Ordinance (COIAO)	7
IV.	Definitions of Obscenity, Indecency and Article	10
V.	Nomenclature of the Classification System	14
VI.	The Obscene Articles Tribunal System	16
VII.	Enforcement of the COIAO	20
VIII.	Regulation of Obscene and Indecent Articles on the Internet	25
IX.	Publicity and Public Education	30
X.	Other Technical Amendments to the COIAO	32

- Appendix 1 A Summary of Major Amendments to the COIAO in 1995
- Appendix 2 A Summary of Major Findings of the Public Opinion Survey on the COIAO
- Appendix 3 Section 10 of the COIAO
- Appendix 4 A Summary of Overseas Practice in Regulating Obscene and Indecent Articles
- Appendix 5 Hong Kong Internet Service Providers Association's Code of Practice : Practice Statement on Regulation of Obscene and Indecent Material
- Appendix 6 A Summary of the Findings and Recommendations of the Review on the Effectiveness of the Hong Kong Internet Service Providers Association's Code of Practice
- Appendix 7 A Summary of Overseas Practice in Regulating Obscene and Indecent Content on the Internet
- Appendix 8 Outline of TELA's Publicity Programme

## **I. PROLOGUE**

1.1 Hong Kong is a free, open and dynamic society. We cherish the free flow of information and respect the individual's right of access to information, freedom to publish and freedom to express an opinion which are rights guaranteed under the Basic Law. Government's long-standing policy is to strike a proper balance between protecting public morals and our young people on the one hand and preserving the free flow of information and safeguarding the freedom of expression on the other. While the Control of Obscene and Indecent Articles Ordinance (COIAO) seeks to restrict the publication, circulation and display of obscene and indecent materials, free expression and freedom of publication are protected. There is no compulsory censorship on publications. Publishers may however voluntarily submit articles to the Obscene Articles Tribunal (OAT) for classification rulings if in doubt.

1.2 To ensure that our regulatory regime is able to meet the changing needs and expectations of the community, we conduct regular reviews of the operation of the COIAO. The last review was conducted in 1995 resulting in the enactment of a package of measures to enhance and improve the effectiveness and operation of the COIAO. These include new and additional measures to restrict the publication of indecent articles, strengthening of the enforcement powers of the Police and the Television and Entertainment Licensing Authority (TELA), adjustment to the level of penalty for publication of indecent articles to maintain its deterrent effect, and an increase in the transparency and representativeness of the OAT. A summary of the major amendments to the COIAO enacted in 1995 is at Appendix 1.

1.3 We undertook to conduct a review of the COIAO as one of our policy commitments in the Chief Executive's 1998 Policy Address. For the purpose of the review and in order to gauge public views, we have conducted a public opinion survey on the operation of the COIAO (the Survey). A summary of the major findings of the Survey is at Appendix 2. The Survey results indicated a general view that there is a need to protect young people from exposure to indecent articles. Most of the respondents therefore objected to the publication of indecent articles in newspapers and publications that can be made available to persons below the age of 18.

1.4 We have also received from time to time representations from concern groups and members of the community expressing their grave concerns about the proliferation of obscene and indecent articles and their harmful effects on the younger generation, to the extent that this is seriously affecting their development. Various community groups have been conducting seminars and surveys to highlight the problem. They have urged the Government to step up the regulation of obscene and indecent articles and proposed a number of measures to help protect the youth from obscene and indecent materials. We have taken into account these views and proposals and the findings of the Survey in drawing up the policy proposals in this Consultation Paper.

1.5 We are conscious that community standards of morality, decency and propriety change with time, and that the taste and standards differ from one individual to another and are inevitably subjective. In the final analysis, there are bound to be occasions where clashes between public standards and private taste occur and where differences between what the community can stand and what an individual wishes to have access to arise. There should not be undue restrictions on what adults in a free society should be able to see, hear and read, but children and young people, being impressionable and vulnerable, need particular protection and a balance has to be struck. It is therefore extremely important that the public provide us with their views to help us arrive at that balance. We would welcome comments on this Consultation Paper and the proposals made therein. We, however, wish to emphasise that journalistic ethics, professional standards and editorial decisions in news reporting are outside the scope of this consultation exercise and are not covered in this Consultation Paper.

1.6 Comments on this Consultation Paper should be sent to the Information Technology and Broadcasting Bureau by 19 June 2000 by –

<i>Post</i>	Information Technology and Broadcasting Bureau 2/F, Murray Building Garden Road Hong Kong
<i>Fax</i>	2511 1458
<i>E-mail</i>	itbbenq@itbb.gcn.gov.hk

1.7 The Government intends to make public all, or parts of any submissions made in response to this Consultation Paper, unless there is a specific request to treat all or part of a response in confidence. If no such request is made, the Government will assume that the response is not intended to be confidential.

## **II. SUMMARY OF PROPOSALS**

2. The key proposals in this Consultation Paper are summarised below –

- 2.1 To adopt alternative means of identification for newspapers containing indecent materials by, for instance, requiring these newspapers to have a certain identification mark printed on every page (such as a red line printed across the page) and the statutory warning for indecent articles printed on the front page (paragraph 3.3).
- 2.2 To increase the penalties under the COIAO (paragraph 3.8).
- 2.3 To provide in the COIAO additional guidance to the OAT for determining whether an article is obscene or indecent (paragraph 4.7).
- 2.4 To revise the definition of the term “article” in the COIAO to the effect that if a gift, prize or thing is supplied with a publication, a sound-recording, or a film, video-tape, disc or other record of a picture or pictures, the gift, prize or thing together with the publication, sound-recording, or film, video-tape, disc or other record of a picture or pictures as a whole will be considered as an article (paragraph 4.10).
- 2.5 To adopt a new nomenclature for classification of articles under the COIAO (paragraph 5.6).
- 2.6 To adopt a two-tier classification system which comprises an obscene articles classification board to classify articles and the OAT to consider appeals against the classification decisions of the classification board and to deal with the determination of articles referred to it by a court or a magistrate. OAT adjudicators will be selected from the list of jurors (paragraphs 6.9-6.11).
- 2.7 To empower TELA’s inspectors to seize articles so as to prohibit sale of indecent articles to juveniles and check identity cards of purchasers of indecent articles and vendors (paragraph 7.3).

- 2.8 To encourage schools and other non-governmental organisations to draw up lists of publications recommended to be bought by parents for their children (paragraph 7.4).
- 2.9 To issue serial publication orders against a serial publication if a specified number of issues of the publication published within a certain period have been classified as obscene or have not been published in accordance with the statutory requirements for publication of indecent articles (paragraphs 7.6-7.11).
- 2.10 Regulation of obscene and indecent articles on the Internet –
- (i) To intensify the co-regulation regime (paragraph 8.3).
  - (ii) To enlist the assistance of educational, social and youth organisations to promote the proper use of the Internet among students in schools and at home and to step up public education and publicity on filtering tools and other advisory services (paragraph 8.3).
  - (iii) The Hong Kong Internet Service Providers Association to stipulate in its Code of Practice that an Internet service provider (ISP) should make available and provide on request filtering tools to its subscribers (paragraph 8.4).
  - (iv) To clarify an ISP's legal liability as a publisher under the COIAO by providing a defence for ISPs (paragraph 8.7).
  - (v) To require an ISP to remove or block access to obscene articles or ensure that an on-screen forewarning is posted if the ISP is aware of or has been notified of obscene or indecent articles (paragraph 8.8).
  - (vi) To consider introducing further measures for enforcement agencies to have recourse to in case ISPs failed to take the actions required of them in respect of obscene articles by, for example, empowering the enforcement agencies to seek an authorisation/order from a magistrate to order ISPs to block access to or remove obscene articles (paragraph 8.9-8.11).

- 2.11 To clarify the legal liability of conveyors of information in electronic form (other than ISPs), newspaper vendors, bookstore operators and distributors as a publisher under the COIAO by providing them with a defence (paragraph 8.7).
- 2.12 To enhance publicity and public education efforts to increase public awareness of the provisions of the COIAO (paragraph 9.2).
- 2.13 To make technical amendments to the COIAO to enhance its operation and effectiveness (paragraph 10.1).

### III. THE REGULATORY FRAMEWORK UNDER THE COIAO

3.1 The publication (including distribution, circulation and sale) and public display of obscene and indecent articles is restricted under the COIAO (Cap. 390). The term “article” as defined in the COIAO includes printed matter, sound-recording, film, video-tape, disc and article published by electronic means (electronic publication). The COIAO does not apply to films regulated by the Film Censorship Ordinance (Cap. 392) and television broadcasts governed by the Television Ordinance (Cap. 52). Under the COIAO, an article may be classified as –

Class I	:	Neither obscene nor indecent
Class II	:	Indecent
Class III	:	Obscene

“Obscenity” and “indecent” as defined in the COIAO include violence, depravity and repulsiveness. Class I articles may be published without restrictions. Class II (indecent) articles must not be published or sold to persons under the age of 18. Publication of Class II articles must comply with certain statutory requirements, including the sealing of such articles in wrappers (opaque wrappers if the covers are indecent) and the display of a warning notice as prescribed by the Ordinance\* on no less than 20% of the front and back covers of such articles. Class III (obscene) articles are prohibited from publication.

3.2 The COIAO serves two main functions. It prohibits the

---

\* The warning notice as prescribed by the COIAO is as follows:

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。

publication of obscene articles. It also restricts the publication of articles containing indecent materials to adults. The requirements for such articles to be wrapped and sealed and carry a statutory warning serve as advice to parents and enable them to make an informed choice as to whether they would wish their children to have access to such articles. There is no compulsory censorship on publications and it is incumbent upon the publishers to ensure that publications containing indecent materials are published in accordance with the statutory requirements.

3.3 The requirements for indecent articles to be wrapped and sealed and carry the statutory warning apply to newspapers and other printed publications alike. In the case of newspapers which contain indecent material, however, in view of their wide circulation and for the purpose of clear identification, we propose the adoption of alternative means of identification, for instance, to require these newspapers to have a certain identification mark printed on every page (such as a red line printed diagonally across the page) and the statutory warning printed on the front page. This will be more environmentally friendly as compared with the present requirement to have the publication wrapped and sealed. If this proposal is adopted and the wrapper requirement is dispensed with for newspapers containing indecent materials, the front pages of such newspapers will not be permitted to contain any indecent materials.

3.4 The Obscene Articles Tribunal (OAT) set up under the COIAO is responsible for and has exclusive jurisdiction in determining whether an article is obscene, indecent or neither. The OAT is a judicial body comprising a presiding magistrate and two or more members of the public drawn from the community to serve as lay adjudicators. The inclusion of lay adjudicators in the OAT is intended to enable public standards of morality to be reflected in the classification process. The OAT determines the classification of an article by reference to a set of guidelines as stipulated in section 10 of the COIAO (an extract of which is at Appendix 3). These include the standards of morality generally accepted by reasonable members of the community, the dominant effect of the article as a whole, the class or age of the likely recipients, the location at which the matter is displayed and whether the article has an honest purpose.

