

Second Round of Public Consultation on the Review of COIAO (2012)
Response of the Hong Kong Internet Service Provider Association

15 July 2012

Introduction

1. As the leading organization that promotes the development of the internet industry in Hong Kong, Hong Kong Internet Service Provider Association (HKISPA) represents the industry to voice out the views of internet service providers (ISPs) on issues affecting government policies and the public's enjoyment of the internet.
2. At the same time, as an active supporter of corporate social responsibility, HKISPA has long been concerned about protecting young people and safeguarding public morals. Hence, we have advocated for self-regulation by the industry of the information transmitted or published via the internet. A Code of Practice was promulgated in October 1997, which sets out procedures for an internet service provider to handle complaints on obscene and indecent information. On the front of education, and supported by OFNAA, HKISPA also led a two-year Internet Content Rating System Project in 2003-2004 to outreach to webmasters, schools, parents and the public to promote awareness of internet content ratings and available filters.
3. ISPs in HK are citizens with high level of corporate social responsibility, as evident by the voluntary cooperation of ISPs with copyright owners to combat online piracy, as well as smooth interactions between ISPs and law enforcement agencies.
4. This paper serves as a response to the Second Round of Public Consultation on the review of COIAO, particularly addressing the questions in Chapter 6 about improvement measures or options for tackling the issues with the current provisions in COIAO.

Question 1:

Do you agree that we should maintain the current approach in the COIAO and not to stipulate detailed definition of "obscenity" and "indecentcy" in law?

5. We are of the view that the current provisions on the definitions of "obscenity" and "indecentcy" lack clarity and comprehensiveness. No line can

be easily drawn because of abstractness of the current provisions of the COIAO. For the purpose of achieving impartiality and consistency in adjudication by the OAT, there is an urgent need for more detailed definitions that are capable of objective proof.

6. Further, we believe that public awareness and understanding of what is considered as indecent or obscene is important for dissuasion of tempted potential offenders. To this effect, the new standards should be clearly communicated to the public in an easy to understand manner. We are of the opinion that more efforts in educating the public would be beneficial.
7. We also recognize that the perception of "indecent" and "obscenity" depends on culture and varies from time to time and from individual to individual. We note that frequent legislative amendments may be needed to cater for the changes and developments. As the main representative of the voice of the industry, we are happy to assist and advise the relevant parties of the Legislature in reviewing and revising the laws in this area.

Question 2:

What are your views on the two options for reforming the OAT institution set-up?

8. We note that because the adjudicators of the OAT may be from different sectors of society and from different age groups, professions and occupations, interim classification and determination by panels composed of different adjudicators may be vastly different. Therefore, we are of the view that consistency is paramount in classification and determination, especially because the current judicial system is based on the common law convention.
9. Option 1 is essentially splitting up classification and determination to be handled by two separate parties instead of one, which is currently OAT. This is a good option because, as set out in para 3.4.4, it provides for delineation of the administrative and judicial functions of the OAT, and addresses the concerns about different rulings made by the same body at different hearings. However, we would like to emphasize again Option 1 is viable only if the Chairman and Deputy Chairman of the Classification and Appeal Boards are members of the Judiciary (i.e. magistrates/judges), so as to achieve true separation of administrative and judicial powers.

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?

10. We acknowledge the concerns of the general public, especially those raised by the parents and teachers urging for increased protection for our younger generation from harmful materials and response to the rapid changes of the internet landscape. The existing co-regulatory framework and Code of Practice have proven to be an adequate mechanism and responded well to the changing needs of the community. Due to the unique nature of the internet, where materials are often extra-territorial, local regulations would most often not be an effective way to tackle the problem. Based on the studies by overseas jurisdictions, we believe a strict rigid regime would be an impractical and an unrealistic way to monitor the internet activity.
11. The Code of Practice has been an effective procedure in dealing with public complaints over the years. We understand the guidelines were last reviewed in 1999, but currently we do not see the need for change to a system that is functioning properly and in our opinion, effectively. Further, we are uncomfortable with any updates to the current Code of Practice at this stage, especially in light of lack of detailed directions and plans for the amendments in the Consultation Paper. We refer to para. 4.4.3. Therefore, we would not support the update of the existing Code of Practice or suggesting any defined mechanism to update the Code of Practice, due to the uncertainty it may impose upon the general public and service providers.
12. For clarity, we have to stress that HKISPA and its members, as always, are open to suggestions for reviewing the Code of Practice. We have been participative in helping to shape a better environment, as evident by facts set out in the Introduction of this paper. What we are against is review of the Code of Practice mechanism along with these amendments to the COIAO legislation, such that multiple uncertainties are amalgamated together. We are open to work with the administration on this issue after the amendments to the COIAO are enacted.
13. Therefore, the HKISPA strongly stands against changes to the current Code of Practice mechanism in this amendment.

