

Introduction

Hong Kong is a free and open society. We enjoy freedom of speech, of the press and of publication as guaranteed under Article 27 of the Basic Law and the relevant provisions of the Hong Kong Bill of Rights Ordinance.

In respect of the regulation of publication of articles, Government's long-standing policy 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 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 any publication is in compliance with the law. The Control of Obscene and Indecent Articles Ordinance (COIAO) reflects this policy.

We conduct reviews on the operation of the COIAO from time to time to ensure that the regulatory regime is able to meet the changing needs and mores of the community. In the last few years, newspapers and entertainment magazines have time and again published articles and photos that have subsequently been ruled to be indecent or worse. Members of the public are also increasingly concerned about the dissemination of obscene and indecent materials on the Internet. We therefore undertook in early 2008 to conduct a comprehensive review of the Ordinance.

We propose to conduct two rounds of public consultation on the review. In the first round, we will consult extensively in the

form of town hall meetings and focus group discussions. The town hall meetings will be open to District Council Members and members of the public. The focus group discussions aim to engage representatives from various sectors, including women, youth, information technology, education, press and publication, culture and arts, civic rights, social moral, etc. We will also conduct a public opinion survey. We will aim to draw together the public views and, as far as possible, come up with proposals for the second round of public consultation.

This booklet has set out the main issues relating to the operation of the COIAO and discusses a wide range of possible improvement measures. It is by its very nature an elementary introduction to a very complex set of issues. This is the first phase of a general consultation exercise on a comprehensive review. To initiate public discussion, this booklet is intended to be user-friendly and easy to digest. Further detailed information is available from www.coiao.gov.hk. The Government wishes to hear from the community to help shape measures to improve the regulation of obscene and indecent articles. Please send your comments to the following addresses and websites by **31 January 2009**.

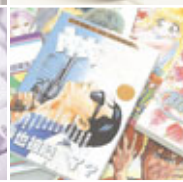
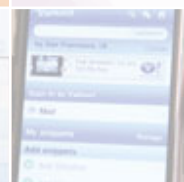
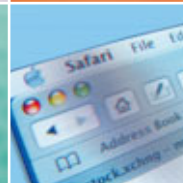
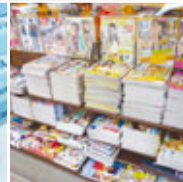
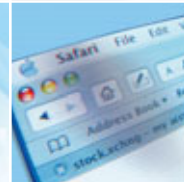
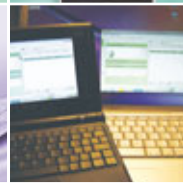
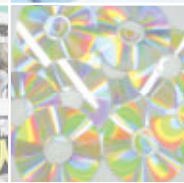
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1. Definitions



1. Definitions

Main Issues

Some members of the public consider it important for the Obscene Articles Tribunal (OAT) to achieve consistency in classifying articles under the Control of Obscene and Indecent Articles Ordinance (COIAO). They also expect OAT to have regard to public standards and cater for changing community needs when making classification decisions.

Focal Question

How would you translate public standards in respect of “obscenity” and “indecenty” into clear provisions to be applied by the OAT consistently?



Detailed Discussion

(1) Existing Arrangement

- 1.1 According to the COIAO, “obscenity” and “indecent” include “violence, depravity and repulsiveness”.
- 1.2 Section 10 of the COIAO provides a list of factors which the OAT, a judicial body presided by a magistrate and comprising adjudicators appointed by the Chief Justice to carry out the article classification function, is required to have regard to in determining whether an article is obscene or indecent: -
 - (a) standards of morality generally accepted by reasonable members of the community;
 - (b) the dominant effect of the article as a whole;
 - (c) the class or age of the likely recipients;
 - (d) the location at which the article is displayed; and
 - (e) whether the article has an honest purpose.

(2) Areas for Improvement

- 2.1 “Obscenity” and “indecent” are not absolute concepts but relative ones because the meaning of the concepts changes with time, place, culture and from individuals to individuals. *The challenge is how to provide for a comprehensive definition of “obscenity” and “indecent” on one hand and to keep pace with changing needs on the other.*

Expanding definitions

- 2.2 There are different ways to enhance the clarity of the statutory provisions. One possible way is to expand the existing definition under the COIAO and provide more concrete explanations for the terms “obscene” and “indecent”. For example, apart from covering the resultant inciting effect (i.e. “depravity and repulsiveness”), the definition may also cover the substance of “obscenity” and “indecency”, i.e., an article shall be deemed to be obscene or indecent if its dominant characteristic is “the undue exploitation of sex, horror, cruelty and violence”.
- 2.3 The public may better understand what “obscenity” and “indecency” refer to with the more concrete explanation, which may also give an indication of the factors to be taken into account when classifying articles. This may help enhance consistency in OAT’s rulings. *If the expanded definition is drawn up in general terms without going into specifics so as to retain flexibility, the challenge is how to fully explain what constitutes “obscenity” and “indecency”.*

Reference Questions:

How would you expand the definition of “obscenity” and “indecency”? What are your major considerations? How would you address the challenge of striking a balance between flexibility and clarity?

Statutory guidelines

- 2.4 Another possible option is to expand section 10 to provide clearer guidance to the OAT. These additional guidelines may continue to be phrased in general terms to provide flexibility, such as –
- (a) Whether the article is considered by reasonable members of the community to be harmful to persons below the age of 18 in terms of psychological development;
 - (b) Whether factors listed in section 28 of the COIAO, i.e. publication of an article may be considered to be intended for the public good if it is in the interests of science, literature, art or learning, or any other object of general concern should be incorporated.
- 2.5 This may facilitate the OAT to consider whether the article is suitable for young people as well as the nature of the article itself. It may help enhance consistency in OAT's rulings, though this may not solve all the problems of inconsistency. *The challenge is how to strike a balance between clarity and flexibility as the expanded guidelines will be stipulated in the law.*

Reference Questions:

What are the additional factors you think should be included in section 10 of the COIAO? What are your major considerations? How would you address the challenge of striking a balance between flexibility and clarity?

