Mobile communication and the protection of children

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7 Comparative jurisdictions

In this chapter, we address RQ3: *"what lessons can we derive from other jurisdictions in the formulation of a viable regulatory strategy?"* To assist in answering RQ3, we list three broad criteria for measuring the efficacy of a framework. The criteria for measurement are

1 the appropriateness of the regulatory approach;
2 is the approach sufficiently clear?
3 is the regulatory approach subject to regular review?

Under the broad criteria of (1) appropriateness of the regulatory approach, we aim to consider six issues, i.e., (1a) the regulator's responsiveness to challenges of mobile communication technology, (1b) whether the social objective of protection of children and young people is clearly defined and recognised, (1c) political or government support, (1d) whether there was active industry input and participation, (1e) whether there was active encouragement of user responsibility, and (1f) establishment of independent regulator.

Under (2) we will consider whether there were (2a) clear procedural provisions and complaints mechanism, and (2b) the provision of ease of access and clarity of information.

The three broad criteria were established based on our study and observations of the weaknesses of regulatory approaches. For example, while the social objective of protection of children and young people may exist, the objective may not receive the necessary political or government support to enable it to achieve its desired outcome. Similarly, procedural provisions may be out-dated and complaints mechanisms cumbersome and not user-friendly.

The regulatory approaches adopted in Australia and the European Union will be investigated in the light of the criteria listed. The primary objective of the investigation is to evaluate the measures adopted in their attempt to regulate the challenges raised by the potential hazards described in Chapter 4.

We have chosen Australia in our study of the regulatory approaches since, Australia has shown its proactive commitment towards addressing the potential hazards. This is evidenced in the measures adopted by the Australian authorities in their attempt to address inappropriate Internet content. We have chosen the European Union since the collaborative partnership can considered as stemming from various initiatives taken by national Member states.

In answering the RQs, we remain mindful of the three key areas of societal concern that can be brought about by mobile phones. These concerns have been previously raised and discussed in Chapter 4. We briefly describe them here as

1 inappropriate content;
2 contact in the form of sourcing, grooming, and bullying; and
3 commercialism seen in form indiscriminate marketing strategies targeting children and young people.

The chapter starts with the regulatory approach adopted in Australia (Section 7.1). Section 7.2 introduces the new content services code under Schedule 7 of the Broadcasting Services Act 1992 (BSA 1992). Having considered the Australian regulatory approach, we turn our attention to the position undertaken in Europe in Section 7.3. In Section 7.4, we examine content regulatory models. In Section 7.5, we measure regulatory efficacy against the three criteria. We deal with the regulatory reality in Hong Kong in Section 7.6. An answer to RQ4 is provided in Section 7.7. Then we propose two contributory factors for Hong Kong's existing regulatory framework by taking into account the influence of culture and politics on the formulation of policies and regulation in Section 7.8. In Section 7.9, we provide Chapter conclusions.

7.1 AUSTRALIA

In this section we examine the regulatory approach adopted in Australia under five sub-headings. Subsection 7.1.1 describes control over content, Subsection 7.1.2 explains Schedule 5 Australia's Broadcasting Services Act 1992 (BSA 1992). Subsection 7.1.3 gives the codes of practice. Subsection 7.1.4 details the complaints mechanism and Subsection 7.1.5 provides classification schemes.

In Australia, the BSA 1992 is the basis of the regulatory framework for broadcasting, data-casting, and Internet content.[1] The objective of Australia's regulatory approach is to maintain consistency between content that is offered both on-line and offline. Thus Australia's regulatory position is centred upon "what is illegal offline remains illegal on-line". As such, the emphasis is (1) on the content, and (2) on the level of control over content. It is not on the delivery platform of content. However, we do not intend to treat the items (1) and (2) separately as we do not view them as separate. Content and the level of control exercised over content, are in our opinion, co-related and inextricably inter-related. Thus a discussion involving (1) content, or (2) the

1 See http://www.austlii.edu.au/au/legis/cth/consol_act/bsa1992214/; and the Australian Government Review of the Regulation of Content Delivered Over Convergent Devices, (2006) available at http://www.archive.dbcde.gov.au/__data/assets/pdf_file/0011/39890/Final_Convergent_Devices_Report.pdf

level of control over content, or the regulation of one without the other achieves nothing.

7.1.1 Control

In Australia, control is seen in two main forms: (1) in a form exercised by service providers over content services provided directly by them over their proprietary networks, and (2) in the form of contractual agreements.

In (1), the control is effected through the type of content and services offered, and made available via the service providers' content portal. Mobile content services are accessible and downloadable by subscribers either for free or by subscription.

Where services are developed by those other than service providers, control is reflected in (2), i.e., in contractual agreements between the parties (that is, between the service providers and the content providers). In so far as contractual control is concerned, we regard such control as a weaker form of control (a) since it is only as effective to the extent of due compliance with the terms and conditions of the agreement by the third party content provider, and (b) in default of compliance of the terms thereof, in the effectiveness of the enforcement mechanisms.

Despite its drawbacks, we do see contractual control as a better form of control when compared to 'little or no control'. This is reflected in situations where Internet access is provided by service providers via Internet-enabled mobile devices. In such circumstances, mobile service providers (MSPs) have no more control over the content accessed by their subscribers than Internet service providers have over their registered users. Thus, the control by MSPs and ISPs, if any, will be solely grounded on the subscriber's agreement with their respective service providers. This invariably could take the form of *inter-alia*,

1 the prohibition of any form of infringement of a third party's intellectual property rights in relation to content available on the open forum without the owner's prior approval; and
2 the prohibition of the posting and distribution of material considered to be illegal, racial, derogatory, harmful or offensive to other subscribers.

7.1.2 Schedule 5

Further and in addition to control via service providers' portals and contractual agreements, a framework for the regulation of Internet content (an on-line content scheme) was established by the Australian BSA (under Schedule 5 of

the Act). The objectives of the on-line content scheme[2] were laid out in section 3 of the BSA and they include

1 to provide a means of addressing complaints about Internet content;
2 to restrict access to Internet content where such content is likely to cause offence, and (3) to protect children from exposure to unsuitable Internet content.[3]

It is apparent that the objectives of the scheme were premised on the community's increasing concern in respect of the availability and the easy accessibility of inappropriate content over the Internet.

Our analysis of the Schedule has revealed that content regulation under the BSA is co-regulatory. This is more aptly reflected in three key elements which are apparent within Australia's co-regulatory scheme. These elements are

1 the regulation of ISPs and Internet content hosts via (1a) self-regulatory codes of practice, and (1b) a complaints mechanism;
2 the codes of practice are underpinned by conventional prescriptive laws which criminalises the use of Internet carriage service to menace or harass another person, or in such a way as would be regarded by a reasonable person to be offensive;[4] and
3 the facilitation of other self-help measures such as media literacy and awareness programs.

The codes are developed by the industry, in this case, the Internet Industry Association, (IIA). Members of IIA include not only the main players such as telecommunications carriers, content creators and publishers, web developers, solutions providers, hardware vendors, and systems integrators but also other stakeholders such as Internet law firms, ISPs, educational and training institutions; Internet research analysts; and a range of other businesses providing professional and technical support services. The developed codes are registered with the Australian Broadcasting Authority[5] and are subsequently enforced

2 Internet content has been regulated under the on-line scheme since January 2000. The scheme was established by Schedule 5 to the BSA and was introduced in response to mounting community concerns about the accessibility of inappropriate Internet content to children.
3 (1), (2), and (3) are listed as (k), (l), and (m) in section 3 of the BSA. Section 3 provides a list of objects for the enactment of the BSA, 1992. Internet content is defined in Clause 3 of Schedule 5 as information that (a) is kept on a data storage device; and (b) is accessed or is available for access, using an Internet carriage service; (c) but does not include (d) ordinary electronic mail; or (e) information that is transmitted in the form of broadcasting service.
4 See Commonwealth Criminal Code in the Schedule to the Criminal Code Act 1995.
5 Clause 62 Division 4 Schedule 5 Broadcasting Services Act, available at http://www.austlii.edu.au/au/legis/cth/consol_act/bsa1992214/sch5.html . Division 4 deals with industry codes and clause 62 provides for the registration of the industry code with ACMA.

by the Australian Communication and Media Authority (ACMA), a separate and independent regulator.

7.1.3 Codes of practice

Industry codes of practice are a major element of the Australian regulatory framework. The codes require both the ISPs and the Internet content hosts (ICHs) to take appropriate steps to protect the public from prohibited and potentially prohibited content. A range of matters are to be dealt with under the codes. Some of these matters include
(a) procedures restricting access to persons over 18 years of age,
(b) assisting subscribers in dealing with spam, and
(c) providing information about, and access to filtering technologies.[6]

While we observe that compliance with the industry codes are not mandatory, Schedule 5 of the BSA does provide that once ACMA directs an ISP or ICH to comply with the code, it must do so or commit an offence.[7] In addition to the matters that the code must deal with, ISPs and ICHs are required to (1) provide information about filtering mechanisms, and (2) to make available to subscribers of their services, filtering products on a cost price basis.

From our investigations, we may provide as a tentative conclusion, the *importance* placed by Australia's regulatory regime in ensuring the *community is consulted*, and their *grievances heard*. We see this reflected not only in the formulation of the codes of practice (as described above) but also in the establishment of a complaint mechanism (discussed in the Subsection 7.1.4 below).