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?

14. We consider filtering software the most effective and appropriate means/tool for parents to control and monitor the contents on the internet to which their children are exposed. However, the existing tools on the market have limitations; for example, some may slow down the access to internet, and some may fail to block undesirable content, and some may filter content in standards that were out of our cultural context.
15. Therefore, we suggest the Government put more resources in developing a more desirable and user-friendly software which is specifically designed to suit the needs of the families in Hong Kong. As pointed out in the Consultation Paper, an average parent's knowledge of the internet is much lower than his/her children, thus unable to make necessary adjustment on the filtering system. We also feel that most parents are not aware of the importance of filtering software to safeguard their children's interest. We therefore strongly support the view that the Government should educate the public about the importance of these software and how to put them in proper use.
16. The HKISPA is also of the view that the government should invite proposals from the public for construction of such filtering software. The HKISPA would be happy to submit its proposal. ⁱ
17. We also agree with the Government to conduct periodic surveys on parents and teachers about the awareness and understanding of filtering services, which may assist with the development of the filtering software to prevent children from the harmful materials.

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?

18. We always welcome and support the Government to continue to work closely with parents, teachers, social workers and ISPs to develop a more comprehensive education and publicity scheme for internet protection. As we pointed out above, more efforts are needed to educate the public, and we would like to see these efforts to extend beyond the current scope, targeting people who have strong influence to our younger generation.
19. We believe that standing allocation of resources to such education to the public should be necessary. We also believe that internet-use ethics and basic training to identify different forms of online frauds should become part of the education syllabus for primary and junior secondary students.

Question 6:

Do you agree that the Government should increase the maximum penalty under the COIAO to enhance the deterrent effect on prospective publishers?

20. We acknowledge that the majority of the public supported a heavier penalty in order to enhance the deterrent effect of the COIAO. We also note that the new maximum penalty proposed (para. 5.3.9) has doubled in fine and, in some cases, imprisonment period as well.
21. We understand that the media landscape had gone through many significant changes since the maximum penalty was last reviewed in 1995. The internet has become accessible to every household, and smartphones and other mobile devices have enabled users to stay connected all the time. Technology and media advancements have created new opportunities and platforms for user-generated content, but at the same time have also imposed greater danger to other internet users, in particular the younger generation.
22. On the other hand, we come to consider the reasonableness of doubling the maximum penalty. In determining reasonableness, we use the inflation of prices over the last 16 years as an indicator to benchmark against the proposed maximum penalty.
23. According to the figures provided by the Census and Statistics Department, the Composite Consumer Price Indices (Composite CPIs), which is the overall consumer price inflation including all household sectors in Hong Kong, of 1995 and 2011 are as follow:

Year	Index	%Change
1995	90.2	-
2011	106.0*	+17.5%

* Full-year data updated up to 2011

24. Inflation over the period between 1995 and 2011 was 17.5%, which was far from double. We therefore are of the view that the proposed maximum penalty is too high to be justifiable, and should remain unchanged at the moment. We also think that increasing the current maximum penalty by inflation over the last 16 years (i.e. 17.5%) would be neither here nor there, thus advise against it.
25. The real cause of the maximum penalty not being deterrent enough, in our opinion, was not because the maximum penalty was not set high enough, but because no offenders have ever been imposed the maximum penalty since

the COIAO came into effect. It is easy to see why this is so: the OAT does not have objective guidelines it could rely upon in determining the level of penalty. Which level of obscenity amounts to the maximum penalty could not be determined because there is currently no scientific way to quantify obscenity for penalty amount. This brings us back to our answer to the first question on the importance of the Legislature stipulating more detailed definitions of "indecenty" and "obscenity".

26. We strongly believe the root of the problem can only be properly addressed with better definitions, which enable better classification, and better classification justifies a more realistic level of penalty to deter potential offenders.

Hong Kong Internet Service Providers Association

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ⁱ In response to the consultation for the COIAO review conducted near end of 2008, HKISPA and HKCSS has jointly submitted a proposal about creating a local filtering system for use by parents. Please visit <http://www.hkisp.org.hk/prelease/HKISPA-COIAO-Response.pdf>