3.5 There is no requirement that articles must be submitted for classification before publication. Publishers may however voluntarily submit articles to the OAT for classification ruling if in doubt. The COIAO stipulates that the publisher, author, printer, manufacturer,

importer, distributor, copyright owner of any article, or any person who commissions the design, production or publication of any article may submit articles to the OAT. As for the Government, the Secretary for Justice and those public officers authorised by the Chief Secretary for Administration may submit any article to the OAT for classification. At present, public officers of TELA, Customs and Excise Department (C&ED) and the Police have been so authorised by the Chief Secretary for Administration.

3.6 As the COIAO is enacted with the intent to protect juveniles, persons making available the restricted articles to a juvenile commit an offence and are criminally liable. They include publishers, distributors and vendors of such articles. Persons under the age of 18 purchasing restricted indecent articles however do not have any criminal liability.

3.7 The COIAO is enforced by TELA, C&ED and the Police. A person who publishes or possesses/imports for the purpose of publication an obscene article, whether or not the person knows that it is an obscene article, is liable to a maximum fine of \$ 1 million and imprisonment for three years. A person who publishes an indecent article to a juvenile, publishes or possesses for the purpose of publication an indecent article not in compliance with the statutory requirements, or publicly displays an indecent matter, whether or not that person knows that it is an indecent article/matter or that the person whom the article is published to is a juvenile, is liable to a maximum fine of \$ 400,000 and imprisonment for one year on first conviction and a maximum fine of \$ 800,000 and imprisonment for one year on a second or subsequent conviction.

3.8 Notwithstanding the maximum penalties prescribed in the COIAO, the convictions in 1999 only resulted in fines ranging from \$500 to \$90,000 and terms of imprisonment from 7 days to 16 months. To achieve the desired deterrent effect, we propose to increase the maximum fine on publication of obscene articles and possession/import of obscene articles for the purpose of publication to \$2 million (with no change to the term of imprisonment for three years). We also propose to increase the penalties for offences relating to the publication of indecent articles and display of indecent matters to a maximum fine of \$800,000 (with no change to the term of imprisonment for one year) on first conviction and a maximum fine of \$1.6 million and imprisonment for two years on a second or subsequent conviction.

#### **IV. DEFINITIONS OF OBSCENITY, INDECENCY AND ARTICLE**

4.1 Despite the brevity of the title, the COIAO actually covers violence, depravity and repulsiveness in addition to obscenity and indecency. “Obscenity” and “indecency” are abstract and relative concepts. The consideration of what is obscene or indecent is not an exact science and there is no absolute standard for it. Perception of obscenity and indecency changes from time to time, from place to place, and from culture to culture. Under the COIAO regulatory regime, the OAT relies on the adjudicators to reflect the standards of morality generally accepted by reasonable members of the community. And in the determination process, the OAT has to have regard to the dominant effect of the article as a whole, the class or age of the likely recipients, the location at which the matter is displayed and whether the article has an honest purpose. As there is no absolute objective yardstick to measure obscenity and indecency and given that context and treatment are as important as the actual words and images, it will neither be appropriate nor practical for determinations to be made by reference to a rigid check list of prohibitions. To do so would give rise to endless arguments as to what should or should not be included in the list and as a result frequent legislative amendments would have to be made.

4.2 Nevertheless, we have received views and representations from time to time that the lack of detailed definition of obscenity and indecency might hamper the work of the OAT and directly affect its decisions.

4.3 The need for a clear definition of obscenity and indecency has been the subject of public debate dating back to the discussions by the then Legislative Council in 1987 leading to the enactment of the COIAO. The same subject was debated again in 1995 during the passage of the Control of Obscene and Indecent Articles (Amendment) Ordinance 1995. On both occasions, the legislature accepted and supported our reasons for not stipulating precise definitions in the law. It was also agreed that the OAT and its members, by virtue of their status as representatives of the public, would be capable of assessing what is generally acceptable to the community.

4.4 We have previously considered the promulgation of administrative guidelines for the OAT for use as reference when

determining whether an article is obscene or indecent or neither. We were advised however that this would amount to circumscribing the judicial powers and discretions of the OAT. The judicial independence of the OAT might also be called into question. We have, therefore, decided not to pursue this option.

4.5 In conducting this review, we have studied the regulatory regimes in other countries. Appendix 4 gives a brief overview of the information we have gathered. In brief, our approach in determining whether an article is obscene or indecent is not out of line with overseas practice. In fact, most jurisdictions, like us, have not attempted to define obscenity and indecency although a general provision setting out the factors to be taken into account when making a determination or a classification is usually included in the relevant legislation.

4.6 Section 10 of the COIAO already provides a range of factors to which the OAT is required to have regard in determining whether an article is obscene or indecent or whether any matter publicly displayed is indecent, or in classifying an article. They are –

- (a) the 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 persons or class of persons, or age groups of persons to whom the article is published;
- (d) the location where the matter is publicly displayed, and the persons or class of persons, or age groups of persons likely to view such matter; and
- (e) whether the article or matter has an honest purpose or whether the content is merely camouflage designed to render acceptable any part of it.

4.7 The above factors already encompass the necessary considerations which the OAT should have regard. However, there have been strong community concerns on publications depicting acts of violence with themes glorifying triad and criminal activities, and which are targeted at young people. Over 60% of the respondents of the

Survey considered that articles advertising prostitution should not be published in newspapers and Class I publications. To address these community concerns, we propose to further strengthen the existing guidance to the OAT by adding the following factors to the list –

- (a) whether an article describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty or violence in manners that are not accepted by reasonable members of the community;
- (b) whether an article advertises services which are not considered acceptable to reasonable members of the community in terms of public decency; and
- (c) whether an article is considered by reasonable members of the community to be harmful to persons below the age of 18.

4.8 Under the COIAO, the term “article” means any thing consisting of or containing material to be read or looked at or both read and looked at (which includes publications such as newspapers and comic books), any sound-recording, and any film, video-tape, disc or other record of a picture or pictures. Gifts given out with publications, discs, etc. are outside the scope of the COIAO unless they fall under the definition of “article” or are themselves indecent matters.

4.9 There have been community concerns about publishers distributing with their publications, in particular comic books, gifts that are potentially offensive or have harmful effects on children and young people. In response to such concerns, one of the industry associations has issued guidelines to urge its members to take into account safety considerations for readers of different age groups in designing gifts for distribution with their publications. However, some publishers continue to give out with their publications gifts that are considered by members of the community to have harmful effects on children and young people. There are calls for the Government to bring such gifts under the control of the COIAO.

4.10 To address these community concerns, we propose to revise the definition of the term “article” in the COIAO to the effect that if a gift, prize or thing is supplied in any manner, whether simultaneously or separately and whether for consideration or not, with a publication, a

sound-recording, or a film, video-tape, disc or other record of a picture or pictures, the gift, prize or thing together with the publication, sound-recording, or film, video-tape, disc or other record of a picture or pictures as a whole will be considered as an article. With such a revised definition of the term “article”, if a gift is distributed with a publication (whether the gift is wrapped together with the publication as a package, given out separately by the vendor upon purchase of the publication, redeemed with a stamp or coupon enclosed with the publication or distributed in any other manner), the gift together with the publication as a whole will be considered as an “article”. As required under the COIAO, all indecent articles must not be published to persons under the age of 18 and have to comply with the statutory requirements for publication of indecent articles.

## V. NOMENCLATURE OF THE CLASSIFICATION SYSTEM

5.1 Under the COIAO, an article may be classified as Class I (neither obscene nor indecent), Class II (indecent) or Class III (obscene). The nomenclature is often confused with that used for the classification of films under the Film Censorship Ordinance (FCO).

5.2 By way of background, films are classified into one of the following categories under the FCO –

Category I - suitable for all ages

Category II<sub>A</sub> - not suitable for children

Category II<sub>B</sub> - not suitable for young persons and children

Category III - for persons aged 18 or above only

All films intended for public exhibition are required to be submitted for censorship and approved by the Commissioner for Television and Entertainment Licensing who is the Film Censorship Authority. Categories I, II<sub>A</sub> and II<sub>B</sub> are advisory in nature whereas restriction on admission to Category III films is statutorily enforced.

5.3 Probably due to the adoption of the same Roman numerals (i.e. I, II and III) to denote the different classes of articles and categories of films, many people have mistaken them to be the same. The two systems are in fact distinctly different. The film classification system operates on a long and well-accepted compulsory censorship basis. The classification system for publications is entirely voluntary.

5.4 We accept that the nomenclature of the two systems can be confusing. Articles which have been given a Class II classification under the COIAO can be mistaken as having the same meaning as Category II films when in fact they are not. Unlike the film classification system, there is no advisory category for articles. For Category II films, despite that they are considered unsuitable for watching by young people below the age of 18, the decision is left for parents to make as to whether they would wish and indeed allow their

children to watch such films. Class II articles on the other hand are not allowed to be circulated and made available to the underage and it is an offence to do so.

5.5 We have received suggestions that an advisory category similar to that of films should be introduced under the COIAO classification system. This will assist parents in choosing reading materials for their children by providing more information on the content of a publication. However, we should point out that the role of the OAT is to determine whether the publication or display of certain articles should be restricted in accordance with its assessment of their acceptability to the community, and not to give advice on the suitability or otherwise of the content of publications to specific age groups. If the community is concerned about easy access of unsuitable publications by young people, introducing an advisory category would only exacerbate this problem. Under the present COIAO classification system, articles which are of an adult nature and by extension not suitable for juveniles would be classified as Class II and restricted only to adults. With the introduction of an advisory category in Class I (such as not suitable for young persons), some articles hitherto classifiable in Class II might fall under the advisory category and may be made publicly available to juveniles. This is unlikely to be in accord with the community's wish to see tighter control of access. The community should also recognise that the introduction of an advisory category notwithstanding, there will be no statutory restrictions governing condition of sale and the question of easy access to unsuitable publications by young people remains unresolved.

5.6 We agree that more needs to be done to make the general public better aware of the COIAO regulatory system. (Specific proposals will be discussed in Chapter IX). In order to distinguish it from the film classification system, one possible way to promote the understanding of the COIAO system is to give the classification system a new nomenclature which is distinctly different from that of films. In this regard, we propose to do away with the class code and that articles should be classified as "unrestricted", "restricted to 18 and above" and "banned" as appropriate.

## **VI. THE OBSCENE ARTICLES TRIBUNAL SYSTEM**

6.1 The establishment of the OAT was designed to replace the previous system whereby the determination of whether an article was objectionable was made by a single magistrate. It emerged from the public consultation undertaken at the time that the community was concerned about whether a single magistrate could reflect the standards held by the community. As a result, the present set-up whereby a judicial officer sits as the presiding magistrate with two or more members drawn from the community serving as adjudicators was incorporated into the COIAO. The inclusion of lay adjudicators in the OAT enables public standards of morality to be reflected in the classification process and allows for community participation in an area which affects not only the adjudicators themselves but the whole society.

6.2 Adjudicators are recruited through open invitation and are appointed by the Chief Justice. They are drawn from different backgrounds representing a wide cross-section of the community. At present, the OAT is served by a panel of 125 adjudicators.

6.3 The main function of the OAT is to classify and determine articles referred to it by publishers on a voluntary basis, the law enforcement agencies (the Police, C&ED and TELA) or the Secretary for Justice. Under the law, the OAT has exclusive jurisdiction to determine whether an article is obscene or indecent. Its decision on decency standard is final and can only be challenged and appealed against on a point of law.

