

# Review of the Control of Obscene and Indecent Articles Ordinance

## Focus Group Summary Report – Culture and Arts

Date: 4 Nov, 2008  
Time: 1800-2030  
Location: Room 229, 2/F, Murray Building, Garden Road, Central, Hong Kong

### Attendants:

Mr. Ko Chi-sum, Clifton	Founder, Spring-Time Stage Productions
Mr. Louis Yu	Chief Executive Officer, Hong Kong Arts Development Council
Mr. Lee Lik-chee	Director, Lee Lik Chee Production Company Limited
Mr. Yeung Chun-yiu	Consultant, Commercial Radio
Mr. Chan Tsz-him	Editor, Fleur des Lettres

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- I. A briefing on the consultation documents of the Review of the Control of Obscene and Indecent Articles Ordinance (COIAO) by Mr. Gregory So, Under Secretary for Commerce & Economic Development of HKSAR. He also invited all attendants to express their opinions.
  - II. Five attendants shared general comments towards COIAO:
    - An open attitude is essential;
    - Artistic work is a portrayal of artists' feelings and perceptions towards different objects, it reflects social circumstances from a certain point of view and it should not be viewed as a violation to its educational function;
    - From the cultural point of view, a adjudication-free proposal would be the most ideal, it is also worthwhile to research for a proposal that

guarantees complete freedom; it certainly exclude portrayal of pedophilia, texts and illustrations of serial killers; however, since protection of certain people groups in the society is essential, complete freedom is also impossible. Contradiction is inevitable;

- To protect freedom of creativity, the government can consider whether certain article is created purely to stimulate sexual desire or to convey an overall message with the whole piece of work. For example, an artwork of cupid carries certain aesthetic values and convey a particular ideology; nudity does not necessarily mean sex, the OAT tends to have these kinds of assumptions, which needs to be reconsidered;
- Publicity and education should be implemented side-by-side with the review of ordinance to ensure sufficient education of the public;
- The name of COIAO should be revised as the word ‘control’ might be too sensitive and should be deleted. If balance and protection of youth is the objective of review, the ordinance can be renamed as ‘Classification of Obscene and Indecent Articles Ordinance’ in order to improve the impression of the public;
- The youth should also be more open-minded; too much restriction would lead to oppression and thus opposition;
- There is no adjudication on plays and stage drama. Play-artists in Hong Kong are satisfactory with the freedom of expression allowed for the exception of arts; attendants hoped that the review would not lead to further restriction on the current situation; the ordinance should strike a balance between norms and abnormalities, i.e. to pay sufficient attention to both, so that creativity would not be sacrificed for the ease of operation.

III. Suggestions for the review raised by the attendants are summarized as follows:

### **Opinions raised and areas of concern:**

#### 1 Definition

- 1.1 The issue of definition deserves the first priority and it should be clearly defined; in the past 20+ years, the definition has been so ambiguous that frontline member faced difficulties in execution;

- 1.2 There is no measurable and objective standard for arts, yet public discussion can already yield trustworthy results;
- 1.3 Articles that are suitable for people above 18 should enjoy a looser definition and it should not be narrowed;
- 1.4 *Possibility of adjudication exemption*
  - 1.4.1 Artists tend to emphasize issues like the exception of arts, whether arts are morally obscene and indecent or not etc. When controversies of this kind are raised, opinions would always stressed that reference should be taken to other artwork. Moral standards of arts have been changing from time to time, and changes always occur first in the sphere of arts and culture; therefore, when drafting and implementing COIAO, the government should consider how the exception of arts should collaborate with the change of moral standards. Attendants also noticed that 2.4(b) of “1. Definition” of the consultation papers stated “publication of an article may be considered to be intended for the public good if it is in the interests of science, literature, art or learning, or any other object of general concern should be incorporated”, they wondered how the clause be phrased;
  - 1.4.2 If exemptions (exemptions for arts, science etc) can be provided sufficiently in the mechanism, it will convey a message to the public that the government values all ideas and the benefits of the cultural industry, it is going to be advantageous to the society’s ways of thinking and creativity;
  - 1.4.3 Apart from culture and arts, the government should also consider to provide exemptions for news, science, arts and academics because those are areas of public concern; but it is not good to include too many exemptions in a legislature;
  - 1.4.4 Agree to supplement Section 10 of COIAO by including the factors stated in Section 28, i.e. the OAT should consider whether certain article is beneficial to science, literature, arts, academic or other areas of public concern when making judgment, the current ordinance cannot strike a balance between various factors, the attendants hoped that the ordinance would not increase the restriction in the future;