Supplementary administrative guidelines

- 2.6 If the classification body (i.e., the OAT) remains as a judicial body (please refer to Chapter 2 on the Adjudication System), some members of the public have suggested inviting the Judiciary to draw up general guidelines to supplement section 10 so as to give clearer guidance to the adjudicators. This may help enhance consistency in OAT's rulings. Bearing in mind the judicial nature of the judiciary, it would not be appropriate for it to draw up detailed administrative guidelines for performing a non-judicial function of classification of articles.
- 2.7 We also have to bear in mind that it would not be appropriate for the Government to make the guidelines for the OAT as this may be perceived as interference with judicial role.
- 2.8 If an independent body is to be set up to classify articles under a two-tier system whereby the OAT will only deal with appeals and determination cases referred by the court (please refer to Chapter 2 on the Adjudication System), there may be a case for the Government to issue detailed guidelines to supplement section 10 of the COIAO so as to give more guidance to the adjudicators of the independent classification body. *The major point of consideration is whether the Government should be directly involved in drawing up classification guidelines.*

Reference Questions:

If more specific guidelines are required to supplement section 10 of the COIAO, which agency would be suitable to draw up these guidelines? What are the advantages and disadvantages of your proposal?

2. Adjudication System



2. Adjudication System

(A) Institutional Set Up

A1. Main Issues

The public considers it important for the OAT to make consistent decisions in classifying articles under the COIAO and to have sufficient representation to reflect community standards.

Focal Question

How do you improve the system to enhance consistency and representativeness, bearing in mind that changes in one area may have impact on issues in other areas?



A2. Detailed Discussion on the Institutional Set Up of the OAT

(1) Existing Arrangement

- 1.1 The OAT has exclusive jurisdiction to determine whether an article is obscene, indecent or neither for the purpose of the COIAO. Apart from enforcement agencies, prospective publishers may submit articles to the OAT on a voluntary basis to obtain classification rulings, so as to avoid breaching the law.
- 1.2 The OAT is a judicial body, which comprises a presiding magistrate and two members of the public appointed by the Chief Justice to serve as adjudicators. Currently there is a pool of some 300 adjudicators serving the OAT.
- 1.3 Upon receipt of a submitted article, the OAT will conduct a **first hearing** in private and give an **interim classification**. The hearing will be conducted by a presiding magistrate and two adjudicators. If the interim classification is not disputed and no request for review is lodged, it will be confirmed as the final classification.
- 1.4 If a request for review of the interim classification is lodged, the OAT will arrange a public **full hearing** which is to be conducted by the presiding magistrate in charge of the interim classification and four or more adjudicators who were not previously involved in the interim classification.

1.5 The adjudicators are all appointed by the Chief Justice of the Court of Final Appeal. Persons who are ordinarily resident in Hong Kong and have so resided for 7 years and proficient in written English or Chinese can apply to the Judiciary for appointment as adjudicators.

(2) Areas for Improvement

Improving OAT

2.1 As some people wish to see the OAT remain as a judicial body, one area for improvement is to build on the existing OAT, in particular to make it more representative. There are a number of possible ways to achieve this, for example:

- (a) draw adjudicators from the list of jurors (currently 570 000 jurors on the list) for each tribunal hearing or expand the existing panel of adjudicators (say, from 300 to 500 or above);
- (b) increase the number of adjudicators at each hearing. For instance, the number of adjudicators attending an interim hearing is to be increased from two to four, whereas the number of adjudicators for full hearings is to be increased from four to six;
- (c) expand the existing panel by including adjudicators from specified sectors and to prescribe in the legislation that each tribunal hearing should consist of adjudicators from specified sectors, e.g. education, cultural, social welfare, etc. But this may lead to public debates on which sectors should be included;

- (d) appoint individual adjudicators for no more than six years so that there is a proper turnover among the adjudicators; and
- (e) require the OAT to make public its reasons for interim classification so as to enhance public understanding of the parameters the OAT has adopted in classification. This is also in line with the OAT's practice in the full hearing.

Reference Question:

How do you improve the representativeness of the OAT?

Two-tier system

- 2.2 Another alternative for consideration is to separate the administrative and judicial functions¹ of the OAT.
- 2.3 One option may be to establish an independent classification board drawing in some 20 to 30 lay members for making interim classifications on articles. Members of the new independent board may be appointed by the Government from some representative sectors in the community, e.g. education, social welfare,

¹ - It is an **administrative function** for the OAT to perform its statutory duty to make an interim classification and, upon appeal, a final classification on a submitted article. In performing such classification duty, the OAT does not possess the power and authority of a court.

- The OAT is also required to perform a **judicial function**. Upon referral by a court or a magistrate arising from a civil or criminal proceeding, the OAT determines whether an article is obscene or indecent. The OAT does so as a court, possessing the powers and authority of a court.

professionals, media, cultural services, academics and district organizations. The existing 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 the OAT by the court.

- 2.4 Under this new two-tier system, decisions made by the new independent board could be reviewed by the OAT as a judicial body, which would enhance transparency of the classification process. The two bodies would also have clear division of roles, functions and powers. *The challenges are how to address the issue of representativeness if the number of members on the new board may possibly be limited; and how to cope with the present caseload (some 70 000 classification cases annually) if such a limited number of members of the new board are not full-time adjudicators.*

Reference Question:

If the independent classification board as described above were to be introduced, how do you ensure that its possibly limited number of members can reflect community standards and cope with the caseload?

The court

- 2.5 Another option may be to abolish the OAT as some members of the public consider it more appropriate for a magistrate to classify articles. In doing so, the magistrate is required to reflect the community views on morality, decency and propriety.

2.6 In the light of the experience of some advanced jurisdictions, the ordinary court may be capable of dealing with the acceptability or otherwise of publications.

2.7 *The major challenge is how to ensure a single magistrate could reflect community standards if the OAT were to be abolished. It is also necessary to consider the issue of publishers not being able to obtain classification rulings in advance to enable compliance with the law as the court will not provide the administrative classification service; and the issue of the heavy burden imposed on the court leading to long waiting time for rulings.*

Reference Questions:

Do you think it is appropriate to abolish the OAT?
Which body do you think can replace the OAT?
How do you ensure that any new body is sufficiently representative; able to address the needs of publishers; and able to cope with the caseload?

