LC Paper No. CB(2)863/11-12(02)

For discussion on 30 January 2012

Legislative Council Panel on Administration of Justice and Legal Services

Review of the Control of Obscene and Indecent Articles Ordinance

PURPOSE

This paper briefs Members on the latest progress of the review of the Control of Obscene and Indecent Articles Ordinance (COIAO).

BACKGROUND

2. The Government's long-standing policy in respect of published articles is to reflect standards of public decency as they should apply particularly to articles intended for young and impressionable people, while at the same time preserving the free flow of information and safeguarding of the freedom of expression. There is no compulsory pre-censorship before the publication of an article, but the publisher has the responsibility to ensure that the publication is in compliance with the law. The COIAO reflects this policy.

3. In response to public concern over the prevalence of indecent and obscene articles in various media and the operation of the regulatory regime, the Government commenced a comprehensive review of the COIAO in 2008 and proposed two rounds of public consultation. During the first round of public consultation, we consulted extensively on seven main areas relating to the operation of the COIAO (i.e. definitions, adjudication system, classification system, new forms of media, enforcement, penalty, and publicity and public education).

4. We attended over 50 meetings and forums, met with about 2 200 people, and received over 18 800 written submissions from individuals and organizations. We commissioned the Public Opinion Programme at the University of Hong Kong to conduct a Public Opinion Survey to gauge public views towards the COIAO. We also commissioned a Consultant to compile, consolidate and analyse the views collected during the first round of public consultation.

5. The first round consultation was completed in 2009, followed by the publication of the consultation report in the same year. We have also presented the major findings to the Legislative Council Panel on Information Technology and Broadcasting.

6. While the first round public consultation generally confirmed the need to retain the COIAO and the regulatory regime, views collected on the various areas were highly diverse. No apparent consensus could be found regarding the institutional set-up of the Obscene Articles Tribunal (OAT).

SET-UP OF THE OBSCENE ARTICLES TRIBUNAL

Existing Arrangements

7. The OAT is set up under the COIAO as a specialized tribunal of the Judiciary. It is responsible for and has exclusive jurisdiction over the determination of whether an article is obscene or indecent. In addition to enforcement agencies, prospective publishers may submit articles to the OAT for classification on a voluntary basis.

8. Upon the submission of an article, the OAT shall conduct a private hearing within five days of the submission and give an interim classification on the submitted article. If the interim classification is not disputed, it will be taken as the final classification. If there is a request for a review of the interim classification, the OAT will arrange a full public hearing to review the classification. Classification by the OAT, including both the interim classification and the classification made after a full hearing, is an **administrative function**. The OAT discharges this function as an administrative tribunal, and is entitled to act only within the powers given to it by the COIAO.

9. If a person disputes over the indecency or obscenity of an article during any civil or criminal proceedings, a court or a magistrate shall refer the article to the OAT for judicial determination. In such circumstances, the OAT would perform a **judicial function** to determine whether the article concerned is obscene or indecent, or neither. The OAT does so as a court, possessing relevant judicial powers and authority.

10. In 2010, the total caseload handled by OAT was 38,350 articles, including 671 articles for interim classification, two articles for full-hearing review and 37,677 articles for judicial determination. The

caseload for administrative classifications was about 2% of the overall OAT caseload.

Views Collected in the First Round of Public Consultation

11. During the first round public consultation, the Judiciary expressed strong and principled objection to the current arrangement for the OAT to serve both administrative and judicial functions. The Judiciary considered that –

(a) Under the COIAO, the OAT is required to perform two different functions: (i) according to Part III of the COIAO, it is an administrative function for the OAT to perform its duty to make a classification on a submitted article; (ii) pursuant to Part V of the COIAO, the OAT makes a determination upon referral by a court or a magistrate arising from a civil or criminal proceeding. The OAT undertakes (ii) as a court.

(b) The exercise of an administrative function by a judicial body may undermine the fundamental principle of judicial independence. It may not be appropriate for the OAT, which is a judicial body, to perform administrative duties in respect of the control of obscene and indecent articles.

(c) The OAT's administrative classification function might transgress the judicial determination function of the OAT. An article might be submitted to the OAT for administrative classification, and later referred by the court to the OAT for judicial determination. Although the panel of adjudicators for a determination proceeding was different from that in the earlier classification proceeding, it was far from ideal for the OAT to perform these two distinct functions under different rules and procedures over the same article according to the same set of statutory guidelines.