6.4 The OAT will conduct a first hearing and give an interim classification on the submitted article. The interim classification hearing is conducted in private. The results of the interim classification are published in two newspapers for general information and requests for review of classification may be lodged within five days. If the interim classification is not disputed, it will be confirmed as the final classification.

6.5 On receipt of the request for review of the interim classification, the OAT will set a date for a full hearing which is open to the public. The appellant can make representations (by himself or through his legal representative) at the OAT full hearing. The presiding magistrate at the full hearing will be assisted by at least four adjudicators

who are not previously involved in the original interim classification. The decision of the OAT at the full hearing is final unless it is challenged on a point of law in a higher court.

6.6 The operation of the OAT was last reviewed in 1995 and as a result, a number of amendments were made to the COIAO to enhance the transparency and representativeness of the OAT. These include –

- (a) increasing the minimum number of adjudicators at full hearings conducted to review the interim classification of articles, or to reconsider previously classified articles from two to four;
- (b) disqualifying an adjudicator involved in the interim classification of the article from sitting as a member of the OAT at the full hearing to review the classification of the same article; and
- (c) requiring the OAT to identify the part of the article which causes the obscenity or indecency at both interim and full hearings.

Also, the number of adjudicators was increased.

6.7 The OAT provides a simple and efficient mechanism to deal with the publication of articles which may need to be restricted to adults or prohibited from publication. In particular, it offers an avenue to publishers who are unsure about the acceptability of their publications to seek classification for the carrying out of lawful publication businesses. The results of the Survey showed that there was general community support for involving members of the public in the classification of articles and for the classification of articles by the OAT, which consists of a presiding magistrate and members of the public. However, the Survey results also reflected the need to enhance the representativeness of the composition of the OAT.

6.8 The role and performance of the OAT have intermittently been a subject of media attention mostly arising from the decisions and rulings the OAT made on certain publications. As the question of whether an article is obscene or indecent involves the making of a value judgement and each individual has his own view, it is not surprising to find disagreement or even objections to the OAT's decisions. In the

final analysis, it has to be accepted that the general community standard has to prevail.

6.9 We have received suggestions to improve the classification mechanism. One suggestion is to establish an independent body for classifying articles. Given that there is community support for the OAT and its function, we do not propose to dismantle the entire OAT system. Having regard to overseas experience, we consider that the existing classification mechanism can be further improved by instituting a two-tier mechanism. A statutory obscene articles classification board can be set up to classify articles. The classification rulings handed down by the board shall have the same legal effect as interim rulings made by the OAT under the existing system. The OAT will remain as a judicial body to consider appeals against the classification decisions of the classification board and deal with the determination of articles referred to the OAT by a court or a magistrate. For the purpose of making classification decisions, the Chief Secretary for Administration (CS) will appoint a Chairman, a small number of Deputy Chairmen and a panel of advisers to constitute the classification board. The advisers will be drawn from some broad sectors of the community, e.g. education, social work, professionals, media and cultural services, academic institutions and district organisations. Insofar as the advisers are concerned, the Administration will invite nominations from relevant bodies in these sectors for consideration for appointment by the CS to the classification board. Articles submitted for classification will be considered at a classification board meeting chaired by either the Chairman or one of the Deputy Chairmen and supported by four members drawn from the panel of advisers. The classification board will classify articles by reference to section 10 of the COIAO (i.e. guidance to Tribunal), supplemented by administrative guidelines to the board consistent with the COIAO issued by the Secretary for Information Technology and Broadcasting and published in the Gazette. The classification board will be required to provide reasons for its rulings. The first and full hearing system for the OAT will be scrapped. Appeals against the ruling of the classification board and determination of classification of articles referred by the court would be handled by the OAT which comprises a presiding magistrate and at least five adjudicators.

6.10 Under this two-tier system, the operation of the OAT would be further improved by adopting the jury system for selecting adjudicators to attend OAT hearings. This arrangement will

significantly enhance the representativeness of the OAT as the selection of adjudicators will no longer be restricted to those who apply to serve on the Tribunal. (At present there are 125 adjudicators but there are some 270 000 persons on the Judiciary's list of jurors.) Anyone who is eligible to serve as a juror will have a chance to be selected as adjudicators. Under the jury system, the presiding magistrate will not vote on the classification of articles. Instead, he will be responsible for explaining the law and giving necessary directions for adjudicators to make a decision on classification. OAT adjudicators, like jurors in High Court trials and the Coroner's Court, will not be required to give reasons for their decisions. Parties to the OAT hearings will, however, be fully informed of the presiding magistrate's directions to the adjudicators which cover legally relevant considerations concerning the classification of an article.

6.11 The proposed two-tier classification system embodies community participation in the classification process. Through a more selective appointment system for the classification board, we can channel the input of the community into the classification process. Administrative guidelines for the classification board will be issued by the Secretary for Information Technology and Broadcasting from time to time, thus ensuring that classification standards will reflect changing community standards and concerns. Checks and balances are available. Appeal against the decisions of the classification board will be handled by a separate judiciary body (i.e. the OAT) which again embodies community participation as adjudicators are selected from the list of jurors. Transparency of the classification process will be enhanced. All classification rulings, be they handed down by the classification board or reviewed by the OAT, will be supported by reasons or the presiding magistrate's directions to the adjudicators, as the case may be. It will also enhance the community's understanding of the classification standards. On the other hand, it has to be recognised that there are bound to be occasions where differences as to the appropriate classification of certain articles arise between the classification board and those of the OAT. This notwithstanding, we consider that the two-tier classification system should be an improvement over the existing arrangement, and recommend that the existing classification mechanism be replaced by the two-tier classification system.

## **VII. ENFORCEMENT OF THE COIAO**

7.1 Enforcement of the COIAO is the joint responsibility of the Police, C&ED and TELA. The Police mainly deals with the sale of pornographic articles at the wholesale and retail outlets such as video and computer shops. The C&ED tackles pornographic articles at entry points and in the course of copyright enforcement work. TELA monitors articles on sale in the market and conducts surveillance inspections at retail outlets, including street news stands, book shops and video shops. Dubious articles are referred to the OAT for classification. Actions are taken on publications found in breach of OAT classification decisions and other provisions of the COIAO. TELA operates a 24-hour hotline to handle complaints. The three enforcement agencies also conduct joint operations regularly to enforce the COIAO. These special operations are targeted at retail black spots and wholesale outlets. Pooling the resources of the three enforcement agencies together not only has the advantage of maximising limited public resources to achieve results in the most cost-effective way, the knowledge and expertise of the three enforcement agencies can also be put to the best use. Through the division of responsibilities, collective efforts are taken to enforce the COIAO. The three enforcement agencies maintain close liaison among themselves. In addition to ad hoc planning meetings for special joint operations, they hold regular meetings to exchange intelligence and co-ordinate actions arising from enforcement operations.

7.2 Enforcement of the COIAO is taken at various levels and different strategies are adopted to tackle offences at the production level, at importation and wholesale outlets, and at retail sales points. Enforcement at sales point is the most problematic. We have received various suggestions to restrict the sale of indecent publications in order to prevent their easy access by children and young persons. Some have suggested that we require newspaper vendors and bookstore management to lock up indecent publications while others have advocated restricting the sale of such publications to designated shops. Given the trade practices of on-street newspaper vendors and the physical limitations in respect of space, the suggestion to install lockers for keeping indecent publications is not practicable. This suggestion will also cause operational problem in convenience stores and supermarkets where there are no shop attendants except the cashiers at exit counters. As regards the proposal to restrict the sale of indecent publications to designated shops, its effective implementation will entail the introduction of a

licensing system, possibly with a cap on the number of designated shops to be licensed. However, the local community is likely to object to the opening of such designated shops in their vicinity. Moreover, since there is no prior censorship on publications, there is no system to pre-determine which publications should be locked up or sold in designated premises in the first place. There is thus a possibility that some publishers may choose to sell their indecent publications through normal outlets.

7.3 We agree that young people should be protected from indecent articles and in this regard vigilant enforcement actions are needed. At present, TELA's inspection officers are vested with the power of seizure to deal with offences relating to the display of indecent articles and publication of indecent articles not in compliance with the statutory requirements, but not in respect of offences relating to prohibition of the sale of indecent articles to juveniles. To increase the effectiveness of enforcement, we propose that TELA's inspectors should be empowered to seize articles so as to prohibit the sale of an indecent article to a juvenile and to check the identity cards of purchasers of indecent articles and vendors in order to establish collaborative evidence. However, enforcement against access by young people is not without difficulties. The following considerations are relevant –

- (a) sales outlets are numerous in numbers and they normally operate for very long hours. It will not be practical nor will it be an efficient use of resources to deploy staff to perform surveillance at each and every sales outlet and for the whole business duration. Enforcement will thus have to be selective and targeted at high risk areas;
- (b) the carrying out of duties at sales outlets should not be so intrusive as to adversely affect the legitimate and lawful businesses of the vendors; and
- (c) since not all articles will have been submitted to the OAT for classification and while action will be taken against those who knowingly breach the law, others who are ignorant of the OAT classification should perhaps be advised and warned before enforcement action is taken against them.

7.4 Legislative control and enforcement action by the Government alone cannot prevent young people from buying and reading

indecent publications. We need the concerted efforts of publishers, vendors, schools and parents to work together for the wider community interest and in particular for our younger generation. Publishers can help by taking responsibility for the content of their publications. Vendors can help by not selling indecent articles to children and young people. Schools should strengthen their educational efforts on both students and parents. And last but not the least, parents should be more vigilant in exercising parental guidance. For instance, parents can choose suitable reading materials for their children and refrain from buying newspapers and publications with repugnant, salacious or repulsive content. Schools and other non-governmental organisations can also be encouraged to draw up lists of publications recommended to be bought by parents for their children.

7.5 The question of daily newspapers which contain materials unsuitable for reading by juveniles is more difficult to resolve. We are aware that the community is increasingly concerned about the inclusion of so-called “sex-pages” in daily newspapers and the unrestricted circulation of these “sex-pages” which would have serious adverse effects on the healthy development of our younger generation. These “sex-pages” deal with contents of an adult nature and should be confined to adults. Some groups and people have suggested that these “sex-pages” should be separated from the main newspaper, wrapped, sealed and made available to adults only upon purchase of the newspaper. However, a newspaper vendors association has raised objection to this proposal because of the difficulty in implementing this proposal, in particular during rush hours. On the enforcement front, there will also be difficulty in ensuring that the “sex pages” are made available to adults only.

7.6 Having studied the regulatory regime of overseas jurisdictions, we consider that we could set up a serial publication order system to tackle the problem relating to “sex-pages” in newspapers and indecent material in Class I magazines. The proposed approach is modelled on the New Zealand system. In New Zealand, serial publications (i.e. printed publications published at regular intervals but do not include newspapers) which have been classified as objectionable or restricted no less than three times in a 12-month period may be subject to a serial publication order for not more than two years. Depending on the nature of the order, serial publications published within the period during which the order is in force will be treated as objectionable (which has the effect of banning such publications) or restricted (which imposes

conditions on the public display of the issues and prohibits their sale to certain groups of readers). In our case, “sex-pages” in newspapers which have wide circulation within the community have aroused serious concerns and we consider it important that any proposed arrangement should also encompass newspapers. We therefore propose to suitably modify the New Zealand system to cater for the circumstances particular to Hong Kong and expand the scope of the proposed serial publication system to cover newspapers as well as other serial publications.