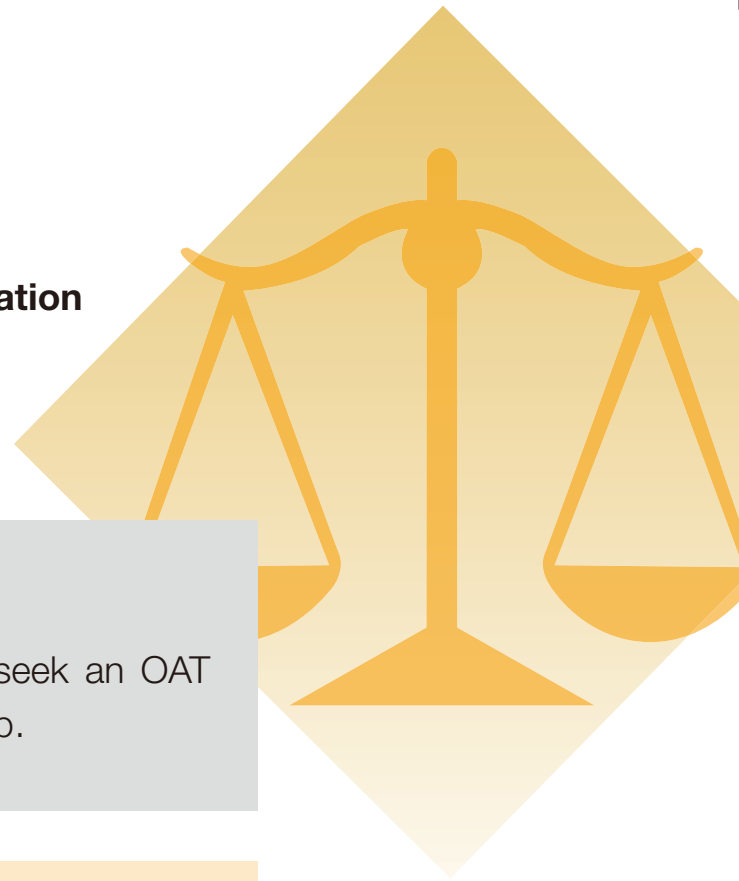
(B) Submission of Articles for Classification

B1. Main Issues

There are public views that the right to seek an OAT classification ruling should be opened up.

Focal Questions

Is it appropriate for more people to be able to refer articles to the OAT for classification? How do you balance the increased access to OAT with OAT's capability to handle the workload?



B2 Detailed Discussion on Submission of Articles for Classification

(1) Existing Arrangement

1.1 Section 13 of the COIAO sets out who can submit articles to the OAT for classification. The law enforcement agencies (e.g. Television and Entertainment Licensing Authority (TELA), the Police and Customs and Excise Department (C&ED)) and the Secretary for Justice may submit articles to the OAT for classification. Publishers can also voluntarily submit articles to the OAT before publication to ensure compliance with the law. The existing arrangement seeks to ensure that the OAT will not be over-burdened and rulings can be handed down in a reasonable time.

(2) Areas for Improvement

2.1 One possible option to enhance accessibility to the OAT is to expand the existing categories to allow more sectors to submit articles to the OAT for classification, e.g. educational bodies, social work organisations, etc. This could enhance community participation in the classification process. *The challenges are how to determine which sectors should have access to the OAT; and how to reach a consensus on such sectors.*

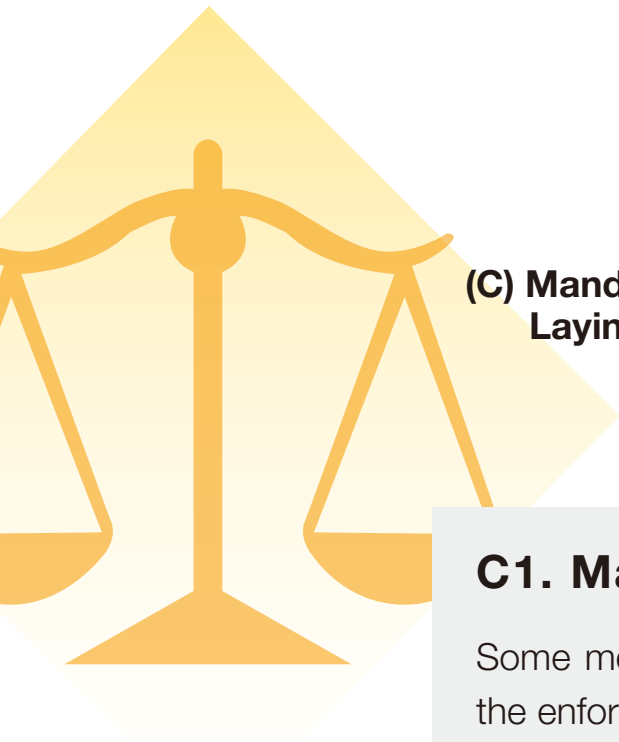
Reference Questions:

How do you determine which sectors should have access to the OAT? What are your major considerations?

2.2 Another option is to allow all members of the public to submit articles to the OAT without restrictions and upon payment of a prescribed fee. This will enable members of the public to take the initiative to seek classification rulings on dubious articles. *The challenges are how to avoid overburdening the OAT; how to handle malicious and frivolous submissions; and how to ensure that opening up the accessibility would not lead to an abuse of the process.*

Reference Questions:

How do you enhance the accessibility by the public to the OAT and at the same time avoid overburdening the OAT? How do you ensure that such open access would not lead to abuse of the classification process?



(C) Mandatory Classification prior to Laying of Charges

C1. Main Issues

Some members of the public consider it important for the enforcement agencies to submit articles to the OAT for classification before laying charges.

Focal Questions

Should the enforcement agencies be required to seek OAT's classification ruling before laying charges? How could this be done without undermining the flexibility for the enforcement agencies and compromising enforcement efficiency?

C2 Detailed Discussion on Classification Prior to Laying of Changes

(1) Existing Arrangement

- 1.1 At present, there is no legal requirement that an article has to be classified before prosecution against the publisher is made. The enforcement agencies can choose to submit articles for classification before laying charges or to lay charges without seeking classification, depending on the merits of individual cases.
- 1.2 The current arrangement provides flexibility for the enforcement agencies. Prosecution can be made more efficiently, taking into account the large volume of articles which may be involved in straightforward cases (e.g., over thousands of pornographic VCDs seized in one single video shop).

(2) Areas for Improvement

- 2.1 If we are to retain the current practice of allowing the enforcement agencies to decide whether or not to submit articles for classification before laying charges, one option is to adopt a set of clear guidelines, requiring the enforcement agencies to make submission to the OAT for classification in borderline cases.

