

Review of the Control of Obscene and Indecent Articles Ordinance

Focus Group Summary Report – Civil Rights and Social Morals

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Time: 1830-2030

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

Attendants:

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Ms. Law Lai-huen	Director, Family Heartware
Mr. Choi Chi-Sum	Chief Officer, The Society for Truth and Light
Mr. Tsang Chung-nam	Vice President, HK Taoist Association
Mr. Wan Hoi-wing	Executive Officer, Hong Kong Christian Council
Ms. Lam Yee-ling	Officer, Zi Teng
Mr. Law Yuk-kai	President, Hong Kong Human Rights Monitor
Mr. Choi Yiu-cheong	Member, Hong Kong Human Right Commission
Mr. Yu Shing-chi	Associate Officer, Hong Kong Christian Institute
Mr. Chan Lok-yi	Executive Committee Member, Rainbow Action
Ms. Chan Man-yee	Representative, Hong Kong Women Christian Council
Ms. Yip Po-ling	Representative, Civil Human Rights Front
Wong Sin-tam	Hong Kong Sheng Kung Hui Welfare Council
Dr. Leung Yuk-ming	Associate Professor, Department for Public Policy Studies
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¹ Observer, did not voice out opinions on the issues

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1. 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.
 2. Fifteen attendants participating the focus group shared general comments towards COIAO:
 - i. The homosexuals and sexual minorities would be affected most and their cultures will be suppressed;
 - ii. There should be a focus group especially for homosexuals and sexual minorities so that they'll have change to join the discussion;
 - iii. During the consultation process, the silent groups' (e.g. parents) opinions are not reflected and there's no focus group for parents;
 - iv. Guidelines can be provided but there shouldn't be a control;
 - v. Review should be done to see whether current ordinance is discriminative, infringement of citizens' rights should be minimize;
 - vi. Insufficient overseas information, the consultation papers should include foreign examples for reference; in UK, obscene publication act is available since 1959 and it's amended in 1964. Although the definition there isn't very clear, it's at least more detailed than ours;
 - vii. Also stated is that the insufficiency of foreign information might mislead people to think that Hong Kong is the only place which regulate obscene and indecent articles; can consider adding foreign information on the website;
 - viii. The review should balance the principles of human rights, there shouldn't be any contradictions between freedom and anti-discrimination;
 - ix. The review should strike a balance between freedom of speech and rights;
 - x. The review should balance the freedom of information, freedom and rights of information distribution;
 - xi. The society must protect citizens from being harmed. There should be fair trial under rule of law, those who harm the others will be penalized, and the review is not only focusing on human rights or the sanction of

- law. Balance should be struck between education and regulation from the protection to adjudication of COIAO. Laws should be followed and the human rights of the public and the minority should be taken care of so that the society would not be worsened;
- xii. The infringement of the others, i.e. civil rights should be the basis and starting point. Citizens are entitled to receive any kinds of information, if not, strong and explicit reasons should be given;
 - xiii. It's difficult to define a true standard ('standards on or under the table'): from a survey conducted by an organization, citizens would think that some photos identified as obscene or indecent should not be viewed, however, they would have personally purchased, viewed or even kept them. Those articles aren't that 'terrifying' indeed. As social workers or teachers, they would recommend students not to view obscene or indecent articles, yet they themselves were in touch with them before 18 and claimed that there wasn't any undesirable effects; the emphasis is that options should be given to everyone, different people have different standards or acceptability; parents should be responsible for educating children;
 - xiv. There's no supporting evidence for the negative effects of obscene and indecent articles. E.g. people breaking laws after watching rape movies. If we assume that viewing of these articles would lead to offenses and ban it, it is an infringement and a limitation of human rights, is the impact of the articles serious enough that we have to suppress the freedom of information? The values involve: e.g. homosexuality or sex workers do not comply with commonly accepted moral standards of the society, whether their existence should be banned; whether the jury or magistrate system is adopted, a fundamental question will still remain unresolved, i.e. there's a set of standards on the surface and another in their hearts (the standards on or under the table);
 - xv. The government should provide guidelines, labels, suggestions and classifications for the citizens to choose freely instead of regulating information and the freedom of distribution;
 - xvi. The existing ordinance is a complete failure, the administration and judiciary is chaotic, it is the most appropriate to have the court to make decisions, like UK and US;
 - xvii. There are opinions disagreeing that the ordinance malfunctioning, there are many decisions that are not arguable, the number of controversial

