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## **Second Round of Public Consultation on the Review of the Control of Obscene and Indecent Articles Ordinance**

### **EXECUTIVE SUMMARY**

#### **Preamble**

1. In response to public concern over the prevalence of indecent and obscene articles in various media and the operation of the regulatory regime, we commenced a comprehensive review of the Control of Obscene and Indecent Articles Ordinance (Cap. 390) (COIAO) in 2008 and proposed two rounds of public consultation. The first round of public consultation completed in 2009 confirms general support for retaining the COIAO regulatory regime but cannot forge consensus on three issues, namely –
  - (a) the definitions of “obscenity” and “indecent”;
  - (b) the institutional set-up of the Obscene Articles Tribunal (OAT); and
  - (c) the handling of new forms of media.

During the first round of public consultation, the majority of the public supported the imposition of heavier penalties in order to enhance the deterrent effect of the COIAO. The distribution of free newspapers containing articles classified as “indecent” generated fresh concerns on the adequacy of the maximum penalties set out in law.

2. The current round of consultation invites views on proposed improvement measures or options for tackling the issues, having regard to public views collected, advice from the Judiciary and overseas practices.

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## Definitions

3. During the first round of public consultation, views were diverse on whether definitions of “obscenity” and “indecenty” should be further clarified in the law. We do not consider it appropriate to stipulate detailed definitions in the legislation. Drawing up a set of detailed administrative guidelines on standards for the OAT to follow is not a conventional practice under the common law system either. The Judiciary also advises that a set of administrative guidelines or standards for the OAT should not be drawn up to avoid interfering with the fundamental principle of judicial independence.

## Institutional Set-up of the OAT

4. During the first round of public consultation, the Judiciary has advised strongly that the present institutional set-up of the OAT under the COIAO is highly unsatisfactory as the OAT is required by law to perform both administrative classification and judicial determination functions. As a matter of principle, the Judiciary regards the exercise of an administrative function by a judicial body as undermining the fundamental principle of judicial independence. The Judiciary firmly considers that the problems with the existing set-up should be addressed by removing the administrative classification function of the OAT from the Judiciary, leaving the OAT to deal only with judicial determination. The separation of the administrative and judicial functions of the OAT is strongly supported by the legal profession (including the Bar Association and the Law Society).
5. Members of the public did not have much discussion on the fundamental issue raised by the Judiciary and the legal sector. Where discussion took place, public views on whether and how the existing adjudication system should be reformed were diverse. Some pointed out that the existing OAT set-up has generally served its purpose well by providing the community with an independent and effective regulatory

system over the past two decades. They preferred to retain the existing OAT, but reform its appointment system and composition. Others suggested that the administrative classification function should be removed from the OAT and the adjudicators system should be replaced by the jury system. Some recommended abolishing the OAT and inviting magistrates to classify articles.

6. In order to address the fundamental concerns of the Judiciary and the legal sector, we would invite feedback from the community on two proposed options – both involving taking the administrative classification function away from the Judiciary.

(a) **Option 1 – Segregating the administrative classification and judicial determination functions**

Under this option, the Administration would appoint a statutory and independent classification board and offer an appeal mechanism, leaving the OAT to deal with judicial determination upon referral by a court or a magistrate in civil or criminal proceedings. Some preliminary ideas are set out below –

(i) **Statutory Classification Board :**

It may consist of a Chairman underpinned by several Deputy Chairmen. The Chairman/Deputy Chairmen will be retired magistrates/judges, or persons with legal or professional background and appointed by the Chief Executive of the Hong Kong Special Administrative Region. The Chairman/Deputy Chairmen may be supported by a pool of adjudicators with different background. Each hearing for interim classification may consist of a Chairman/Deputy Chairman plus at least four adjudicators.

(ii) **Statutory Appeal Panel :**

The appeal panel may comprise a Chairman who will be a retired magistrate/judge, or a person with legal or professional background and appointed by the Chief Executive and about 20 to 30 members with different background. The panel for each full hearing may consist of the Chairman plus at least six panel members.

(iii) **The revamped OAT :**

This may be led by a presiding magistrate. The current system of OAT adjudicators may be retained or replaced by a jury system. For the latter option, the OAT for each hearing may consist of a presiding magistrate and seven jurors.

The revamp in question would remove the administrative classification function from the Judiciary and address the fundamental problems with the OAT. On the other hand, the role of appointing adjudicators to classify articles and managing the administrative classification functions under the COIAO would be transferred from the Judiciary to the Government. This could prompt concerns on whether the Government would be seeking to control the values of society and interfere with freedom of expression. Adjudication systems with similar independent classification and appeal boards to classify articles are adopted in overseas jurisdictions such as Australia, New Zealand and Germany.

(b) **Option 2 – Abolishing the administrative classification function**

Under this option, the administrative classification function would be abolished altogether. The OAT would continue to be responsible for determining whether an article is obscene/indecent or not in criminal

and civil proceedings. Same as Option 1, the fundamental concerns of the Judiciary and the legal sector about the OAT's institutional set-up would be addressed if the administrative classification function were to be abolished. With this option, the Administration would not need to worry about having to first seek the administrative classifications from the OAT - for controversial and likely-to-be contested cases, before deciding on prosecution. This potential time saving could address the concerns of many who failed to appreciate why prosecution decisions would typically be preceded by interim and full hearings of OAT. On the other hand, the merits of providing a simple and efficient article classification process under the existing situation would be lost. Some stakeholders would be concerned about de facto loosening of the regulatory regime as publishers would not be able to seek classification for articles before publication; as a complementary measure under this option, the Government would step up enforcement efforts and preventive education. There could be additional judicial determination workload for the OAT.

7. Either option to reform the OAT institutional set-up would address the fundamental concerns of the Judiciary by removing the administrative classification function from the OAT. However, we would require a broad consensus within the community in order to take the proposal forward. It will also take considerable lead time to initiate necessary legislative amendments and, if Option 1 is adopted, to conduct the administrative work to establish the new classification and appeal bodies.

### **OAT Operations**

8. Before we complete the necessary legislative amendments to reform the OAT, the existing system will continue to operate. We have considered feedback from the public in 2009 on

measures to improve the current set-up. Indeed the Judiciary has been improving the existing operations of the OAT as appropriate. The Judiciary has applied a nine-year rule in the re-appointment of serving adjudicators and increased the total number of adjudicators from about 340 in 2010 to about 400 in 2011 and further to about 500. Other propositions raised and our feedback are set out below -

- (a) some proposed that the Judiciary should appoint adjudicators with specific knowledge and expertise. However, the Judiciary finds the suggestion unworkable as it is too vague as to how a person should fit into one group of persons with the specific knowledge or expertise or another. We consider it appropriate to maintain the current arrangement for community participation and we believe that an ordinary member of the public should be able to reflect the general public standards of morality in OAT classification work;
- (b) some proposed that the Registrar of the High Court can consider **appointing more adjudicators at each hearing**. The Judiciary points out that the Registrar exercises his judicial discretion to decide the number of adjudicators in accordance with the relevant legislative provisions. Such judicial discretion should not be fettered. Any changes to the number of adjudicators at a hearing require legislative amendments; and
- (c) some proposed that **more briefings and training sessions** be arranged for OAT adjudicators. The Judiciary has no objection to continuing to organise regular briefing sessions for adjudicators as appropriate and practical.

## **New Forms of Media**

9. While mainstream views received from the first round of public consultation raised no objection to maintaining the

complaint-driven and co-regulatory approach (Government and Internet Service Providers (ISPs) working together) for the control of indecent and obscene articles on the Internet, public views were very diverse on whether more statutory controls should be introduced. There was nonetheless a general consensus to strengthen publicity and public education. Having regard to views collated and overseas experience, we consider it more practicable to improve the regulation of the Internet by improving the co-regulatory system and stepping up publicity and public education.

10. We propose the following measures –
  - (a) **Regular Review of the Existing Co-regulatory Framework** : Government can establish a standing liaison group, consisting of information technology professionals, representatives of ISPs, government representatives, etc., to review and enhance the existing co-regulatory framework and update the Code of Practice which was promulgated in 1997 to meet the changing needs of the community.
  - (b) **Filtering Service** : Government can introduce measures to assist the industry in developing filtering service to meet public demand. Specifically, Government can conduct periodic surveys on parents and teachers on the awareness and adequacy or otherwise of filtering service and can disseminate information on filtering technologies to educate the public.
  - (c) **Publicity and Public Education** : Government will continue to work closely with teachers, social workers and the ISPs, etc. to develop comprehensive publicity and public education programmes.

## Enforcement and Penalty

11. During the first round of public consultation, the majority of the public supported the imposition of a heavier penalty in order to enhance the deterrent effect of the COIAO. In recent months, the distribution of free newspapers containing articles classified as indecent generated fresh concerns that heavier penalties should be imposed on publishers infringing the COIAO. In order to enhance the deterrent effect on prospective publishers, we propose to increase the maximum financial penalty and imprisonment under the COIAO, which were last reviewed in 1995, as follows –

<b>Offence</b>	<b>Current Maximum Penalty</b>	<b>Proposed Maximum Penalty</b>
<b>Obscene Articles</b>	A fine of \$1 million Imprisonment for 3 years	A fine of \$2 million Imprisonment for 3 years
<b>Indecent Articles</b>		
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

## We Need Your Views

12. We wish to hear from the community in order to help shape measures for improving the regulation of obscene and indecent articles. Please let us have your views.

## Chapter 1: Introduction

- 1.1. On the subject of regulating the publication of articles, Government's long-standing policy is to strike a fine balance between applying standards of public decency to articles (especially those intended for young and impressionable people) and preserving free flow of information and safeguarding 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), which was enacted in 1987 following extensive consultation with the public, reflects the above policy.

### The First Round of Public Consultation

- 1.2. The Government commenced a comprehensive review of the COIAO in 2008 in response to the growing public concern over obscene or indecent materials published in newspapers and entertainment magazines, or disseminated through the Internet. The first round of public consultation ended in January 2009, followed by the publication of the consultation report in July 2009.
- 1.3. The first round of public consultation covered seven main topics relating to the operation of the COIAO, namely –
  - (a) definition;
  - (b) adjudication system;
  - (c) classification system;
  - (d) new forms of media;

- (e) enforcement;
- (f) penalty; and
- (g) publicity and public education.

We attended over 50 meetings and forums, met with about 2 200 people, and received over 18 800 written submissions from individuals and organisations. We commissioned the Public Opinion Programme at the University of Hong Kong (HKUPOP) to conduct a Public Opinion Survey to gauge public views towards the COIAO. We also commissioned a Consultant<sup>1</sup> to compile, consolidate and analyse the views collected during the first round of public consultation.

- 1.4. While the public consultation generally confirms the need to retain the COIAO and the regulatory regime, views collected are diverse.
- 1.5. The topics on “classification system” and “enforcement” did not attract much public interest or concern. The community generally recognised that education and publicity should be as important as enforcement against the publication of obscene and indecent materials. There is general consensus that we should equip youngsters and children with the tool to handle the different situations they may encounter in an information-overloaded era and to critically analyse and evaluate the information/messages they receive. The public generally agreed that the Government, schools and families should each take up their respective roles and work together to promote public education. The public called on the Government to launch systematic publicity and public education programmes to foster cooperation among different sectors. In the light of clear community support, the Government will –

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<sup>1</sup> AWTC (Lo & Lam) Consultancies Ltd.

- (a) introduce more structured training courses for the enforcement team of the Office for Film, Newspaper and Article Administration (OFNAA) to strengthen its expertise in enforcement work;
- (b) strengthen public education on the operation of the COIAO for retailers; and
- (c) step up efforts in publicity and public education programmes for the COIAO, with particular focus on the positive use of the Internet.

1.6. The following issues –

- (a) the definitions of “obscenity” and “indecenty”;
- (b) the institutional set-up of the Obscene Articles Tribunal (OAT); and
- (c) the handling of the new forms of media

attracted most concerns and discussion in the consultation process. The Consultant recommended that the Government should seek further in-depth discussion on these issues to help forge a consensus in the community before we move forward.