7.7 Under the proposed system, a serial publication order may be issued by the obscene articles classification board proposed in paragraph 6.9 above if a specified number of issues of the publication published within a certain period have been found by the classification board or the OAT to be obscene or have not been published in accordance with the statutory requirements for publication of indecent articles. The proposed benchmark for triggering the obscene articles classification board to consider the issue of a serial publication order is three offending issues within three months for daily publications and three offending issues within 12 months for other serial publications. Alternatively, the benchmark for daily publications can be set at three offending issues within six months.

7.8 We propose that, if the obscene articles classification board is satisfied that subsequent issues of the publication may contain offensive materials, it may impose a serial publication order on the publication. The order will require issues of the serial publication published within the duration of the order to be clearly identified by, for example, having a red line printed diagonally and prominently on the front page or cover and every page of the publication and have a statutory notice printed on the front page or cover stating that the publication is subject to a serial publication order for a specified period of time. Publications subject to a serial publication order cannot be sold to persons below the age of 18.

7.9 Publications subject to a serial publication order will not be absolved from compliance with any other provisions of the COIAO, including the statutory requirements for indecent publications if the content of the serial publication is indecent. If the serial publication is obscene, it is prohibited from publication under the law.

7.10 The serial publication order will last for no more than three months for daily publications and no more than 12 months for other

publications. The exact duration of the order will be decided by the obscene articles classification board. Failure to comply with the order will be an offence. If the proposed system is adopted, a publicity programme will be launched to educate the public on the new arrangements.

7.11 The proposed approach represents a marked departure from the existing regulatory regime. To require a serial publication to be subject to a serial publication order on the basis of its past track record is punitive in nature. However, in view of the grave concern of the community on inclusion of indecent materials in supposedly Class I publications, we have put forth this approach as an option for public consultation. We would like to seek public comments on the proposal outlined in paragraphs 7.6-7.10 above.

## **VIII. REGULATION OF OBSCENE AND INDECENT ARTICLES ON THE INTERNET**

8.1 Generally speaking, content which is regulated by the COIAO and published via the Internet would also come within the ambit of the Ordinance. On this front, Hong Kong is not alone in having to tackle problems associated with content regulation on the Internet. We believe that any attempts to regulate and control content on the Internet must have regard to the following principles and considerations –

- (a) the need to strike a proper balance between protecting public morals and our young people on the one hand and preserving the free flow of information and safeguarding the freedom of expression on the other;
- (b) Government's policy objective to promote the development of the Internet industry, the wider use of Internet-based applications and the development and hosting of attractive and innovative Internet sites locally, including electronic commerce, Government electronic service delivery and cyber-learning, and to establish Hong Kong as the Internet hub in the Asia-Pacific region; and
- (c) the impracticality of actively monitoring information transmitted over the Internet given its vast volume and transient nature.

The Government alone cannot tackle the problem. Some might suggest that there should be no regulation at all. However, we believe that leaving problematic materials which raise social and moral questions unregulated is unlikely to be acceptable to the community.

8.2 In 1996, following public and industry consultations, the Government worked with the Internet industry and subsequently the Hong Kong Internet Service Providers Association (HKISPA) and together developed a Code of Practice: Practice Statement on Regulation of Obscene and Indecent Material to address the community concern about the transmission of obscene and indecent materials over the Internet. The Code of Practice (at Appendix 5) was promulgated in October 1997. It sets out the appropriate action which an Internet service provider (ISP) should take and details the procedures in dealing

with complaints. A review of the operational experience gained from implementing the HKISPA's Code of Practice was conducted by TELA in January 1999 and the outcome of the review is at Appendix 6.

8.3 There is no dispute that children and young people should be protected from indiscriminate and exploitative harmful materials. However, the seriousness and extent to which they are being exposed to such content on the Internet have to be assessed and viewed in perspective. Unlike some other forms of publication, the chances of Internet users being involuntarily exposed to pornographic material are relatively low. A great majority of the information and materials transmitted over the Internet are benign. A lot are in fact educational. Relatively speaking, the amount of offensive materials is small in proportion. This notwithstanding, the Government, the industry, parents, schools and non-governmental organisations should work together to prevent the publication of offensive materials online and to prevent children and young people from being exposed to these materials. We propose that we should build on our co-operation with the Internet industry and intensify the co-regulation regime. Co-regulation is the world-wide trend. Appendix 7 gives examples of some overseas practices. We also propose to enlist the assistance of educational, social and youth organisations to promote the proper use of the Internet among students in schools and at home. Public education and publicity of filtering tools and other advisory services could also be stepped up.

8.4 Filtering technique provides a useful means in protecting Internet users and young children from offensive or harmful materials. With the use of filtering tools, selective blocking of materials can be controlled by the user according to his own stipulated criteria. Some filtering software directly analyses content, typically looking for particular keywords. Other filtering software decides what to allow and what to block based on a set of descriptive labels on the content rated by a Web site owner or a third party (such as the content provider), and a set of filtering rules which advise on what kind of labels attention should be paid to and what particular attributes in the labels would mean that the content is not acceptable. We propose that the HKISPA should stipulate in its Code of Practice that an ISP should make available and provide on request filtering tools to its subscribers. In response to such request, an ISP should provide guidance to users on the installation as well as the use of such tools.

8.5 It should however be noted that filtering tools are not without limitations. Although filtering software can screen out suggestive words or known sites, it cannot at this stage screen out explicit images unaccompanied by suggestive text unless those who configure the software are aware of the particular site. Also, computer-competent children may always disable their parents' filtering efforts. It is therefore important for parents to instil in their children an appropriate sense of morality, guide them in their choice of reading materials and spend time with their children on using the Internet.

8.6 Since January 1996, the COIAO has been tested on twelve occasions on its applicability to electronic publications. Ten cases resulted in conviction (with the defendant pleading guilty in nine cases). One case was dismissed on the ground that the evidence available could not indicate whether the accused was guilty or innocent and the benefit of the doubt should go to the defendant. The remaining case was unsuccessful because it involved publication of obscene articles originating from overseas which was outside the jurisdiction of the Hong Kong Special Administrative Region (HKSAR). The Court of First Instance held in the case HKSAR v Cheung Kam Keung [1998] 2 HKC 156 that "The definition of article in section 2 of the Ordinance (i.e. the COIAO) is very wide and the term 'disc or other record' can cover the graphic computer files complained of. The Ordinance came into effect at a time when computer technology was well developed and it is possible that it applied to future developments in that field through the wording used." In the circumstances we are of the view that there is no immediate need to enact separate legislation to regulate contents transmitted via the Internet. However, there are certain aspects of the COIAO which we propose to clarify and adapt in order to cater specifically for the Internet. These are elaborated in paragraphs 8.7-8.8.

8.7 An ISP, as a conveyor of information, is liable for publishing obscene articles or indecent articles not in accordance with the statutory requirements. Considering however that ISPs may not be the creators of the problematic content in the first place and that it is not reasonable to expect them to be able to screen all information that may be uploaded onto or downloaded from the Internet by users or transmitted via their servers from other servers on the Internet, we propose that ISPs as conveyors of information should not be held responsible merely for the conveyance of information which they are not aware of or have reasonable grounds for believing to be not obscene or indecent. Under sections 21(1)(a) and 24(1) of the COIAO, a person who publishes an

obscene article or publishes an indecent article not in accordance with the statutory requirements commits an offence whether or not he knows that it is an obscene or indecent article. To cater for the special nature of Internet transmission, we propose that ISPs as conveyors of information should be provided with a defence to such charges. They should not be held responsible for any article that they were not aware of or had reasonable grounds for believing to be not obscene or indecent. In the same vein, we propose that other conveyors of information in electronic form should be given the same defence. Also, other print publishers such as newspaper vendors, bookstore operators and distributors should be provided with a similar defence to charges under sections 21(1)(a) and 24(1) that they should not be held responsible for any article that they have had no reasonable opportunity to inspect and had reasonable grounds for believing to be not obscene or indecent.

8.8 Corresponding to the above proposal and in recognition of the special nature of content transmission over the Internet, we propose to clarify the liabilities of ISPs, in line with the practices set out in the HKISPA's Code of Practice, as follows –

- (a) if an ISP is aware of or has been notified that a user of his services has placed obscene articles on the Internet to which the public have access, he must take prompt action to remove or block access to the obscene articles; and
- (b) if an ISP is aware of or has been notified that a user of his services has placed indecent articles on the Internet to which the public have access, he must promptly ask the user to post an on-screen fore-warning indicating that the articles contain material which may offend and may not be published to a person under the age of 18. If the user fails to post the warning notice within a specified period, the ISP must block access to the offensive articles or cease to provide services to the user.

Failure to do so will be a breach of the COIAO. For obscene articles hosted overseas, as local ISPs cannot remove them, we propose that if an ISP is aware of or has been notified of obscene articles hosted overseas, he must take prompt action to block access to the articles. Failure to do so will also be a breach of the COIAO.

8.9 Furthermore, in view of the increasing popularity and prevalence of the Internet and community concerns about publication of offensive materials online, there may be a need for further measures for us to have recourse to in case the ISPs failed to take the actions required of them in respect of obscene articles. The COIAO does not at present empower our enforcement agencies to block access to obscene articles on the Internet or remove obscene articles from the Internet. In the case of other published articles including VCDs, a Police or Customs officer may apply for a judicial warrant to search for, seize, remove and detain articles suspected to be obscene. To enhance the Government's enforcement capabilities, one option is that, similar to the existing provisions governing other published articles, a new power to direct ISPs to remove or block obscene articles hosted locally, or block access to obscene articles hosted overseas, should be provided to the enforcement agencies to deal with obscene articles on the Internet subject to the issue of an authorisation/order by a magistrate.

8.10 Under the proposed arrangement, if obscene material hosted locally is found, the enforcement agencies may seek an authorisation/order from a magistrate directed at the ISPs hosting the material to remove or block access to the material. For obscene material hosted overseas, blockage is proposed because we do not have jurisdiction over overseas ISPs and what we can do is to require all local ISPs to block access to the obscene material. Notice of such authorisation/order will be communicated to ISPs individually and through the HKISPA.

8.11 However, this proposal has its limitations as the obscene material found on the Internet may have been altered or moved elsewhere by the time the authorisation/order is issued. The blocking of access to obscene material hosted overseas may not result in total blockage given that users can still access it through overseas servers. Also, where the removal or blocking of the obscene material or the concerned sections of the Web site is not practicable, the entire Web site will have to be removed or blocked. In such cases, other material on the Web site that may not be objectionable will also be removed or blocked. Notwithstanding these limitations, we would like to seek public comments on this proposal.

## **IX. PUBLICITY AND PUBLIC EDUCATION**

9.1 TELA is responsible for organising publicity and educational programmes on the operation of the COIAO. These publicity programmes serve the objectives of –

- (a) promoting public awareness and understanding of the provisions of the COIAO;
- (b) promoting parental guidance; and
- (c) supporting and contributing to the efforts of other Government departments and non-governmental organisations in the provision of civic education.