7.1.4 Complaints mechanism

Below we investigate the importance Australia places on having a viable complaint mechanism. The complaints system is administered by the regulator, ACMA; its purpose is to examine complaints in respect of inappropriate content over the Internet. The complaints mechanism provides an avenue for users to complain to the ACMA if they believe prohibited content is accessible. The mechanism provides for ACMA (i) to investigate upon receipt of a complaint, and (ii) to order the content to be taken down if the content is considered to be prohibited and is hosted in Australia.[8] In cases where content is considered to be illegal or sufficiently inappropriate for the consumption of the general public or particular sections of the public, ACMA will refer the content to the police for further investigations. In circumstances where the content was not

6 Supra Clause 60, Division 3, Schedule 5 Broadcasting Services Act.
7 Supra Review of Regulation of Content Delivered over Convergent Devices, n. 1 at p. 59.
8 Supra Part 4 Schedule 5 Broadcasting Services Act, n. 5.

hosted in Australia but originated out of Australia, ACMA may notify the relevant overseas counterpart.[9]

Although we are acutely aware that Schedule 5 relates to the regulation of Internet content, we find it useful to provide a brief description of the framework since the framework provides (1) the foundation for regulating on-line content, and (2) covers on-line content accessible via Internet-enabled mobile phones. In fact, our investigation indicates that the framework had indeed incorporated provisions that might apply to mobile carriage service providers who are (1) members of the Internet Industry Association (IIA) and (2) who provide mobile content services. These provisions include (a) prohibiting content which would be classified as X18+ (X18+ applies to films which contain only sexually explicit content or content that will be refused classification), and (b) restricting access by requiring subscribers to opt-in for content classified as R18+ or MA15+. R18+ means high level content restricted to 18 years and over and MA15+ means the content is strong and is not suitable for people under 15. Those under 15 must be accompanied by a parent or an adult guardian (see Figure 7.1 below).

As to (a) and (b), and from the study of the Australian regulatory regime, we note the importance of classification schemes. Indeed, classification schemes are not specific to Australia. Most jurisdictions do have their own national classification system. We regard the classification systems as forming the backbone of content regulation since its primary purpose is "to promote informed choice by adults about the content they access and to limit the risk of exposure to inappropriate content by children and young persons".[10] As no international classification system currently exists, each jurisdiction devises its own national system to reflect its national standards of morality, decency, and proprietary.

7.1.5 Classification schemes

In Australia, the national classification system is provided under the Classification (Publication, Film, and Computer Games) Act 1995. Under the Classification Act, a classification board and classification review board are established; their functions being to classify and review classification decisions in relation to films, computer games, and publications, respectively. The classification board classifies films and computer games into G, PG, M, MA 15+ and RC. (see Figure 7.1)[11] In addition, films have two additional classifications and that is, R 18+ and X 18+.[12] In so far as publications are concerned, the classifi-

9 Supra n. 5.
10 Supra n. 5.
11 See The Australian Government Classification Website at http://www.classification.gov.au/special.html
12 Supra.

cation categories are Unrestricted, Unrestricted M, Category 1-Restricted, Category 2-Restricted and RC. RC (restricted content) are prohibited and cannot be shown, sold or hired in Australia. The relevant classification categories and symbols may only be applied once the material has been classified by the Classification Board.[13] Figure 7.1 provides a table reflecting the classification categories.

Films and computers		*Publications*	
G	General	Unrestricted	
PG	Parental guidance Unrestricted	Unrestricted M	Unrestricted but not recommended to those under 15
M	Recommended for mature audiences	Category 1	Equivalent to R18+;
MA15+	Not suitable for under 15s.Under 15s must be accompanied by parent/adult guardian	Category 2	Restricted to adults; Sold only in premises accessible to adults
R18+	Restricted to 18 and over	RC	Restricted content; Prohibited material – Cannot be legally sold
X18+	Restricted to 18 and over. This rating applies to sexual content.		
RC	Restricted content; Prohibited material – cannot be legally shown, sold or rented		

Figure 7.1: Classification categories for films, computer games, and publications.

On the one hand, the classification board also classifies Internet content referred to them by ACMA.[14] On the other hand, the classification review board reviews classification decisions and makes new classification decisions. However in this case, only the Minister, the applicant for classification, the publisher of the published material, or an aggrieved person may apply for a review of the decision.[15]

In our investigations we found that the Australian Classification Act provides a National Classification Code which in turn provides for the making of Guidelines for the classification of films and computer games. The Office of Film and Literature (OFL) is responsible for all decisions relating to the classification of content. Amongst the principles which guide classification decision-making, we find the following two principles of particular significance: (1) that everyone should be protected from exposure to unsolicited material

13 Supra.
14 Supra.
15 Supra.

that they find offensive, and (2) the need to take into account community concerns that condone or incite violence.[16]

Moreover, we note the OFL's decision that content which has been classified for free-to- air television broadcasting need not be re-classified if the content is provided as part of the service providers' content portal. The position is different in respect to subscription-based content services whereby we observe that the control is more permissive. While we understand that this is due to the subscriptive nature of the service coupled with the provision of freedom of choice to subscribers, we opine that the provision of, and the access to subscription-based services should be subjected to age-verification measures and restrictions. We believe that the measures are useful in prohibiting the access of, for example, adult services or other inappropriate material that may be offered over the mobile service provider's portal.

Having considered the regulatory strategy in Australia, we may conclude that Australia has in place a comprehensive regime which attempts to address the potential hazards that are accessible on-line. Australia's strategy is significant in that it adopts an approach which represents a close collaboration between an independent regulator, i.e., the ACMA, the industry (the IIA), and the community. Further, classification schemes are presented in a clear and informative way so as to inform the community adequately as to the type of content that is being offered. This facilitates the community in making informed choices as to what might be considered harmful and/or inappropriate for children and young people.

7.2 AUSTRALIA'S NEW INDUSTRY CONTENT CODE

A new Content Services Code (the Code) developed by the IIA was approved by the ACMA in July 2008.[17] Under the Code, all on-line and mobile phone content likely to be classified as MA15+ or above must be assessed and classified by trained content assessors, hired by content providers.[18] The Code is part of the new legislation (new Schedule 7 to the Broadcasting Act 1992)

16 See Guidelines for Classification of Publications; available at http://www.comlaw.gov.au/comlaw/Legislation/LegislativeInstrumentCompilation1.nsf/0/641231640D2B08F5CA25741200010315?OpenDocument

17 The code was developed as an industry code pursuant to clauses 80-84 of Schedule 7. See Paragraph 5.4 of the Content Service Code, available at http://www.acma.gov.au/webwr/_assets/main/lib310679/registration_of_content_svces_code.pdf

18 Supra Paragraph 8.1, Part B Assessment of Content and Classification, Content Services Code. Note that a trained content assessor is an individual who has in the preceding 12 months a) completed training in the making of assessments as referred to in Schedule 7 and giving advice of a kind referred to in the Schedule and b) the training was approved by the Director of the Classification Board – see paragraph 4.2. The trained assessor may be an employee of the service providers or are contracted or engaged by them.

mandating a new regulatory framework for all content delivered on-line (Internet content) or via mobile phones.[19] The new schedule replaces Schedule 5 and the interim content arrangements that had applied to content providers of mobile content under the Telecommunications Service Provider (Mobile Premium Services) Determination 2005.[20] We deal briefly with the new code under the following subsections: access restriction (Subsection 7.2.1), take-down order, (Subsection 7.2.2), chat services (Subsection 7.2.3), complaints mechanism (Subsection 7.2.4) and the Code's compliance (Subsection 7.2.5).

7.2.1 Access restriction

Under the new content regulatory framework, mobile content providers are prohibited from distributing content rated MA15+ and R18+ unless access restrictions have been satisfied. The access restrictions include (1) distributing the material only if the subscriber has requested for the material (opt-in), and (2) after ascertaining and verifying the age of the subscriber. Age-verification is most commonly carried out by (2a) obtaining a credit card in the name of the subscriber, in writing, electronically or orally, or (2b) having sight of the original or copy of the subscriber's identification card issued by the tertiary education institution, license or permit issued by the Commonwealth, State or Territory law, the subscriber's passport, or birth certificate which shows the birth date of the subscriber.[21]

7.2.2 Take-down order

In so far as stored content is concerned, content providers must have in place take-down procedures in the event a complaint is lodged about the unsuitability of the material.[22] Stored content is defined as content kept on a data storage device. Thus, a take-down procedure will not affect transitory content, such as content arising by nature of the services provided, for example, chat rooms. This is dealt with in the following subsection.

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19 Schedule 7 came into effect on 20 January 2008.

20 See ACMA approves industry code of practice to protect children from unsuitable on-line and mobile phone content, ACMA media release 88/2008 – 16 July; available at www.acma.gov.au/WEB/STANDARD/pc=PC-311247

21 Supra paragraph 19, Age verification and risk analysis under Part F Restricted Access Systems of the Content Services Code, n. 17.

22 Supra paragraph 10, Part D Take Down Regime and Annexure – Diagrammatic summary of take down procedure; n.17.

7.2.3 Chat services

The regulation of chat services is provided separately in Part G of the Code. Part G provides for a consideration of a number of appropriate safety measures for chat services. We note four safety measures that may be implemented.

1 age restriction of chat services to users of 18 years and above;
2 the provision of human monitoring and human moderation of chat services;
3 the blocking of other users of the chat services; and
4 preventing search results that return matches for individuals under 18.[23]

We view these measures are proactive and if adopted, may prove effective in reducing the abuse of the service by exploitative adults and other youngsters.

7.2.4 Complaints mechanism

As with the Schedule 5 on-line content scheme, a complaints mechanism is provided for in the Code. The procedure provides two separate yet interrelated measures, i.e., (1) investigation, and (2) notification. The first measure requires the content providers to investigate the complaint but only need to do so provided the complaint is made in good faith, is not frivolous or vexatious.[24] The second measure encourages content service providers to notify and advise the other content service providers (a) of the availability, and nature of content that is prohibited, or (b) that the content is potentially prohibited content, in situations where the first content service providers are not aware of the nature of the content, they are making available.[25] Whilst the notification system is not intended to impose a monitoring scheme amongst content providers, we find the 'buddy system' innovative in facilitating a more vigilant industry.