1.7. During the first round of public consultation, the majority of the public supported a heavier penalty in order to enhance the deterrent effect of the COIAO. In recent months, the distribution of free newspapers containing indecent articles generated fresh public concerns about enforcement and penalty issues under the COIAO.

## The Second Round of Public Consultation

- 1.8. This consultation document proposes various improvement measures or options for tackling the four issues (see paragraphs 1.6 and 1.7) and provides relevant references on the handling of obscene and indecent articles in overseas countries (**Annex 1**) for public deliberation and discussion. We welcome views from all sectors of the community on these issues and will engage the public to discuss the improvement measures.
- 1.9. Further information is available from the dedicated thematic website for the review of the COIAO, [www.coiao.gov.hk](http://www.coiao.gov.hk). Please send your comments to the Commerce and Economic Development Bureau by 15 July 2012 through any of the following means listed below. Let us know in case you do **not** want to be attributed. Unless otherwise specified, all responses will be treated as public information and may be published in future.

Post: Commerce and Economic Development Bureau  
21/F, West Wing  
Central Government Offices  
2 Tim Mei Avenue, Tamar  
Hong Kong

Fax: (852) 2511 1458

E-mail: [info@coiao.gov.hk](mailto:info@coiao.gov.hk)

## Chapter 2: Definitions

2.1.	<b>MAJOR CONCERNS OF THE PUBLIC</b>
2.1.1.	<p>Feedback from the first round of public consultation shows that there are diverse public views on the definitions of “obscenity” and “indecenty” in the COIAO. The community is mainly concerned about the following issues –</p> <p>(a) <u>Clarity and comprehensiveness of the definitions</u> : The definitions of “obscenity” and “indecenty” should be made more precise and comprehensive to enhance consistency in the classification decisions made by the OAT and to enable the stakeholders (e.g. publishers and content providers) and members of the public to have a better understanding of the yardstick used by the OAT in articles classification.</p> <p>(b) <u>Scope of the definitions</u> : The definitions should be flexible enough to cater for different situations and keep pace with the changing needs of the community. On the other hand, there are also views that a prescriptive approach to define “obscenity” and “indecenty” would be inflexible and might lead to grey areas in articles classification.</p>

## **2.2. EXISTING ARRANGEMENTS**

### **Definitions of “Obscenity” and “Indecency”**

2.2.1. Under the COIAO, “obscenity” and “indecent” include “violence, depravity and repulsiveness”.

### **Statutory Guidance to the OAT**

2.2.2. The existing OAT is a judicial body presided over by a magistrate and comprising adjudicators appointed by the Chief Justice to carry out the administrative classification and judicial determination functions. Under section 10 of the COIAO, the following factors shall be taken into account by the OAT –

- (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.

The enforcement authorities, including OFNAA, Police and the Customs and Excise Department (C&ED), take these factors into account when considering whether an article should be submitted to the OAT for classification or whether enforcement action should be taken.

2.2.3. Section 28 of the COIAO provides that it shall be a defence to a charge in respect of the publication of an article if the publication is found by the OAT to have been intended for the public good on the ground that such publication is in the interests of science, literature, art or learning, or any other object of general concern.

## **2.3. AREAS WHICH MAY REQUIRE IMPROVEMENTS**

### **“Obscenity” and “Indecency”**

- 2.3.1. During the first round of public consultation, some respondents were in favour of clarifying the definitions of “obscenity” and “indecent” in the legislation. Different ways had been suggested to enable members of the public, publishers as well as OAT adjudicators to have a better understanding of the classification standards so as to facilitate compliance and enhance consistency in classification rulings.
- 2.3.2. One way to further clarify the definitions of “obscenity” and “indecent” would be to stipulate in the law in specific terms the items that are to be considered as “obscene” and “indecent”. However, as different people may have different responses to the same article and social values differ among individuals, it would be extremely difficult, if not impossible, for the public to reach a consensus on the items to be included in the definitions. In addition, the accepted standards of propriety in any community change and evolve with time. If precise and comprehensive definitions of these terms were set out in the law, frequent legislative amendments would be required to cater for the changes and developments. There is also concern that precise and comprehensive definitions of “obscenity” and “indecent” would render the COIAO difficult to operate and lead to more legal challenges against the classification rulings.
- 2.3.3. The current system in Hong Kong is based on the common law convention, which recognises that the concepts of “obscenity” and “indecent” are not matters of exact science capable of objective proof like criminal conduct. “Obscenity” and “indecent” are relative rather than absolute concepts as they change from time to time, place to place, culture to culture, individual to individual, one class of persons to another and are also subject to the age

of a person. Moreover, the common law recognises that the two concepts do not have an independent existence of their own. An article is obscene or indecent only to the extent that it causes, or is likely to cause, in the reader/viewer a feeling of moral depravity, revolt or disgust.

2.3.4. In conducting the COIAO review, we have studied the experience of overseas jurisdictions. We have not been able to identify any overseas jurisdiction where precise definitions of “obscenity” and “indecent” have been set out in legislation. Under the UK’s Obscene Publications Act, an article shall be deemed to be obscene if its effect tends to deprave and corrupt persons who are likely to read, see or hear the matter embodied therein. Some countries like New Zealand and Canada have provided more concrete explanations for defining objectionable/obscene publications, e.g. 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 the publication is likely to be injurious to the public good. In Australia and the USA, there is no definition of obscenity and indecent. Instead, principles have been developed which need to be taken into account when the relevant authorities make classification decisions. Details of the practices in various countries are set out at **Annex 1**. Overseas experience suggests that practical difficulties do exist if we are to provide in specific terms in the law what is deemed to be unacceptable on matters of propriety.

2.3.5. On the assumption that the OAT will remain in operation under our regulatory regime (further discussion in Chapter 3), another suggestion is to develop comprehensive administrative guidelines on standards for referral of articles to the OAT and/or for the reference of the OAT when classifying articles. Under this option, regular legislative amendments on the definitions will not be necessary.

- 2.3.6. We have examined the experience of overseas jurisdictions. Australia is almost unique in that it has set out detailed statutory guidelines for restricted and unrestricted content and listed out criteria for violence, sex, nudity, coarse language, adult themes and drug use.
- 2.3.7. While the introduction of guidelines may help supplement the definitions in the COIAO, we have to take into account the following considerations –
- (a) Under the current system, it would not be appropriate for the Government, a non-judicial body, to promulgate administrative guidelines on classification standards for the OAT, which is a judicial body. This would be contrary to the fundamental principle of judicial independence.
  - (b) Common law recognises that “obscenity” and “indecent” are relative concepts. An article is obscene or indecent only to the extent that it causes or is likely to cause, in the reader/viewer a feeling of moral depravity, revolt or disgust. The provision of comprehensive guidelines is not a conventional practice under the common law system.
  - (c) The findings of the public opinion survey conducted by the HKUPOP during the first round of public consultation show that there is a wider range of matters which are considered by the public as falling within the “obscene” or “indecent” categories. Even if we were to adopt the Australian approach mentioned in paragraph 2.3.6 above, there would be many more areas that are likely to be considered obscene or indecent in Hong Kong, but not restricted in Australia. It would be very difficult to promulgate a set of guidelines that is precise and at the same time exhaustive.

- 2.3.8. The need to define “obscenity” and “indecent” in the law or to promulgate comprehensive guidelines on standards was thoroughly debated at the Legislative Council in 1987 when the COIAO was enacted and again in 1995 when the COIAO was amended. On both occasions, the Legislative Council recognised the practical difficulties involved and agreed not to incorporate precise and detailed definitions in the law or introduce written guidelines. Instead, it was agreed that the regulatory system should rely on the OAT to apply the “public standard test” described in section 10 of the COIAO to determine whether an article is “obscene” or “indecent”. The OAT adjudicators, who have different social backgrounds, should be able to apply the standards generally accepted by reasonable members of the community in the classification of articles.
- 2.3.9. On balance, we do not find it desirable or practical to further clarify the definitions of “obscenity” and “indecent”, or to draw up a set of administrative/statutory guidelines on standards.
- 2.3.10. The Judiciary advises that a set of administrative guidelines or standards for the OAT should not be drawn up. It is a fundamental principle that judicial independence must not be interfered with. Even if such guidelines or standards were drawn up, they should not be relevant or binding on the OAT, which is part of the Judiciary.

## **2.4. Database of Previous Classified Cases**

- 2.4.1. During the first round of public consultation, there was public concern about the need for greater transparency in the OAT’s classification rulings. Stakeholders and members of the public also expressed difficulty in understanding the classification standards.

- 2.4.2. At present, the Registrar of the High Court (Registrar) is required under section 20 of the COIAO to maintain a repository for the keeping of articles submitted for classification. The articles in the repository are now made available for public inspection in person upon payment of a prescribed fee. Apart from an article per se and its classification outcome, the Registrar also records the part of the article identified by the OAT during the classification hearings which causes the obscenity or indecency. The Registrar only keeps reasons for the classification decisions made at full hearings as the OAT is not required by the law to give any reasons for interim classifications.
- 2.4.3. We have consulted the Judiciary on the suggestion of building up an on-line database of the classified cases so that the public, stakeholders and OAT adjudicators will readily have access to the prevailing classification standards.
- 2.4.4. The Judiciary does not support the proposal to develop an on-line database. The Judiciary does not agree that an on-line database can address the concern of transparency. Any on-line database can only record the classification results, the cross-reference number and the description of the articles. The content of the articles themselves will not be published because –
- (a) it is prohibited under the law for anybody to publish any obscene articles;
  - (b) indecent articles should also not be published on-line for viewing by the public; and
  - (c) there are copyright concerns for publication of the articles.

The Judiciary also observes that any on-line database will not show the reasons for the interim classification. Thus

any on-line database will be of little or no value for enhancing consistency of any rulings.

2.4.5. We agree with the Judiciary that an on-line database would not work.

2.4.6. We welcome public views on whether the definitions of “obscenity” and “indecent” need to be amended.

## Chapter 3: Adjudication System

<b>3.1.</b>	<b>MAJOR CONCERNS OF THE PUBLIC</b>
3.1.1.	<p>During the first round of public consultation, the Judiciary has advised strongly that the existing institutional set-up of requiring the OAT to serve both administrative classification and judicial functions is highly unsatisfactory. The administrative classification function of the OAT should be removed from the Judiciary, leaving the OAT to deal only with judicial determination. The Judiciary also considers that when dealing with judicial determination, the option of replacing the adjudicator system by a jury system should be explored.</p>
3.1.2.	<p>The separation of the administrative and judicial functions of the OAT is also strongly supported by the legal profession including the Bar Association and Law Society.</p>
3.1.3.	<p>Members of the public did not have much discussion on this fundamental issue raised by the Judiciary and the legal sector.</p>
3.1.4.	<p>For those who commented on whether and how the existing adjudication system should be reformed, their views were diverse. Some preferred to retain the existing OAT while reforming 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.</p>

3.1.5.	<p>The University of Hong Kong (HKU) conducted a Telephone Public Opinion Survey to gauge public's support level on six improvement proposals of the existing adjudication system (i.e. increasing the number of adjudicators in each hearing, drawing adjudicators from specified sectors, establishing an independent classification board for making interim classification while the OAT would consider appeals, drawing adjudicators from the list of jurors, increase the total number of adjudicators and abolishing the OAT). As the support level for each proposal ranged from 40% to 78%, the survey found that the results were not conclusive.</p>
3.1.6.	<p>The public is also concerned about operational matters, as follows –</p> <ul style="list-style-type: none"><li data-bbox="387 954 1337 1368">(a) <u>Representativeness of OAT membership</u> : The self-nomination system for appointment of adjudicators to the OAT can neither ensure that the panel of adjudicators is sufficiently representative nor ensure that the adjudicators have the necessary knowledge to carry out the adjudication work. The number of adjudicators engaged in interim classification hearing or full hearing should also be increased;</li><li data-bbox="387 1424 1337 1648">(b) <u>Consistency in the OAT's classification rulings</u> : An article may be given different classification rulings at different OAT hearings. Articles with similar content and images may also be given different rulings; and</li><li data-bbox="387 1704 1337 1928">(c) <u>Transparency of the OAT in reaching classification rulings</u> : Hearings for interim classification are held in private and the OAT is not required to give reasons for interim classification.</li></ul>

## 3.2. EXISTING ARRANGEMENTS

### Exclusive Jurisdiction of the OAT

3.2.1. The OAT is set up under the COIAO as a specialised 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.

3.2.2. The objectives of the existing set-up of the OAT are –

- (a) to provide a simple and efficient mechanism to deal with the publication of articles under the COIAO. The OAT makes the classification, and the Government is not involved in the classification process at all;
- (b) to offer an avenue for publishers to seek classification before publication in carrying out lawful publication business; and
- (c) to enable, with the inclusion of lay adjudicators in the OAT, public standards of morality to be reflected in the classification process and allow for community participation.

