

Review of the Control of Obscene and Indecent Articles Ordinance

Focus Group Summary Report – Legal

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Time: 1830-2030

Location: Room 229, 2/F, Murray Building, Garden Road, Central, Hong Kong

Attendants:

Mr. Rimsky Yuen	Chairman, Hong Kong Bar Association
Mr. Wong Kwok Kee	Committee member, Criminal Law and Procedure Committee, The Law Society of Hong Kong
Mr. Eric Cheung Tat-ming	Assistant Professor, Faculty of Law, University of Hong Kong
Mr. Chong Yiu-kwong	Chairman, Hong Kong Human Rights Monitor

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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. General comments of the attendants concerning the review of COIAO:

Opinions raised and areas of concern:

1 Definition

- 1.1 Attendants believed that a clear guidelines would serve the purpose of definition; the more we define, the more ambiguities would there be. Unless the government can educate the public about the concrete definitions, it is unnecessary to extend the current definition;
- 1.2 Other attendants believed that it is better to maintain the flexibility of the existing ordinance. No matter how the definition is amended, certain extent of flexibility should be preserved. It would be difficult even for the government to explain the actual standards of the best-written ordinance. Working definitions must be established by the government and the

transparency should be enhanced, e.g. to list out the grounds of each case judgment, so that the public would be able to determine how the definitions are being used and to understand the change of social standards as time goes by. However, the existing standards are way too ambiguous and there are rooms for clarifications. The government can refer to the previous case decision and the court's interpretation of the judgment in order to further amend the definition of the ordinance;

- 1.3 A set of guidelines would enable the public to understand what is obscene
- 1.4 Attendants pointed out that with a clear definition, the pre-publication adjudication can be omitted because some people might exploit the system for publicity –articles that are regarded as obscene are much more attractive in the minority markets, and the ordinance might end up bringing undesirable effects despite its good intention; the government should spend most of its resources on public education instead of the pre-publication adjudication;
- 1.5 If the definition of ordinance is clarified, the existing adjudication system can be changed;
- 1.6 Ordinances are supposed to be clear and specific, but the current ordinance isn't clear enough. The government should provide the public with overseas examples during or before the 2nd consultation, e.g. the definitions of ordinance, execution system, courts' comments and guidance for the current system and case law from places like Canada and other European countries, it will be the beginning of the new system;
- 1.7 Some attendants stressed the considering factors stated in Section 28 of the ordinance, i.e. whether the article is in the interests of science, literature, art etc. Members believed that those purposes are important in consideration and should be included in the definition of Section 10. When adjudicating the tribunal members should also consider these factors. Although the Section 28 are the defenses, those factors should be put into consideration during the first round of adjudication;
- 1.8 Other attendants pointed out that Section 10 and 28 are talking about two different issues. Section 10 identifies whether an article is obscene/indecent or not, while Section 28 concerns that act of publishing. Different circumstances would lead to different results even for the same article. He stated that by separating it into two sections, people can first understand whether an article is indecent/obscene or not, then consider if the act distribution is within the specified exemption area and thus acceptable;
- 1.9 An attendant believed that the prosecutor needs not to consider the background and purpose of the publication as it should be the defense of an defendant, while another group member objected as the purpose of publication is one of the considering factors when judging the indecency and obscenity of an article.

2 Adjudication System

2.1 *The OAT system*

- 2.1.1 In 2.3 of the consultation papers, it suggested that 20-30 citizens should sit in the new independent adjudicating committee. Some

attendants believed that the number of people is too few. Members suggested that it should at least adopted the existing system of over 200 people or to further expand it, e.g. establish a jury system. In short, more citizens should take part in the adjudication system and the tribunal should include youth and professions of mass media in order to reflect changes of the society;

2.2 *The insufficiency of the existing adjudication system*

- 2.2.1 The existing adjudication system is not fully utilized now. The OAT does not fully comply with the terms of Section 10, e.g. they are making judgments without understanding the main target of the article. An article might be determined as obscene or indecent as long as the sex organ is shown. Once this problem is fixed, the situation will be improved;
- 2.2.2 The OAT is not transparent enough now. A hearing decision should be supported by full evidence instead of some vague statements. Previous case laws are valuable references, however, very few people will actually go to the case law library and study them and it would be difficult to get hold of those documents. If this can be improved, those who are not satisfied with the judgment of the OAT can challenge its decision according to the previous cases;