9.2 TELA has an on-going publicity programme to promote public awareness of the provisions of the COIAO. These include –

- (a) the distribution of publicity leaflets and souvenirs to schools, youth centres, newspaper vendors and publication retail outlets, and at public enquiry service counters in District Offices;
- (b) regular issues of advisory letters to newspaper vendors and publishers to remind them of the provisions of the COIAO, in particular of those which may directly affect them;
- (c) the organisation of talks and visits to schools and youth centres;
- (d) the organisation of seminars with ISPs; and
- (e) the production of new publicity and appeal messages for broadcast on television and radio.

We propose that TELA should continue to work with the Education Department and the Committee on Home-School Co-operation to organise structured talks and seminars for teachers and parents focusing on how to provide guidance to children, including the proper use of the Internet and the application of filtering tools. An outline of our proposed initiatives is set out in Appendix 8.

9.3            Suggestions on how the existing publicity programme may be improved and what additional measures may be taken to enhance its effectiveness are welcome.

## **X. OTHER TECHNICAL AMENDMENTS TO THE COIAO**

10.1 We have in the light of the operational experience of the enforcement agencies identified certain areas in respect of which the COIAO can be improved to enhance its operation and effectiveness. We propose –

- (a) to clarify the scope of the application of the COIAO so that the COIAO will not apply to films published in the form of videotapes or laser discs with addition to or excision from the version previously approved under the Film Censorship Ordinance. The reason is that these videotapes and laser discs are already controlled under the Film Censorship Ordinance;
- (b) to clarify that a publisher of an article is obliged to give notice of the classification of the OAT and the proposed obscene articles classification board (if adopted) to recipients of more than two copies of the article if he causes, manages or controls the printing, manufacturing or reproduction of the article;
- (c) to require all indecent materials transmitted by electronic means and sound recordings be preceded by audio, visual or audio-visual warnings as appropriate;
- (d) to improve the appeal mechanism by also allowing appeals to the Court of First Instance on any ground involving a point of law; and
- (e) to enhance administrative efficiency by empowering the Chief Justice to administratively prescribe forms for submissions to OAT.

## **List of Appendices**

- Appendix 1      A Summary of Major Amendments to the COIAO in 1995
- Appendix 2      A Summary of Major Findings of the Public Opinion Survey on the COIAO
- Appendix 3      Section 10 of the COIAO
- Appendix 4      A Summary of Overseas Practice in Regulating Obscene and Indecent Articles
- Appendix 5      Hong Kong Internet Service Providers Association's Code of Practice: Practice Statement on Regulation of Obscene and Indecent Material
- Appendix 6      A Summary of the Findings and Recommendations of the Review on the Effectiveness of the Hong Kong Internet Service Providers Association's Code of Practice
- Appendix 7      A Summary of Overseas Practice in Regulating Obscene and Indecent Content on the Internet
- Appendix 8      Outline of TELA's Publicity Programme

## **Appendix 1**

### **A Summary of Major Amendments to the COIAO in 1995**

#### **Restriction on publication of indecent articles**

- Introduce the following restrictions on publication of an indecent article:
  - The article must be sealed in a wrapper (opaque wrappers if the covers are indecent).
  - A warning notice of no less than 20% of the front and back covers of the article must be displayed. In case the article is sealed in an opaque wrapper, the warning notice should also be displayed on both sides of the wrapper.
  - The name, address and telephone number of the publisher must be printed on the cover of the article, and if the article is sealed in an opaque wrapper, on the opaque wrapper as well.
- Create a new offence for the possession of indecent articles for the purpose of publication.

#### **Obscene Articles Tribunal (OAT)**

- Increase the number of adjudicators at full hearings conducted to review interim classification or reconsider previously classified articles from two to four.
- Disqualify an adjudicator involved in an interim classification to sit at the full hearing to review the classification of the same article.
- Require the OAT to identify the offending part or parts of the article which give(s) rise to an “obscene” or “indecent” classification.

### Responsibility of publishers

- In respect of the responsibility of a publisher to comply with the restrictions on the publication of an indecent article, clarify the meaning of a “publisher” as a person who controls or manages the printing, manufacturing or reproduction of the indecent article.
- To prevent publishers from using surrogates, create a new offence for anyone who knowingly or wilfully allows his name to be printed on an indecent article as the publisher of that article when in fact he is not.

### Enforcement

- Empower TELA inspection officers and Police officers to seize indecent articles in public places.

### Penalty

- Increase the fine for the publication of indecent articles or display of indecent matter in violation of the law from \$200,000 to \$400,000, and introduce a higher level of fine, at \$800,000, for subsequent convictions.

**A Summary of Major Findings of the Public Opinion Survey  
on the COIAO**

TELA commissioned in September 1998 the Lingnan College to conduct a survey to find out the public opinion on the effectiveness of the operation of the COIAO, gauge public perception of the level of moral standards generally accepted by the community, and collect views on possible areas of improvement.

2. The survey comprised two parts: the general survey and focus group survey. The general survey covered 1 107 members of the public aged 18 or above chosen through random sampling. The focus group survey involved 200 persons selected from different sectors of the community, namely professionals (including lawyers, doctors, businessmen, IT professionals, PR consultants, artists, designers), social workers, mass media professionals (including reporters, producers, publishers), teachers, parents, students over the age of 18, concern groups (including women groups, religious groups, Provisional District Board/Urban and Regional Councils/Legislative Council members), and the general public.

3. The survey covered the following five broad aspects –
- (a) knowledge of the classification system under the COIAO;
  - (b) public understanding about the work of the OAT;
  - (c) public perception of the moral standards generally accepted by the community;
  - (d) effectiveness of self-regulation of obscene and indecent articles transmitted through the Internet; and
  - (e) effectiveness of civic education and publicity efforts in protecting young persons from being exposed to obscene and indecent articles.

Field work for the survey was conducted between September and

December 1998.

4. The major findings of the public opinion survey are summarised below –

(a) Knowledge of Classification System

Some 78.7% of the respondents in the general survey and 50% in the focus group survey considered the present three-tier classification system appropriate. As regards nomenclature, most of the respondents (67.4% in the general survey and 72.5% in the focus group survey) considered that there was confusion between the system for classifying articles under the COIAO and the film classification system under the Film Censorship Ordinance.

(b) Understanding of the Work of OAT

The survey revealed that there was general acceptance of the present system of classifying obscene and indecent articles by the OAT. The majority of the respondents (87.8% in the general survey and 94% in the focus group survey) considered that members of the public should be involved in the classification of articles. Some 75.9% of the respondents in the general survey and 66.5% in the focus group survey considered it appropriate for the OAT, which consists of a presiding magistrate and members of the public, to assume responsibility of classifying articles. Most of the respondents (80.4% in the general survey and 67.5% in the focus group survey) agreed that the OAT should classify articles on the basis of standards of morality generally accepted by the community. However, 52.7% of the respondents in the focus group survey and 32.3% in the general survey did not consider that the present composition of the OAT could reflect the standards of morality generally accepted by the community.

(c) Perception of the Prevailing Standards of Morality

The survey revealed that in respect of obscene articles, the existing classification standards of the OAT were generally in line with the expectation of the community. However, standards for classifying articles in newspapers, magazines and comic books with indecent elements did not appear to match the more conservative standards of the respondents. The respondents in particular reacted strongly to indecency in written form. Some 65.8% of the respondents in the general survey and 60.8% in the focus group survey considered that articles advertising prostitution could not be published in newspapers and Class I (neither obscene nor indecent) magazines. There was widespread support for the need to protect juveniles from exposure to indecent articles. Some 52.8% of the respondents in the general survey and 72.6% in the focus group survey gave this as the reason for objecting to the publication of indecent articles in newspapers and Class I magazines.

(d) Penalty

Over 60% of the respondents in both surveys considered the maximum level of penalty stipulated in the Ordinance for publishing Class II (indecent) and Class III (obscene) articles appropriate.

(e) Restrictions on Access to Indecent Articles

In both surveys, over 80% of the respondents considered the present restrictions on the publication of indecent article (i.e. sealing the article in a wrapper and the display of a warning notice) acceptable. On the other hand, most respondents considered these restrictions not effective in preventing the sale of indecent articles to and purchase of these articles by juveniles.

Civic education, parental guidance and heavy penalty topped the list of effective measures (as perceived by the respondents) in preventing young people from accessing indecent articles in both surveys.

(f) Obscene and Indecent Articles Transmitted through the Internet

Of the 1 107 respondents in the general survey, only 13 indicated that their children had accidentally come across obscene or indecent articles on the Internet. Four out of the 200 respondents in the focus group survey indicated that their children had accidentally come across such articles.

Most of the respondents (over 70%) considered that it was not appropriate to rely solely on self-regulation by Internet service providers (ISPs). Government regulation and parental guidance were all perceived to be necessary.

(g) Effectiveness of Civic Education and Publicity

The survey revealed that publicity and civic education relating to control of obscene and indecent articles were generally considered inadequate.

(h) Means to Prevent Juveniles from Accessing Obscene and Indecent Articles

In the general survey, most of the respondents (80%) considered that parents played an important role in preventing youth from accessing obscene and indecent articles, followed by media, schools, government and publishers. In the focus group survey, the order was media, parents, publishers, schools and government.

Section 10 of the COIAO

10. Guidance to Tribunal

(1) In determining whether an article is obscene or indecent or whether any matter publicly displayed is indecent, or in classifying an article, a Tribunal shall have regard to –

(a) **standards of morality, decency and propriety that are generally accepted by reasonable members of the community, and in relation thereto may, in the case of an article, have regard to any decision of a censor under section 10 of the Film Censorship Ordinance (Cap. 392) in respect of a film within the meaning of section 2(1) of that Ordinance;**

(b) **the dominant effect of an article or of matter as a whole;**

(c) in the case of an article, the persons or class of persons, or age groups of persons, to or amongst whom the article is, or is intended or is likely to be, published;

(d) in the case of matter publicly displayed, the location where the matter is or is to be publicly displayed and the persons or class of persons, or age groups of persons likely to view such matter; and

(e) whether the article or matter has an honest purpose or whether its content is merely camouflage designed to render acceptable any part of it.

(2) The opinion of an expert as to any of the matters to which a Tribunal must or may have regard under subsection (1) may be admitted in any proceedings before a Tribunal either to establish or negative that matter.

**A Summary of Overseas Practice in**  
**Regulating Obscene and Indecent Articles**

**Australia**

- The Commonwealth Classification (Publications, Films and Computer Games) Act 1995 requires that publications falling into the definition of “submittable publication” must be submitted for classification.
- Under the Act, a “submittable publication” means an unclassified publication that, having regard to the National Classification Code and the classification guidelines to the extent that they relate to publications, contains depictions or descriptions of sexual matters, drugs, nudity or violence that are likely to cause offence to a reasonable adult to the extent that the publication should not be sold as an unrestricted publication.
- Publications are classified as unrestricted, restricted category 1 (to be displayed in a sealed wrapper and not to be sold to persons below the age of 18), restricted category 2 (not to be sold to persons below the age of 18 and only to be displayed for the purpose of sale in restricted premises), and refused classification (not to be sold nor displayed).
- Classification decisions are made by the Classification Board in the Attorney-General’s Department. Classification guidelines conforming to the principles set out in the Act are determined by the Commonwealth, State and Territory Censorship Ministers to assist the Classification Board in applying the criteria in the National Classification Code.
- The Classification Board comprises a Director, a Deputy Director, Senior Classifiers and other members. There must not be more than 20 members. Members of the Classification Board are appointed by the Governor-General. Appointment to the Board is for a term of not more than five years and may be extended on condition that a member must not hold office for more than seven years.