### The OAT's Role in Classification and Determination

3.2.3. 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 hearing*** in public to review the interim classification.

- 3.2.4. Classification by the OAT, including both the interim classification and the classification 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.
- 3.2.5. Under section 29 of the COIAO, where a person disputes over the obscenity or indecency of an article in any civil or criminal proceedings, the court or magistrate concerned shall refer the question to the OAT for **determination**.
- 3.2.6. Determination by the OAT is a **judicial function** as the OAT does so as a court, with the related powers and authority. The determination made by the OAT will be taken as findings of fact by the court or magistrate making the referral.
- 3.2.7. When the OAT is performing the administrative classification function and the judicial determination function, the OAT is in effect operating as two different bodies which possess different powers and are subject to different procedures and rules of evidence.
- 3.2.8. In 2011, the total caseload handled by the OAT was 27 903 articles, including –
- 737 articles for interim classification;
  - six articles for review in full hearings;
  - one article for re-consideration; and
  - 27 159 articles for determination.

The total number of articles submitted to the OAT each year from 2007 to 2011 has dropped from 70 221 to 27 903, and the total number of hearing days of the OAT has dropped from 226 to 180. In 2011, the OAT's administrative classification function accounted for about 3% of the number of articles submitted but amounted to 88% of the total number of hearing day.

## Composition of Membership

- 3.2.9. Under the COIAO, the adjudicators of the OAT are all appointed by the Chief Justice of the Court of Final Appeal. To be eligible for appointment as an adjudicator, the person must be ordinarily resident in Hong Kong and has so resided for seven years; and be proficient in written English or written Chinese. The Judiciary has decided to increase the total number of adjudicators serving the OAT from about 340 in 2010 to about 400 in 2011, and further to about 500.
- 3.2.10. The number of adjudicators to be selected at each hearing of the OAT is prescribed by law. Under section 7(1) of the COIAO, subject to section 15(1A), a Tribunal should consist of the following persons appointed by the Registrar: (i) a magistrate who shall preside; and (ii) two or more adjudicators selected from the panel of adjudicators. And, under section 15(1A), the Tribunal for a full hearing shall consist of the following persons appointed by the Registrar: (i) a magistrate who shall preside; and (ii) four or more adjudicators selected from the panel of adjudicators.
- 3.2.11. In accordance with the relevant provisions, the Registrar, as a matter of normal practice, would appoint two adjudicators for hearings other than full hearings and it is only on exceptional occasions that four adjudicators will be appointed on such occasions. The Judiciary considers that this is in accordance with what is specified in the statute and that any deviation from this practice should be justified. In exercising his statutory power, it is a matter of judicial discretion for the Registrar to decide whether the number should be kept at two or be increased for any specific case. Such judicial discretion should not be fettered.
- 3.2.12. In dealing with administrative classification or judicial determination, the presiding magistrate shall determine any point of law arising. But apart from any point of law,

in the event of any difference between the members of the Tribunal, the decision shall be that of the majority of them or, in the event that they are equally divided, that of the presiding magistrate. This means that the presiding magistrate's view on classification or determination as to whether an article is obscene, indecent or neither may be a minority view.

### **3.3. VIEWS COLLECTED IN THE FIRST ROUND OF PUBLIC CONSULTATION**

- 3.3.1. The views collected in the first round of public consultation can be classified into two categories. The first category related to the fundamental issue of the existing statutory institutional set-up of the OAT. The other category related to the operational issues of the existing OAT, such as the consistency and transparency of the OAT and the representativeness of its adjudicators.

#### **Fundamental Issue of the Existing Statutory Set-up of OAT**

##### **Views of the Judiciary**

- 3.3.2. The Judiciary considers that the present statutory institutional set-up of the OAT under the COIAO is highly unsatisfactory as the OAT is required by law to perform both administrative classification and judicial determination functions. The Judiciary firmly considers that the problems with the existing statutory set-up of the OAT should be addressed by removing the administrative classification function from the Judiciary, leaving the OAT to deal only with judicial determination.

#### **Problems with the Existing Statutory Set-up**

##### **A. Matters of Principle**

- 3.3.3. Firstly, the existing statutory set-up obliges the OAT to perform the administrative classification function, in

addition to the judicial determination function. The exercise of an administrative function by a judicial body may undermine the fundamental principle of judicial independence. It is therefore not appropriate for the OAT, which is a judicial body, to perform administrative duties in respect of the same area, that is, the control of obscene and indecent articles.

- 3.3.4. Secondly, the OAT's administrative classification function may transgress its judicial determination function. The situation often arises that the same article is submitted to the OAT for administrative classification and later also referred by a court to the OAT for judicial determination. It is highly unsatisfactory that the OAT should perform these two distinct functions sequentially under different rules and procedures over the same article under the same set of statutory guidance, even though the panel of adjudicators in the determination proceedings will be different from that in the earlier classification proceedings.
- 3.3.5. Thirdly, there are grave problems with the existing procedures when the OAT is performing the administrative classification function as an administrative tribunal. Even in relation to the administrative classification function, 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 is also dealing with "appeals" against its own decisions.

## **B. Problems of Perception**

- 3.3.6. 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 are therefore of grave concern to the Judiciary. Throughout the years, there have been public criticisms of the functioning of the OAT. Many of these are related to the unsatisfactory statutory set-up of the OAT having both the administrative and the judicial roles.

- 3.3.7. Firstly, there are many allegations and misunderstandings about the operation of the OAT, for example, concerning the inconsistent rulings. The Judiciary considers that this arises mainly because it is difficult for the public to understand why the OAT is not making a court ruling when it is engaged in administrative classification since the OAT is part of the Judiciary.
- 3.3.8. Secondly, the OAT has been criticised for lack of transparency in its interim classification procedures. The Judiciary considers that it is difficult for the public to understand and accept that when the OAT is undertaking the interim classification function, it is operating as an administrative tribunal, to which the principle of open justice in judicial proceedings does not apply.
- 3.3.9. As such, the Judiciary does not agree with any reform option without taking away from it the administrative classification function.

### **Views of the legal profession**

- 3.3.10. The separation of the administrative and judicial functions of the OAT is strongly supported by the legal profession including the Bar Association and the Law Society.
- 3.3.11. The Bar Association agrees with the Judiciary's view that the present statutory institutional set-up of the OAT under the COIAO is highly unsatisfactory. The coexistence of a judicial jurisdiction to determine the nature of an article in connection with extant legal proceedings with an administrative function to classify submitted articles is corrosive of the independence of the tribunal as a judicial body and the administrative classification must at least be removed, if not abolished. A new institutional arrangement for censorship of publications for the protection of public morals should be explored and established.

3.3.12. The Law Society also supports the Judiciary's recommendation that the administrative classification functions of the OAT should be removed from the Judiciary.

### **Views of the Public**

3.3.13. Members of the public did not have much discussion on this fundamental issue raised by the Judiciary and the legal sector. Where discussion took place, public views on whether and how to reform the existing adjudication system were diverse. Some pointed out that the existing OAT set-up has generally served its purpose well by providing the community with an independent and effective regulatory system over the past two decades. They preferred to retain the existing OAT, but reform its appointment system and composition. Others suggested that the administrative classification function should be removed from the OAT and the adjudicators system should be replaced by the jury system. Some recommended abolishing the OAT and inviting magistrates to classify articles.

3.3.14. According to the Telephone Public Opinion Survey conducted by HKU, covering 1 531 respondents, during the first round of public consultation -

- (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 would 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 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.

Members of the public did not have conclusive discussions on whether the adjudication system should be reformed.

### **3.4. OPTIONS FOR TAKING AWAY FROM THE JUDICIARY THE ADMINISTRATIVE CLASSIFICATION FUNCTION**

- 3.4.1. We respect the views and concerns of the Judiciary and the legal sector. To address their concerns, we suggest that the OAT should be revamped. We have set out below two proposed options that would remove the administrative classification function from the Judiciary, and welcome views on the two options for reforming the current OAT institutional set-up.

#### **OPTION 1 : Segregating the administrative classification and judicial determination functions**

##### **A. Details of the proposed set-up**

- 3.4.2. Our consideration of ways to improve the OAT's institutional set-up is premised on the need to retain the merits of the existing OAT system, i.e. simple and efficient process of classification, providing an avenue for publishers to seek classification on their publications in advance and allowing for community participation. It may

be feasible to achieve these merits and to improve the OAT's institutional set-up by establishing a new statutory classification board to be responsible for interim classification, and a new statutory appeal panel to review interim classifications. This will leave the OAT to deal with judicial determination upon referral by a court or a magistrate in a civil or criminal proceeding.

3.4.3. Some preliminary ideas on how the new system may work are set out below –

(a) **Statutory Classification Board**

- (i) Function : There may be a classification board to be set up by law to take over the OAT's administrative function in respect of interim classifications. The classification rulings made by this board may have the same legal effect as the interim classifications made by the OAT under the existing system. Publishers may seek a ruling on their articles from the board prior to publication and may rely on the board's rulings as defence if they are prosecuted despite their compliance with the board's decisions. Any administrative classification decision made by the classification board will be subject to appeal to the statutory appeal panel. The board's decision will also be subject to judicial review;
- (ii) Composition : The classification board may consist of a Chairman underpinned by several Deputy Chairmen who may assume the chairmanship in the absence of the Chairman. The Chairman/Deputy Chairmen will be retired magistrates/judges, or persons with legal or professional background and appointed by the Chief Executive of the Hong Kong Special Administrative Region. The Chairman/Deputy Chairmen will be supported by a pool of

adjudicators with different background. All adjudicators may be appointed by the Secretary for Commerce and Economic Development with a maximum tenure of not exceeding six years. This pool of adjudicators will be different from the pool that may be appointed by the Chief Justice to continue serving the judicial determination function of the revamped OAT (unless a jury system is adopted – as discussed in paragraph 3.4.3(c) below);

- (iii) Hearings : Each hearing for interim classification may consist of a Chairman/Deputy Chairman who will preside over the hearing, with a panel of at least four adjudicators which is larger than the current statutory requirement of at least two OAT adjudicators at each interim hearing; and
- (iv) Operation : The board may classify articles by reference to the factors set out under section 10 of the COIAO. To ensure transparency, it will be required to provide reasons for its rulings. With the problems set out in paragraph 2.4.4, it seems not feasible to establish an on-line database for classification rulings. Expert advice may be sought during the classification process as appropriate. The board should be served by an independent secretariat headed by an executive director to be recruited outside the civil service.

(b) **Statutory Appeal Panel**

- (i) Function : A statutory appeal panel may be established under the COIAO to take over the OAT's administrative function to hold full hearings to review interim classifications. Any person who submits an article for classification or the concerned enforcement authorities may

request the appeal panel to review the result of interim classification at a full hearing. The decisions made by the appeal panel should have the same legal effect as those made by the OAT now under a full hearing;

- (ii) Composition : The Chief Executive may appoint a retired magistrate/judge, or a person with legal or professional background as the Chairman, and about 20 to 30 members with different background to the appeal panel. The maximum tenure of the Chairman and members will not exceed six years;
- (iii) Hearings : Each full hearing held by the appeal panel should consist of the Chairman plus at least six panel members which is larger than the current statutory requirement of at least four OAT adjudicators at each full hearing; and
- (iv) Operation : The appeal panel should operate in the same way as the statutory classification board as described in paragraph 3.4.3.(a)(iv) above. As the workload of the appeal panel may not justify the appointment of full time staff, the executive arm of the Appeal Board may be part-time staff recruited from outside or posted from within the Government.