## 1.5 *Majority vs. minority*

- 1.5.1 There are different moral standards in the society. If the articles are only distributed to the minority of public, they might have the same set of moral standards; discussion about the majority and minority often occur when considering the COIAO. The paragraph “1. definition” of the consultation paper mentions that the OAT should regard to Section 10 of COIAO and consider the following 5 factors when determining whether an article is obscene or indecent: (a) standards of morality generally accepted by reasonable members of the community; (b) the dominant effect of the article as a whole; (c) the class or age of the likely recipients; (d) the location at which the article is displayed; and (e) whether the article has an honest purpose; however, the number of recipients is not mentioned in this section. In the arts and culture sector, the recipients are obviously minority, hence its modes of distribution and volume of production is also for the minority only, the current COIAO does not specify those factors, i.e. the difference of making 500 copies and 5 million copies of a book, it is advised that COIAO should clearly specify the factor of recipients’ numbers;
- 1.5.2 The COIAO should consider the formats of putting certain factors into practice, however, if an article is identified to be obscene, its scope of distribution shall make no difference;
- 1.5.3 As for the number of recipient, the attendants stated that it would be difficult to specify the number in the ordinance as it is hard to execute; for instance a publication might be allowed to release at a number of 50,000, yet no one would know even if the publisher issues another 50,000 copies in secret; also certain movies might be shown only in one cinema, yet if it’s being shown for one whole year, then anyone can enter and watch it;

## 2 Adjudicating system

- 2.1 Adjudication is essential, maybe the government should consider including exemption clauses in the ordinance;
- 2.2 The present ordinance allows a chance for self-defense for the defendant if certain article is identified as obscene or indecent by OAT, if the classification of articles would be modified on the grounds of its artistic and

literal nature, it might be too late; therefore, attendants hoped that the OAT can consider about cultural and artistic values when classifying the articles, an article should not be classified as obscene or indecent if it contains such values;

- 2.3 The current system allows one judge and two randomly chosen adjudicators to form the tribunal, but there are worries that they may not be able to judge appropriately with reference to the special needs of arts, science and education; hence it is suggested that the tribunal members should be professionals of different areas. Such requirements might complicate the qualifications of tribunal members, reference can be taken to the Hong Kong Arts Development Council: the council has difficulty in defining artwork and experts of arts; nevertheless, after over ten years of experience, the system now works effectively. Although the council has faced numerous challenges and doubts in the process, it can be taken as a reference when considering who is qualified as an expert to adjudicate artworks;
- 2.4 There should be some exceptions for arts and such articles should not be judged with ordinary standards; in the current adjudicating system, there should be somebody defends for arts and put such factors into consideration during the process;
- 2.5 Various modes of adjudication can be considered. E.g. two levels of adjudication, the first level is the general public, while the second level is experts of science, literature and arts; they can judge according to the nature of the article and decide on the final judgment; otherwise, experts opinions can be counted proportionately at the first level, e.g. 40% of the score, while the remaining 60% is determined by the general public. This may help strike a balance in making judgment. However, there are 70,000 articles submitted for adjudication in last year alone and it might not be practical to adjudicate from the point of view of arts;
- 2.6 TELA can form an expert groups to advise on the articles and determine whether such articles needed to be further submitted to the OAT for adjudication. The government should ensure that the experts opinions are being heard, if they are put together with the general public during adjudication, it would be difficult to grant sufficient weight to their opinions; public adjudication can be adopted for the first level and determine whether a second adjudication is needed, exemption will be exercised in the second adjudication;