- cases aren't that many; not every articles are prohibited under the existing ordinance;
- xviii. Wordings of the ordinance are too old-fashioned, modern legal language should be adopted;
- xix. Most controversial issues occur in the execution of the ordinance; the insufficient training of the staff of TELA creates an impression that they are regulating where they shouldn't and ignoring where they should regulate. Taking the Student Press of CUHK as an example, parents and children are not going to read this article, but the TELA spent lots of effort and resources to intervene it and driven great controversy. On the other hand, the whole guide on newspaper should be regulated but is left unsupervised;
- xx. This review is similar to that of 2000 or even worse, it seems that it's just a 'talking show';
- xxi. The government claimed that they have not predetermined stance in this amendment, however, there is a stance in the consultation paper. The government wants to tighten the ordinance; the recommendations cited in the paper show its stance, e.g. 2.4(b) of the paper reads 'according to the reasonable community members, whether certain article would pose unhealthy effects to people below 18'. It did not refer to any overseas examples to enhance public understanding and offered only two options. What should we do if both options are not suitable? Concrete legal documents should be added as reference and it should be listed according to its tightness, the implementation of the ordinance, social impacts, pros and cons etc; e.g. distribution of obscene articles of Class III are prohibited, it shows that COIAO is not based on civil rights, if the review aims at the protection of children and the youth, it can be listed out explicitly;
- xxii. From the point of view of human rights, the freedom of each person's pursuit of goodness should be protected, although each individual may have their own standards on this, consideration should also be put on the parenting of next generation; we should strike a balance on this principle, it is not recommended to have no regulation at all, freedom should be kept so that the youth can learn from trial and error;
- xxiii. The consultation papers seem to be some teaching materials of secondary Liberal Studies, i.e. it's only up to the level of a secondary school student;

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

Opinions raised and areas of concern:

1 Definition

- 1.1 References should be taken to some overseas examples, the discussions in the States evolved around the Millor's case in 1973, the law defined clearly about obscenity and provided ways of regulation without violating the freedom of speech guaranteed in the first amendment of the American Constitution;
- 1.2 Important principles should be upheld: (a) purpose of distribution (b) Values in terms of literature, politics and science;
- 1.3 Suggested to replace the terms 'obscene and indecent' with 'annoying information';
- 1.4 Suggested to use the term in 1987, i.e. 'unhealthy information' in order to avoid the arguments over 'obscene' and 'indecent'. The word 'unhealthy' targets at articles that are personally harmful and infringe the well being of the others;
- 1.5 Some agreed to terminate the use of wordings like 'obscene' and 'indecent'. In the past, the word 'indecent' is equal to nudity which is a belittling of human body and a misuse of wordings that are full of moral judgments; the key point of nudity or sexual intercourse clips is the way people interpret it and how guidance is given;
- 1.6 The words 'obscene and indecent' needed to be changed most in the ordinance, the target of this ordinance should not be pornography, but the dignity of and respect for human beings that cannot be trampled;
- 1.7 It is not the immoral information that requires regulation, but the harmful information;
- 1.8 The definition of the States provided ample principles for reference, e.g. the process of making love is not a sexual relationship, something destructive, and carry no educational nor literature values etc. These can be listed out explicitly and helped prevent interfering the freedom of speech;
- 1.9 Some reasonable standards and principles, something that are commonly acceptable or unacceptable can be written into the ordinance in a concrete and clear way so that arguments under the judicial system can be avoided;