2.3 *The administration and judicial function of the adjudication system*

- 2.3.1 It is chaotic to have a judiciary handling both administrative work and a judicial classification, but other problems would arise if the administration is separated from the judiciary;
- 2.3.2 Some attendants stated that the existing administrative classification system carries three objectives: 1) The publisher can be certain about the classification before releasing an article and avoid violation of law. This part of the system should be maintained as it has been effective and is voluntary, the publisher wants to keep this as well. 2) If TELA cannot determine whether an article is against law or not, the OAT would be asked to classify it before laying charges. The ordinance should ensure that specific acts can really be controlled by doing so. After the review of ordinance, both the COIAO and the operation guidelines should enable the enforcement body to identify whether an article is against law or not, or they can seek legal advice. The administrative body is no longer necessary to maintain this function. If the jury is responsible for the judicial function, then the OAT can continue to allow defendants to submit articles for classification, so that the unpredictable jury decisions would not constitute an unfair circumstance for the defendant. If so, then this should also be kept. 3) To prevent people from distributing problematic articles. The attendant said that it is impractical in the real world. According to the ordinance, distribution of obscene articles is against law whether the defendant is aware of it or not. However, numerous articles are being circulated on the internet but articles that are judged as obscene would be published on the gazette only. Information on the gazette is

insufficient for the public to know what went wrong with that article. He thought that the government would not prosecute anybody with this ordinance at all.

- 2.3.3 According to him, it is needless to retain purpose 2 and 3. If the whole administrative procedure is set up to ensure a publisher in his/her publication and needs not to handle penalty and cannot issue any binding decisions, the whole structure can be simplified. The administrative body only needs to provide professional advice on the article and the publisher can decide for itself as to follow such classifications or not. This administrative body can be replaced by an execution agency or a new, independent administrative agency. For example, if the agency classified an article as not obscene, but members of the public see it the other way round, the publisher can be exempted from prosecution. If the publisher disagree with the administrative classification and continue to publish the article, the government can submit it to a magistrate for final classification. When being asked whether such suggestion would take away the sole adjudicating power of the OAT and its decision not final, the attendant stated that it must not be the case. It is up to the purpose of different cases. The attendant stated that further discussion is required before deciding upon an appeal mechanism for this administrative body;
- 2.3.4 An attendant cited the example of Mingpao and stressed that the court had listed out numerous requirements because of the possible criminal responsibilities. If the future adjudication system aims at assuring the publishers whether their publications are against law or not, then the whole system can be simplified;
- 2.3.5 If the definitions of ordinance is clear, the OAT can be modified in the following directions: 1) to cancel the OAT and leave all judicial decisions to the magistrate and there will only be a judicial section but no OAT; 2) to cancel the OAT and follow the Australia and New Zealand's example to set up a classification board, which has the sole adjudication power, otherwise resources would be duplicated with other bodies; 3) to cancel the OAT but include a lay assessor system in the adjudication. The assessors should be selected from the jury list. The final suggestion is to preserve the existing OAT but the selection of members should be amended so that the public would have faith in them and reduce the chance of being criticized
- 2.3.6 Some attendants agreed that the judiciary and administrative function should be separated and the permanent judge of Court of Final Appeal should not be authorized to appoint OAT members. A jury system is preferred

2.4 *Feasibility of canceling OAT*

- 2.4.1 Attendants believed that it is a cultural issue for publishers to submit articles to the OAT before publications. It is difficult to define obscene and indecent, but it is not the only area that is ambiguous. Attendants said that it is controversial to set up an administrative organ for each ambiguous area of law, so that people are less likely to

violate the ordinance. The existing system portrays such an impression. The government is responsible for informing citizens about obscene and indecent articles so that they won't violate the law, but this mentality can be wrong. He believed that a fundamental review is required;

2.4.2 Another attendant said that it is advantageous for this system to allow people like artists and publishers work on publications with peace of mind. The system can be kept;

2.4.3 Some believed that pre-classification is unnecessary because they can seek legal advice or delete sections that might violate the ordinance; people who publish newspapers and commentators would worry about libel as well and libel cases are also decided upon social standards

2.4.4 Currently, people being charged with libel can choose to have a jury or a judge to decide the case. Attendant said that the COIAO can imitate this system but the jury should not be voluntary or assigned but to be drawn from the current list of jury members, so that there would not be a small group of people dominating the whole adjudication system;

2.5 If certain offenses in the ordinance have to be decriminalized, the government can take away sections that requires protection e.g. children pornography and establish another ordinance to deal with it, the COIAO does not have to regulate those parts if so.