7.2.5 The Code's compliance

In so far as compliance with the Code under Schedule 5 and Schedule 7 BSA is concerned, ACMA as the independent regulator may direct an ISP or an on-line content service provider to comply with the Code. We note there is a graduated range of enforcement mechanisms and sanctions to allow flexibility in dealing with breaches depending on the seriousness of the circumstances. The Code's enforcement mechanisms include compliance mechanisms, such

23 Supra paragraph 23.1 and Annexure Two – Safety Measures To Deal With Safety Issues Associated With Access To And Use Of Chat Services, Content Services Code, n.17.
24 Supra paragraph 9, Part C, Content Services Code, n.17.
25 Supra paragraph 16, Content Services Code, n. 17.

as withdrawal of industry association rights or privileges, and compliance incentives, such as the right to display compliance symbols.[26]

The graduated range of enforcement mechanisms we opine, is an illustration of Ayers and Braithwaite's (1992) 'tit for tat' strategy where compliance is more likely if the least interventionary form of regulation is applied first with a threat of more severe sanctions if the least interventionary form fails to produce the desired result (see discussion in Section 8.4 and Figures 8.4 and 8.5). As posited by Ayers and Braithwaite, regulatory cultures can be transformed by clever signalling by regulatory agencies (in this case, the ACMA) that every escalation of non-compliance by the industry or collective group can be matched with a corresponding escalation in the punitiveness by the state, thus resulting in a more interventionist regulatory strategy.

Our investigations of the Code indicates that the Code provides a comprehensive guide to industry players in Australia as to their social responsibilities in protecting society from illegal and/or inappropriate content. This can be seen specifically in the provision of safety measures for mobile chat and other interactive services which can potentially lead to inappropriate contact with children and young people.

In so far as the extent to which the regulatory objectives of the Australian BSA have been met, we may conclude from our investigations that the objectives are broadly satisfied in that the regime

1 provides a consistency between the regulation of new and old media;
2 imposes greater obligation on service providers that have better control over content accessible via their networks;
3 instills a respect for community standards with a view to protecting the vulnerable sectors of society;
4 provides an easy to follow complaints procedure for inappropriate material; and
5 assists individuals to make informed choices about content and self-help mechanisms (such as filtering technologies) by promoting media literacy.[27]

While we note that there are concerns whether the industry, i.e., the ISPs, ICHs, and the MSPs should be responsible for regulating content, we hold the view that the industry players are indeed the best sector/people to provide the lead that is required. They are seen to be in the greater position to understand the rapid changes in communication technology, and the demands of users. Consequently, they would be best placed to creatively advise and educate the consuming public, civic society, and the regulators.

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26 See ACMA: Content service provider's responsibilities, available at http://www.acma.gov.au/WEB/STANDARD/pc=PC_90156

27 Corker, J., Nugent, S., and Porter, J., (2000) Regulating Internet Content: A Co-Regulatory Approach, UNSWLJ 5, available at http://www.austlii.edu.au/au/journals/UNSWLJ/2000/5.html

7.3 EUROPE

In this section we will briefly describe and consider the framework adopted in Europe. More specifically, we will consider the position adopted in the UK.

In Europe, the European Union (EU) is strongly committed to the protection of children. Kierkegaard suggests that the mission of the EU is to protect children and young people against any infringement on their health and their psychosocial development. Moreover, Kierkegaard continues that it is in compliance with Article 29 of the Treaty of the European Union and Article 24 of the Charter of Fundamental Rights.[28]

We remark that a number of initiatives in the form of EU Directives have been adopted addressing the challenges of digital content in the Information Society *vis-a-vis* the protection of children and implemented in varying degrees in member states.[29] A telling example from 2006 is the European Parliament and the European Council[30]'s adoption of the Recommendation on Protection of Minors and Human Dignity in Audiovisual and Information Services and on the Right of Reply. The Recommendation 2006/952/EC which was adopted on 20 December 2006 builds upon an earlier 1998 European Council Recom-

28 Kierkegaard, S., On-line Child Protection: Cybering, on-line grooming and ageplay, 2008, Computer Law & Security Report, Vol. 24, p.41-55.

29 An older example of a EU Directive related to the protection of children and young people is the Council's Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography. The Directive was enacted to harmonise legislative and regulatory provisions of member states with a view to combating trafficking of human beings, the sexual exploitation of children and child pornography. The latter is relevant in terms of one of our three Cs, contact, in Chapter 4. See Articles 1 for the definition of a "child" and "child pornography". Note Article 2 which sets out the behaviour that are punishable.

30 The European Council is a consultative branch of the governing body of the European Union (European Community, (EC)), an economic and political confederation of European nations, and other organizations (with the same member nations) that are responsible for a common foreign and security policy and for cooperation on justice and home affairs. It defines the general political direction and priorities of the European Union. However, it does not exercise legislative functions. With the entry into force of the Treaty of Lisbon on 1 December 2009, it has become an institution. The European Council is composed of the heads of government of the EU nations and their foreign ministers, in conjunction with the president and two additional members from the European Commission, branch of the governing body of the European Union invested with executive and some legislative powers. Located in Brussels, Belgium, it was founded in 1967. It meets at least twice a year. Meetings of the European Council often emphasise political as well as economic cooperation among EU nations; for example, the impetus for the move to have the members of the European Parliament, a branch of the governing body of the European Union. At its first meeting of the European Council in 1974, the ministers decided to establish the European Parliament elected directly by universal suffrage. The European Parliament convenes on a monthly basis in Strasbourg, France; most meetings of the separate parliamentary committees are held in Brussels, Belgium, and its Secretariat is located in Luxembourg. The Council was given legal definition by the Single European Act 1987.

mendation.[31] An important element of Recommendation 1998 is that it offered guidelines for the development of national self regulation regarding the protection of minors and human dignity. According to the Recommendation, self-regulation is based on three key elements: first, the involvement of all the interested parties, i.e., (government, industry, service and access providers, user associations) in the production of codes of conduct; second, the implementation of codes of conduct by the industry, and third, the evaluation of measures taken. We note that the Recommendation was implemented successfully. The measure of its success was seen in a number of member states' commitment to the Recommendation in the establishment of hotlines and industry codes of conduct, the launch of awareness campaigns, and the creation of Internet filters.[32]

Under Recommendation 2006, member states are to adopt measures, *inter-alia*, to enable minor's responsible use of audiovisual and on-line information services in particular through media literacy, to draw up codes of conduct in cooperation with professionals and regulatory authorities at both national and Community level, and to promote measures to combat all illegal activities harmful to minors on the Internet. Additionally, the Commission's Safer Internet programme will educate the public about the benefits and the risks of the Internet, how to use the Internet safely and responsibly, how to make complaints, and how to activate parental control.

A follow-up of the Recommendation is the Audiovisual Media Services Directive (AVMSD) which covers both linear and non-linear services such as the television and video-on-demand (the Internet). The AVMSD, for example, empowers member states to restrict the broadcast of unsuitable content by restricting the transmission of on-demand audiovisual content regarded as inappropriate.[33] This may be relevant in broadcasting of on-demand audiovisual material on Internet-enabled mobile phones. A two-step safeguard in the form of a cooperation procedure and a circumvention procedure is established for receiving countries.[34] Article 3h of the Directive specifically restricts access to children content which might seriously impair children's development. The provision ensures that measures such as access codes must be in place so that children are protected from inappropriate content.

Further, we mention the European Parliament and the European Council's adoption and implementation of the Safer Internet programmes. The programme is a three year action programme aimed at the protection of children by promoting safer Internet use and use of new on-line technologies. For example, the Safer Internet Action Plan 1998–2001 was renewed in 2002 and

31 Recommendation 1998 was presented in a Communication (Com (97) 570 final).

32 See Evaluation Report to the European Council and European Parliament on the application of Recommendation 1998, COM (2001) 106 final.

33 See Article 2 (4) – (6) AVMSD 2007/65/EC.

34 See Article 3(2) – (5) AVMSD.

expired in 2004.[35] It was replaced by the Safer Internet Plus Programme 2005–2008. The current programme, the Safer Internet Programme (2009–2013) aims to fight illegal content and harmful conduct such as grooming and bullying.

In addition to the European Parliament and the European Council, we see an equally important player in the protection of children against all forms of abuse in the form of the Council of Europe[36] (COE). The COE's work to protect children against sexual exploitation and abuse stems from Article 34 of the UN Convention on the Rights of the Child. This also includes the Optional Protocol to the Convention on the Sale of Children, Child Prostitution, and Child Pornography. Both Article 34 and the UN Optional Protocol have been ratified by all member states of the COE. As such, member states shall take all appropriate measures, whether national, bilateral and multilateral, to prevent (a) the inducement or coercion of a child to engage in any sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.

The COE has been in the forefront of combating sexual exploitation of children.[37] The organisation has, for example, adopted Recommendation (91)11 on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults. With technological evolution and the increased use and abuse of the Internet, the Committee of Ministers reviewed Recommendation (91)11 and adopted Recommendation (2001) 16 on the protection of children against sexual exploitation. In 2001, the Convention on Cybercrime was adopted wherein Article 9 provides offences relating to child pornography.[38] While the Convention on Cybercrime was useful in providing guidance for criminalising pornography, it failed to deal with other forms of sexual abuse against children such as "grooming". We note that the loophole was plugged with the adoption of the Convention on the Protection of Children

35 Europe's Information Society, Safer Internet Programme history, available at http://ec.europa.eu/information_society/activities/sip/policy/programme/early_prog/index_en.htm.

36 The Council of Europe was established in 1949. It is an international organization with 46 member states, with the aim to protect human rights, plurarist democracy, and the rule of law. Any European state can become a member of the Council of Europe provided that it accepts the Councils fundamental principles and guarantees human rights and fundamental freedom to everyone under its jurisdiction. The Council of Europe should not be confused with the European Union. The two are distinct. However, the 25 European member states are all members of the Council of Europe. The Council of Europe headquarters is in Strasbourg, France.

37 It should be noted that the COE in addition to establishing and reviewing Recommendations and Conventions, had actively participated in World Congresses against Commercial Sexual Exploitation of Children held in Stockholm in 1996 and Yokohama in 2001.