(c) **The revamped OAT**

- (i) Function : The revamped OAT will remain as a purely judicial body tasked to perform only the judicial determination function. It will no longer have any responsibility for administrative article classification under this arrangement.
- (ii) Composition : The revamped OAT under this arrangement can be led by a presiding

magistrate. The current system of OAT adjudicators can be retained, or an alternative is to replace the OAT adjudicators by a jury system, similar to that adopted in the High Court and the Coroner's Court;

- (iii) Hearings : The OAT can be led by a presiding magistrate, and if a jury system is adopted, the jury for each hearing may consist of seven persons which is in line with the number of jurors on trial as stipulated in the Jury Ordinance and is larger than the present statutory requirement of at least two adjudicators engaged in the determination hearings of the OAT. A juror having served on one or more occasions can be exempted from OAT service within a reasonable period. If the adjudicator system is retained, the current statutory provisions require the Registrar to appoint at least two OAT adjudicators at each hearing of the OAT and it will remain a matter of judicial discretion for the Registrar to decide whether the number should be kept at two or be increased for any specific case (see paragraph 3.2.11 above). If it is considered that the statutory requirement for the number of OAT adjudicators to be appointed should be increased, appropriate amendments to the relevant legislation would need to be made;
- (iv) Operation : If a jury system is adopted, the determination of whether an article is obscene, indecent or neither will be entirely a matter for the jury. The jury will deliver a verdict but will not give reasons for its decision. The role of the presiding magistrate in the OAT should be re-defined to one similar to that of a judge in a court with a jury. Under the system, the presiding magistrate will rule on questions of law,

including the admissibility of evidence, and give directions to the jury on the law and the evidence. The presiding magistrate will not take part in the determination of whether an article is obscene, indecent or neither, but will be responsible for guiding the panel of jurors by appropriate directions to reach a decision in accordance with the law and the evidence; and

- (v) Appeal : Any appeal against the determination of the OAT with a jury may be made to the Court of First Instance. Further appeal to the Court of Appeal may be made where a point of law of great and general importance is involved.

## **B. Considerations relating to the proposed set-up**

- 3.4.4. The revamp in question aims to provide separate bodies to assume different duties and roles so as to address the call of the Judiciary and members of the legal sector for a clear delineation of the administrative and judicial functions of the OAT. This option will address the fundamental problems with the OAT as set out in paragraphs 3.3.2 to 3.3.9 above. It will also help address the concerns about different rulings made by the same body at different hearings in respect of the same article.
- 3.4.5. The separation of the administrative and judicial functions of the OAT is strongly supported by the Judiciary and legal profession including the Bar Association and the Law Society. The public did not have much discussion on this issue. See paragraphs 3.3.13 and 3.3.14 above.
- 3.4.6. Under this option, the Administration would be involved in the constitution of the classification board and appeal panel and the appointment of its members. For an article classification system which is censorship in nature, this option could be viewed by some as compromising the impartiality and independence of the whole system.

Some might see this as an attempt by the Administration to seek to control the value of the society and interfere with the freedom of expression. In fact, during a public consultation exercise in 2000, a number of political parties explicitly objected to the proposition of the Administration having a role in the article classification function, as against the current independent role served by the OAT under the Judiciary system. They were of the view that establishing a statutory body appointed by the Government to classify articles would harm the freedom of press and speech. Given the sensitive nature of classification, this led to suspicions that the Government was seeking to extend its control of censorship.

- 3.4.7. To alleviate such concerns, we suggest that the Chairman/Deputy Chairmen of the Classification and Appeal Boards should be retired magistrates/judges, or persons with legal or professional background appointed by the Chief Executive. See paragraph 3.4.3 above.

### **C. Overseas examples**

- 3.4.8. Adjudication systems with similar independent classification and appeal boards to classify articles are adopted in overseas jurisdictions such as Australia, New Zealand and Germany. In Australia, classification decisions are made by the Classification Board, which is an independent statutory body consisting of a Director, a Deputy Director, Senior Classifiers and a maximum of 20 other members appointed by the Governor-General. Decisions of the Classification Board can be reviewed by the Classification Review Board, which is a part-time body comprising a Convenor, a Deputy Convenor and three to eight other members. A person aggrieved by a classification decision of the Review Board may seek judicial review through the Federal Court of Australia on a question of law.

- 3.4.9. In New Zealand, the Office of Film and Literature Classification (“the Office”), a statutory Government body consisting of a Chief Censor, a Deputy Chief Censor and other classification officers, is responsible for classifying publications. Classification made by the Office may be reviewed by the Film and Literature Board of Review (“the Review Board”), which is a statutory body and consists of nine members appointed by the Governor-General. An appeal may be made to the High Court against a decision of the Review Board on points of law, and the decision of the High Court may be further appealed to the Court of Appeal on points of law. If the High Court/Court of Appeal allows the appeal, the Court will refer the publication back to the Review Board for reconsideration.
- 3.4.10. In Germany, the Federal Review Board for Publications Harmful to Young Persons (“the Board”) is responsible to monitor publications that have severely damaging impact on the development of children and adolescents in society. The Board is established by the Federal Government as an official administrative authority and the chairperson of the Board is appointed by the Federal Ministry for Family, Senior Citizens, Women and Youth. Appeal against a ruling by the Board is made to the administrative tribunals. If the administrative court disagrees with the decision of the Board, it can refer the object back to the Board for reconsideration. However if the administrative court rules that the object is not harmful to minors at all, it can order the Board to follow its decision immediately with no scope for further judgment. If the Board does not agree, it has the right to appeal to the Court of Appeal.
- 3.4.11. Please refer to **Annex 1** for details.

## **OPTION 2 : Abolishing the administrative classification function**

### **A. Details of the proposed set-up**

3.4.12. This option would involve abolishing the classification function altogether and allowing the court (whether called “OAT” or otherwise) to rule direct on the indecency/obscenity of articles. Publishers would no longer be able to seek classification for articles before publication, but they can seek expert/legal advice themselves as to whether they should publish the articles. Such arrangement (direct judicial determination) exists in some overseas jurisdictions and seems to have worked well in their circumstances, i.e. for the court to judge whether an article is indecent or obscene or not.

### **B. Considerations relating to the proposed set-up**

3.4.13. Same as Option 1, the concern relating to the OAT’s institutional set-up as expressed by the Judiciary and members of the legal sector would be addressed if the administrative classification function were to be abolished.

3.4.14. Concerns about the Government being perceived as attempting to interfere with censorship and freedom of expression would not be applicable under this option as the courts would be responsible for ruling on the indecency/obscenity of articles and the Government would not be involved at all.

3.4.15. Although all cases would be put to the court process, it is expected that the impact on the operations of the Judiciary will not be significant. This is because the Judiciary has been objecting to the present arrangements as a matter of principle, and not as a matter of workload.

- 3.4.16. With this option, the Administration would not need to worry about having to first seek the administrative classifications from the OAT - for controversial and likely-to-be contested cases, before deciding on prosecution. This potential time saving could address the concerns of many who have kept pressurising the Government to speed up prosecution.
- 3.4.17. On the other hand, certain sectors of the community would prefer the retention of the existing administrative classification function, which provides a simple and efficient article classification process. Publishers would no longer have the avenue to seek classification in advance to ensure compliance with the law. Parents, teachers and social workers may be worried that there would be a *de facto* loosening of the regulatory regime for obscene and indecent articles. To assure the public that this option would not signal a relaxation of the control regime against the publication of obscene and indecent articles, the Government would step up enforcement efforts and preventive education.

### **C. Overseas examples**

- 3.4.18. The adjudication system described above i.e. allowing the court to judge direct on whether an article is indecent, obscene or not, is adopted in overseas jurisdictions such as the United States, Canada and the United Kingdom. In each of these jurisdictions, there are no separate statutory bodies responsible for classification of publications. In the United States, the relevant trial will usually be conducted with the presence of jury if the charges may result in imprisonment for more than six months. In Canada, the jury will usually not be present for obscenity trials for which the maximum penalty is imprisonment of two years (the threshold for jury trial in Canada is imprisonment of five years).

### **3.5. SYSTEM OF ADJUDICATORS**

3.5.1. Under both Options 1 and 2, the future set-up of the OAT will only require it to deal with judicial determination. The current system of OAT adjudicators can be retained, or an alternative is to replace the OAT adjudicators by a jury system.

#### **A. Considerations of maintaining the existing adjudicators system**

3.5.2. The existing adjudicator system has been in operation for many years. Adjudicators are appointed by the Chief Justice mainly through self-nomination. The Judiciary has decided to increase the total number of adjudicators serving the OAT from about 340 to about 500. Generally speaking, it is a workable system with proven experience.

3.5.3. However, the adjudicators system also has its constraints –

- (a) under the present process of self-nomination, there are concerns that the panel of adjudicators is not sufficiently “representative”, and that the decisions of the OAT are left to a limited group of adjudicators who may not fully reflect the prevailing standards of the community; and
- (b) it is difficult to operate a satisfactory appointment system including identifying suitable candidates and vetting nominations. To come up with an administrative system which can produce a large enough pool of adjudicators representing a wide spectrum of residents is not easy.

## **B. Considerations relating to a jury system**

3.5.4. At present, there are about 690 000 persons on the jury list. The same jury list could be used for the OAT. The jury system has the following advantages –

- (a) the jury system will address the small size and the nomination of the pool of adjudicators, and better reflect the prevailing standards of the community;
- (b) the judicial determination of whether an article is obscene, indecent or neither will be entirely a matter for the jury. The presiding magistrate would only be responsible for guiding the panel of jurors. This would avoid the problem whereby a magistrate's view may turn out to be a minority view; and
- (c) the number of jurors for each hearing could be larger than the present number of adjudicators. It should be an odd number, with decisions by a simple majority. A juror serving on one or more occasions could be exempted from service within a reasonable period. This would avoid the current perception problem that the decisions of the OAT are concentrated in the hands of a limited group of people who are willing to volunteer their service.

3.5.5. Nevertheless, a jury system has the following constraints –

- (a) the adoption of a jury system in the OAT would be both resources and time consuming. Much more time would be required for the presiding magistrate to give directions to the jurors at the hearings. It is likely that the hearings would be lengthened as a result; and
- (b) verdicts would be given by the jurors without reasons.

3.5.6. On balance, the Judiciary recognises that the proposal of a jury system is a debatable one, and the reformed OAT with the administrative classification function removed and the adjudicator system maintained is an acceptable option to the Judiciary. We will take into account views collected in the second round public consultation to determine the appropriate set-up of the future adjudicator system, or to replace it with the jury system.

### **3.6. OAT OPERATIONAL ISSUES**

3.6.1. As mentioned in paragraph 3.4.1 above, to address the fundamental concerns of the Judiciary and the legal sector, we suggest that the OAT should be revamped. We put forward two options that would remove the administrative classification function from the Judiciary and welcome views on the two options. We note that we would require a broad consensus within the community in order to take the proposal forward. It will also take considerable lead time to formulate the corresponding legislative proposals, to initiate necessary legislative amendments and, if Option 1 is adopted, to conduct the administrative work to establish the new classification and appeal bodies. We will take into account views collected in the second round of consultation to determine the best way forward to reform the OAT.

3.6.2. Before we can determine and execute the reform option. There remains a need to uphold the existing system.

3.6.3. During the last round of consultation, the public had offered views on the existing operations of the OAT. The Judiciary's feedback is as follow –

- (a) pending the fundamental revamp of the OAT which requires legislative amendments, the Judiciary,

having regard to the feedback, has been improving the existing operations of the OAT where appropriate (for details, please see paragraphs 3.6.4 to 3.6.7 below);

- (b) any further improvement measures within the existing unsatisfactory framework can neither resolve the fundamental problems of the OAT nor serve as a substitute for fundamental reforms; and
- (c) maintaining the status quo in respect of the institutional set-up of the OAT is a non-option for the way forward. The Judiciary urges the Administration to reform the institutional set-up of the OAT as expeditiously as possible.