- 1.10 It should listed out explicitly how moral requirements are being harmed, e.g. sexual harassment, or to list out what is irritating, such doings would not violate human rights and the restrictions should be written down;
- 1.11 For the sake of consistency, statutes should be adopted and based on the commonness of certain standards. E.g. information like the process of serious sex crime should not be disclosed as it will be harmful;
- 1.12 The existing definition is ambiguous yet the ordinance needs to be clear without being too detailed, overly judgmental or restricting adjudication;
- 1.13 Regulation should based on the harm being posed and evidence should be submitted in order to request for a restriction in courts;
- 1.14 There are some exceptional cases, e.g. the uploading of a rape video while the distributor is not involved in the clip. This is something that beyond the regulation of COIAO, the regulation can only apply to one particular sphere and more rooms should be left in the other areas;
- 1.15 Issues like the sex photos are single cases that involved privacy and should be handled with the privacy ordinance;
- 1.16 It is impossible to provide absolute evidence for ‘obscene’ and ‘indecent’ hence people should not drag on the definition of ‘obscene’ and ‘indecent’;
- 1.17 Biased wordings should be reduced, e.g. ‘control’;
- 1.18 There are numerous cases in Hong Kong and it’s worthwhile to develop them into a database which is open to public;
- 1.19 An attendant stated that the definition will only get more and more ambiguous, e.g. some people say that certain articles will pose negative effects on people below 18, yet this is still open for discussion academically, if we include them in a legal ordinance it will only draw greater controversies;

2 Adjudication system

- 2.1 The adjudicator system
 - 2.1.1 The problem lies in the ambiguous guidelines and standards, not the quality of particular adjudicator;
 - 2.1.2 The judgment should not be monopolize by a group of experts, if it is to reflect the moral standards of the public, adjudicators should not be picked by the OAT, ‘choosing their own people’ will only result in people that are the most conservative or extreme;
 - 2.1.3 There are worries towards the adoption of the jury system as they

tend to be more protective and it is not that easy to accept different opinions;

- 2.1.4 Number of adjudicators in each hearing should be increased, e.g. adjudicators should be increased from 2 to 4 in preliminary hearing, while adjudicators in full hearing should be increased from 4 to 6; the system should ensure that people from different classes can participate in the adjudication;
- 2.1.5 An attendant didn't mind adopting the jury system, however, if it is adopted even in the preliminary adjudication, more resources will be needed;
- 2.1.6 There are opinions favoring the increase of number of adjudicators, the papers recommend to increase from 300 to 500, and it is considerable since the more people, the more it is reflecting the moral standard of the general public;

2.2 Function

- 2.2.1 To have administrative and judicial branch one authority will only make things more chaotic and difficult to clarify; is there any other countries which adopt the current HK model?;
- 2.2.2 The adjudicating branch should not be responsible for the administration and the appeal cases;
- 2.2.3 In the existing adjudication system, both ranks belong to judiciary (in terms of function);
- 2.2.4 The administrative classification should be maintained so that those being adjudicated would have the right to appeal, the appeal should be comprehensive and led by a magistrate;

2.3 Courts

- 2.3.1 Attendant did not agree that each and every article should be passed to the magistrate for judgment as they cannot represent the general public, it should be determined by all citizens; the acceptable standards can be determined by opinion poll;
- 2.3.2 There were opinions supporting the abolition of the OAT since its judicial function is way too heavy; adjudicators and jury are incomparable; adjudicators make decision according to moral standards that are acceptable to the general public, while the jury determine cases with their own common sense and reason; in other words, the number of adjudicators are available for choice would not affect the final decision since it is not based on the

personal moral standards; the question is, whether or not the adjudicator knows that they are representing the moral standards of the society and their ability to be such representation. If the OAT is not to be abolished, the existing adjudicating system can still be kept but their decision should not be legally binding; the risk remains the same whether the decision is made by the judge or the adjudicators; moral standards isn't a line and cannot be written into legal documents;