38 (ETS 185). The Cybercrime Convention came into force in 2004.

against Sexual Exploitation and Sexual Abuse in October 2007.[39] The Convention criminalises various forms of sexual abuse of children including "grooming or solicitation of children".[40]

In the European Parliament and the European Council's Decision 1351/2008, a Community programme ('the Programme') was established to promote safer use of the Internet and other communication technologies particularly for children and to fight against illegal content and harmful material. The Programme recognises other forms of evolving communication technologies and shifts in societal behaviours which are leading to new risks for children.[41] The European Parliament and the European Council stated that action should be aimed at preventing children from being victimised by threats, harassment, and humiliation via the Internet and/or interactive digital technologies, including mobile phones.[42] We note the Programme's position that measures and actions should be combined in a multi-faceted and complementary way. The Programme further provides four action lines to be addressed, i.e., (a) ensuring public awareness; (b) fighting against illegal content and harmful conduct on-line; (c) promoting a safer on-line environment; and (d) establishing a knowledge base.[43] So, in our brief study of the Programme, we can elicit five salient points.

1 In the Programme's pursuit of its objective to promote safer use of the Internet and other communication technologies, the Programme will encourage multi-stakeholder partnerships.[44]
2 The Programme's activities will increase public awareness (through media literacy) on the use of on-line technologies and the means to stay safe on-line. The activities will also empower users to make informed and responsible choices by providing them with information and with precaution on how to stay safe.[45]
3 The Programme's activities will reduce the amount of illegal content circulated on-line and deal adequately with harmful conduct on-line with a particular focus on the distribution of child sexual material, grooming, and cyber-bullying.[46]
4 The Programme will encourage the design, development, and promotion of effective technological tools to deal adequately with illegal content and to fight against harmful conduct on-line. Some of the measures will include (i) adopting a quality label for service providers thus enabling users to check if the providers had to subscribe to a code of conduct, (ii) the use

39 See http:// conventions.coe.int/Treaty/EN/Treaties/Html/ExplChildren.htm.
40 See Articles 18-23 of the Convention.
41 Supra.
42 Supra.
43 See Article 1 (2) of Decision 1351/2008.
44 See Annex I Actions.
45 Supra.
46 Supra.

of filters, and (iii) supporting and providing measures to encourage positive content for children.[47]

5 In addition to improving co-operation, harmonising approaches and enabling the exchange of best practices, stakeholders are encouraged to develop and implement self and co-regulatory mechanisms.[48]

Thus, what we have seen in our study is the strong political and social commitment by the EU in ensuring that measures are adopted to protect the physical, mental, and moral integrity of children and young people, which may be impaired by their increasing access to inappropriate content.[49] Most of the legal instruments seem to address the abuse of children and young people via the use of computers and the Internet. While this may be so, we note the establishment and the working of the European Framework for Safer Mobile Use which focuses on mobile phones in the following manner. The brief establishment of the European Framework for Safer Mobile Use is dealt with in Subsection 7.3.1. The guiding elements of the European Framework is considered in Subsection 7.3.2, shared collective responsibility in Subsection 7.3.3, a classification scheme in Subsection 7.3.4, and self regulation in Subsection 7.3.5.

7.3.1 The European Framework for Safer Mobile Use

The European Framework for Safer Mobile Use by young teenagers and children (the Framework) was signed by leading mobile operators and content providers in 2007.[50] Our study revealed that the EU wide framework was an accumulation of national initiatives developed by the European signatory mobile providers in conjunction with content providers to ensure safer use of mobile phones by children and teenagers. Thus, one of the main objectives of the Framework was to encourage all relevant stakeholders to support safer mobile use by implementing the measures and key recommendations. Thus, the Framework essentially lays down the principles and measures that signatories to the Framework must commit to implementing nationally throughout Europe by February 2008.

47 Supra.

48 Supra.

49 See Decision No. 1351/2008/EC of the European Parliament and of the Council of 16 December 2008 establishing a multiannual Community programme on protecting children using the Internet and other communication technologies; available at http://eur-lex.europa/LexUriServ/LexUriServ.do?uri=CELEX:32008D1351:EN:NOT

50 See brief background to Safer Internet Programme's focus on child safety and mobile phone at http://ec.europa.eu/information_society/activities/sip/mobile_sector/index_en.htm

7.3.2 *Guiding elements of the European Framework*

A review of the Framework indicated (a) an active collaboration, and (b) a firm commitment between mobile operators and content providers in formulating the Framework. Both parties had in developing the Framework, paid tribute to four main guiding elements. These guiding elements are

1 the acknowledgement and recognition of potential hazards that can arise in the consumption of mobile content services;
2 the importance of available and easy to understand parent and child friendly information;
3 the necessity of classifying content according to national standards of morality, decency, and propriety; and
4 the suitability of industry self-regulatory approach.[51]

We note that these guiding elements were derived from the consultation conducted by the European Commission on Child Safety and Mobile Phones in 2006 and were dealt with in the European Framework as recommendations.[52] The recommendations are (1) access control mechanisms, (2) raising awareness, (3) classification, and (4) combating illegal content.

Our study further revealed that an Implementation Report (The GSM Europe Implementation Report) has been completed setting out (a) the status of implementation of the Framework in the respective member states and, (b) the compliance status of national codes of conduct against the recommendations of the Framework on a country to country basis.[53] The Implementation Report proves useful in two ways: first, it provides a brief overview of the stages of implementation of the EU's Recommendations in member states, and second, the report reflects a positive indication of the proactiveness and the commitment of the EU in their collective responsibility towards addressing the potential hazards with a view to protect children and young people.

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51 Summary of the Results of the Public Consultation on Child Safety and Mobile Phone Services, available at http:ec.europa.eu/information_society/activities/sip/docs/public_consultation/public_consultation_rsults_en.pdf

52 Supra.

53 GSM Europe: European Framework For Safer Mobile Use by Younger Teenagers and Children: One Year After, March 6, 2008; available at http://www.gsmworld.com/gsmeurope/documents/gsma_implementation_report.pdf. The report was published in March 2008 detailing the extent the key recommendations adopted by member states nationally. According to the report, 24 industry signatories covering 27 member states have signed the Framework. This is in contrast to 10 member states before the establishment of the Framework. It is indicated that the industry signatories in the member states serve approximately 550 million subscribers customers. This represents 96% of all EU mobile customers.

7.3.3 Shared collective responsibility

In response to the numerous hazards brought about by the use of mobile phones, including but not limited to harassment and bullying, grooming and sexual discussions, risks to privacy, exposure and access to illegal and harmful content, and high expenses, fraud and spam, the respondents to the consultation[54] acknowledge that the responsibility of ensuring safe mobile use amongst children and young people rests not solely on the shoulders of one stakeholder but numerous stakeholders. We thus arrive at shared collective responsibility wherein we firmly believe that responsibility must be shared between (1) mobile phone operators and service providers, (2) parents and care givers, and (3) public authorities.

The importance of shared responsibility cannot be denied. This concept is best applied in the provision and facilitation of user awareness measures. The facilitation and provision of user awareness measures can broadly encompass two essentials: (1) the necessity for mobile operators to provide to parents and care givers user friendly and accessible information concerning potential risks arising from the use of mobile phones by children, and (2) to develop a user friendly mechanism for parents and care givers to control the access of inappropriate content. The latter would require educating parents and child carers with regards to the various mobile applications and functionalities. We surmise that mobile phone manufacturers, suppliers and mobile application developers and providers should actively participate in sharing the responsibility, for example, by sponsoring education and awareness programs in conjunction with mobile operators. We can justify this suggestion by stating that since it is apparent that these parties have immense economic interest in the provision and supply of hardware, software and services for mobile phones, it is our opinion that it should be part of the stakeholders' social responsibility to undertake and/or to sponsor the program. Public authorities can further contribute by facilitating and supporting the organisation of public awareness campaigns of new media literacy.

7.3.4 A classification scheme

As with Australia, the classification of mobile content in accordance with a national member state's classification scheme is an important element. As previously discussed, the classification of content and the labeling used for

54 Supra public consultation, n. 51. The report was published in March 2008 detailing the extent the key recommendations adopted by member states nationally. According to the report, 24 industry signatories covering 27 member states have signed the Framework. This is in contrast to 10 member states before the establishment of the Framework. It is indicated that the industry signatories in the Member states serve approximately 550 million subscribers customers. This represents 96% of all EU mobile customers.

classification of content must be consistent with that applied to content available over traditional media so as not to result (a) in confusion, and (b) disparity in treatment. We provide as an example, the UK's Independent Mobile Classification Body (IMCB), discussed further in Subsection B which applies a classification framework that is consistent with the standards used and applied in other media.

7.3.5 Self regulation

The rapidly evolving nature of mobile communication technology renders self regulation as an appropriate mechanism that can be adopted as an effective and efficient means in ensuring adequate protection for children and young people. Indeed, we note that a self- regulatory approach formed the basis of the European Framework in that "[…] it is a EU wide common framework for national self regulation".[55] Thus to implement the Framework, signatory operators and content providers are required to develop national self-regulatory codes. In fact, our observations reveal that most national member states have developed their respective codes of practice.[56]

In the following section, we consider UK's code of practice in relation to regulation of mobile content as an illustration to describe the code of practice developed and adopted by the mobile service providers in the UK The UK is chosen as an illustration for two reasons:

1 self regulation is not a new regulatory strategy in their regulatory framework in that historically self regulation has been applied with much success in the UK In this regard, we provide two examples of self regulatory success: (1a) the Independent Mobile Classification Body (IMCB) and (1b) Internet Watch Foundation (IWF).
2 Hong Kong was a former British Colony; thus, the UK experience might prove useful to the Territory.

The structure of the section is as follows: Subsection A provides a brief description of the UK's code of practice. This is followed by two illustrations of self-regulatory mechanism: (1) the IMCB (Subsection B) and (2) the IWF (Subsection C).