### **Representativeness of the OAT**

- 3.6.4. During the first round of public consultation, members of the public in general considered that the representativeness of the OAT should be enhanced. A number of improvement measures have been proposed and those that are favoured by the public include increasing the total number of adjudicators of the OAT, increasing the number of adjudicators at each hearing and selecting adjudicators from different sectors, such as education, art and culture, social welfare, etc.
- 3.6.5. The classification system of the COIAO is mainly based on the moral standards generally acceptable by reasonable members of the community. We note the public's views that the representativeness of OAT should be further enhanced.

3.6.6. Indeed, the Judiciary has introduced the following improvement measures to enhance the representativeness of the OAT and to allow more opportunities for members of the public to serve as adjudicators –

(a) **Increasing the total number of adjudicators to about 500**

Many respondents considered that increasing the total number of adjudicators would allow more people to participate in the adjudication process, while some were concerned that expanding OAT membership might aggravate the problem of inconsistency since each adjudicator would attend fewer hearings and hence might be less able to build up experience and expertise about the classification standards. On the latter concern, we are of the view that consistency in adjudication could be achieved by guidance to be provided by the presiding magistrate and training of the adjudicators. The Judiciary has decided to increase the total number of adjudicators from about 340 in 2010 to about 400 in 2011, and further to about 500. We agree that this is a balanced approach to take and we welcome the Judiciary's initiative in doing so.

(b) **Applying a nine-year rule in the re-appointment of serving adjudicators**

Some adjudicators have served for a long period (over 10 years in some cases), leading to criticisms that the OAT is dominated by a small number of adjudicators. We welcome the introduction of the nine-year rule by the Judiciary which will ensure a steady turnover of adjudicators.

3.6.7. Our feedback on the other propositions for enhancing the operation of the existing OAT system is set out below -

(a) **Appointing adjudicators with specific knowledge and expertise**

Some suggested that the Judiciary should appoint adjudicators with specific knowledge and expertise. However, this suggestion would affect the opportunity of ordinary members of the public to participate in the adjudication work of the OAT, thereby undermining the principle of the current system, i.e. to reflect general public standards of morality through community participation. If this suggestion were to be pursued, a number of issues would need to be thoroughly deliberated so as to achieve a general consensus in the community, for instance, the criteria for selecting the sectors to be involved, the total number of adjudicators from specific sectors versus the total number of adjudicators from different sectors, the number of adjudicators from specific sectors at each hearing, etc.

The Judiciary finds the suggestion unworkable as it is too vague as to how a person should fit into one group of persons with the specific knowledge or expertise or another. When recruiting the pool of adjudicators, extensive information would be required from the persons concerned. Whether this could be justified on grounds of privacy is doubtful. Moreover, the Judiciary considers that the suggestion is legally invalid as the present law does not provide for how the eligible persons are to be classified and it does not prescribe the circumstances under which a particular nomination should be approved or rejected.

We consider it appropriate to maintain the current arrangement for community participation and we believe that an ordinary member of the public should be able to reflect the general public standards of morality in OAT classification work. Moreover, the OAT is allowed to seek expert advice when necessary.

**(b) Increasing the number of adjudicators at each hearing**

Opinion received during the first round of public consultation generally favours increasing the number of adjudicators at each hearing. As described in paragraph 3.2.11 above, the Registrar exercises his judicial discretion to decide the number of adjudicators in accordance with the relevant legislative provisions. Any proposal that the number of adjudicators should invariably be increased for each hearing must be backed up by legislative amendments; otherwise it would be legally invalid. We consider it appropriate to maintain the current arrangement. To avoid fettering the judicial discretion of the Registrar, we also agree with the Judiciary that administrative policies or guidelines should not be drawn up in this regard.

**(c) Training for adjudicators**

At present, a newly appointed adjudicator receives a briefing by the presiding magistrate when he/she attends a hearing for the first time. Considerable views received during the first round of public consultation call for measures to enhance the training of adjudicators in order to improve the quality of adjudication. We share this view and understand that the Judiciary has no objection to continuing to organise regular briefing sessions for

adjudicators to enable them to exchange views on public standards of morality and propriety and to update them. As an incentive for the adjudicators, we will further explore with the Judiciary as to whether an adjudicator can be remunerated through appropriate means for attending relevant briefing or experience sharing sessions as in the case of attending OAT hearings.

While the Judiciary will continue to do what is appropriate and practical in conducting briefing and training of adjudicators, it should also be pointed out that, at times, matters for consideration before the OAT may involve issues of artistic or moral values which by their nature can be controversial, attracting diverse opinions in the community.

- 3.6.8. We welcome public views on the two options for reforming the current OAT institutional set-up.

## Chapter 4: New Forms of Media

4.1.	<b>MAJOR CONCERNS OF THE PUBLIC</b>
4.1.1.	<p>The Internet has become part of our everyday life. Young people in particular are spending more and more time using the services of the Internet. While positive use of the Internet has brought great convenience in searching information, sharing of knowledge, efficient communication, etc., the public are also aware of the negative side of it, in particular, the objectionable materials found in the Internet and their harmful impact on children and youngsters. The views collected in the first round of consultation show that the public are mainly concerned about –</p> <p>(a) <u>The proliferation of obscene and indecent articles on the Internet and the need to protect children and youngsters from their possible harmful impact</u> : The increasing degree of accessibility to and pervasiveness of the Internet has led to the proliferation of obscene and indecent articles. While there should not be undue restrictions on what adults in a free society should be able to see, hear and read, protection of children and young people against obscene and indecent material on the Internet is a matter of public concern; and</p> <p>(b) <u>Adequacy and effectiveness of the existing regulatory regime</u> : Public views are polarised. Industry representatives and discussions in online forums are strongly opposed to any attempt to tighten regulation of the Internet, while many members of the public, particularly parents and educators, support measures to step up regulation.</p>

## **4.2. EXISTING ARRANGEMENTS**

4.2.1. The COIAO regulates the publication of obscene and indecent articles, including those on the Internet. From 1996 when the COIAO was last amended to end 2011, prosecution action has been taken against 37 cases involving publication of obscene articles on the Internet, of which 34 cases resulted in conviction.

4.2.2. The vast volume of transient information transmitted on the Internet poses more challenges to us than ordinary printed materials in terms of investigation and law enforcement. A complaint-driven and co-regulatory approach has been adopted to deal with obscene or indecent Internet content. OFNAA<sup>2</sup> worked 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. Under the Code of Practice, if the content under complaint is indecent, the ISP concerned will request the webmaster to add the required statutory warning notice or remove the indecent article. If the content under complaint is likely to be obscene, the ISP concerned will block access to the article or request the webmaster to remove it. The ISPs may also cancel the account of repeated offenders. OFNAA/ISPs will refer cases involving obscene articles to the Police for follow-up enforcement action.

## **4.3. AREAS WHICH MAY REQUIRE IMPROVEMENTS**

4.3.1. There was extensive public discussion on the regulation of the new forms of media during the first round of public consultation. Some principles are generally supported by the community, i.e. the importance of safeguarding freedom of speech and free flow of information which are Hong Kong's core values, and appropriate protection of

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<sup>2</sup> The corresponding function was performed by the Television and Entertainment Licensing Authority before 1 April 2012.

children and youngsters from the proliferation of harmful materials on the Internet. However, public views received are very diverse on how to strike a right balance between these principles, particularly as to whether statutory controls on the Internet should be stepped up.

### **Regulatory Framework on New Forms of Media**

- 4.3.2. There have been calls for the Government to consider introducing a separate set of legislation to regulate Internet as the nature of the Internet is significantly different from other forms of media. However, the mainstream view received is that the existing arrangement to treat the Internet and other forms of media under the same set of regulatory framework (i.e. under COIAO) is more equitable, and responds well to changing needs of the community. In light of our regulatory experience, we agree that there is neither obvious need nor sound justification to change the status quo.
- 4.3.3. The focus of public discussion on the regulation of the Internet was whether we should step up statutory controls. According to the Public Opinion Survey conducted by the HKUPOP, three quarters of the respondents felt that the regulatory regime for the Internet could be “stricter than it is now”, of which almost half of them opted for “much stricter” control. Another 13% considered the current regulation “appropriate”, while only less than one-tenth felt that the regulation could be “more lenient than it is now”. However, views collected from discussion sessions and written submissions were polarised. The information technology industry and netizens strongly opposed to any tightening of statutory controls, but a large number of members of the public, especially parents and educators, supported measures of more stringent regulation. A key issue discussed was whether ISPs should be mandated to provide filtering service. Apart from commenting on the effectiveness and limitations of filtering service, there were extensive debates on the relative roles of the Government,

ISPs and parents in protecting children and youngsters from harmful materials on the Internet, particularly the extent of reliance on legislative measures to tackle issues relating to social morality and education of children and youngsters as well as the extent of liabilities and social responsibility that should be imposed on ISPs by the law. There were also concerns about the possible impact of stipulating mandatory filtering service on the free flow of information on the Internet.

- 4.3.4. We have studied the experience of various developed jurisdictions in regulating indecent and obscene articles on the Internet (**Annex 1**). All enforcement authorities face the same challenges posed by the large volume of transient information transmitted on the Internet. Users can disguise their identities when distributing information on the Internet, leading to practical difficulties in enforcement action. More importantly, as materials transmitted on the Internet are often extraterritorial in nature, regulating local websites would not serve any useful purpose since users can continue to access obscene and indecent materials through overseas websites, which are not subject to the local laws of the concerned jurisdiction. We also note that while co-regulation with the Internet industry is still a world trend, some developed countries have started to introduce certain mandatory requirements in recent years, e.g. ISPs in Australia and France are required to provide their customers with filtering software or to provide information on its availability; providers of content in Germany must use an age verification system to ensure that children cannot gain access to restricted content. However, the implementation of these measures remains controversial in these countries as there is concern about the effectiveness of the measures, the impact on free flow of information on the Internet as well as freedom of expression. For the age verification system, many have raised concern about the problem of personal data

protection. There are also queries on how it could be effectively implemented.

- 4.3.5. As public views on whether we should step up mandatory controls are very diverse and there seems to be no apparent success stories overseas in this respect, we consider it not appropriate to amend the COIAO at this stage to introduce new statutory controls on the Internet. We should continue to keep track of overseas experience so as to enhance our knowledge about regulatory approaches adopted elsewhere.

### **Provision of Filtering Service**

- 4.3.6. During the first round of consultation, many members of the public, particularly parents and educators, considered that filtering technique provided a useful tool to protect young Internet users from obscene and indecent materials, though most recognised that filtering tools were not without limitations. While the public had very diverse views on whether ISPs should be mandated to provide filtering service to Internet users, there was general agreement on a number of relevant issues. Firstly, parents should be given the choice to decide on whether filtering service should be installed for their children and the level of filtering required. Secondly, to suit different needs of parents, it is desirable to allow the market to develop and provide different filtering software for selection. Thirdly, not many parents are now using the filtering service provided in the market, probably due to the lack of knowledge on the availability, usage and effectiveness of such service. We consider that the Internet industry and community organisations could assist to improve the situation. The Government will continue to make available information on Internet security measures to help parents and others to make informed choices over the type and level of filtering service they wish to adopt.

## **Publicity and Public Education**

4.3.7. There is a consensus in public views received on the importance of publicity and public education and that the Government should join hands with the Internet industry, schools, community organisations and parents to step up publicity and public education work. It is crucial to provide guidance to children and youngsters on how to deal with a range of issues related to prudent and safe use of the Internet, including how to deal with obscene and indecent materials found in the Internet. The public consider it important to help parents, particularly those with low IT literacy, and update them on ways to guide and supervise their children in the safe use of the Internet. We agree that public education is the most effective way to provide guidance to children and youngsters on how to deal with harmful materials they may come across when using the Internet. We also agree that greater assistance should be provided to parents so that they can better keep pace with the development of the Internet.

## **4.4. POSSIBLE IMPROVEMENTS MEASURES**

4.4.1. Having considered the views received in the first round of public consultation and studied the regulatory regimes of overseas jurisdictions (**Annex 1**), we have explored different possible measures to improve the regulation on the new forms of media with a view to safeguarding free flow of information and freedom of expression on the one hand, and protecting children and young people from obscene and indecent materials on the Internet on the other hand.