2.3.3 Agree to keep the decision of the magistrate, therefore the definition cannot be too narrow, in the court, the judge would provide guidance for the jury on the handling of cases; on the other hand, the jury system can be viewed as a form of monopoly and needs to handle with care;

2.3.4 Did not oppose the abolition of OAT, but if a similar organization is to be kept, the administrative and judicial function must be split; since the court does not make decisions according to the public opinions but the ordinance and its underlying spirit; therefore, to have the OAT taking care of both administration and judiciary is a bad approach to this problem; no matter the government is going to set up a new administrative organ or to reform the OAT, it should only be responsible for administration and hand over the cases to judges or personnel with legal expertise, they need not to consider the public's opinions; whether the administrative body are discussing in secrecy is not important, the adjudicators are making decisions on behalf of certain class in the society, different people represents different classes and there needn't be a consistent judgment of cases, it all depends on the aspects being represented by the adjudicators;

2.4 The OAT should publicize the reasons of classification after preliminary hearing, even for administrative handling, reasons are required to be listed in clarity for public view, e.g. the reason of certain judgment could be, 'this article is banned because it is resentful', such writings do not violate human rights law because it is not seeking consensus of the majority, it's just a matter of moral standards; by doing so consistency can be reached more easily and standards can be re-established according to these reasons;

2.5 The judgment should be uploaded to the internet after each adjudication in order to increase transparency; the public has the rights to know about the

results of adjudication and the government should also let the public know about this, publicizing the judgment information is a good form of education;

- 2.6 If there are people who are not satisfied with the judgment, they can express their opinions through different channels and the government can collect those opinions in order to know more about the social moral standards;
- 2.7 The defendant should be given the option to choose between a magistrate or the jury; if the jury is opted for, guidance should be provided, the judge needs to guide and remind them on certain details and references should be given so that the decision can be more convincing;

3 Classification System

- 3.1 There should be explicit laws listing out what should be prohibited and what are restricted from teenagers;
- 3.2 Recommended to use words like ‘at ease’, ‘medium irritating’ and ‘extremely irritating’ for classification ;
- 3.3 Age is not the best way for classification, family background, religion, level of education, social class can be reasons of irritation but not age;
- 3.4 Oppose the detailed categorization of IIA and IIB, it’s impractical and not clearly defined;
- 3.5 The existing ordinance is quite loose, some citizens think that what is determined as Class I should actually be regarded as Class II;
- 3.6 The Prevention of Child Pornography Ordinance can protect children already, is it still necessary to classify and define such things clearly in this COIAO?;
- 3.7 the classification should be similar the air pollution index, e.g. to label the class of a book, trust the youth and allow them to choose freely;

4 New Forms of Media

- 4.1 If the government is going to regulate public distribution, the regulation should be as loose as possible and the parents should be free to choose, otherwise the parents and the others will be unable to get hold of those information;
- 4.2 Regulation of the internet should be minimize;
- 4.3 There are numerous obscene and violent articles on the internet that are not appropriate for the youth or even adults, attendants did not agree that

regulation of the internet should be minimize; it should be regulated by another ordinance;