A: The UK code of practice

The UK's Office of Communication (OFCOM) was established as a body corporate by the Office of Communication Act 2002.[57] Its responsibilities includes
(a) ensuring a high quality and a wide range of television and radio services;

55 Supra n.31.
56 'Safer Mobile Use'; available at http://www.gsmworld.com/gsmeurope/safer_mobile/national.shtml
57 See www.ofcom.gov.uk

(b) ensuring that a wide range of electronic communications services including high speed data services is available throughout the UK;
(c) maintaining plurality in broadcasting; and
(d) ensuring adequate protection against offensive and harmful materials for the audience.

However, it is observed that although OFCOM is the content and broadcast regulator in the UK, OFCOM does not regulate electronic content accessible via the Internet or Internet- enabled devices.[58] These services are regulated via self-regulatory codes of practice.

Of particular significance is the regulation of content available via mobile phones. In this regard, we note the existence of a separate code of practice for mobile content services. The code was developed in 1994 by six mobile operators namely: Orange, O2, T-Mobile, Virgin Mobile, Vodafone, and Hutchinson 3. It identified five areas for which the provisions of the code will apply namely (1) commercial content, (2) Internet content, (3) illegal content, (4) unsolicited bulk communications, and (5) malicious communications.[59]

We observe that the focus of attention of mobile operators is on commercial content. In the circumstances, commercial content can include mobile content services such as (a) visual content, (b) on-line gambling, (c) mobile gaming, (d) chat rooms, and (e) Internet access. We surmise that depending on the (i) type of content and (ii) the frequency of the content transmitted (for unsolicited bulk communications) mobile content services can, and do fall within the other identified areas of the code. In such circumstances, the mobile services will be regulated under the code.

B: IMCB

A content classification framework was set out by mobile providers and operators when they established the Independent Mobile Classification Body (IMCB). Subsequently, it was IMCB's key components, elements of the code and its content classification framework that influenced the EU's European Framework for Safer Mobile Use by Young Teenagers and Children.[60]

IMCB is an example of a self-regulatory framework. It is an independent classification body for the purpose of classifying commercial content that is regarded as unsuitable for customers under the age of 18.[61] The established

58 Supra.
59 Supra n.35
60 Supra n.31.
61 The Classification Framework has been drawn up taking account of the need to be consistent, as far as is possible, with standards for other media produced the Agreed Bodies such as the British Board of Film Classification (BBFC) and Interactive Software Federation of Europe (ISFE)/Pan-European Game Information (PEGI) for Mobile Games. See 'Section One: Classification Framework – General'; available at http://www.imcb.org.uk/classificationframe/section1.asp

framework is consistent with standards used in other media in that it will treat as "18 content", all content that would receive an 18-type classification for equivalent material in magazines, video and computer games, and films. In this context, we should note that commercial content is content provided by commercial content providers to their mobile customers. The content can include pictures, video clips, mobile games, music, and experiences, such as gambling. Thus, services which falls within IMCB and the framework's remit are services of a commercial nature (i.e., neither private nor personal nor in return for profit or gain). They include services such as still pictures, video and audio-visual materials, and mobile games. A provision is made for mobile operators to self-classify against the framework, their own content (whether the content was developed directly or provided for by third party content providers). Thus on the one hand, if commercial content has been classified 18,[62] mobile operators must place the commercial content so classified behind access controls.[63] In such circumstances, the content can only be made available to subscribers who have convinced the mobile operator that he is 18 years or over (age verification). The age verification process is also required for non-moderated chat rooms.[64] On the other hand, if commercial content is not classified as 18, it is to be treated as unrestricted content.

In so far as Internet content is concerned, our investigations made it clear that since the content (1) is immense and diversified, and (2) not within the control of mobile operators, it is sufficient for mobile operators to provide filtering applications to parents and child-carers to ensure that access to content available over the Internet via Internet-enabled mobile phones is restricted.[65] In this respect, the code requires that filtering mechanisms be set at a level such that content which is regarded as being equivalent to content classified as 18 is restricted.[66] It is worth noting that the position adopted here differs from the position of an ISP ('an information society provider' in Art. 42 Directive on Electronic Commerce 31/2000) where an ISP is not held liable under the Directive if it has neither knowledge nor control over the contents transmitted or stored, i.e., where they are acting merely as conduits of information.[67]

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62 According to IMCB framework, content classified as 18 if it contains "full frontal nudity, especially where depicting the pubic area and/or genitals".

63 U.K. code of practice for self regulation of new forms of content on mobiles; available at http://www.gsmworld.com/gsmeurope/documents/eu_codes/uk_self_reg.pdf

64 Non-moderated chatrooms are chatrooms not moderated either by human moderators or computers.

65 Supra n. 63.

66 Supra n. 63.

67 See Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), available at http://www.legi-internet.ro/direcommerce.htm

In so far as illegal content is concerned, in addition to having in place 'notify and take-down provisions', it is incumbent for mobile operators to work closely with law-enforcement bodies. We note that this is especially so if mobile operators provide web-hosting services.[68]

From our observations, we note two elements underlying IMCB. (1) commitment and (2) requirement.

1. Commitment

We mean the UK mobile operators' commitment in implementing the content controls and ensuring strict compliance as envisaged in the code. For example, a colour-coded scheme was established to reflect the number of times the code has been breached and the severity of the breach. Thus, an initial breach of the code results in a warning (yellow card).[69] Any subsequent breach of the code can result in a sanction (red card). Repeated failures to comply with the code may lead to termination of future business.[70] The colour-coded scheme has been welcomed as a highly effective compliance mechanism by both mobile operators and the content suppliers. In fact, it has been recommended that the sector should notify; (a) IMCB of all information pertaining to the number of cards issued, and (b) the information published on IMCB's website.[71]

2. Requirement

We mean the implicit requirement that mobile operators and service providers remain vigilant in (2a) monitoring mobile content that is being offered or transmitted, and (2b) maintaining the objectives of the code.

Below we examine both elements reflected in the code's provision for mobile operators, in that mobile operators (1) must continue to take action against (1a) unsolicited bulk communications (spam), and (1b) other forms of malicious communications, and (2) regularly review the code to ensure the code remains relevant to its subscribers.[72]

Indeed, we note that IMCB had taken on the responsibility of maintaining and regularly reviewing the classification framework in consultation with mobile operators and other stakeholders. This proactive measure by IMCB is a step in the right direction (1) to ensure the framework reflects the objectives for which it was set up, and (2) to take into account the changing technological landscape.

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68 Supra n.41.

69 OFCOM's U.K. code of practice for self regulation of new forms of content on mobiles; available at http://www.ofcom.org.uk/advice/media_literacy/medlitpub/ukcode/

70 Supra.

71 Supra OFCOM's consultation paper, n. 57 & n. 69.

72 Supra.

C: IWF

A second example of a successful self-regulatory approach is the Internet Watch Foundation (IWF). We find IWF useful since the IWF provides an example of (1) the one pointed focus for which the organisation was established and (2) the measures the organisation undertakes to adopt achieve its objectives.

One of IWF's main objective is to minimise the availability of potentially illegal Internet content based on three main themes: (1) child abuse images hosted anywhere in the world, (2) criminally obscene content hosted in the UK, and (3) incitement to racial hatred content hosted in the UK[73] The IWF has been immensely successful. Five factors have been identified as contributing to its immense success.

1 tough laws that prohibit any form of possession or distribution of child abuse images with strong sanctions for transgression;
2 a sophisticated system to transfer intelligence and information from the IWF to the police for the police to investigate;
3 a committed and effective Internet content service provider community who remove any potentially illegal content found on their services immediately when notified;
4 an informed public who report on-line if they are exposed to potentially illegal on-line content;
5 continued support of IWF by a diverse range of industry funding members.[74]

Further, in our investigations we noted that OFCOM in assessing whether to employ a self-regulatory or co-regulatory approach, suggested that self-regulation is more likely to be effective in three situations, i.e., in those markets

1 where companies recognise that their future viability depends not only on their relationship with their current customers and shareholders, but also that they operate in a environment where they have to act responsibly within the societies in which they operate;
2 where companies recognise and acknowledge the identified problems which may cause harm or market failure that impede citizens or consumers; and
3 where companies individually and collectively acknowledge the need to reduce the identified harm or market failure, since this will improve the ability of those companies to determine the interests of citizens or consumers and, potentially, society as a whole.[75]

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73 Initial assessments of when to adopt self regulation or co-regulation, OFCOM consultation paper, March 2008; available at www.ofcom.gov.uk/consult/condoc/coregulation/condoc.pdf
74 Supra.
75 Supra n. 73.

While we have studied and seen the merits of cost benefits, and the flexibility of adopting such an self-regulatory approach in Chapter 8 in comparison to direct government intervention, regulators must be certain that self regulation is the appropriate approach to adopt having taken into consideration the specific industry environment and market circumstances. We opine that for self regulation to be effective in a new communications technology and media sector, in addition to the fear of direct government intervention, it is vital for industry players themselves to be committed to the social well-being of society, and to share in greater public responsibility and commitment towards protecting society from harm. This can be done by

1 acknowledging potential hazards that can be accessible via the provision of mobile services;
2 identifying inappropriate mobile content;
3 providing users with an accessible yet easy to use information to assist users in making informed decisions; this should include classification of mobile content, and filtering mechanisms;
4 providing a user friendly dedicated hotline for lodging complaints on inappropriate materials;
5 establishing an openness and transparency in a decision making process.

In the following section, we briefly consider the content regulatory models that most accurately reflect the content regulatory strategy of Australia and the UK.

7.4 Content regulatory models

Two regulatory models (1) a broadcasting-centric model and (2) a converged content model for regulating content were devised by researchers Hargrave, Lealand, and Stirling (2006).