### **Regular Review of the Existing Co-regulatory Framework**

4.4.2. With the unique nature of the Internet, co-regulation has been considered as the most appropriate approach in most developed places since the 1990's. During the first round of public consultation, there was general support for

the existing co-regulatory arrangements. Due to the nature and mode of operation of the Internet, many recognised that it would be impractical and unproductive to attempt to actively monitor content on the Internet, and co-regulation is largely in line with overseas practices. We therefore consider that the existing co-regulation arrangements should be maintained.

- 4.4.3. The Code of Practice (**Annex 2**) promulgated in 1997 sets out the appropriate action which an ISP should take and details the procedures in dealing with public complaints under the co-regulation arrangement. Television and Entertainment Licensing Authority<sup>3</sup> last conducted a review of the effectiveness of the Code of Practice in 1999. Since the Code of Practice was last reviewed more than ten years ago, we consider that it is time for conducting another review to further improve its operation. The Government may establish a standing liaison group, consisting of information technology professionals, representatives of ISPs, Government representatives, etc., to review the existing co-regulatory framework and keep it up-to-date to meet the changing needs of the community. For example, we may consider developing appropriate guidelines or good industry practices to tackle publication of obscene and indecent articles for reference by ISPs, introducing voluntary labelling system to encourage webmasters to label their websites so as to indicate whether the web sites are suitable for children and youngsters, etc.

### **Filtering Service**

- 4.4.4. Many members of the public consider that filtering software is a useful tool which can be used by parents to block objectionable contents on the Internet for protecting their children. There is a wide variety of web content filtering software and services in the market using technologies such as blacklist, whitelist, keyword, text or

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<sup>3</sup> The corresponding function has been transferred to OFNAA on 1 April 2012.

image analysis to prevent improper content from being accessed. They can support filtering of content from both local and overseas websites. Almost all solutions available in the market are capable of filtering contents with Chinese characters. Through the creation of different user accounts with varying levels of filtering strength (e.g. more relaxed filtering strength or no filtering for parents but more restrictive filtering for children and youngsters) and setting different time restrictions for different Internet user accounts, parents can better manage their children's access to the Internet.

- 4.4.5. However, it must be recognised that filtering solutions have their limitations. Filters downloaded to work on individual computers may slow down access to the Internet or increase maintenance/upgrading workload; filters may block innocuous content (over-block) or fail to block undesirable content (under-block). Some products may provide little flexibility such that users are unable to adjust the filtering criteria to suit their specific needs. Furthermore, a user may circumvent a filter in order to access the Internet without restriction, such as making use of a proxy site service to bypass the filtering.
- 4.4.6. Moreover, filtering solutions cannot meet the needs of everyone, as different people may have different moral standards. Parents would need to make their own decisions on whether they would use filtering service and what to use taking into account their individual requirements and the limitations of the filtering service. It is important for those who wish to use such service to possess adequate knowledge in order to make the necessary decisions.
- 4.4.7. According to the Public Opinion Survey conducted by the HKUPOP in early 2009, only 20% of the Internet users use filtering service regularly. A possible reason for this relatively low usage rate may be a lack of knowledge on the availability, usage and effectiveness of such service.

We consider that a better understanding of parents' awareness of filtering service and adoption of various techniques and approaches should be attained in order to facilitate the Government in formulating measures to effectively help parents to guide and supervise their children on the use of the Internet.

- 4.4.8. The Office of the Government Chief Information Officer (OGCIO) has commissioned a study to gather information on how parents guide and supervise their children on the use of the Internet from August 2009 to March 2010. The findings of this study indicate that parents' knowledge of the Internet was much lower than that of their children. Over a quarter of the parents interviewed were not satisfied with their ability to help their children in the use of the Internet. The study recommends, among other things, promoting parents' Internet knowledge, encouraging their children to have a more balanced Internet usage, and supervising and guiding their children's use of the Internet as early as possible. We consider that it would be in the public interest if parents have more knowledge about the use of the Internet and the filtering service available in the market. We will therefore continue to assist in providing training on the use of the Internet and relevant information on filtering service to parents so as to assist them in supervising and guiding their children on Internet usage.
- 4.4.9. In order to monitor the awareness and views of parents, teachers and other stakeholders on the various techniques and approaches for guiding and supervising their children on the use of the Internet, the Government can conduct periodic surveys. We will share with the industry feedback on filtering service gathered from the follow-up tracking survey, which should be useful for the industry to develop and fine-tune different packages in the market to better meet local needs. We can also share information on filtering technologies with members of the public to enable them to make informed decision on the use of filtering service.

## Enhancement of Publicity and Public Education

- 4.4.10. There is general consensus on the importance of publicity and public education in the first round of public consultation. The Government, schools and families are expected to work together to promote public education.
- 4.4.11. OFNAA is responsible for organising publicity and educational programmes on the operation of the COIAO. The main targets are youngsters and children as they are particularly vulnerable to obscene and indecent articles. In view of the increasing popularity of the Internet, OFNAA has been putting more emphasis on the positive use of the Internet in recent years. Our publicity programmes serve the objectives of –
- (a) promoting public awareness and understanding of the provisions of the COIAO;
  - (b) promoting parental guidance and parents' use of new media; and
  - (c) educating children and youngsters and developing their critical thinking in order to guide them on how to deal with the harmful materials to which they may be exposed.
- 4.4.12. OFNAA has been organising a number of in-depth programmes for educating students on issues related to the COIAO and the positive use of the Internet. Over the past three years, the programmes had reached an average of more than 300 schools and 100 000 students each year. In addition, around 100 talks and workshops had been organised each year to brief parents on the use of the Internet and the availability of different types of filtering solutions, as well as their functions and limitations, with a view to helping parents make a decision in the use of the filtering solutions. We also distributed filtering software free of charge to parents who had such a need

and assisted them to install the filtering software at their homes upon request. An average of about 6 000 parents had participated in these programmes each year in the past three years.

### **Future Strategies on Publicity and Public Education**

- 4.4.13. We will seek to equip youngsters and children with the ability to deal with different situations they may encounter in the Internet world in an appropriate manner. We will also encourage parents to guide and assist their children in the positive use of the Internet.
- 4.4.14. To enhance publicity and public education, we would establish closer liaison and facilitate cooperation with the relevant parties, including teachers, social workers and the ISPs, so as to work out a series of comprehensive and in-depth publicity and public education programmes.
- 4.4.15. We welcome public feedback on the adoption of the proposed improvement measures set out above.

## Chapter 5: Enforcement and Penalty

<b>5.1.</b>	<b>MAJOR CONCERNS OF THE PUBLIC</b>
5.1.1.	In the first round of public consultation, there was little feedback on issues relating to enforcement of the COIAO. Members of the public did not show much concern regarding the division of labour between the enforcement departments.
5.1.2.	As for penalty, the majority of the public supported a heavier penalty in order to enhance the deterrent effect of the COIAO. According to the Telephone Public Opinion Survey conducted by HKU, 75% of the respondents felt that the penalties should be “more severe than now”.
5.1.3.	In recent months, indecent articles published in free newspapers have raised public concerns that the Government should explore ways to speed up the prosecution process and heavier penalties should be imposed on publishers infringing the COIAO.

### 5.2. EXISTING ARRANGEMENTS

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

OFNAA Focuses on the sale of indecent articles in the market by conducting inspections in sales outlets and monitoring publications on sale in the market.

Police	Focuses on the sale of obscene articles in the market and conducts joint operations with OFNAA from time to time.
C&ED	Tackles obscene and indecent articles at entry points and in day-to-day anti-piracy operations.

- 5.2.2. Last reviewed in 1995, the maximum penalty for the publication of an obscene article under the COIAO is a fine of \$1,000,000 and imprisonment for 3 years. The maximum penalty for the publication of an indecent article in breach of the COIAO is a fine of \$400,000 and imprisonment for 12 months on a first conviction, and a fine of \$800,000 and imprisonment for 12 months on a second or subsequent conviction. The court has full discretion to determine the level of penalty in individual cases, having regard to the prevailing law and circumstances of each case.

### **5.3. POSSIBLE IMPROVEMENT MEASURES**

#### **Enforcement**

- 5.3.1. In the first round of public consultation, the general public did not indicate much concern regarding issues relating to enforcement. Therefore we consider it appropriate to maintain the present division of labour among the enforcement departments.
- 5.3.2. However, members of the public recently raised concerns about the distribution of free newspapers containing indecent content. Some expressed views that as newspapers are not classified before their publications, students and youngsters under the age of 18 could not be prevented from exposure to indecent contents therein. Some have commented that OFNAA's existing practice of first submitting an article suspected of contravening the

COIAO to the OAT for classification before taking prosecution action against publisher takes too long. They urged the Administration to take swift prosecution action against publishers who violated the COIAO.

- 5.3.3. The Administration is very concerned about the indecent articles which are published in newspapers, and has been taking prosecution actions against publishers who illegally publish those articles. However, it is important for the Government to uphold the long-standing policy to preserve the free flow of information and safeguard the freedom of speech, while applying the standards of public decency to articles. As such, we consider it appropriate to maintain the existing arrangement where there is no compulsory pre-censorship before the publication of an article. Nevertheless, publishers have a clear responsibility to ensure that their publications are in compliance with the legal requirements. OFNAA will continue to closely monitor indecent contents in newspapers and where necessary, take appropriate follow-up action, including prosecution.
- 5.3.4. At present, OFNAA usually submits an article suspected of contravening the COIAO to the OAT for classification first before taking prosecution action against the publisher. However, if the article clearly violates the COIAO, OFNAA would also consider taking direct prosecution action against the publisher without submitting the article concerned to the OAT in order to speed up the prosecution process. In fact, OFNAA has successfully taken direct prosecution against offenders in the past. In Chapter 3, we invite feedback from the community on two new options to revamp the OAT set-up by removing the administrative classification function from the Judiciary. Subject to public views received in the second round consultation, if Option 2 (paragraph 3.4.12 refers) is the preferred way forward, the administrative classification function would be abolished and enforcement departments would take direct prosecution action against the publishers

that violate the COIAO. On the other hand, if Option 1 (paragraph 3.4.2 refers) is preferred and the administrative classification function is to be retained but taken up by a new statutory classification board, we propose that enforcement agencies should be allowed to maintain the flexibility to take direct prosecution action under the new administrative classification system. This will help address the public concerns that enforcement agencies should take swift prosecution action against publishers of articles which clearly violate the COIAO without submitting them to the new statutory classification board for classification first.

- 5.3.5. Some members of the public also suggested that for publishers who commit offences repeatedly, there should be compulsory pre-censorship of the newspapers/articles concerned in order to prevent youngsters under the age of 18 from being exposed to the indecent contents therein. However, there is a presumption of innocence until proven guilty under the common law principle. It would not be appropriate to impose different regulatory requirements such as compulsory pre-censorship to publishers solely because they have committed offences under the COIAO before. Instead, the prosecuting department will draw the court's attention to offenders' past records and the court will determine the level of penalty in individual cases, taking into account all factors that the court considers relevant under the law.

## **Penalty**

- 5.3.6. During the first round of public consultation, the majority of the public supported a heavier penalty in order to enhance the deterrent effect of the COIAO. Some were concerned that no publisher of obscene articles has been imposed the maximum penalty since the COIAO came into effect and publishers might have taken into account the penalty when calculating their business cost and their main concern was whether they could make a profit from the

publications. There were views that both the maximum fine and maximum imprisonment period should be increased and reviewed regularly to ensure that the deterrent effect is effective and up-to-date. However, some members of the public expressed reservations about increasing the maximum penalty. They commented that if the maximum penalty was set too high, creativity and development of culture and art would possibly be hindered and increasing the maximum penalty might result in self censorship.