- 2.7 Agree with Section 13 of COIAO which authorizes the law enforcing departments and the Secretary for Justice to submit articles to OAT for classification; while publishers can submit their own articles to OAT as well. To expand the current system will increase workload of the OAT and so as the pressure of the tribunal members. Furthermore, a magazine will target at another magazine and submit each issue of that magazine to the OAT for adjudication, resulting in a never-ending cycle;
- 2.8 The article should be first classified then prosecuted, if certain disc has already been identified as a sex CD-Rom, it should be treated exceptionally;
- 2.9 The adjudicating principle is ambiguous, a set of clear adjudicating standards should be established for the OAT members;
- 2.10 Each individual has their own set of standards, the government can considered to modify the combination of OAT from having 1 judge and 2 adjudicators to 1 judge and 4 adjudicators in order to have a more balanced set of adjudicating standards;
- 2.11 Some articles that are adjudicated as class III may not be obscene, it will affect the artists who might have got hold of those articles; pre-distribution submission is recommended so that normal sales will not be hampered; it is not recommended to blur and cover certain parts of the article, the whole page should be taken away when necessary;

### 3 Classification system

- 3.1 We should maintain the exemption for arts and at the same time protect the youth below 18 from getting in touch with obscene and indecent articles, therefore, there should be a classification system identifying different classes of articles;
- 3.2 Oppose to include one more subcategory of ‘only suitable for people 15 or above’, the definition and standards now being discussed are already very ambiguous, the situation will only be more chaotic if one more category is added.

### 4 New Media

- 4.1 Oppose compulsory provision of filtering software by the ISP by means of legislation. If parents see the needs of it, they can purchase the filtering

software and make use of them even now, those software is available in the market now and it is part of the market, the parents should be free to choose whether they want to buy it or not, compulsory provision is unnecessary;

- 4.2 Oppose adjudication of internet information. There are several tens of thousands of articles submitted for adjudication in last year alone, if the OAT has to adjudicate also the information on the internet, the amount would be mushroomed, furthermore, no public report is required after judgment, it will only draw even more doubts about its judging principles, there is no effective adjudicating system that can block the circulation of obscene and indecent articles on the internet;
- 4.3 Meanwhile, adjudication of internet information would harm 公眾的知情權 and hinder circulation of knowledge; if it is a must for the government to do so, they should at least disclose the websites and information that are being filtered;
- 4.4 Law enforcement on the internet requires abundant resources, the legislation should be done according to the resources available.

## 5 Enforcement

- 5.1 Clear enforcement principles should be established for frontline executors;
- 5.2 It is useless just to classify the articles, since people under 18 can still purchase them easily; in order to improve the control of sales, the attendants recommended to allow sales of articles that are suitable for people over 18 only in venues that only permit the entry of people over 18, e.g. amusement game center and the Jockey Clubs etc.

## 6 Penalty

- 6.1 Penalty of offenders should be more heavy-handed;
- 6.2 The current penalty is too lenient. The ordinance now allows company to submit articles for adjudication before distribution, most contents of printed matters are not urgent or journalistic and require immediate publication. If in doubt, they can send it for adjudication voluntarily. Those who do not submit articles for adjudication before distribution is trying to exploit the grey areas of law, therefore, those who did not do so should bear the fruits of their own decision and the penalty should be raised;

- 6.3 Penalty on internet offenses should not be too heavy because the traditional penalty against the distribution of obscene articles mainly targeted at commercial agencies or criminal organizations which are profit-making, however, most internet users are not non-profit-making, individual users might be simply sharing information with the others without the intention or ability of making any profits at all; if users are making profits by such doings on the internet or distributing harmful messages like pedophilia, incest, harmful to public security of HK or drug trafficking, the penalty should be heavier;
- 6.4 The two extremes of ordinance violation should be widen and so as the penalty, the number of recipients should be one of the consideration when determining the penalty, e.g. penalty should be heavier for medium like newspaper and websites which recipients are over 200,000-300,000; while those who only distribute 1-2 photos on the internet with about 10 page views should receive less punishment; profits should be another consideration, those who do not gain profit from doing so should receive less penalty; those who violates category III with a wide distribution and great profits should receive extra punishment.

## 7 Publicity and Public education

- 7.1 Loopholes are unavoidable in law enforcement and prosecution, thus education and publicity is the most important thing to do;
- 7.2 The government should strengthen the educational campaign so that the parents would be aware of the existence of filtering software and will make their own decision to purchase and use;
- 7.3 The busy parents in Hong Kong may not have time to take appropriate measures to protect children from receiving obscene and indecent information on the internet, the government should teach them about ways of handling such situations and enhance communication between parents and children;
- 7.4 Lots of people assumed that they could do whatever they want on the internet without the risk of being prosecuted, publicity and education of this aspect should be fortified.