3 Classification System

3.1 Some attendants stated that the existing 3 classes have no problems.

4 New Forms of Media

4.1 The government can take reference to foreign examples in order to regulate acquaintances circulating obscene or indecent articles in forums;

4.2 Some attendants saw the need of regulating new forms of media, but provided no suggestion about execution details; the others did not suggest the addition of internet regulation and stated that nothing effective can be done through legislation, but they would not oppose the provision of filtering software by ISPs; other attendants pointed that it would be very difficult to control the internet; if the government establish laws to require something impossible, it will be people in an awkward position;

4.3 Did not agree mandatory provision of filtering software by ISPs, age verification by credit cards is not feasible as teenagers can obtain parents' credit card information easily; the principle of restricting offenders' use of broadband is also problematic, it would be impractical to ban somebody from phone if he/she commits phone harassment, or to stop water supply if he/she spills water on the others. In case of serious offense, the offenders can be imprisoned. However, it would not be effective to do so in Hong Kong alone, it would be more ideal if other countries are doing

- similar things as well;
- 4.4 Some attendants pointed out that the existing ordinance can cover internet circulation and is able to regulate obscene articles within Hong Kong despite its limitations; others said that the current ordinance is not applicable to internet as it the internet is not existed when the ordinance is drafted, no plastic bags can be put on internet materials as well. Attendant believed that the government could consider requiring websites with indecent content to put words of caution on top of the page, it would be effective despite the limitations;
- 4.5 Some attendants believed that ‘the public’ should include peer to peer transfer, but did not favor extending the definition to the sharing among friends. If there are existing ordinance which define all members of a certain club as ‘the public’, then the government might consider doing so on the internet. If somebody is only sending certain materials to a friend that he/she knows, it should not be considered as ‘the public’, but it would be another issue to upload something on BT for everybody

5 Enforcement

- 5.1 Current law enforcement mode can be kept, i.e. the police will be in charge of the enforcement since they receive better trainings than other bodies; TELA should not be given too much authority as well

6 Penalty

- 6.1 If the maximum penalty is raised but the actual punishment is never reaching that level, it will never work. Lots of people can change the name of the company and continue operation, if so, it doesn’t mean much to increase penalty on repeated offender. The maximum penalty right now is not lenient at all, the public won’t think that the government is paying more attention to this issue simply because the penalty is raised. Nevertheless, if the judge adds his/her own opinions in certain cases, it would pose a greater impact on the public. The group suggested that it is not necessary to increase penalty and flexibility should be allowed for the court to decide;
- 6.2 Some media are making great profits by publishing indecent articles while receiving unproportionately low penalty. The government can consider establishing civil penalty system so that the judge can assign penalty in proportion to the profits made by the offender;
- 6.3 The administrative structure should have no influence on the penalty assigned by the judiciary; the judiciary should be independent in deciding such cases. They should be allowed to work under current procedures and the administrative bodies should not put pressure on the judiciary as to increase penalty; some attendants pointed out that the consideration of penalty of the judiciary would change and the ordinance would not list out all factors, on the other hand, if the ordinance lists out most factors, the judiciary would be restricted. If the social atmosphere changes, the Secretary of Justice would be able to recommend the judges to raise penalty on the offenders. Taking the head-bashers’ case as an example, the

government can appeal and request for a heavier one if the penalty is deemed to be too lenient, such actions will send a message to the society. Current punishment assigned by courts is still far lower than the maximum penalty, hence raising the penalty ceiling cannot deal with the existing problem.

- 6.4 Some attendants stated that he would not oppose the increase of maximum penalty in principle and it is not just about the aspect concerned in this review, but all penalties within criminal laws as a whole. However he doubted if this is a suitable way to handle such issues. Why would this aspect be the only one which requires a heavier penalty? Would such actions affect the penalty of other criminal offenses? He also challenged why an offender of COIAO should receive a heavier penalty while others who commit a drug offense should not. Concrete reasons and evidence are required in order to do so. The common law system allows the judiciary to determine the amount of penalty so that the judiciary would be flexible enough to judge and evaluate according to the social circumstances and the Secretary of Justice has the authority to review the penalty as well. To include details of penalty in the ordinance would be complicated since LEGCO's approval would be required every time it is amended; if the details are included in the subsidiary ordinance, the authority would be kept in one person's hands and new problems would arise. Who should be authorized to do so? Would it be inconsistent with the existing system? Why would the government do this with the COIAO but not authorize the Commissioner of Transport to decide the penalty of reckless driving? This is going to be very controversial.

7 Publicity and Public Education

- 7.1 Not many people notice the issue of the classification of computer games. There are games in which players have to speed-drive, crash somebody to death, rape a woman or steal money in order to advance to the next level. The classification of computer games is unclear;
- 7.2 The government should strengthen the publicity and educate parents to make wise choices.