- 5.3.7. 75% of the respondents in the HKU Telephone Public Opinion Survey felt that the penalties should be “more severe than now”.
- 5.3.8. In recent months, the distribution of free newspapers containing indecent content also led to suggestions that heavier penalties should be imposed on publishers infringing the COIAO.
- 5.3.9. In order to enhance the deterrent effect against offenders, we propose to increase the maximum financial penalty and imprisonment term under the law as follows -

<b>Offence</b>	<b>Current Maximum Penalty</b>	<b>Proposed Maximum Penalty</b>
<b>Obscene Articles</b>	A fine of \$1 million Imprisonment for 3 years	A fine of \$2 million Imprisonment for 3 years
<b>Indecent Articles</b>		
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

- 5.3.10. The increased financial penalty and imprisonment term should enhance the deterrent effect on prospective publishers and reflect to the court public concern about the gravity of these offences. OFNAA will continue to closely monitor the penalties imposed by the court for a breach of the COIAO, and where necessary, will apply to the court for a review of sentence after consulting the Department of Justice, which is a legal entitlement for all criminal proceedings heard at the Magistrates' Courts. However, we have to stress that the level of penalty imposed by the court on each and every case is a judicial decision made in accordance with the individual circumstances of the case and the prevailing law. We fully respect the court's decision.
- 5.3.11. We welcome public views on the above issues.

## Chapter 6: Views Sought

6.1. The Government would like to seek your views on the following –

**Question 1:** Do you agree that we should maintain the current approach in the COIAO and not to stipulate detailed definitions of “obscenity” and “indecent” in law? Under the COIAO, “obscenity” and “indecent” include “violence, depravity and repulsiveness” and the OAT is responsible for classifying whether an article is obscene, indecent or neither. The terms are not exact science capable of objective proof. It would be extremely difficult, if not impossible, for the public to reach a consensus on the items to be included in the definitions. (see paragraphs 2.3.1 to 2.3.10 of Chapter 2)

**Question 2:** What are your views on the two options for reforming the OAT institutional set-up?

(a) **Option 1 –**

to segregate the administrative classification and judicial determination functions of the OAT. This will be achieved by the establishment of a statutory classification board and appeal panel to take over the OAT’s administrative classification function. The revamped OAT will focus only on the judicial determination function, and the current system of OAT adjudicators may

be retained, or replaced by a jury system. (see paragraphs 3.4.2 to 3.4.11 of Chapter 3)

(b) **Option 2 –**

to abolish the administrative classification function such that the OAT would be responsible for determining whether an article is obscene/indecent or not in criminal and civil proceedings. (see paragraphs 3.4.12 to 3.4.18 of Chapter 3)

**Question 3:** Do you agree that the Government should keep track of local and overseas developments, and establish a standing liaison group, consisting of information technology professionals, representatives of ISPs, government representatives, etc. to review and enhance the existing co-regulatory framework and update the existing Code of Practice to meet the changing needs of the community? (see paragraphs 4.3.2 to 4.3.5, and paragraphs 4.4.2 and 4.4.3 of Chapter 4)

**Question 4:** Do you agree that the Government should conduct periodic surveys on parents and teachers on the awareness and adequacy or otherwise of filtering service to help the industry develop and fine-tune different packages of filtering service in the market? The Government would also disseminate information on filtering technologies to educate the public. (see paragraph 4.3.6, and paragraphs 4.4.4 to 4.4.9 of Chapter 4)

**Question 5:** Do you agree that the Government should continue to work closely with teachers, social workers and the ISPs, etc. to develop comprehensive publicity and public education programmes? (see paragraph 4.3.7, and paragraphs 4.4.10 to 4.4.14 of Chapter 4)

**Question 6:** Do you agree that the Government should increase the maximum penalty under the COIAO to enhance the deterrent effect on prospective publishers (see paragraphs 5.3.6 to 5.3.10 of Chapter 5)

6.2. We welcome public views on the above questions by 15 July 2012.

## **Regulatory Practices in Australia, New Zealand, the United Kingdom, Germany, the United States, Canada and France<sup>1</sup>**

### **Australia**

#### Legislation

The Australian National Classification Scheme is established by the Classification (Publications, Films and Computer Games) Act 1995 (the Classification Act). There is no reference to obscenity and indecency. Under the Classification Code, classification decisions are required to take account of community concerns about:

- (a) depictions that condone or incite violence, particularly sexual violence; and
- (b) the portrayal of persons in a demeaning manner.

#### Classification

The Classification Act provides for different classification systems for films, computer games and publications respectively. There are four classification categories in respect of publications: Unrestricted, Category 1 Restricted, Category 2 Restricted, and Refused Classification (RC). Publication which is classified Category 1 Restricted or Category 2 Restricted is unsuitable for those under 18 years of age and is subject to certain sales conditions. For instance, publication classified as Category 1 Restricted must be distributed in a sealed wrapper whilst publication classified as Category 2 Restricted may not be publicly displayed and may only be displayed in premises that are restricted to adults. In addition, Category 1 and 2 materials cannot be legally sold in Queensland and must have the classification markings displayed on the publications when they are being sold or delivered in other jurisdictions. Publications which fall within the criteria for RC classification cannot be legally imported or sold in Australia.

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<sup>1</sup> This annex of overseas regulatory practices is prepared based on information available to us, which is gathered through various channels such as documents published by overseas organisations on the Internet, or through enquiries made directly to the relevant bodies, etc.

In making a classification decision, the Classification Board and the Classification Review Board (the Review Board) apply criteria in the Classification Act, the Classification Code and the Classification Guidelines (the Guidelines). The Classification Code contains the general principles which form the basis of the Guidelines. The Guidelines describes in more detail the criteria of different elements (such as violence, sex, drug use, nudity, adult theme and coarse language) for each classification category. Both the Code and the Guidelines are determined by the Australian Government, and may be revised from time to time to reflect changes in community standards.

### Enforcement

The enforcement of classification decisions is the responsibility of each Australian State and Territory under complementary classification enforcement legislation.

### Adjudication System

Classification decisions are made by the Classification Board, which is an independent statutory body. It is a full-time body consisting of a Director, a Deputy Director, Senior Classifiers and other members. The Classification Act provides for a maximum of twenty Board members. The Act also requires that the membership of the Board should be broadly representative of the Australian community. All members are subject to a limitation on Board membership of seven years. Classification training is provided to board members upon their appointment. The board members classify films, computer games and certain publications on a daily basis. In addition to commercial materials, the Board also classifies materials submitted by the enforcement bodies.

The Classification Review Board (the Review Board) is an independent statutory body established to review certain decisions of the Classification Board. The Review Board is a part-time body comprising a Convenor, a Deputy Convenor and three to eight other members. The Review Board members are also subject to membership limitation of seven years.

A classification database of decisions made by the Classification Board and Classification Review Board is available on the website of the Australian Government for public access.

A person aggrieved by a classification decision of the Review Board may seek judicial review through the Federal Court of Australia on a question of law.

### Regulation of the Internet

Since January 2000, the Australian Communications and Media Authority (ACMA) has administered a co-regulatory scheme for Internet content. The scheme seeks to protect children from exposure to unsuitable online content and to restrict access to certain Internet content that is likely to cause offence to a reasonable adult.

Internet content is generally classified by applying the 7-tier film classification system. The following four categories of online content are prohibited:

- RC;
- Restricted – Contain Consensual Sexually Explicit Activity (X18+);
- Restricted (R18+) but without restricted access system; and
- Mature Accompanied (MA15+) but without restricted access system.

The co-regulatory scheme for Internet content is implemented through codes of practice developed by the Internet industry. The codes of practice are then registered under the Broadcasting Services Act (BSA). Where ACMA identifies prohibited Internet content that is hosted in Australia, a take-down notice is issued directing the content host to remove the content concerned. For content service providers, failure to comply with a take-down notice may result in a penalty of AU\$11,000 per day; and for internet service providers (ISPs), AU\$5,500 per day for an individual and up to AU\$27,500 per day for a corporation. If Internet content is not hosted in Australia (ACMA only takes action against RC and X18+ for content hosted overseas) and is prohibited, or is likely to be prohibited, ACMA will notify the content to the suppliers of approved filters in accordance with the codes of practice, so that the content is blocked for users of that filtering software.

ACMA adopts a complaint-driven approach in dealing with the Internet. However it is also empowered to initiate investigations of its own accord without receiving a complaint. Under the BSA, content service providers are protected from civil proceedings in respect of anything they have done in compliance with an industry code of practice, industry standard, and notices and directions issued by the ACMA. ISPs are also protected in respect of anything they have done in compliance with an ACMA notice or direction.

Internet contents of R18+ and MA15+ are subject to restricted access system. Credit card check is one way of verifying that the age of a person is over 18 years. However, a content service provider may also choose to rely on other documents such as a valid drivers licence, proof-of-age card, passport or birth certificate in the name of the account holder. For access restricted to users over the age of 15 years, a registration process that includes a self-declaration by the user is generally regarded as satisfactory as Australian residents under the age of 18 years do not carry easily verifiable identification.

### Filtering Services

The codes of practice require ISPs to give customers information about the availability, use and application of Internet filtering software and ensure that customers have the option of subscribing to a filtered internet carriage service.

The Internet Industry Association (IIA) of ISPs, content service providers, hosting service providers and filter suppliers administers an IIA Family Friendly Program. Where an ISP provides Internet access to end users within Australia, the ISP must make available to those end users one or more IIA Family Friendly Filters. Where an ISP seeks to charge for the provision of an IIA Family Friendly Filter, the charge to the end user must not exceed the total cost incurred by the ISP in obtaining, supplying and supporting that IIA Family Friendly Filter.

The IIA will maintain a public register of IIA Family Friendly Filters and all ISPs and mobile carriers who comply with the IIA's Family Friendly Program. The register is accessible from the IIA's Home Page and/or the IIA's Safety Page.

## **New Zealand**

### Legislation

Under the Films, Videos, and Publications Classification Act 1993 (the FVPC 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 the publication is likely to be injurious to the public good”.

### Classification

A publication can be classified as:

- Unrestricted;
- Objectionable except in the following circumstances (i.e., restricted):
  - Restricted to persons who have attained a specified age not exceeding 18 years; or
  - Restricted to specified persons or classes of persons; or
  - For one or more specified purposes.
- Objectionable (i.e., banned).

Statutory guidelines are provided in the FVPC Act.

### Enforcement

Inspectors of the Department of Internal Affairs (DIA) proactively monitor compliance of publications and make prosecution. The Customs and the Police are also enforcement agencies.

### Adjudication System

Under the Films, Videos, and Publications Classification Act 1993, the Office of Film and Literature Classification (the Office) is responsible for classifying publications that may need to be restricted or banned. Publications can be submitted by the Customs, DIA and Police, or referred by courts. Other person can

submit a publication to the Office only with the leave of the Chief Censor.

The Office is a statutory Government body which consists of the Chief Censor and the Deputy Chief Censor. The Chief Censor may appoint classification officers to assist the Chief Censor and the Deputy Chief Censor in carrying out their functions and powers under the Act. Members of the Office work full-time. A member may be appointed for three years and reappointed for another three years.

Training is given on the job. Typically, a new classification officer would be paired with an experienced one for a period of up to three months. In addition, the Chief Censor gives lectures to new staff about New Zealand classification legislation and any other relevant New Zealand law and policy.

Classification made by the Office may be reviewed by the Film and Literature Board of Review (the Review Board), which is a statutory independent body and consists nine members 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. The President of the Review Board is required to hold a practising certificate as a barrister or solicitor for at least seven years. All members work part-time. The Review Board members may be appointed for three years and reappointed for another three years. Every review shall be conducted by the President and at least four other members of the Review Board.

A review can be sought by the person who had submitted that publication for classification under the Act; any party to court proceeding in respect of which that court referral was made; the owner, maker, publisher, or authorised distributor of the publication; and any other person with the leave of the Secretary for Internal Affairs.

Both the Office and the Review Board are required under the FVPC Act to give reasons for classification decisions. A database of classification decisions made by the Office and the Review Board is available on the Office's website for public access.

An appeal may be made to the High Court against a decision of the Review Board on points of law, and the decision of the High Court may be further appealed to the Court of Appeal on points of law. If the High Court/Court of Appeal allows the appeal, the Court will refer the publication back to the Review Board for reconsideration.