- There is no restriction on who may submit publications to the Board for classification. The Classification Board may by Gazette call in for classification a “submittable publication”.
- Five members shall constitute a quorum for a classification meeting. Classification decisions are made by majority vote.
- The Classification Board’s decisions may be reviewed by the Classification Review Board upon application by the Minister of the State or Territory responsible for censorship matters, the applicant for classification, the publisher or a person aggrieved by the Board’s decision.
- The Classification Review Board consists of a Convenor, a Deputy Convenor and at least three, but not more than eight, other members. They are appointed by the Governor-General for a period not longer than five years and are eligible for re-appointment, but must not hold office for a total of more than seven years.
- A review shall be conducted by at least three members of the Board. Decisions are to be made by majority vote.

### Canada

- It is an offence under the Criminal Code to, among others, make, print, publish, distribute, sell and circulate any crime comic, and any obscene written matter, picture, model, phonograph record or other thing whatever; and to publicly display any obscene articles, a disgusting object or an indecent show. A person shall not be convicted if the public good is served by such acts.
- A publication shall be deemed to be obscene if its dominant characteristic is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence. A crime comic means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially the commission of real or fictitious crimes, regardless of whether they occur before or after the commission of the crime.

- Whether a publication is obscene or a crime comic shall be determined by the court.

### New Zealand

- The Films, Videos, and Publications Classification Act 1993 provides that it is an offence to make, supply, distribute, display or exhibit an objectionable publication; and to supply, distribute, display or exhibit restricted publications not in accordance with the provisions of the Act.
- Publications may be classified as unrestricted, restricted or objectionable. According to the Act, a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty or violence in such a manner that the availability of such a publication is likely to be injurious to the public good. The Act also sets out the circumstances under which a publication may be classified as objectionable or restricted.
- Classification decisions are made by the Office of Film and Literature Classification. The Office comprises a Chief Censor, a Deputy Chief Censor and other classification officers appointed under the Act by the Chief Censor. The Chief Censor and the Deputy Chief Censor are appointed by the Governor-General on the recommendation of the Minister of Internal Affairs acting with the concurrence of the Minister of Women's Affairs and the Minister of Justice. Appointments to the Office is for a term of not exceeding three years and may from time to time be re-appointed for any period not exceeding three years.
- Any person dissatisfied with the classification decision of the Office of Film and Literature Classification may request for a review of the decision by the Film and Literature Board of Review which comprises nine members also appointed by the Governor-General on the recommendation of the Minister of Internal Affairs acting with the concurrence of the Minister of Women's Affairs and the Minister of Justice. Members of the Board may be appointed for a term not exceeding three years, and may be re-appointed for a further term of three years. Appeal against the Board's decisions on point of law may be lodged with the High Court.

- A review shall be conducted by five members of the Board. Decisions are to be made by majority vote.
- Apart from the public officers specified in the Act, any person with the leave of the Chief Censor may submit publications to the Office of Film and Literature Classification.
- The Classification Office may make a serial publication order in respect of a serial publication (defined as a magazine or periodical published at substantially regular intervals but does not include any newspaper published at intervals of less than one month) where it has been determined that no fewer than three issues of the publication published within a period of not more than 12 months are objectionable or are restricted publications. Depending on the nature of the order, serial publications published within the period during which the order is in force will be treated as objectionable (which has the effect of banning such publications) or restricted with conditions imposed on the public display of the issues. The order will be in force for a period of not more than two years. The Classification Office may revoke or vary the terms of a serial publication order on the application of concerned parties. The fact that a serial publication order is in force does not exonerate the publishers from complying with other provisions in the Act.

### Singapore

- The Undesirable Publications Act enacted in 1967 provides that the Minister for Information and the Arts may prohibit the importation, sale or circulation of any publication which, in the Minister's opinion, is contrary to the public interest.
- The Films and Publications Department maintains and publishes a list of prohibited publications.

### United Kingdom

- The Obscene Publications Act 1959 regulates the publication of obscene matters. It provides for the protection of literature and strengthens the law concerning pornography.

- The Act prohibits the publication of obscene articles. An article shall be deemed to be obscene if its effect or the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely to read, see or hear the matter contained in it.
- It shall be a defence to charges if it is proved that publication of an article is justified as being for the public good on the ground that it is in the interest of science, literature, art or learning, or of other objects of general concern.

### United States

- Sexually oriented materials are classified by both Federal and State laws as either obscene or indecent. Indecent material is awarded some protection under the First Amendment of the Constitution (which concerns, among others, the freedom of speech and of the press), while obscene materials are not.
- The US Code on Crimes and Criminal Procedure provides that it is an offence to knowingly transport in interstate or foreign commerce for the purpose of sale or distribution, or knowingly travel in interstate commerce, or use a facility or means of interstate commerce for the purpose of transporting obscene material in interstate or foreign commerce, any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character.
- The Supreme Court has developed a three-part test to determine whether material is obscene or merely indecent. Material is obscene if –
  - (a) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to prurient interest;
  - (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

- (c) the work, taken as a whole, lacks serious artistic, political or scientific value.
- Indecent speech is protected by the First Amendment. However, Federal, State, and local governments can regulate the time, place, and manner of indecent speech if their interest is sufficiently compelling.

**Hong Kong Internet Service Providers Association's  
Code of Practice: Practice Statement on  
Regulation of Obscene and Indecent Material**

**Preamble**

To protect young people and public morals, this Practice Statement recommends guidelines for Members of the Hong Kong Internet Service Providers Association (“HKISPA”) to follow in their provision of services insofar as the regulation of obscene and indecent material transmitted on the Internet is concerned.

2. For the avoidance of doubt, this Practice Statement does not absolve any Member of the HKISPA from the relevant legislation (including the Control of Obscene and Indecent Articles Ordinance and the Telecommunication Ordinance) currently in force in Hong Kong, and its obligations under the terms of the Public Non-Exclusive Telecommunications Service Licence granted by the Telecommunications Authority.
3. This Practice Statement shall be reviewed as and when necessary.

**Terminology**

4. For the purpose of this Policy Statement,
  - “enforcement agencies” means government agencies responsible for the enforcement of the Control of Obscene and Indecent Articles Ordinance, namely the Customs and Excise Department, Hong Kong Police Force (HKPF) and Television and Entertainment Licensing Authority (TELA);
  - “Member” means a Member of the Hong Kong Internet Service Providers Association;
  - “URL” stands for “Uniform Resource Locator” which is the address of a file of content on the Internet;
  - “Web Page” means a file of content accessible on the World Wide Web by a single URL;
  - “World Wide Web” means the network of content accessible on the Internet

using the Hypertext Transfer Protocol (“http”).

### **Conduct**

5. Members will take reasonable steps to prevent users of their services from placing on the Internet or transmitting using the Internet, material likely to be classifiable as Class III (obscene) under the Control of Obscene and Indecent Articles Ordinance (“COIAO”) (Chapter 390).
6. Members will advise subscribers that access to the Internet by a person under the age of 18 years needs to be supervised by a person over the age of 18 years.
7. Members will inform their users that material likely to be classifiable as Class II (indecent) under the COIAO should not be published or made available to persons under the age of 18 years.
8. Members will advise local content providers and distributors that all material put up by them which are likely to be classifiable as Class II (indecent) under the COIAO should be accompanied by the following on-screen warning on the Web Page before the content can be viewed:

**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。

9. A Member shall be regarded to have complied with paragraph 5 above if :
  - (a) the Member has informed its users that they shall not place on the Internet or transmit material likely to be classifiable as Class III (obscene) under the COIAO;
  - (b) when a Member becomes aware that a user has placed on the Internet or transmitted using the Internet material likely to be classifiable as Class III

(obscene) which remains at a Web Site or other content database within its control, the Member :

- (i) promptly blocks access to the Web Site or database which contains offending material;
- (ii) promptly informs the user that the user's conduct may constitute an offence under the COIAO and if the user is a subscriber, such conduct is a breach of the subscriber's service conditions;
- (iii) promptly cancels the account of any subscriber that repeats offending conduct despite being informed that the subscriber's conduct may constitute an offence under the COIAO and is a breach of the subscriber's service conditions;
- (iv) reports to the HKISPA on action taken in accordance with paragraph 9b(i) and b(iii) above.

10. When a Member becomes aware that a user has placed on the Internet or transmitted using the Internet material likely to be classifiable as Class II (indecent) without putting up a warning notice in accordance with the requirements stipulated in paragraph 8, the Member shall:

- (a) promptly advise the user to place a warning notice in accordance with the requirements stipulated in paragraph 8;
- (b) promptly inform the user that the user's conduct may constitute an offence under the COIAO and if the user is a subscriber, such conduct is a breach of the subscriber's service conditions;
- (c) promptly cancel the account of any subscriber that repeats offending conduct despite being informed that the subscriber's conduct may constitute an offence under the COIAO and is a breach of the subscriber's service conditions;
- (d) report to the HKISPA on action taken in accordance with paragraph 10(a) and (c) above.

11. Members and the HKISPA may seek the assistance of TELA if they have doubt on the classification of material on the Internet.

12. The HKISPA will provide TELA with a monthly report on action taken by Members in accordance with paragraphs 9(b)(i), 9(b)(iii), 10(a) and 10(c) in a format as per Appendix II.

13. Members will encourage Platform for Internet Content Selection (PICS) tagging or tagging using other non-PICS technology having regard to the statutory guidelines on obscenity and indecency as set out in section 10 of the COIAO (at Appendix III).

14. Members will inform parents and other responsible persons of options and precautionary steps they can take to ensure that persons under the age of 18 years are protected from access to Class III (obscene) or Class II (indecent) material on the Internet.

15. Members will make available a URL link to material which is of use in educating Internet users, parents and guardians on the use of filtering software (including a list of such software) to help protect persons under the age of 18 years from accessing Class III (obscene) or Class II (indecent) material on the Internet.

### **Complaints Handling Procedures**

16. Complaints on presence of Class III (obscene) or Class II (indecent) material on the Internet may be lodged with Members and the HKISPA by a member of the public, TELA or HKPF.

17. A Member will notify the HKISPA in writing upon receipt of a complaint by a member of the public, TELA or HKPF. The Member will act promptly and conscientiously on the complaint with a view to resolving the complaint in compliance with the COIAO. The Member will notify the HKISPA in writing as soon as the complaint has been settled (including the means of settlement).

18. Where a complaint is made by a member of the public, TELA or HKPF directly to the HKISPA, the HKISPA will refer the complaint to the Member being complained. The Member will, upon receipt of the complaint, act promptly and conscientiously on the complaint with a view to resolving the complaint in compliance with the COIAO. The Member will notify the HKISPA in writing as soon as the complaint has been settled (including the means of settlement).