2.2 Another option is to require the enforcement agencies to make submission to the OAT for classification before laying charges. This would avoid the enforcement agencies making their own judgment before the submission of articles to the OAT for classification. *The major challenge is how to ensure that effective enforcement would not be compromised, particularly in cases where swift action is necessary, as enforcement agencies will not be able to take enforcement actions until the classification of the article(s) concerned is announced. Another issue that needs to be addressed is how the OAT could cope with a much greater caseload if all cases have to obtain its prior classification before charges are laid.*

Reference Questions:

Is it practical to make it a mandatory requirement to seek an OAT classification ruling prior to prosecution in all cases? How do you address the issue of overburdening the OAT?

3. Classification System



3. Classification System

Main Issues

The community seems to consider that there may be a need to tighten up the classification system. There are views that the coverage of Class II (Indecent) article under the existing regime seems to be too broad.

Focal Question

How do you improve the classification system to achieve better consistency and to meet the changing standards of the community?



Detailed Discussion

(1) Existing Arrangement

1.1 Under the COIAO, an article may be classified as: -

Class I (Neither Obscene nor Indecent)	- Class I articles may be published without restriction.
Class II (Indecent)	- Class II articles must not be published or sold to persons under the age of 18. Publications of Class II articles must comply with specified statutory requirements, including sealing such articles in wrappers and the display of a warning notice.
Class III (Obscene)	- Class III articles are prohibited from publication.

1.2 The principles behind the classification of publications are to ensure that materials which seriously offend against community standards should be banned; access of children to materials which may harm them should be restricted; and warnings should be provided to consumers as to contents.

1.3 The classification system provides a mechanism to enable publishers to obtain rulings on publications in advance for compliance with the law. Decisions on the acceptability of dubious publications can also be sought quickly to help contain the circulation of offending materials.

(2) Areas for Improvement

Retaining the classification system with improvements

2.1 One option is to improve the existing classification system by making improvements where appropriate, including expanding the definitions of “obscenity” and “indecent”, providing more elaborate guidelines for classification and improving the operation of the OAT (please refer to Chapters 1 and 2). *The challenge is how to achieve consistency in classification decisions bearing in mind the wide range of articles covered under the Class II (indecent) category.*

Reference Question:

How would you improve the existing classification system to ensure that it would not unduly restrict what adults are allowed to receive while affording appropriate protection to children and young people?

Introducing sub-classes

2.2 Another approach is to adopt a new classification system by introducing sub-classes under Class II (Indecent) in order to help the public better understand the level of indecency of the concerned article. One

possible way is to sub-divide Class II articles according to age, e.g. -

Class I – Unrestricted

Class IIA – Restricted to persons above 15 years old

Class IIB – Restricted to persons above 18 years old

Class III – Refused classification; obscene articles banned for all ages

2.3 Under this approach, it is possible to subject the sub-classes to different legal requirements, for example, Class IIA articles would be required to provide statutory advice and subject to wrapping requirement, while Class IIB articles would be subject to wrapping requirement and could only be displayed in premises restricted to persons above 18 years old. To achieve this, it is necessary to draw up clear guidelines for each class of articles.

2.4 Sub-dividing Class II would assist parents in choosing appropriate reading materials for their children by providing more information on the content of the publications. It would also better protect children while giving elder teenagers wider choice and greater discretion as to what they choose to read or look at.

2.5 *The major challenge is that introducing sub-classes would create more grey areas leading to disputes and litigations thus aggravating the problem of inconsistency in classification. It is necessary to consider how to draw up appropriate guidelines for different sub-classes, which agency to draw up such guidelines (bearing in mind the difficulties of the judiciary in drawing up detailed administrative guidelines – please refer to Chapter 1*

on Definitions), and how to address the practical difficulties in introducing different requirements for different sub-classes, for example, 'premises restricted to persons above 18 years old'.

Reference Questions:

How do you sub-divide Class II? Do you consider age an appropriate basis for the sub-division? What do you consider to be the advantages and disadvantages of sub-dividing Class II?

Classification by the court

- 2.6 Another option may be to abolish the classification system altogether and revert to the practice before the enactment of the COIAO in 1987, i.e. the decision as to whether a particular article is objectionable would be made by a magistrate, who is required to reflect the community views instead of applying his own standards. Experience in overseas countries indicates that ordinary courts are capable of dealing with the classification of articles.
- 2.7 *The major challenge is how to ensure a single magistrate could reflect community standards. It is also necessary to consider the issue of publishers not being able to obtain classification rulings in advance to enable compliance with the law as the court will not provide the administrative classification service; and that of the heavy burden imposed on the court leading to long waiting time.*

Reference Questions:

Do you think it is appropriate to abolish the classification system? Do you consider it appropriate for the court to deal with classification of articles? How do you address the issues of representativeness, the needs of publishers and the court's ability to cope with the caseload?

2.8 Both the COIAO and the Film Censorship Ordinance (FCO) maintain a three-tier classification system. Some members of the public find the two systems confusing and wonder whether there should be consistency in standards and improvement in the nomenclature of the systems.

2.9 In view of the different nature of the two systems (i.e. the FCO system being a pre-censorship system while the one under the COIAO is not) and the smooth operation of the FCO system, we will not review the FCO system in this exercise so as to avoid complicating this review. An improvement we may consider at the moment is to adopt a new nomenclature for the COIAO to avoid confusions between the two three-tier classification systems, e.g.-