- 4.4 Agreed to offer more protection for the children and the youth;
- 4.5 Attendant pointed out that apart from protecting children and the youth, the government should also ensure that they have the rights to acquire sex information, their rights should not be exploited in the name of protection;
- 4.6 The internet should not be regulated by the same ordinance, just as the movies are regulated by film censorship ordinance ;
- 4.7 The regulation of the internet should be separated from the OAT;
- 4.8 The ISP should not be asked to provided a list of unhealthy publications, it is what the public refers to as ‘Article 23 on the Net’;
- 4.9 The ISP can provide filtering software for the parents to choose, different levels of filtering can be provided and it is also up to the parents to choose, e.g. from level 1-5/6;
- 4.10 The choice of level of filtering should not be one-off, variety should be allowed;
- 4.11 Apart from choice, parents should be allowed to involve in the screening process as well, e.g. In a foreign country, some parents have set up their own group and classify internet information on a regular basis, if it belongs to level 1-5, it will be blacklisted and parents can determine which level of information can be allowed for their children. Parents can discuss it with the children, if their children are too young, parents can make the decisions by themselves. By doing so, both parents and children have some rights of choice; if all parties participate they can balance with each other so that children can be protected; if some parents don’t know how to install software, young officers of NGO can offer help;
- 4.12 The government needs to regulate on the ‘articles distributed to the public’ instead of the ‘distribution to the public’, if parents show articles to children at home, it would be something beyond government control;
- 4.13 Articles are to be regulated, but there should not be a total screen out of all information so that children and adults are unable to get in touch with it; regulation should be loose;
- 4.14 The documents are full of fear towards the internet, adults have fears towards the youth’s internet mastery as well, adults can make use of the ordinance to suppress teenagers’ use of the internet, attendants objected this;
- 4.15 Practical suggestion: 1) Films, publication and internet should not be separated, because it would be difficult to define whether a 10-minute clip

on youtube is ‘film’ or ‘internet information’; 2) support the suggestions on classification; 2) Object regulation of any kind, it is not going to help develop the net, blacklist of porn websites provided by the internet would become the recommended websites of the government;

5 Enforcement

- 5.1 It is difficult for the government to take the initiative to ban all obscene and indecent articles, it has to be depended on the citizens’ complaints;
- 5.2 The authority should enforce law upon citizens’ complaints; a mechanism of complaint supervision should be set up, e.g. if a person complained for 10 times and all over them are overthrown by the court, future complains (of that person) should be rejected (avoid abuse of complaints);
- 5.3 (the definition and legislation should be loose, otherwise)attendant worried that the police might abuse their power if they are assigned to enforce laws;
- 5.4 Strong reasons should be provided before prosecution under the enforcement mechanism;

6 Penalty

- 6.1 [There was no discussion on Penalty]

7 Publicity and Public Education

- 7.1 Sex education should be led by parents; teachings of different parents may differ, some parents would view information that are ‘extremely irritating’ with their children; suggested to offer school registration cards to parents every year, so that parents would be entitled to decide on the level of irritating information received by their children; data should be collected annually in order to know the acceptability of the society and develop classification according to this standard; if parents worry about the influence of these articles to their children, they should have the authority to control;
- 7.2 Another attendant said that it is unfair to rely totally on the parents to educate children, not every parents have the time and knowledge to educate their children;
- 7.3 If the government put all the responsibilities on parents, they will only leave it to the ISP as many parents are not familiar with the internet;

- 7.4 The government cannot control how parents teach their children at home;
- 7.5 Freedom of choice of the parents is important;
- 7.6 Information that are open to public should be the target of regulation;
- 7.7 Video games that contain obscene, indecent and violent information should be blocked, education on the building of a harmonious campus, problem-solving is essential and complemented by proper sex education;
- 7.8 Teenagers are taking the initiative to seek for sex knowledge, however, in formal education they cannot receive sufficient sex knowledge, that's why they go to the internet and look for it. It is unhealthy for the government to ban sex information on printed matters and the internet; healthy information cannot be achieved by prohibition but to have better planning in sex education; the government should have more confidence in the youth instead of restricting their freedom;

8 Summary

- 8.1 In terms of regulation, some attendants believed that the existing system should be continued while some believed that the regulation should be minimized, it should be done from the point of view of human rights and choice of parents;
- 8.2 In terms of definition, some attendants stated that it's impossible to come up with a flawless ordinance thus it needs not be discussed, the others pointed out that the definition can be clarified and considered on the grounds of harms;
- 8.3 As for the internet, some attendants thought that the regulations should be minimized while the others stated that it should be separated and regulated by another ordinance;
- 8.4 Second stage of the consultation should provide overseas information as reference for the general public;
- 8.5 Finally, attendants added that more considerations should be put on human rights and allow sufficient rooms in the legislation.