A: Broadcasting-centric model

Using the regulatory models devised, we assume that the UK's content regulatory model is an appropriate example of a broadcasting-centric model.[76] According to Hargrave, Lealand, and Stirling (2006), the defining characteristics of a broadcasting-centric model is that the model regulates broadcasting but does not directly regulate electronic content delivered via other platforms, such as the Internet or the mobile phone. For these platforms, self-regulatory systems are in place. This is well reflected in the UK model discussed in Subsection 7.3.5 A. Thus for non-broadcasting content such as the Internet and mobile telephony, a self-regulatory approach, i.e., codes of conduct for use

76 Hargrave. A.M, Lealand. G, Stirling. A., (2006) Issues facing broadcast content regulation, available at http://www.bsa.govt.nz/publications/IssuesBroadcastContent-2.pdf

by the UK's ISPs, and the IMCB are applicable.[77] We reproduce a table from Hargrave, Lealand, and Stirling (2006) (Figure 7.2) indicating the (1) strengths and weaknesses, and (2) the opportunities and threats of a broadcasting-centric model.

STRENGTHS	*WEAKNESSES*
Thorough understanding of and expertise in dominant content platforms	More limited regulatory power over or knowledge of new market Increased resource required by industry on new platforms
OPPORTUNITIES	*THREATS*
Create market benefits for audiences/users and industry Ability to react quickly in a dynamic new platform market Lighter form of content regulation possible	Unexpected sources of harm could emerge and cause embarassment for political and regulatory authorities

Figure 7.2: Broadcasting-centric model.[78]

B: Converged content model

In comparison to the broadcasting-centric model, the model adopted by Australia is a converged content regulation model. Thus Australia's regulatory framework covers both the regulation of broadcast content and content delivered over other media devices (such as the Internet and the mobile phones). As described in Section 7.1, ACMA is the combined content and platform regulator. Figure 7.3 adopted from Hargrave, Lealand, and Stirling provides the strengths and weaknesses of a converged content regulation model.

77 See www.ispa.org.uk and www.imcb.org.uk

78 Supra Hargrave, Lealand and Stirling n. 76.

STRENGTHS	*WEAKNESSES*
Better understanding of multiple platforms and their potential impact by main regulator (intellectual capital)	Too much control over industry – regulatory burden
Use of industry for understanding of both industry and consequent audience/user objectives growth	Regulatory capture and slowing of market
OPPORTUNITIES	*THREATS*
Buy-in by industry with concomitant commitment	Loss of innovation potential consumer choice and benefits
Lighter form of content regulation possible	Consumers feel unnecessarily constrained in choice

Figure 7.3: Converged content regulation model[79]

Upon analysing both models, we observe that the broadcasting-centric model (model A) on the one hand, represents the more traditional form of regulatory framework in that it has its emphasis on broadcasting of content rather than on the delivery of electronic content via other new media devices. Since delivery of electronic content is regulated via self regulation, model A has the advantage of being free of regulatory burden, thus enabling the industry to act more expediently. This in turn encourages innovation. However, as discussed in Chapter 9, if the self-regulatory mechanism fails to achieve its desired objectives, it will provide the opportunity for the regulator to intervene.

The convergent content regulation model (model B) on the other hand, acknowledges new converging services that can be delivered over convergent devices. However its 'imposing' regulatory backdrop provides fertile ground for regulatory capture. Researchers Hargrave, Lealand and Stirling (2006) opined that neither of these models are mutually exclusive since both these models share a number of common strengths.[80] Six strengths have been identified by the researchers. Both models (1) answer key social and cultural objectives, (2) are supported by the regulator, (3) are independent from the government and industry, (4) have a thorough understanding of what is required and expertise in dominant content, (5) provide clear and consistent objectives for the industry and the users, and (6) establish protection mechanism for users.[81]

79 Supra n. 76.
80 Supra n. 76.
81 Supra n. 76.

With the strengths common to both broadcasting-centric and convergent content regulation models, we may tentatively conclude that there is no standard regulatory model that (1) can provide a resolution to all the uncertainties and challenges that has arisen (or will arise in the future) or that (2) adequately address the challenges of the potential hazards made available via mobile communication technology. The task for the regulators and the various stakeholders is to work out the best approach taking into consideration, inter-alia (a) the technological environment, and (b) the state's public policy, social and economic objectives. The approach adopted will no doubt differ from one jurisdiction to another.

From the above discussion, a comparative analysis will be made with the regulatory framework currently in force in Hong Kong.

7.5 Measuring regulatory efficacy

In measuring the efficacy of regulatory approaches, we provide Figure 7.4 which encompasses the three broad criteria for measuring the efficacy of the regulatory approaches adopted in Australia, the UK, and Hong Kong. For ease of reference, we list the three criteria here again.

1 The appropriateness of the regulatory approach.
2 Is the regulatory approach sufficiently clear?
3 Is the regulatory approach subject to regular review?

We further detail the three criteria as follows.

1 an appropriate regulatory approach contains
   (a) the regulator's responsiveness to challenges of mobile communication technology;
   (b) the social objective of protection of children and young people clearly recognised;
   (c) political or government support;
   (d) active industry input and participation;
   (e) encouraging user responsibility;
   (f) the establishment of an independent regulator.
2 the clarity of the approach contains
   (a) clarity of information for users and interested parties;
   (b) ease of user access;
   (c) provision of complaint mechanism.
3 is the regulatory approach subject to regular review?

Country	*Australia*	*The UK*	*Hong Kong*
Regulatory approach	Co-regulatory	Self-regulatory	Self-regulatory
1. Appropriateness of the regulatory approach			
(1a) regulatory responsiveness to challenges of mobile communication technology	Yes, On-line content scheme: Schedule 5 and & 7 BSA	Yes, Code of Practice for Self Regulation of new forms of content for mobiles	None
(1b) social objective of protection of children and young people clearly recognised	Yes	Yes	Unclear
(1c) political or government support	Yes	Yes	None
(1d) active industry input and participation	Yes, IIA members and mobile carrier service providers	Yes, mobile network operators	None
- Method	Yes, industry code of practice	Yes, Code of practice: applies to all mobile phone operators	HKISPA code of practice not applicable to mobile phone operators
	No mandatory compliance but is an offence if ACMA's direction to comply with code ignored	Code has full support of mobile phone operators	Not applicable
(1e) encouraging user responsibility	Yes	Yes	No
(1f) establishment of independent regulator	Yes, ACMA	Yes, OFCOM but complaints of access to inappropriate material outside its remit outside	Pending outcome of government's consultation

Country	*Australia*	*The UK*	*Hong Kong*
2. Clarity of regulatory approach			
(2a) clarity of information for users and interested parties	Yes, user friendly link: www.acma.gov.au/ hotline	Yes, user friendly link: www.imcb.org.uk	Yes, www.ofta.gov.hk
(2b) ease of user access	Yes	Yes	Yes
(2c) provision of complaint mechanism	Yes, administered by ACMA	Yes, based on Content Classification Framework by IMCB: complaints to be resolved initially by mobile operators	Yes
3. Regulatory approach subject to review	Yes, review introduced Schedule 7 on-line content scheme in 2008	Yes, review of code and framework in completed in 2008. See www.ofcom. org.uk/advice/media_ literacy /medlitpub/ukcode/ ukcode.pdf	Pending outcome of government's consultation

Figure 7.4: Measuring the efficacy of regulatory approaches

From the above, we may draw two conclusions.

1 The regulatory approaches adopted by Australia and the UK demonstrate that different jurisdictions have chosen different approaches to suit their cultural specificities.
2 While the regulatory approaches differs considerably, the approaches adopted does acknowledge the potential hazards of new communication technology and seeks to address the challenges posed by establishing a clear and appropriate regulatory structure for mobile content regulation.

Our aim is to arrive at a regulatory approach which ensures that children and young people are sufficiently protected as young consumers. We see this being accomplished in the use of a combination of two approaches with three explicit additions, viz (1) in the case of Australia by collaboration with the regulator or upon strong industry initiative (as in the UK), in the establishment of an industry code of practice, (2) the establishment of an independent regulator to oversee and monitor the regulation of mobile content, and (3) the provision of adequate, clear information of classification schemes, procedural provisions, and complaints mechanism.

In comparison to the approaches in Australia and the UK, we observe from Figure 7.4 that the regulatory approach adopted in Hong Kong (1) does not measure up to the criteria listed, and (2) is evidently weak and deficient for

the reasons in that the existing framework is fragmented, and lacks focus. We provide a detailed discussion for the weakness in the Section 7.7.1.

7.6 HONG KONG: REGULATORY REALITY

In so far as the regulatory structure of the Territory is concerned, Hong Kong was a former British colony, she thus inherited the British tradition of multiple regulators or sector-specific regulatory regime as her regulatory model. That is to say a separate regulator exists for different industry sectors. Thus, as previously described in Chapter 4, Hong Kong has the Telecommunications Authority (the TA) as the regulator for the telecommunications sector, and the Broadcasting Authority (the BA) as the regulator for the broadcasting sector. Accordingly, we remark that the regulatory model for Hong Kong follows a broadcasting-centric model. However despite the fact that (1) the multiple regulators model was regarded as "inflexible" to deal with the challenges of the converging era and market integration, and (2) a number of jurisdictions have seen the merits of having a unified regulator, Hong Kong's proposal for a unified regulator remains under consideration.[82] The complete proposal resulting from the Consultation Paper should be noted as further and in addition to the proposal for the establishment of a unified regulator. The Consultation Paper (2006) also proposed a review of the existing sector-specific regulatory regime legislations with a view to consolidate them into a unified communications regulation. Thus, it seems that there will neither be a review of the existing regulatory structure nor relevant legislations as a follow up of the consultation. While this might be seen as positive on the one hand as providing the opportunity for a more rigorous review of the Territory's position, we remark that on the other hand, this proves unsatisfactory since we have not elicited any positive indications that the review will be completed in the near future.

