





## 6. Penalty



### **Main Issues**

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

### **Focal Question:**

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

## Detailed Discussion

### (1) Existing Arrangement

- 1.1 Publication of obscene articles is subject to a maximum penalty of \$1 million fine and three years' imprisonment upon conviction. The first conviction for publishing indecent articles not in compliance with statutory restrictions may attract a maximum fine of \$400,000 and imprisonment for one year, and each subsequent conviction would attract a financial penalty of \$800,000 and imprisonment for a maximum of one year. The COIAO does not set out factors which the court should take into consideration when meting out a penalty, leaving this to the sole discretion of the court.
  
- 1.2 So far the heaviest penalties handed down by the court involving obscene articles are imprisonment for 30 months in one case and a fine of \$100,000 in another case. The heaviest penalties involving indecent articles are imprisonment for 8 months in one case and a fine of \$100,000 in another case. Some members of the public are concerned that the penalties imposed for the breaches of the COIAO have consistently been below the statutory maximum and feel that this lacks deterrent effect.

## (2) Areas for Improvement

### Increase maximum penalty

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

<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

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

### **Reference Questions:**

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

*Include factors for consideration by the court when imposing penalty*

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

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

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

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

### **Reference Questions:**

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