(d) There were grave problems with the existing procedures when the OAT was performing the classification function as an administrative tribunal. The OAT dealing with classification, review and reconsideration of its own decisions, though with different panels of adjudicators, has given rise to criticisms that the OAT was also dealing with appeals against its own decision.

(e) It is not only important for justice to be done, but also for justice to be seen to be done. The problems of perception generated by the existing statutory set-up of the OAT were therefore of grave concern to the Judiciary. Throughout the years, there had been public criticisms of the functioning of the OAT. Many of these were related to the unsatisfactory statutory set-up of the OAT having both the administrative and the judicial roles.

(f) The administrative classification function of the OAT should be removed from the Judiciary, leaving the OAT to deal only with judicial determination.

12. The Hong Kong Bar Association wrote in January 2009, agreeing with the Judiciary views and proposing that a new institutional arrangement for censorship of publications for the protection of public moral should be explored and established. The Bar Association suggested that the OAT should be abolished and that judges and magistrates should determine the censorship question when it arises in proceedings, and they could be assisted by either an advisory committee or a panel of lay assessors. Alternatively, the abolished OAT could be replaced by establishing a classification board along the lines practiced in New Zealand to have exclusive jurisdiction to determine the censorship question on referral from the courts or on its own motion. If the OAT should continue to exist as a judicial body, the Bar Association considered that its administrative function should at least be removed, if not abolished.

13. The general public offered little feedback on the OAT's institutional set-up during the first round public consultation. For those who commented on whether to reform the existing adjudication system, their views were diverse. Some preferred to retain the existing OAT but reform the adjudicators' appointment system and composition. Some suggested that the administrative classification function should be removed from OAT and the adjudicators system should be replaced by the jury system. Yet others recommended abolishing the OAT and inviting magistrates to classify articles. There was public concern over other OAT operational issues such as the consistency and transparency of the OAT and the representativeness of its adjudicators.

14. We engaged the Public Opinion Programme at the University of Hong Kong to conduct a Telephone Public Opinion Survey during the

first round of public consultation and successfully interviewed a total of 1 531 respondents. The results indicated that –

(a) 78% supported increasing the number of adjudicators in each hearing, i.e. from 2 to 4 persons for interim hearings and from 4 to 6 persons for full hearings;

(b) 77% supported prescribing in the legislation that each tribunal hearing should consist of adjudicators from specified sectors, e.g. education, and social welfare;

(c) 63% supported establishing an independent classification board for making interim classification on articles, while the existing OAT will remain as a judicial body to consider appeals against the classification decisions of the board;

(d) 58% supported drawing adjudicators from the list of jurors (570,000 jurors) instead of the list of adjudicators for each tribunal hearing;

(e) 43% supported expanding the existing panel of adjudicators from 300 to 500 individuals; and

(f) 40% supported abolishing the OAT and having the articles classified by a magistrate.

The survey results pointed to unrelated or contradictory suggestions regarding the OAT set-up.

15. We respect the views of the Judiciary and the legal sector and have been working with the Judiciary on different options that could address their concern. Propositions to revamp the OAT or to replace the OAT with a government-appointed classification system had met with strong objection from some political parties in the 2000. The Government would need to be guided by the community on how the current institutional set-up for the OAT should be reformed and would consult them in an informed manner.

Measures Implemented to Improve the Existing System

16. Many respondents in the first round public consultation considered that increasing the total number of adjudicators would allow

more people to participate in the adjudication process. In addition, some adjudicators have served for a long period (over 10 years in some cases) and this leads to criticisms that the OAT is dominated by a small number of adjudicators. To enhance the representativeness of the OAT and to allow more opportunities for members of the public to serve as adjudicators, the Judiciary has decided to increase the total number of adjudicators from 340 to 500 and applied a nine-year rule in the re-appointment of serving adjudicators.

WAY FORWARD

17. The Administration has been in discussion and will continue to work with the Judiciary with a view to formulating viable options for reforming the institutional set-up of the OAT for public deliberation in the second round public consultation as soon as possible.

Commerce and Economic Development Bureau
January 2012