### Regulation of the Internet

The Censorship Compliance Unit of the DIA actively monitors the distribution of images of child sexual abuse on the internet. Other than that, the DIA generally adopts a complaint-driven approach and focuses mostly on online child pornography. The Internet is also self-regulated where the Internet Service Providers Association of New Zealand operates a voluntary code of practice, which is without sanction. The code of practice requires adult content to be accompanied by on-screen warnings on the home or title page before the adult content is viewed; and / or managed by subscription enrollment to exclude under-age subscribers. It also encourages industry players to provide information on availability of filtering software.

### Filtering Services

A filtering system (called Digital Child Exploitation Filtering System) to block websites that host child sexual abuse images is available to ISPs in New Zealand for their use voluntarily. The system is operated by the DIA in partnership with ISPs, and focuses solely on websites offering clearly objectionable images of child sexual abuse. Anyone trying to access websites offering child sex abuse pictures will receive a screen message saying the site has been blocked because it is illegal.

## **The United Kingdom**

### Legislation

Under the Obscene Publications Act 1959 and 1964 (the OPA), an article shall be deemed obscene if its effect is to deprave and corrupt persons who are likely to read, see or hear the matter contained or embodied in it.

The Protection of Children Act 1978, prohibits the taking, making circulation and possession with a view to distribution of any indecent photograph of a child under 18. Section 160 of the Criminal Justice Act 1988 also makes the possession of indecent images of children an offence.

There is no classification system for publications and Internet content in the UK, but there are classification/rating systems for films and video games.

### Enforcement

The OPA makes it an offence to (1) publish an obscene article whether for gain or not; or (2) have an obscene article for publication for gain (whether gain to himself or gain to another).

The Police is responsible for enforcement related to publications, and adopts a proactive approach.

### Adjudication System

There are no separate statutory bodies responsible for classification of publications in the United Kingdom. Whether a publication is obscene is to be determined by Court.

### Regulation of the Internet

In 1996, the Internet Watch Foundation (IWF) was formed consequential to an agreement between the UK Government, the Police and the Internet industry. The IWF is an independent charity tasked to receive complaints on online illegality, the majority of which entails child pornography.

The IWF establishes a “notice and take down” mechanism in its voluntary code of practice. If the content is hosted in the UK, the IWF notifies UK ISPs / hosting companies of any illegal content found on their servers, and requests the content to be removed. It will pass the information to the Police, who may seek to bring criminal charges against the person responsible for the content.

In addition, some ISPs joined the “Cleanfeed” scheme voluntarily and block access to certain overseas websites. For example, British Telecom employs the blacklist maintained by IWF to fend off illegal overseas websites.

The e-Commerce Regulations 2002, which was introduced after the EU e-Commerce Directive, absolve an ISP from any criminal or civil liability for the material it transmits provided that it acts expeditiously to remove or render inaccessible any material that might give rise to such liability as soon as it becomes aware of its presence.

To further protect children from online risk, the UK Government created the UK Council for Child Internet Safety (UKCCIS) in September 2008, bringing together 170 organisations and individuals from government, industry, law enforcement, academia and parenting groups. In consultation with UKCCIS, four major ISPs launched a new code of practice on parental controls in October 2011, whereby new customers will be presented with an enforced choice of whether or not to activate parental controls.

### Filtering Services

The IWF produces a list of Internet addresses containing potentially illegal child sexual abuse content hosted overseas. This list is made available to IWF members under licence so that they can develop technical solutions to prevent their users from being inadvertently exposed to this type of content.

## Germany

### Legislation

Obscenity is regulated under Section 184 of the German Criminal Code. The law mainly governs distribution of pornographic writings to minors and of child pornography. "Writings" also include audio and visual recording media, data storage media, illustrations and other images. The law is enforced by public prosecutor's offices and local police.

### Adjudication System

Under the Protection of Young Persons Act, data media and telemedia which may have a severely damaging impact on the development of children and adolescents in society shall be registered by the Federal Review Board for Publications Harmful to Young Persons and included in a List of Publications Harmful to Young Persons. Distributors of a listed medium are not permitted to sell, rent out, advertise or even present this object in public or to broadcast it, except to people of legal age only.

The Board is established by Federal Government as an official administrative authority. Media monitored by the Board include videos, DVDs, computer games, audio records, CDs and print media. Formal requests for review to the Board may be submitted by the Federal Ministry of Family, Senior Citizens, Women and Youth, the Central State Agency for Media Protection of Young Persons and youth welfare offices at state and local levels.

The Board consists of one chairperson appointed by the Federal Ministry for Family, Senior Citizens, Women and Youth, one official appointed by each of the State governments as well as additional officials appointed by the above Federal Ministry representing the following sectors :

- (a) creative and performing arts;
- (b) literature;
- (c) book trade and publishing;
- (d) suppliers of data media and telemedia;
- (e) non-government bodies of youth welfare;
- (f) bodies of public youth welfare;
- (g) school teaching; and

- (h) christian churches as well as Jewish and other religious communities holding the status of a public-law corporation.

Action or appeal against a ruling by the Board on listing of a medium or rejection of an application for delisting shall be made to the administrative tribunals. If the administrative court disagrees with the decision of the Board, it can refer the object back to the Board for reconsideration. However if the administrative court rules that the object is not harmful to minors at all, it can order the Board to follow its decision on delisting immediately with no scope for further judgement. If the Board does not agree, it has the right to appeal to the Court of Appeal.

### Regulation of the Internet

The Youth Protection Act 2002 and the Interstate Treaty on the Protection of Minors and Human Dignity in Broadcasting and Telemedia (the Interstate Treaty) set out the framework on Internet regulation. A government body, KJM (The Commission for the Protection of Minors and Human Dignity), was established to accredit self-regulatory agencies to carry out regulatory work. FSM (The Association for the Voluntary Self-Monitoring of Multimedia Service Providers) has been authorized as the self-regulatory agency.

The Interstate Treaty provides three distinct categories of Internet content:

- Illegal content: forbidden in all circumstances (e.g. child pornography, Holocaust denial, incitement to hatred, violations of human dignity).
- Restricted content: adult content (e.g. pornography and gambling) should only be made available to adults in closed user groups behind a strict age verification system.
- Harmful content: content which may harm minors (e.g. violent games) and should be made available only in a way that prevents, or substantially impedes, children's access via a basic age verification system through ID card, credit card, or sometimes web cam checks.

Both KJM and FSM may issue take-down notices to domestically-hosted illegal content. In addition, KJM may impose financial sanctions on persistent offenders. Information about internationally hosted content is passed to INHOPE (The Association of Internet Hotline Providers in Europe).

In Germany, people under 18 are not allowed access to restricted content. Providers of such content must use a strict age verification system to ensure children cannot gain access. Strict age verification implies a one-time physical identification, where the identity is checked against a valid identity card, either at the post office, at the point of sale in mobile phone shops, or at lottery offices.

## **The United States**

### Legislation

Obscenity is regulated under US Code Title 18 Chapter 71. There is no definition of obscenity and indecency. The court applies the Miller test to determine whether a work is obscene:

- Whether an average person would find it appeals to the prurient interest;
- Whether it depicts or describes sexual conduct in a patently offensive way; and
- Whether it lacks serious literary, artistic, political or scientific value.

There is no classification system for publications and Internet content, but there are classification/rating systems for films and video games.

### Enforcement

The US Attorneys are tasked with enforcement of the Federal obscene law. They work with the Federal Bureau of Investigation, Postal inspectors and Customs officers to enforce the law.

### Adjudication System

There are no separate statutory bodies responsible for classification of publications in the United States. Whether a visual depiction of any kind is obscene is to be determined by Court.

### Regulation of the Internet

There have been some legislative activities to address online child safety and access to objectionable materials on the Internet. For example, the Children's Internet Protection Act 2000 requires schools and public libraries receiving federal funds on communications and technology to install Internet filtering software. Failure in doing so may render further funds being withheld. However, this law allows libraries to disable filters for an adult library user when requested to do so by the user.

Since 1990's, most legislative attempts to legislate in the area of protecting minors from accessing harmful materials online have been struck down by the US Supreme Court and various lower courts as a violation of freedom of speech, including the Communications Decency Act of 1996 and the Child Online Protection Act of 1998.

It was reported that the US Government places their online focus on child pornography.

### Filtering Services

Filtering solutions are provided by the private sector. There are no legal requirements regarding filtering solutions in the United States.

## **Canada**

### Legislation

Obscene matters are regulated under S.163 of the Criminal Code. Obscene publication is “any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence”. Whether there is undue exploitation is determined by reference to community standards.

There is no classification system for publications and Internet content, but there are classification/rating systems for films and video games.

### Enforcement

The Police and the Customs (Canada Border Services Agency) are responsible for enforcement, which is generally complaint-driven.

### Adjudication System

There are no separate statutory bodies responsible for classification of publications in Canada. Whether a publication is obscene is to be determined by Court.

### Regulation of the Internet

Canada seeks to promote self-regulation of the Internet and adopts a complaint-driven approach regarding online obscenity. The main focus is on child pornography which is actively monitored by the police. Organizations such as the Canadian Association of Internet Providers (CAIP) that represent Canada’s independent ISPs, have helped to develop standards for the industry, including a code of conduct. Under the code of conduct, members pledge to comply with all applicable laws and in particular, will not knowingly host illegal content. The court may issue take-down order to mandate ISPs to take down illegal content however, as ISPs do not normally have requisite knowledge of content on their networks, they are normally not held liable for illegal content placed on their networks.

## Filtering Services

The Canadian Coalition Against Internet Child Exploitation (which consists Cybertip.ca, ISPs, federal and provincial governments, and law enforcement agencies) organizes the Project Cleanfeed Canada that maintains a regularly updated list of specific foreign-hosted Internet addresses associated with images of child sexual abuse. Filters from participating ISPs would automatically prevent access to those addresses on the list.

## **France**

### Legislation

The Penal Code establishes a general prohibition to produce or distribute content which is violent, pornographic or which seriously violates human dignity, whatever the means, where the message may be seen or perceived by a minor.

### Regulation of the Internet

The Association of Internet Service Providers in France (AFA) created the “Point de Contact” in 1998 to offer advice to parents and children on Internet protection issues and on using filtering software. It works in partnership with the industry, the Police and the Government. For domestically hosted content, depending on the characteristics of the content, it will inform the content hosts and/or the enforcement authorities. Content hosts may be required to take down content. Internationally hosted content is dealt with by the use of filtering software.

The French Government legally obliged ISPs to provide their customers with filtering software (at a charge or simply to provide information on where filtering software may be available). The law was thereafter reinforced by an agreement between the Ministry of Family Affairs and the AFA, committing ISPs to supply their subscribers with filtering software for free, if so requested by subscribers. As a result of this agreement, ISPs have offered free parental control software with three different profiles - one for children, one for teenagers, and one for adults since April 2006.

**Code of Practice**  
**Practice Statement on Regulation of Obscene and Indecent Material**

**Preamble**

1. 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 License granted by the Communications 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 Office for Film, Newspaper and Article Administration (OFNAA);

“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). A summary of main provisions of COIAO is at Appendix I.

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 OFNAA if they have doubt on the classification of material on the Internet.

12. The HKISPA will provide OFNAA 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). The tagging technology of the ICRS Project operated by HKISPA should be particularly promoted as one of the options among others.

14. Members will inform parents and other responsible persons of various options and precautionary steps they can take, including the content filters of the ICRS Project operated by HKISPA, to help protect persons under the age of 18 years from 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, OFNAA or HKPF.

17. A Member will notify the HKISPA in writing upon receipt of a complaint by a member of the public, OFNAA 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, OFNAA 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, OFNAA 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 co-operate 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 OFNAA 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 OFNAA 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 seek OFNAA's assistance to 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 OFNAA with a monthly report on the number of complaints received, number of complaints resolved and the number of outstanding complaints.

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

**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).

## Appendix II

### Monthly Report on Action Taken by ISPs in respect of Indecent and Obscene materials on Internet

Month : \_\_\_\_\_ Year : \_\_\_\_\_

Name of ISP : \_\_\_\_\_

<b><u>Summary :</u></b>	1.	No. of cases handled :	
	2.	No. of cases resolved :	
	3.	No. of cases pending :	

#### **Details of Anomalies & Actions taken :**

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