Existing nomenclature under FCO

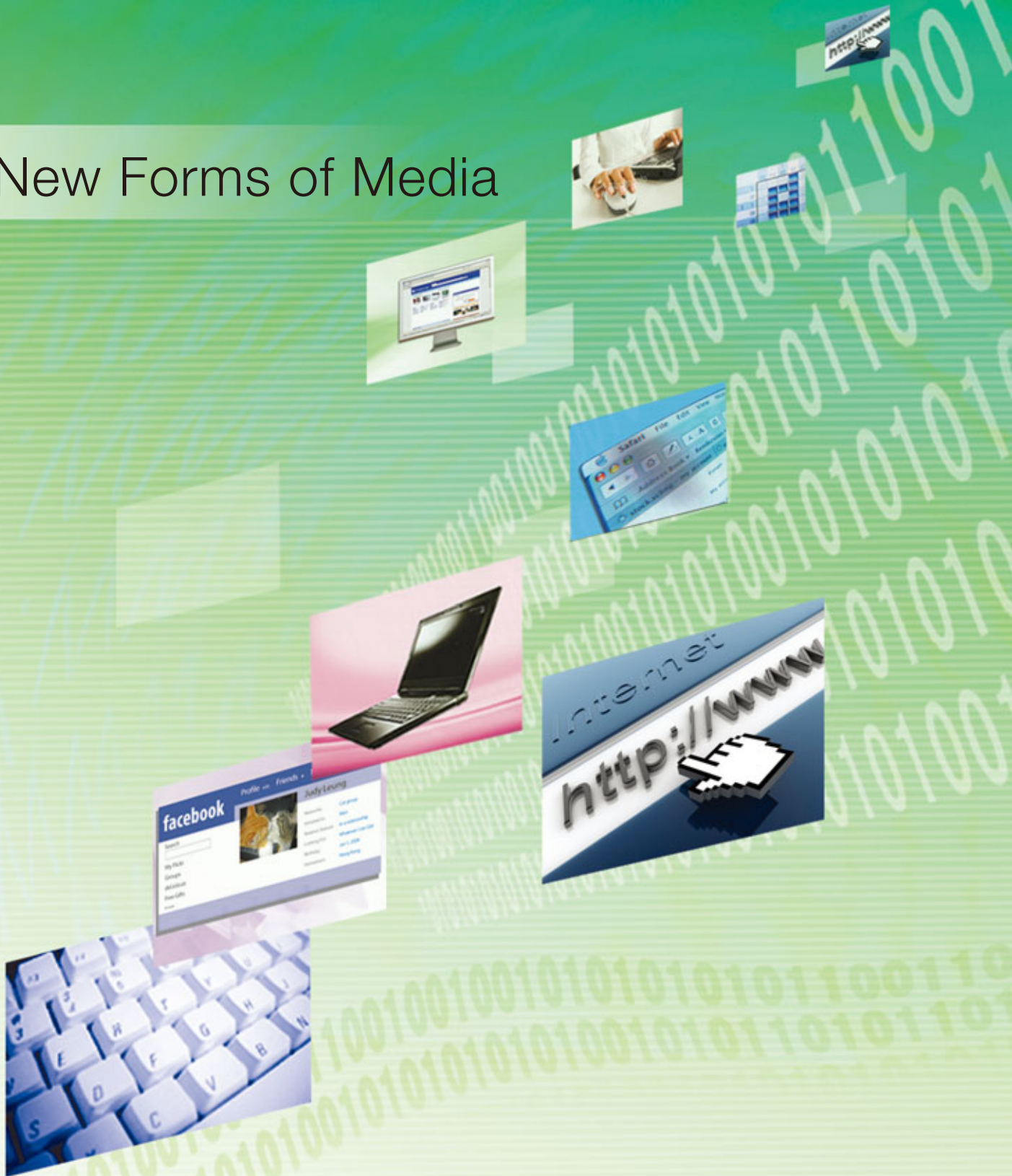
- I Suitable for all ages
- IIA Not suitable for children
- IIB Not suitable for young persons and children
- III Persons aged 18 and above only

Existing nomenclature under COIAO	Alternative nomenclature under COIAO
Class I (Neither obscene nor indecent)	Unrestricted
Class II (Indecent)	Restricted to 18 and above
Class III (Obscene)	Banned

Reference Questions:

Do you think we should adopt a new nomenclature for the COIAO to avoid confusion with the FCO?
What are the advantages and disadvantages?

4. New Forms of Media





4. New Forms of Media

(A) Regulation of Obscene and Indecent Materials

A1. Main Issue

Given the emergence of new forms of media, particularly the growing popularity of the Internet, members of the public consider it important that measures are taken to protect youngsters from the dissemination of obscene and indecent materials on such new media systems.

Focal Questions:

To what extent should new media systems, in particular the Internet, be regulated? Is this practicable? How can this be done?



A2. Detailed Discussion on the Regulation of Obscene and Indecent Materials on the Internet

(1) Existing Arrangement

- 1.1 TELA adopts a complaint-driven approach to deal with obscene or indecent Internet content. TELA works closely with the Hong Kong Internet Service Providers Association (HKISPA) to implement a Code of Practice which was promulgated in 1997 following public and industry consultation. TELA normally does not take prosecution action against publishers of indecent articles on the Internet, but asks the webmaster to add the required statutory warning, or to remove or block access to the indecent articles. If the content under complaint is likely to be obscene, TELA will refer the case to the Police for follow-up enforcement action, including prosecution.
- 1.2 The large volume of transient information transmitted on the Internet poses more challenges than ordinary printed materials in terms of investigation and law enforcement. In addition users can disguise their identities when distributing information on the Internet, leading to practical difficulties in uncovering their true identities. More importantly, as materials transmitted on the Internet are often extraterritorial in nature, regulating local websites would not serve any useful purpose since youngsters can continue to access obscene or indecent materials through overseas websites, which are not subject to the laws of Hong Kong.
- 1.3 Other developed economies also tend to rely on the self-regulatory approach by the industry to deal with the problem.

(2) Areas for Improvement

Retaining the existing co-regulatory regime with the introduction of additional administrative measures

2.1 One possible option is to retain the existing co-regulatory regime with the industry while strengthening public education and putting in place additional measures to improve the regime, for example, by encouraging Internet service providers (ISPs) to:

- (a) develop good industry practice for protection of youngsters and children;
- (b) tighten up their service contracts with subscribers by incorporating specific clauses which prohibit subscribers from publishing obscene or indecent articles, and seeking subscribers' prior agreement to the course of action that ISPs may take in response to notices of contravention of the COIAO;
- (c) formulate measures against repeated offenders, which may involve limiting the bandwidth made available to such offenders or imposing temporary suspension or termination of service in case of contravention of contractual terms;
- (d) implement a voluntary labelling system and encourage webmasters to label their websites to indicate whether they are suitable for children and youngsters; and

(e) provide filtering services to subscribers for the purpose of filtering out web content which is not suitable for children and youngsters.

2.2 This approach of co-regulation is largely in line with overseas practices. In support of this approach, the Government needs to step up public education in order to enhance the capability of the public to deal with obscene and indecent material on the Internet.

2.3 *As co-regulation relies heavily on the self-discipline and voluntary support of the ISPs, webmasters and web users, the challenge is how to ensure their co-operation.*

Reference Questions:

Should we continue with the co-regulatory approach in regulating the Internet? What are the advantages and disadvantages of this approach?