In comparison to the regulatory approaches adopted in Australia and the UK, we posit that the Territory's regulatory strategy is deficient (Subsection 7.6.1). We support our position by evaluating the existing content regulatory system (Subsection 7.6.2). We do this by making our observations of the Control of Obscene and Indecent Articles Ordinance (COIAO) (Subsection 7.6.3) and the Hong Kong Internet Service Providers' Association (HKISPA) code of practice in Subsection 7.6.4.

82 The proposal for the establishment of a Communications Authority was first made after a public consultation in 2006. Two reasons were given for the proposal (1) the provision of 'one-stop-shopping' in which interested parties need only to deal with one organisation for matters relating to communication industries, and (2) the provision of regulatory consistency leading to operational synergy and efficiency See Public Consultation on the Establishment of the Communication Authority, Government Printer, Hong Kong SAR Government 2006 and Chapter 4.

7.6.1 A deficient system

It cannot be sufficiently stressed that Hong Kong needs to create a framework that enables her to recognise and react proactively to changes that are rapidly present itself in the new communications and new media environment. While we agree that the Consultation Paper's proposals do provide positive steps by the government to move away from the traditional regulatory structure to a converging regulatory trend that is being adopted in other jurisdictions, we opine that what is required is significantly more than 'window dressing' measures. Indeed, in comparison with the regulatory regimes of Australia and the UK, we may tentatively conclude that the Territory's regulatory framework is deficient in failing to show firm commitment towards protecting children and young people. Moreover, we opine that the Territory has not taken adequate, positive, and proactive measures to incorporate the important elements that we articulate are crucially essential for an efficient regulatory framework. We discuss the elements in greater detail in Chapter 10. For now, we provide below a summary of the Territory's regulatory weaknesses:

1 the absence of a clear objective to protect children and young people from the potential hazards as described in Chapter 4;
2 the failure to recognise, the potential hazards that can arise via the use of converging devices, such as mobile phones;
3 the failure to address the social objective of consumer protection and privacy, specifically with regards to the protection of children and young people in relation to the potential hazards;
4 the absence of a comprehensive protective regulatory framework which primarily addresses the challenges of the potential hazards accessible via mobile communication technology; this includes but is not limited to
   (a) the development of a relevant and proactive industry code of practice in active collaboration and consultation with mobile service providers, mobile virtual network providers, and third party content provider;
   (b) the establishment of an independent regulator to regulate the provision of, and the delivery of mobile content services in the Territory, and to oversee, and monitor the strict compliance of the code of practice;
   (c) supporting the need to educate mobile phone users (whether parents, child carers or children) on risk management issues in relation to mobile phones; this includes the proper use of mobile phones, its applications, and functionalities, and the potential hazards that can arise from such use (or abuse).
   (d) the establishment of a protection mechanism for mobile users by providing
   (i) assistance to mobile phone users to make informed choices about the suitability of content via classification schemes,
   (ii) self-help mechanisms (such as filtering technologies),

(iii) a hotline service for the purposes of reporting inappropriate content, and
(iv) a transparent complaints mechanism to address the concerns of users and to deal formally with complaints.

7.6.2 *The existing content regulatory regime*

In Chapter 6, we have described the regulatory regime for content regulation in Hong Kong. Before we proceed further, we find it appropriate to justify the importance that we placed in considering the regulation of Internet content.

We regard the consideration of such Internet content regulations as having significant value for two primary reasons. We opine that (1) the treatment of such issues reflects the legislative position and attitude of the regulator, and (2) the consideration of such content regulation provides a pre-cursor to any discussion on the formulation and design of regulations pertaining to material that is available electronically.

Thus, upon examination of the Territory's existing legal framework, we arrive at two observations.

1 The regulation of the Internet in Hong Kong has been minimal in that unlike Australia's Broadcasting Services Act which does provide, and deal with Internet content, Hong Kong has adopted a liberal hand, by not dealing with it. As such, no specific Internet content regulation has been enacted in the Territory. Our investigations however reveal that the regulation of inappropriate content is provided for by primarily two main Ordinances. (a) the Control of Obscene and Indecent Articles Ordinance (COIAO), a regulation that controls obscene and indecent articles in all media, and (b) the Prevention of Child Pornography Ordinance (PCPO). We note however that the scope and application of the PCPO is restricted in that it was enacted to deal with activities relating to child pornography. As the regulation of content encompasses more than child pornographic activities and materials, we do neither view the PCPO as sufficiently adequate nor competent in addressing the hazards of the converging media. Notwithstanding, there is in addition to the two main Ordinances, the Hong Kong Internet Service Providers' Association (HKISPA) code of practice which although minimal, provides a useful guide in the regulation of content.
2 The enactment of the COIAO and the development of the HKISPA code of practice were not aimed at addressing (2a) the potential hazards of mobile usage nor (2b) the inappropriateness of mobile content services.

We do this by making our observations of the COIAO in Subsection 7.6.3 and the HKISPA's code of practice in Subsection 7.6.4.

We do this by making our observations of the COIAO in Subsection 7.6.3 and the HKISPA's code of practice in Subsection 7.6.4.

7.6.3 Observations of the COIAO

From our study and observations of the COIAO, we opine that the COIAO has been less than satisfactory in three main ways.

1 The COIAO was enacted in 1987. Although there have been minor amendments since 1987, i.e., in 2000 and 2003, we opine that the law remains obsolete and does neither reflect nor deal with challenging issues presented by the new communications technology and new media. The primary objective of the COIAO is to *inter-alia*, "control articles which consist of or contain material that is obscene or indecent (including material that is violent, depraved or repulsive) (…)".[83] We remark that it was neither the intention of the legislature in the enactment of the COIAO nor was it envisaged that the Ordinance would cover the electronic publication, transmission, and distribution of articles. We use as an illustration of the Ordinance's obsoleteness at the interpretation section of the COIAO. Section 2(1) of the Ordinance defines an article as "anything consisting of or containing material to be read or looked at or both read and looked at, any sound recording, and any film, video-tape, disc or other record of a picture or pictures". This apparent concern of the Ordinance's "failure to keep up with the times" was not addressed despite amendments made in 2003.

2 As the crux of the COIAO is grounded on the issue of "obscenity" and "indecency", we have found that the guidance provided on what constitutes an obscene or an indecent article is wholly inadequate and exceedingly vague. For instance, Section 2(2) of the COIAO provides
"For the purposes of this Ordinance-
(a) a thing is obscene if by reason of obscenity it is not suitable to be published to any person; and
(b) a thing is indecent if by reason of indecency it is not suitable to be published to a juvenile.

3 For the purposes of subsection (2), 'obscenity' (淫褻) and 'indecency' (不雅) include violence, depravity and repulsiveness".
Although we agree that providing a comprehensive definition of the terms is an insurmountable task, it would prove helpful to the community and the Obscene Articles Tribunal[84] (OAT) to have a useful guide as to what

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83 See the Long Title of the Control of Obscene and Indecent Articles Ordinance. The other objectives of the Ordinance includes " (…) to establish tribunals to determine whether an article is obscene or indecent, or whether matter publicly displayed is indecent, and to classify articles as obscene or indecent or neither obscene nor indecent (…)"; available at www.legislation.gov.hk/eng/home.htm

84 See section 6 of the COIAO at www.legislation.gov.hk/eng/home.htm

articles might be considered obscene or indecent. In this regard, we suggest providing clarity to the terms "obscenity" and "indecency" by drawing examples of what might or might not be considered obscene and indecent.

4 Criticisms have also been levied on the current classification system by the OAT. In determining whether an article is obscene or indecent, the OAT is to have regard to inter-alia, "the standards of morality, decency and propriety that are generally accepted by reasonable members of the community".[85] We posit that standards of morality, decency, and propriety change over a period of time, place, and culture. The latter is particularly significant considering that Hong Kong is "a melting pot of cultures". In such circumstances, we strongly believe that a regular review of the community's moral fiber is required. This we surmise was not undertaken. We may tentatively conclude that the guidelines provided for under the COIAO do not accurately reflect the standards of morality, decency, and propriety of the community. The continuing use of the guidelines without review will result in an inaccurate representation of the Territory's standard of morality, decency and propriety. We have previously described in Chapter 6, the government's launch of a first round of public consultation on the review of the COIAO in October 2008. We still believe many expect that the review will be conducted in a robust manner with meaningful proposals considered, and adopted. More importantly, we still expect that the exercise is not a window dressing exercise.

7.6.4 Observations of the HKISPA's code of practice

The Hong Kong Internet Internet Service Providers' Association (HKISPA) code of practice is an example of a self-regulatory approach adopted in the Territory.[86]We have in Chapter 6 described the provisions of the code and the steps to be taken by members (including an on-screen warning) relating to the posting or publishing of material which are likely to be classified as Class III (obscene) material or Class II (indecent) material under the COIAO. A closer look at the code reveals the following provisions:

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85 See section 10(a) of the COIAO; the other requirements include b) the dominant effect of an article or of matter as a whole;
(c) in the case of an article, the persons or class of persons, or age groups of persons, to or amongst whom the article is, or is intended or is likely to be, published;
(d) in the case of matter publicly displayed, the location where the matter is or is to be publicly displayed and the persons or class of persons, or age groups of persons likely to view such matter; and
(e) whether the article or matter has an honest purpose or whether its content is merely camouflage designed to render acceptable any part of it.

86 See Code of Practice, Practice Statement on Regulation of Obscene and Indecent Materials, Revision1.1, September 2003. See also Chapter 3.

1 members will encourage the Platform for Internet Content Selection (PICS) tagging and promote the tagging technology of the ICRS Project operated by HKISPA;[87]
2 members will inform parents and other responsible persons of various options and precautionary steps they can take, including the content filters of the ICRS Project;[88]
3 the provision of a complaints handling procedure.