19. Where a complaint is made by a member of the public, TELA or HKPF against a Member who has failed to act on a complaint or resolve a complaint in

compliance with the COIAO, the HKISPA will take on the complaint and act promptly and conscientiously with a view to resolving the complaint in compliance with the COIAO. The HKISPA will consider the full nature and extent of the complaint and will consult the Member concerned. The Member shall cooperate fully with the HKISPA. The HKISPA shall be entitled to consult relevant parties prior to determining the complaint. The HKISPA shall be responsible for communicating its determination of the complaint to the Member and the complainant.

20. Where despite the conscientious efforts of a Member or the HKISPA a complaint lodged by a member of the public still cannot be resolved, the Member/HKISPA will refer the complaint to TELA who may, in collaboration with the relevant enforcement agencies, consider instituting legal action against the relevant party(ies).

21. Where despite the conscientious efforts of a Member or the HKISPA a complaint lodged by TELA or HKPF still cannot be resolved, the latter may consider instituting legal action against the relevant party(ies).

22. Nothing in paragraphs 16 to 21 above will preclude the enforcement agencies from taking direct enforcement action against a Member if the circumstances so warrant.

23. Members or the HKISPA may refer cases to the Obscene Articles Tribunal established under section 6 of the COIAO for classification advice on whether material transmitted on the Internet is Class III (obscene), Class II (indecent) or neither.

24. The HKISPA will provide TELA with a monthly report on the number of complaints received, number of complaints resolved and the number of outstanding complaints in a format as per Appendix IV.

25. The HKISPA undertakes to provide promptly to the enforcement agencies information on outstanding complaints if so requested.

## **Sanctions**

26. Members must comply with any conclusion reached by the HKISPA, including a decision to promptly block access to a Web Site or database which contains material likely to be classifiable as Class III (obscene), or to impose a sanction on a Member for breach of this Practice Statement.

27. Where a Member is able to act on the advice of the HKISPA but unreasonably refuses to do so, or where a Member is found repeatedly to be in breach of this Practice Statement, the HKISPA will take appropriate disciplinary action against the Member for breach of this Practice Statement.

28. The sanctions to be imposed by the HKISPA shall be regularly reviewed.

### **Appendices**

Appendix I Summary of Main Provisions of the Control of Obscene and Indecent Articles Ordinance

Appendix II Format of Monthly Report on Action Taken by ISP Members in respect of Indecent and Obscene Material on Internet

Appendix III Section 10 of the Control of Obscene and Indecent Articles Ordinance

Appendix IV Format of Monthly Progress Report on Complaints relating to Indecent and Obscene Material on the Internet

**Summary of Main Provisions of the  
Control of Obscene and Indecent Articles Ordinance (“COIAO”)  
Chapter 390**

1. Articles are classified into three categories : Class I (neither obscene nor indecent); Class II (indecent); and Class III (obscene).
2. Class I articles are for general consumption and may be published without any restriction. Class II (indecent) articles may be published to persons of 18 years old or above with certain restrictions such as a warning notice to the effect that the article must not be made available to persons under the age of 18. Class III (obscene) articles are banned from publication.
3. Publishing or possessing for the purpose of publishing an obscene article is liable to a maximum fine of \$1 million and imprisonment of three years. Publishing or possessing for the purpose of publishing an indecent article without complying with the statutory requirements is liable to a maximum fine of \$400,000 and imprisonment of 12 months; a repeated offender is liable to a maximum fine of \$800,000 and imprisonment of 12 months.
4. “Obscenity” and “indecent” include violence, depravity and repulsiveness.
5. A person publishes an article if he, whether or not for gain, distributes, circulates, sells, hires, gives or lends the article to the public or a section of the public.
6. Articles may be submitted to the Obscene Articles Tribunal (“OAT”), a judicial body, for classification. In making its classification, the OAT follows the statutory guidelines as set out in section 10(1) of the COIAO (at Appendix III).
7. Articles submitted to the OAT for classification are kept in a repository. Members of the public may, upon payment of fees, view articles kept in the OAT repository (address : 9/F, Eastern Law Courts Building, 29 Tai On Street, Sai Wan Ho, Hong Kong).

**Monthly Report on Action Taken by ISPs in respect of  
Indecent and Obscene Materials on Internet**

**Month : \_\_\_\_\_ Year : \_\_\_\_\_ Name of ISP : \_\_\_\_\_**

**Summary :**

1.	No. of cases handled :	
2.	No. of cases resolved :	
3.	No. of cases pending :	

**Details of Anomalies & Actions taken :**

	<b>Date</b>	<b>Arising from<sup>(1)</sup></b>	<b>Type of Material transmitted<sup>(2)</sup></b>	<b>Action taken (with dates)<sup>(3)</sup></b>	<b>Case resolved</b>	<b>Other Developments<sup>(4)</sup> (Please specify)</b>
1.					Yes / Pending	
2.					Yes / Pending	
3.					Yes / Pending	

Notes : Please use the following keys for filling in the table.

(1) **S** - Observed by ISP; **T** - Referred by TELA; **A** - Referred by HKISPA; **P** - Referred by the Police; **C** - Complaint from the public.

(2) **N** - Nudity; **S** - Sexual activity; **V**- Violence; **O** - Others (please specify).

(3) **R** - Obscene material blocked; **X** - Subscriber account cancelled by ISP; **W** - Statutory warning added.

(4) Other Developments (e.g. subscriber cancels his account, URL cease to exist etc.)

Responsible Person: \_\_\_\_\_  
( )

**Section 10 of the Control of Obscene and  
Indecent Articles Ordinance (Chapter 390)**

**10. Guidance to Tribunal**

- (1) In determining whether an article is obscene or indecent or whether any matter publicly displayed is indecent, or in classifying an article, a Tribunal shall have regard to –
  - (a) standards of morality, decency and propriety that are generally accepted by reasonable members of the community, and in relation thereto may, in the case of an article, have regard to any decision of a censor under section 10 of the Film Censorship Ordinance (Cap. 392) in respect of a film within the meaning of section 2(1) of that Ordinance;
  - (b) the dominant effect of an article or of matter as a whole;
  - (c) in the case of an article, the persons or class of persons, or age groups of persons, to or amongst whom the article is, or is intended or is likely to be, published;
  - (d) in the case of matter publicly displayed, the location where the matter is or is to be publicly displayed and the persons or class of persons, or age groups of persons likely to view such matter; and
  - (e) whether the article or matter has an honest purpose or whether its content is merely camouflage designed to render acceptable any part of it.
- (2) The opinion of an expert as to any of the matters to which a Tribunal must or may have regard under subsection (1) may be admitted in any proceedings before a Tribunal either to establish or negative that matter.

**Complaints Relating to Indecent & Obscene Materials on the Internet**  
Monthly Summary of Cases handled by ISPs

Month: \_\_\_\_\_ Year: \_\_\_\_\_ From: HKISPA

Cases Summary:

	ISP Concerned	Action taken by ISP			Action/Recommendation of HKISPA*
		Number of Cases reported by the ISP	Number of Cases resolved	Number of Cases pending	
1.					
2.					
3.					
4.					
5.					
6.					

e.g. Referral of outstanding cases to TELA, other disciplinary action against relevant ISPs such as warning or expulsion from HKISPA.

Responsible Person: \_\_\_\_\_  
 ( )

**A Summary of the Findings and Recommendations  
of the Review on the Effectiveness of  
the Hong Kong Internet Service Providers Association's  
Code of Practice**

**Background**

In January 1999, the Television and Entertainment Licensing Authority (TELA) conducted a review of the self-regulatory arrangements administered by the Hong Kong Internet Service Providers Association (HKISPA) to regulate the transmission of obscene and indecent articles through the Internet. The review covered the following five main areas –

- (a) adequacy of existing law, i.e. the Control of Obscene and Indecent Articles Ordinance (COIAO);
- (b) the operation and effectiveness of the self-regulatory regime;
- (c) publicity and public education;
- (d) labelling and filtering tools to minimise access to obscene/indecent web sites by youngsters; and
- (e) overseas practices and international cooperation.

2. In the course of the review, TELA consulted the HKISPA, various educational, social and youth organisations and sought their views on the existing self-regulatory framework relating to the control of obscene and indecent articles transmitted through the Internet. A list of such organisations is at the Annex.

## **Summary of Findings and Recommendations**

### ***Review Findings***

3. The review indicates that –
  - (a) No insurmountable problem has been encountered by the Police in taking legal action, under the COIAO, to prosecute the content providers for transmitting obscene/indecent articles through the Internet. Since 1996, the Police has undertaken seven prosecution cases, with six successful convictions and one unsuccessful case because the material originated from overseas where we do not have jurisdiction;
  - (b) The self-regulatory regime administered by the HKISPA on the basis of its Code of Practice and Practice Statement has operated effectively and satisfactorily as a means by which objectionable web sites are blocked or removed promptly and voluntarily by the ISPs upon being notified of their existence or referred to the Police for further investigation and enforcement action. It also provides a means by which public complaints on objectionable web sites originated locally could be dealt with expeditiously;
  - (c) The HKISPA, and the various other educational, social and youth organisations have indicated their support for the continuation of the present self-regulatory arrangements;
  - (d) There is a need to step up publicity measures and public education in order to enhance public awareness of the problem of obscene and indecent material transmitted through the Internet, the self-regulatory regime operated by the HKISPA and the need for parents to exercise parental guidance on the proper use of the Internet;
  - (e) The use of labelling and filtering tools is an effective means to prevent children and young persons from accessing

obscene/indecent materials from the Internet; and

- (f) The self-regulatory approach which has been adopted in Hong Kong is entirely consistent with overseas practices in Australia and the United Kingdom where increasing emphasis has been placed on the legal responsibility of ISPs to remove objectionable web sites as and when they have been informed of their existence through a system of notification. There is also a need to establish international cooperation in dealing with the problem of objectionable web sites originated from overseas countries.

### ***Conclusions and Recommendations***

4. In the light of the review findings at para. 3(a) above, the existing COIAO is considered adequate in dealing with the problem of Internet content control and there is no pressing need for the law to be amended or for a new piece of legislation to be enacted for enforcement purpose.

5. The review findings have also reaffirmed the effectiveness of the self-regulatory regime administered by HKISPA in dealing with objectionable web sites and public complaints. There is therefore no strong justification for changing the present system which appears to be widely accepted and supported by both the HKISPA and the various educational, social and youth organisations.

6. Following consultation with the HKISPA and other organisations, the review has recommended that the following measures should be implemented with a view to improving the operation of the self-regulatory system –

- (a) to provide more briefings for the ISPs on the provisions of the COIAO and the prevailing OAT standards so as to facilitate the ISPs in their self-regulatory work;

- (b) to formulate clear guidelines (by the Police) on the procedures for ISPs to follow in blocking obscene web sites so as not to compromise any subsequent Police investigation work;
- (c) to step up and intensify publicity efforts and educational activities which are important measures to complement enforcement efforts and the self-regulatory arrangements. In this respect, TELA will work closely with Education Department to organise talks, seminars and exhibitions for teachers, parents and students to publicise the provisions of the COIAO and the self-regulatory system;
- (d) to consider setting out in the HKISPA Practice Statement adequate and specific sanctions against those ISPs who do not comply with the Practice Statement;
- (e) to discuss with the relevant authorities on the installation of filtering tools in computers used in schools, public libraries and youth centres;
- (f) to provide information kits for parents so as to enable them to exercise parental guidance;
- (g) to encourage the ISP industry to develop more Internet service (e.g. School Net) for students and young persons and to publicise healthy web sites for their enjoyment; and
- (h) to publicise the complaint channel in order to facilitate monitoring by the public.