Making it a legislative requirement for ISPs to provide filtering software

2.4 In addition to the administrative measures set out in paragraph 2.1 above, another alternative is to make it mandatory for ISPs to provide filtering service to their subscribers so that children and youngsters will be protected from web content not suitable to them. This would enable filtering of content from both local and overseas websites. Upstream control carried out by the operators would be more

effective than the use of domestic filtering software. Since the filtering software is installed in the server-end rather than in the computer on the client side, it is less likely to be circumvented by children and youngsters. Updates to blocking database can be carried out automatically for the convenience and at the option of the users. Under this approach, it would be the parents' responsibility to decide whether to accept the protection provided by ISPs or to set up other measures to safeguard their children against harmful online materials.

2.5 The challenge is that some small-sized ISPs may face business difficulties to give effect to this requirement. It is also necessary to address a number of technical issues in relation to the use of filtering service or software, including, for example, how to avoid blocking of websites that are neither obscene nor indecent, how to avoid circumvention and how to prevent the software used from interfering with the operation of other computer programmes.

Reference Questions:

Should ISPs be required to provide filtering software?
What are the advantages and disadvantages?

Tightening statutory controls

2.6 Another possible option is to introduce more statutory requirements to regulate the publication of obscene and indecent materials on the Internet, including, for example:

- (a) websites are required to provide warnings if they display indecent materials;
- (b) an access control system is to be established to authenticate the age of the web users. For example, web users are required to input their credit card data before getting access to webpage containing indecent materials to ensure that they have attained the age of 18;
- (c) empower enforcement agencies, upon receipt of a judicial warrant, to issue a “take-down notice” to the indecent websites or the ISPs concerned; and
- (d) prosecute content providers who fail to comply with the statutory requirements.

2.7 *The major challenge is that obscene or indecent materials can continue to be accessed through overseas websites, which are not subject to the laws of Hong Kong. Considerable manpower and financial resources would be incurred under this approach in view of the large volume of transient information transmitted on the Internet, but this may not serve much useful purpose given the extraterritoriality issue. Another challenge is how to avoid regulation overkill so that the local Internet industry would not lose its competitiveness to other economies.*

Reference Question:

Is it practical to impose additional statutory requirements on local ISPs regarding the dissemination of information on the Internet?

Tightening statutory controls on obscene articles on the Internet only

2.8 To reduce the manpower and financial resources required under the approach described in paragraphs 2.6 and 2.7 above, an alternative is to focus the statutory regulation on obscene materials on the Internet only while leaving online indecent material to be dealt with under the existing co-regulatory approach. Resources can be utilised in a more cost-effective manner if regulation focuses on online obscene materials only. This would also partially address the concern of stifling the development of the Internet industry as raised in paragraphs 2.6 and 2.7 above.

2.9 *The major challenge is that obscene materials can still be accessed through overseas websites. We would also need to address whether it would be fair to exempt online indecent materials from statutory controls while materials of the same nature found in other articles in the market are under regulation.*

Reference Questions:

Should we focus on regulating obscene materials on the Internet only? What are the advantages and disadvantages?



(B) Definition of “public”

B1. Main Issue

The public wish to know if the COIAO is sufficiently all encompassing and is able to respond to new developments in public communication (be it on the Internet or in other forms of media) without compromising the free flow of information.

Focal Questions:

How can new forms of public communication, particularly those on the Internet, be regulated? How would you do it in a practical way?

B2. Detailed Discussion on the Definition of “Public”

(1) Existing Arrangement

1.1 Communication on the Internet can be classified into public communication and individual-to-individual communication. Public communication is that through which members of the public can have access to without obtaining prior permission. Under the COIAO, the definition of “publication” includes transmitting articles to the public or a section of the public or among individual users. While the term “public” is not defined in the COIAO, it stipulates that “public” include the members of a club. For example, it would be an offence to publish obscene or indecent materials through online discussion forums. There is also growing public concern on how to deal with cases of publication of obscene or indecent materials through the peer-to-peer (P2P) software on the Internet.

(2) Areas for Improvement

Regulating public communication but leaving communication among individual Internet users unregulated

2.1 One possible option is to regulate public communication but leave communication among individual users unregulated. This would address

the concern about proliferation of obscene and indecent material published or posted on popular Internet platforms, and will not hinder the free flow of information among individuals on the Internet. *The major point for consideration is that leaving the transmission of information among individual Internet users unregulated may create a loophole, where obscene and indecent material could be distributed very quickly under the auspices of communication among individual Internet users.*

Reference Question:

Do you agree that only public communication should be regulated under the COIAO?

Regulating both public communication and communication among Internet users

2.2 Another alternative is to regulate both public communication and communication among individual Internet users. This would generate deterrent effect and discourage distribution of obscene and indecent articles through any form of communication on the Internet. Inadvertent violation of the law can be avoided through a clearer definition, for example, on “public” or

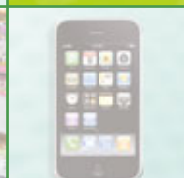
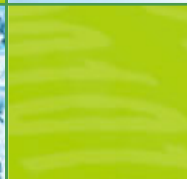
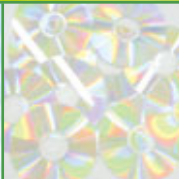
“individual users”. The major challenge is how wide we should cast the net of control on communication among Internet users, how this could be done without being too intrusive into private communication among individual Internet users.

Reference Questions:

How wide should we cast the net to subject the communication of Internet users under the COIAO? Should the P2P network be considered as public? Should the initiator only or all the participants be held responsible?



5. Enforcement



5. Enforcement



(A) Division of Labour among the Enforcement Departments

A1. Main Issue

Some members of the public wish to have a clear understanding of the division of labour among the enforcement departments.

Focal Questions:

What roles should the three enforcement departments (i.e. TELA/Police/C&ED) play in the enforcement of the COIAO? How could their roles be identified by the public more easily?

A2. Detailed Discussion on the Division of Labour among TELA/Police/C&ED

(1) Existing Arrangement

1.1 At present, three Government departments, TELA, Police and C&ED are responsible for the enforcement of the provisions under the COIAO. The division of labour is as follows -

TELA Focuses on the sale of **indecent** articles in the market by conducting inspections in sales outlets and monitoring publications on sale in the market; and also deal with **indecent** articles transmitted on the Internet through monitoring of sites and following up on complaints.

Police Focuses on the sale of **obscene** articles in the market and conducts joint operations with TELA from time to time; and also deals with **obscene** articles transmitted on the Internet.

C&ED Tackles **obscene** and **indecent** articles at entry points.