7. The review has also recommended that TELA should participate in the work of the Internet Content Rating Alliance (ICRA) which has been established to design an internationally accepted rating and filtering system for Internet content and to set up regional hotlines for dealing with objectionable web sites originated from overseas.

Television and Entertainment Licensing Authority  
May 1999



**Organisations Consulted**

*A. Consultation via Interview*

1. The Hong Kong Federation of Youth Groups
2. Hong Kong Young Women's Christian Association
3. Hong Kong Lutheran Social Service
4. Boys' & Girls' Clubs Association of Hong Kong
5. SKH Diocesan Welfare Council
6. Committee on Home-School Co-operation

*B. Written Submissions*

7. The Hong Kong Council of Social Service
8. The Society for Truth and Light

**A Summary of Overseas Practice in Regulating  
Obscene and Indecent Content on the Internet**

Australia

- The Australian Government promotes a co-regulatory approach, involving industry, government and the community.
- The Broadcasting Services Amendment (Online Services) Act took effect on 1 January 2000. The Act establishes a complaints-based legal regime, administered by the Australian Broadcasting Authority, to regulate the carriage of content on the Internet. Under the regime, ISPs are not liable for material carried on their service. The primary responsibility for Internet content lies with Internet content providers who must refrain from hosting contents which are rated as “sexually explicit” or “refused classification”. Once notified of the existence of illegal or highly offensive material on their service, ISPs have a responsibility to remove or block access to such material.
- The content classification system under the Classification (Publications, Films and Computer Games) Act 1995 is used to classify content on Australian Internet sites.
- The Act requires the Internet industry to develop a Code of Practice which, among others, sets out steps that an ISP has to take to prevent or restrict access to illegal or highly offensive material, promotes the development and implementation of Internet content filtering technologies, provides parents with information on how to supervise and control children’s access to Internet content, and advises customers on the availability, use and application of Internet content filtering software.

Canada

- There is no legislation which specifically regulates obscene material on the Internet. Provisions of the Criminal Code have been used to prosecute offences relating to transmission of obscene material on the

Internet.

- The Canadian Association of Internet Providers has developed a Code of Conduct whereby its members will co-operate with government officials, international organisations and law enforcement authorities seeking to clarify the responsibilities for each of the different functions performed by Internet companies. The Code also provides that ISPs will not knowingly host illegal content and will share information about illegal content for this purpose. ISPs are also required to make a reasonable effort to investigate legitimate complaints about alleged illegal content or network abuse and will take appropriate action.

### Germany

- The Information and Communication Services Law (the Multimedia Law), which established a federal regulatory framework for multimedia, came into effect in August 1997.
- Under the Law, ISPs are responsible for the content they create. They are responsible for third-party illegal content only if they have knowledge of such content, have technical means to block access to such content and can be reasonably expected to block access to such content. They are not responsible for third-party content to which they merely provide access.
- ISPs are also required to appoint a youth protection officer to keep electronic information that may be harmful to minors away from children.
- Although there is no specific self-regulatory arrangement among ISPs, they are expected to follow the general principles of self-regulation contained in the German Press Laws.

### Japan

- Provisions in the criminal law on obscenity have been used to prosecute offences relating to the transmission of obscene material on the Internet.

- The amended Law on Control and Improvement of Amusement Business, which regulates “image transmission type sex-oriented special amusement business” came into effect in April 1999. It obliges those who install an automatic public transmission device, including ISPs, to take necessary measures to stop the transmission of obscene images uploaded to the server-computer by the operators of this business.
- On self-regulation by the industry, the Telecom Services Association has drawn up the “Guidelines for Codes of Practice for ISPs”. The Guidelines provides that if ISPs are aware that illegal/harmful information is posted in the one-to-many communication, they may issue warning to the sender, terminate the sender’s Internet access or even terminate the contract with the sender.

### New Zealand

- There is no specific legislation to regulate content on the Internet. The Films, Videos, and Publications Classification Act regulates on-line pornography.
- The New Zealand Government encourages industry self-regulation. The Internet Society of New Zealand has adopted an Internet Code of Practice which was issued in April 1997. The Code provides that members of the Code will ensure that adult services hosted in their sites are classified in accordance with a commonly used classification system and managed by subscription enrolments to exclude under-age subscribers. Such content will also be accompanied by suitable on-screen warnings. ISPs have a responsibility to inform parents of precautionary steps they can take to protect minors from harmful materials and to monitor usage.

### Singapore

- The Singaporean Government adopts a three-pronged approach in regulating Internet, namely government regulation, industry self-regulation and public education. Their primary concern on Internet Policy is pornography, violence and incitement of racial or religious

hatred.

- On government regulation, the Singapore Broadcasting Authority (SBA) introduced in July 1996 the Internet Class Licence Scheme and Code of Practice to regulate ISPs and Internet content providers (ICPs). Under the Scheme, all ISPs and ICPs must be licensed. They have to abide by the Code of Practice which forbids them to create or allow access to sites containing offensive materials, including pornography, violence and materials which may undermine Singapore's racial and religious harmony. The primary responsibility for the content remains with the content providers and not the ISPs or server administrators. SBA will alert ISPs if it comes across or receives any complaints on websites that flout its Internet guidelines. ISPs have to block users from accessing specific sites when directed by the SBA. Currently, ISPs are required to limit access to about 100 high-impact pornographic sites. A light-touch enforcement approach is adopted: an offender will be given a chance to rectify the breach before SBA takes any action.
- On industry self-regulation, ISPs are encouraged to come up with their own acceptable use policies. They are not required to monitor the Internet or their users' Internet activities, nor pre-censor content. ICPs are urged to label the contents of their sites using the Platform for Internet Content Selection system.

### United Kingdom

- The Obscene Publications Act 1959 was amended in 1994 to cover computer transmissions within the definition of "publication".
- The UK adopts a co-regulation approach, which embodies partnership between the Government and the ISP industry, to regulate illegal materials on the Internet.
- The Internet Watch Foundation (IWF), an industry-funded self-regulatory body, was established in September 1996. It operates a "hotline" reporting and action system for illegal materials on the Internet, and promotes the use of rating and filtering systems.
- The Code of Practice adopted by the UK Internet Services Providers

Association provides that ISPs should ensure that services (excluding third party content) and promotional material do not contain material inciting violence, cruelty or racial hatred and are not used to promote or facilitate practices which are contrary to UK law. The Code also requires ISPs to provide guidance to customers on filtering software and offer customers such software. ISPs are also required to provide Police a 24-hour point of contact. The Code stipulates that its members must comply with notices issued by the IWF requesting prompt removal of specified material from websites or newsgroups.

### United States

- The Communication Decency Act (CDA) was passed in February 1996. Under the CDA, people whose computer facilities are used for the distribution of obscene material are liable for the distribution of that material, regardless of whether the defendant knows about it. It also criminalises the knowing transmission of obscene or indecent messages to any recipient under 18 years of age, and prohibits the knowing sending or displaying to a person under 18 of any message that, in context, depicts or describes, in terms patently offensive as measured by contemporary standards, sexual or excretory activities or organs.
- The Act also empowers the Federal Communications Commission to prescribe measures (such as a Code of Practice) which are reasonable, effective and appropriate to restrict access to objectionable material.
- In June 1997, the Supreme Court struck down provisions of the CDA which made it an offence to distribute indecent content which a minor may be able to access on the ground that it would interfere with the constitutionally protected right of free speech. On the other hand, the provisions relating to obscene content have been upheld.
- In July 1997, the President announced a strategy for making the Internet “family friendly” by giving parents and teachers the tools they need to prevent children from getting access to inappropriate material on the Internet, and to guide them towards high-quality educational resources. Industry leaders and associations agreed to take steps to promote filtering and rating and awareness actions.
- In October 1998, in an attempt to protect minors from harmful

materials on the Internet, the Congress passed the Child Online Protection Act (COPA) which makes it an offence to knowingly make any communication for commercial purposes that is available to any minor and that includes material harmful to minors. “Material harmful to minors” is defined as matter that is obscene, or any material that is designed to appeal to the prurient interest by contemporary community standards, depicts an actual or simulated sexual act or a lewd exhibition of the genitals or post-pubescent female breast in a manner patently offensive to juveniles, and lacks serious literary, artistic, political, or scientific value for minors.

- The US District Court for the Eastern District of Pennsylvania issued in February 1999 a preliminary injunction preventing the COPA from being enforced (except for investigations or prosecution concerning child pornography or obscene material) on the ground that the Act violates the First Amendment in that it infringes the constitutional right of freedom of speech. The US Government has appealed against the decision and hearing by the US Court of Appeals for the Third Circuit commenced on 4 November 1999.
- The Child Protection Act of 1999 was introduced into Congress on 20 July 1999. This Act requires schools and libraries to install filters to block obscene materials and child pornography on all computers purchased with Federal funds and with Internet connections that minors can access.

### Outline of TELA's Publicity Programme

<u>Target groups</u>	<b>How to reach them</b>	<b>Message to convey</b>
General public	<ul style="list-style-type: none"> <li>● Mass media (TV and radio Announcements in the Public Interest (APIs))</li> <li>● Publicity leaflets</li> <li>● Seminars, exhibitions</li> <li>● Newspaper advertisement</li> <li>● TELA homepage</li> </ul>	<ul style="list-style-type: none"> <li>● Main provisions of the COIAO, particularly the conditions for the sale of Class II materials</li> <li>● Parental guidance on the use of the Internet</li> <li>● Complaint procedures</li> </ul>
Publishers	<ul style="list-style-type: none"> <li>● Regular advisory letters</li> <li>● Seminars for publishers</li> </ul>	<ul style="list-style-type: none"> <li>● Main provisions of the COIAO, particularly the conditions for the sale of Class II materials, and the ban on Class III articles</li> <li>● System of voluntary submission for classification before publication</li> </ul>
ISPs	<ul style="list-style-type: none"> <li>● Through the HKISPA</li> <li>● Seminars/talks</li> <li>● Publicity leaflets and TELA homepage</li> </ul>	<ul style="list-style-type: none"> <li>● Main provisions of the COIAO</li> <li>● Self-regulatory framework</li> <li>● Complaint handling</li> </ul>
Newspaper vendors/shop operators	<ul style="list-style-type: none"> <li>● Publicity leaflets</li> <li>● Seminars/talks</li> </ul>	<ul style="list-style-type: none"> <li>● Main provisions of the COIAO, particularly the conditions for the sale of Class II materials and the ban on Class III articles</li> <li>● Complaint and enquiries avenue</li> </ul>
Schools, parents, students, social workers and concern groups	<ul style="list-style-type: none"> <li>● TV and radio APIs</li> <li>● Publicity leaflets</li> <li>● Seminars/talks</li> <li>● Newspaper advertisement</li> <li>● TELA homepage</li> </ul>	<ul style="list-style-type: none"> <li>● Main provisions of the COAIO</li> <li>● Suggested measures for parental guidance</li> <li>● Complaint and enquiries avenue</li> </ul>