(2) Areas for Improvement

Retaining the existing division of labour with improvements

2.1 The existing division of labour is cost-effective and generally in line with international practice, where the Police are responsible for handling more serious crimes including publication of obscene articles. TELA, Police and C&ED have been co-operating effectively in dealing with suspected breaches of the COIAO.

2.2 One possible option is simply to allow TELA/Police/C&ED to continue with their respective enforcement work but introduce improvement measures. Of the three enforcement departments, only TELA is not a disciplined force. To strengthen this arm, we may enhance training for TELA's enforcement staff, for example, by organising refresher courses to enrich their understanding of prosecution procedures and to strengthen their investigation skills. We may also consider empowering TELA staff to seize obscene articles so that TELA may conduct its own enforcement operations where appropriate. *The challenge is how to step up public education to let members of the public have a clearer picture of the division of labour.*

TELA to set up a special team to deal with all Internet cases

2.3 Some members of the public are particularly concerned about the division of labour between TELA and the Police on the handling of Internet cases. One option is to set up a special team in TELA to deal with all Internet cases. Efficiency would be enhanced and public misunderstanding minimised if all cases, whether obscene or indecent, are to be dealt with by the same enforcement agency. Consistency in taking enforcement action would also be enhanced if all cases are dealt with by TELA.

2.4 However, given the lack of expertise and resources in conducting investigations and taking enforcement action, TELA would have to allocate significant additional resources in staff recruitment/training and in the procurement of the required equipment if this approach is adopted. *A major consideration is how to address the duplication of resources between TELA and the Police as there is a need for the Police to retain its existing team to deal with other computer related crimes. This*

also raises the question as to whether it is appropriate to give various investigative powers to TELA inspectors, who are not disciplined staff. We should bear in mind that TELA staff may not be able to uncover associated crimes such as theft and making forged document.

Reference Question:

What roles should the Police and TELA play in regulating the Internet?

Enforcement by the Police

2.5 Another possible approach is for the Police to be responsible for enforcement against both obscene and indecent articles at wholesale and retail outlets and on the Internet, and TELA to focus on monitoring publications.

2.6 The Police are well trained and equipped to carry out enforcement operations. This approach would be easier for the public to understand. *The major point for consideration is whether the Police should focus on dealing with more serious crimes, and the need for additional resources for the Police to take on this expanded role.*

Reference Questions:

What are the advantages and disadvantages of having one single enforcement agency to be responsible for enforcement against both obscene and indecent articles? If so, which department would be more suitable for this role?



(B) Enforcement Approach

B1. Main Issue

Some members of the public would like to see all offending articles in the market be identified and enforcement action be taken by the enforcement departments.

Focal Question:

How can you step up enforcement while not overburdening the enforcement departments?

B2. Detailed Discussion on Enforcement Approach

(1) Existing Arrangement

1.1 Owing to the broad coverage of “articles”¹ under the COIAO and the large number of outlets available, it is impossible to monitor the publication of all articles in the market. Hence, while TELA adopts a proactive approach in monitoring selected priority areas, such as local newspapers and magazines, VCDs/DVDs and comic books, it adopts a complaint-driven approach for articles which are less common to the general public, such as imported newspapers/publications, postcards, bookmarks etc.

(2) Areas for Improvement

Retaining existing approach with improvements

2.1 One option is to maintain the existing approach with TELA stepping up education work to publicize the COIAO so as to enhance public participation through lodging complaints on dubious articles. Proactive monitoring of the articles in the priority

¹ Under the COIAO, an “article” is defined as any article that consists of or contains material to be read or looked at or to be read and looked at. It also means a sound recording or a film, video-tape, disc or other record of a picture or pictures (i.e., including printed materials, recordings, films, video-tapes, record discs and publications distributed by electronic means, etc.)

areas while responding to public complaints about articles in other areas generally meet the community's expectations. It is also imperative to educate retailers about the need to comply with the COIAO.

Reference Question:

What do you think are the advantages and disadvantages to continue the existing approach with improvements?

Proactive monitoring of all articles

2.2 Another option is for TELA to conduct proactive monitoring of all articles, including those which are less accessible to youngsters and the general public. *The major point for consideration is whether it is an appropriate use of public resources given the wide variety of articles under the broad statutory definition and some of which have relatively limited circulation.*

Reference Question:

How would you step up enforcement in a reasonably cost-effective way?

Complaint-driven

2.3 Some members of the public suggest that we should adopt an entirely complaint-driven approach, without proactive monitoring and inspection of retail outlets so as to be in line with the practice in certain open and liberal jurisdictions. Only articles which are the subject of a complaint from members of the public will be sent to the OAT for classification. *The challenge is that the deterrent effect may be weaker and hence it is likely that there may be more obscene or indecent materials available in the market.*

Reference Question:

Do you think there should be greater involvement of the public in the enforcement of the COIAO?



(C) Enforcement Priorities

C1. Main Issues

Some members of the public have expressed the view that greater attention should be placed on new forms of publication which have growing popularity among youngsters, for example, electronic game products, computer games, etc.

Focal Questions:

Should more attention be placed on new forms of publication? If so, what are your major considerations?

C2. Detailed Discussion on Enforcement Priorities

(1) Existing Arrangement

1.1 TELA has a practical need to focus its limited enforcement resources on priority areas. The existing enforcement priorities are on VCDs/DVDs, comic books, local newspapers and entertainment magazines. Electronic game products, computer games, etc. which are considered by some to pose high risks to young people are not on the priority list. As a result of persistent joint operations by TELA and the Police, the number of shops selling obscene VCDs/DVDs in the market has substantially decreased.

(2) Areas for Improvement

2.1 One option is to ask TELA to closely monitor areas of public concern and deploy resources to cover these areas. For example, the resources released from monitoring of VCDs/DVDs can be deployed to monitor electronic game products, computer games etc. We may also ask TELA to closely monitor public views on priority areas so as to redeploy resources to meet changing community concerns.

Reference Questions:

What should be the priority areas to be monitored by TELA? What are your major considerations?

6. Penalty



6. Penalty



Main Issues

Some members of the public consider it important to enhance the deterrent effect of the COIAO.

Focal Question:

What do you consider to be the most effective means to deter breaches of the COIAO?

Detailed Discussion

(1) Existing Arrangement

- 1.1 Publication of obscene articles is subject to a maximum penalty of \$1 million fine and three years' imprisonment upon conviction. The first conviction for publishing indecent articles not in compliance with statutory restrictions may attract a maximum fine of \$400,000 and imprisonment for one year, and each subsequent conviction would attract a financial penalty of \$800,000 and imprisonment for a maximum of one year. The COIAO does not set out factors which the court should take into consideration when meting out a penalty, leaving this to the sole discretion of the court.

- 1.2 So far the heaviest penalties handed down by the court involving obscene articles are imprisonment for 30 months in one case and a fine of \$100,000 in another case. The heaviest penalties involving indecent articles are imprisonment for 8 months in one case and a fine of \$100,000 in another case. Some members of the public are concerned that the penalties imposed for the breaches of the COIAO have consistently been below the statutory maximum and feel that this lacks deterrent effect.

(2) Areas for Improvement

Increase maximum penalty

- 2.1 One option to enhance the deterrent effect against offenders, in particular those repeatedly offend the law, is to increase the maximum financial penalty and imprisonment under the law, for example, doubling the maximum fine as follows -

Offence	Current Maximum Penalty	Proposed Maximum Penalty
Obscene Articles	A fine of \$1 million Imprisonment for 3 years	A fine of \$2 million Imprisonment for 3 years
Indecent Articles		
First conviction	A fine of \$400,000 Imprisonment for 1 year	A fine of \$800,000 Imprisonment for 1 year
Subsequent conviction	A fine of \$800,000 Imprisonment for 1 year	A fine of \$1.6 million Imprisonment for 2 years

2.2 Financial penalty and imprisonment set at an appropriately high level should carry sufficient deterrent effect against breaches of the COIAO. *While introducing higher maximum penalty may reflect to the court public concern about the gravity of these offences, we have to bear in mind that the court still has full discretion to determine the level of penalty in individual cases.*

Reference Questions:

How should we improve the existing penalty provisions in the COIAO to enhance the deterrent effect? How to deal with repeat offenders?

Include factors for consideration by the court when imposing penalty

2.3 To facilitate the court to take into account relevant factors when meting out penalty and impose appropriate levels of penalties, one possible measure would be to set out a list of such factors in the COIAO, for example:

- (a) circulation of the publication;
- (b) level of obscenity or indecency;
- (c) circumstances of the sale or display (e.g., whether the publication is widely available in the market, number of selling points);

- (d) sophistication of the method of sale or display (e.g., whether the publication is easily accessed by young people);
- (e) prevalence of the offence (e.g., whether similar offences are on the rise or on the decline);
- (f) factors personal to the offender (whether the offender has committed the offence repeatedly); and
- (g) need for deterrence to the offenders and to those who might commit similar offences.

2.4 While this approach would not unduly restrict the court's discretion in deciding on the appropriate level of sentence, it may ensure that major factors would be taken into consideration in the process. *Bearing in mind that the Department of Justice and the enforcement departments would require additional measures to acquire information in relation to the abovementioned factors for consideration of the court, the challenge is how this could be achieved without being too intrusive into the publishers' businesses.*

Reference Questions:

Do you consider setting out in the COIAO a list of factors for consideration of the court would facilitate it in meting out a deterrent penalty? What are your major considerations?

7. Publicity and Public Education



Healthy Information for a Healthy Mind

7. Publicity and Public Education



Main Issue

The public recognise the importance of stepping up publicity and public education to combat the harmful effect of indecent and obscene articles, in particular in relation to new forms of media with growing popularity among youngsters.

Focal Question:

Do you consider public education an effective way to protect youngsters from harmful effect of obscene and indecent articles?

Detailed Discussion

(1) Existing Measures

- 1.1 To combat the publication of obscene and indecent articles, education and publicity are as important as enforcement.
- 1.2 The public see the need to enhance parents' role in managing their children's access to obscene and indecent articles, particularly in respect of the Internet. Indeed, in response, TELA has strengthened both its enforcement and educational efforts in respect of the Internet.

(2) Areas for Improvement

2.1 It is imperative to educate children and youngsters, so as to build up their resistance to harmful materials to which they may be exposed. Public education can have a major impact to raise awareness and help protect children and youngsters from harmful obscene and indecent materials. To achieve greater effect, a number of measures may be introduced, for example -

- to formulate a systematic plan on publicity and public education;
- to call for the co-operation of various sectors of the community, including the IT sector, the education sector, parents and social workers target at youth related matters to work on public education in the long run;

- to allocate more resources to provide additional support for parents, schools, teachers and non-government organisations (NGOs) in the field of education.

2.2 For long-term publicity and public education, different strategies may be adopted, for example -

- (a) To adopt a two-pronged approach focusing on parents and students and pooling of resources for stepping up educational efforts, particularly in respect of the Internet:

Parents As parents have a key role to play in managing children's access to obscene and indecent materials particularly on the Internet, we may consider according priority to this area. One example might be the promotion of the use of filtering software to parents.

Students Enhance parents' and children's awareness of the provisions of the COIAO and promote the healthy use of new forms of media to safeguard young people against objectionable materials transmitted thereon.

- (b) To deploy additional resources to step up publicity and public education, including subsidising NGOs and schools to organise activities to promote the COIAO.
- (c) To focus limited resources to subsidise schools and NGOs where there is perceived to be greatest need to organise talks and workshops for parents, for example, to encourage and provide guidance to parents to install and use filtering software for the protection of their children from harmful materials on the Internet.
- (d) To provide assistance to teachers, for example, to develop interesting teaching kits through joint efforts of the Government, educational institutions and youth groups.
- (e) To collaborate with the IT industry to explore ways to enhance filtering software and to encourage Internet service providers to provide filtering service for their subscribers.
- (f) To enhance co-operation with IT industry to promote awareness of the COIAO on the Internet.

- (g) During normal inspections, TELA's enforcement staff to enhance its work in public education and promote the COIAO.

Reference Questions:

How do you step up publicity and public education to promote the COIAO in order to strengthen youngsters' resistance to harmful materials? What are the roles of parents and other stakeholders in the work?

List of Abbreviations

C&ED	Customs and Excise Department
COIAO	Control of Obscene and Indecent Articles Ordinance
FCO	Film Censorship Ordinance
HKISPA	Hong Kong Internet Service Providers Association
ISPs	Internet service providers
IT	Information Technology
NGO	Non-government organisation
OAT	Obscene Articles Tribunal
P2P	Peer-to-peer
TELA	Television and Entertainment Licensing Authority

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