The procedure of (3) provides for (a) any member of the public, (b) the Hong Kong Police Force and (c) the Television and Entertainment Licensing Authority (TELA) to lodge a complaint with a member of HKISPA with regards to material considered to be Class II or Class III. The complaint will be referred to the member concerned if the complaint was first lodged with HKISPA. This effectively makes the member ISP the first point of contact in any complaint. The member upon receipt of the complaint must act promptly and conscientiously on the complaint with a view to resolving the complaint in compliance with the COIAO. In circumstances where the complaint cannot be resolved, TELA may in collaboration with the relevant enforcement agencies, consider instituting legal action against the relevant party(ies).[89] It is observed that the procedure laid out does not preclude the enforcement agencies from taking direct enforcement action against a member if the circumstances so warrant.

However despite the provisions in the HKISPA code, we posit four misgivings about the code.

1 There is no provision for the code to apply to mobile network and service providers who provide Internet access via mobile phones. These providers are therefore neither bound nor regulated in the same way as ISPs. A regulatory gap thus exists in that although the HKISPA code is dated and weak in enforcement, guidelines exist as a reference point for the industry.
2 It is apparent that the code only applies to ISPs and to members of the HKISPA. Despite the non-application of the code to non-members, we do not see a strict requirement for ISPs to be members of the HKISPA. As such, we note that while there are 168 ISPs in Hong Kong, there are only 57 registered members of the HKISPA.
3 To an observer, the language used in the code portrays leniency. We see this reflected in the words used in the code, for example, (a) the code "(…) recommends guidelines (…)", and (b) "the members will inform (…)", or (c) "the members will advise (…)", or (d) "the members will encourage (…)".
4 While the code does provide that sanctions will be imposed on a defaulting member, the provision does neither comprehensively provide either on

87 Supra item 13, HKISPA code of practice.
88 Supra item 14, HKISPA code of practice, n. 86.
89 Supra items 16-21, HKISPA code of practice, n. 86.

HKISPA's website or by way of a hyperlink, (3a) the type and severity of the sanction to be imposed or (3b) an appeal mechanism for defaulting members. It is our opinion that this is important as it provides the necessary transparency in the decision–making process, thus promoting accountability. This measure if adopted is a step in the right direction in promoting and instilling the trust and confidence of mobile users and the community as a whole.

7.7 An answer to RQ3

For RQ3, *"what lessons can we derive from other jurisdictions in the formulation of a viable regulatory strategy?"*, we may conclude by laying down eight lessons learnt. Three additional elements are given after the eight lessons learnt.

A: Eight lessons

(A1) The formulation of objectives. We believe that the formulation of clear and achievable objectives is the mainstay of an efficient and forward looking regulatory framework. With this in mind, we suggest that the objectives should include (a) the reduction of availability, (b) the restriction of access, and (c) the increase of resilience of children and young people to potential hazards. The objectives should not be seen in isolation. Rather they are inter-related and are inter-dependant. As such, we suggest that the measures adopted by regulators in respect of (a), (b), and (c) respectively should be inter-dependant and complementary. The measures should thus include (i) reviewing and enacting (where appropriate) regulations to deal with the availability of inappropriate materials, (ii) having in place a comprehensive classifications system and access control restrictions, and (iii) an education and media awareness program to adequately educate and inform society at large in particular children and young people of the inherent hazards of new communication technology. It is crucial that once policy objectives and measures have been identified and formulated, they should be effectively communicated to all stakeholders.

(A2) An independent organisation to deal with content regulation. To establish a comprehensive regulatory framework which focuses on content regulation delivered over new converging media platforms. The framework should adopt a co-regulatory approach and an independent body should be established to regulate, oversee, and manage issues relating to content regulation. It is envisaged that one of the functions and responsibilities of this independent body would be to establish a user friendly and transparent complaint mechanism. In this regard, it is important that (a) the decision-making process, (b) the schedule for penalties to be imposed if provisions are breached, and (c) the

decision made and the penalty imposed be consistent, made transparent and accessible.

(A3) The content regulatory framework to be supported by strong regulations. The content regulatory framework is underpinned by regulations that should be reviewed regularly to deal adequately with the challenges of rapid advancement in new media and communications technology. A case in point is the Prevention of Child Pornography Ordinance (PCPO) (Cap. 579). The PCPO does not provide for the offence of grooming. As previously discussed in Chapter 4, children can be solicited on-line and groomed for sexual activities, the activity thus progressing to a contact crime. In addition to a review of the PCPO, we propose that the Crimes Ordinance (Cap. 200) be reviewed to take into account (a) unwanted solicitation, (b) unwanted harassment of those under 18 years, and (c) the activities of cyber-bullying.

(A4) A classification mechanism. A separate body responsible for the classification of mobile content services should also be established. The existing classification scheme under the Broadcasting Act should be reviewed to see if it is appropriate for the scheme to be extended to cover mobile content services.

In the classification of content, it is incumbent for the classification body to distinguish content that can be appropriately classified, filtered, or monitored. For instance, content available over the mobile service or network provider's portal (stored content) should be classified whereas it may not be expedient for the mobile operators and providers to monitor adequately all transient content arising from chat services. In such circumstances, consideration should be given to the viability of whether human or computer monitoring mechanism be adopted to monitor mobile chat services. In so far as Internet content that is accessible via Internet-enabled mobile devices are concerned, we state that an efficient mobile filtering mechanism be developed and adopted to filter content classified as unsuitable for children and young people.

Furthermore, we find it appropriate that

(a) the classification body develops an appropriate certification mark. The certification mark will be granted by the independent body to mobile service operators and providers (i) who adhere strictly to the principles of content regulation, and (ii) who exhibit social responsibility by participating actively in media literacy awareness and education programs.
(b) an appeal system be in place to address appeals against the classification of content.

(A5) Access control mechanisms. We view access control an integral part of content regulation. As such an efficient and effective age verification mechanism must be in place. We opine that all mobile network and service providers offering mobile content and mobile services must agree as to the type and application of such mechanisms. For instance, it is more cost efficient and less

cumbersome if there is an agreement to require children and young people to provide a copy of their Hong Kong identity card to verify their age before subscribing to mobile content or mobile services classified as inappropriate by the classification body. The identity card will prove an ideal document for age verification purposes as (1) the document indicates the individual's date of birth and (2) every individual in Hong Kong above the age of 11 years and above must possess a Hong Kong identity card.[90]

(A6) A code of practice. An industry code of practice should be developed by mobile network operators, mobile virtual network operators, mobile service providers and third party content providers (relevant interested parties and stakeholders) wherein it must be made a mandatory requirement for relevant parties and stakeholders to adhere strictly to the provisions of the code specifically in relation to (a) the development, (b) publication, and (c) dissemination and transmission of digital content. We suggest that this be made a condition in the existing fixed and mobile carrier licenses or in the new unified carrier license scheme. A breach of the code in relation to the provision of content regulation requirement and complaints against any of the interested parties and stakeholders should be dealt with seriously by the independent body (the regulator).

We believe that for the code to be workable, it is necessary that code of conduct adopted by relevant parties and stakeholders be the product of genuine consultation between government and the industry. It is vital that the code is further strengthened by a meaningful dialogue with non-governmental groups and the interested public. In our opinion it is especially important to ensure that the code be understood by those who are limited by its provisions as well as those who are seeking its protection. The codes must also be backed up by clear lines of accountability and monitoring.

(A7) Media literacy programs and campaigns. We have in our earlier chapters recommended the development of an aggressive media literacy awareness program and campaign in partnership with interested parties and relevant stakeholders. We view such programs and campaigns as crucial in encouraging and increasing user or community responsibility. Thus, it is proactive and positive on the part of the regulator to have in place risk- management measures to educate the community as to (a) the functionalities and applications of the mobile phone, (b) the potential hazards of mobile usage, and (c) the safeguards that can be implemented with a view to reducing the incidences of exposure to the hazards. A crucial part of the program is to ensure that such awareness program and campaign is to be targeted at parents, child carers, teachers, educators, and the children and young people themselves.

90 See Public service: application for a Hong Kong identity card by a person under 18 years and below, see http://www.immd.gov.hk/ehtml/hkid_b18.htm

(A8) Self help mechanisms. In line with (A7) media literacy programs and campaigns, we strongly advise (1) to provide self-help mechanisms, such as security features, filtering technology, and control tools that has been agreed upon by the relevant stakeholders and (2) to educate parents, child carers, teachers, and educators how to use them effectively. So it is proposed that developers of hardware (mobile devices) develop security features (as a default mechanism) in the mobile device itself such that content that has been classified as not suitable for children and young people, cannot be displayed or accessed. It will benefit parents immensely if they are adequately aware of self-help mechanisms and if the application methodologies for security features are couched in a language that is easier for parents and child carers to understand and apply.

We believe that the eight lessons learnt can accurately reflect the necessary ingredients of a combined 'mixture of control' regime. The mixture of control regime or combined control regime is articulated in greater detail in Section 10.7 (see also Figure 8.2) as being essential in the design of a regulatory framework.

B: Three additional elements

Further and in addition to the lessons learnt above, we propose three additional elements of which we advocate that they should be considered in the formulation of a new content regulatory framework: (B1) children and young people's input, (B2) the establishment of content advisory committees, and (B3) the use of incentives. A brief explanation of each element follows.

(B1) Children and young people's input. We believe there should be greater appreciation in the necessity of consulting children and young people for their input on technological change and use. We opine that their input would greatly assist the government and the independent body in achieving the desired outcome and the social objective of consumer protection. In line with this element, we are mindful of the rights of children as enunciated, for example, by international instruments such as the United Nations Convention on the Rights of the Child (CRC).[91]

The CRC promotes the idea of children as people with rights that have to be respected by adults, society, and all institutions that deal with children's affairs. Children are entitled to be respected and treated with dignity simply because they are human, whatever their age.[92] No doubt, this represents a distinct change in attitude and perception towards children and young people.

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91 See Convention on the Rights of the Child at http://www.crin.org/resources/treaties/CRC.asp?legal&ID=6

92 See www.unicef.org/crc/. The CRC was adopted in 1989 and since then has been widely ratified in all countries save and except in Somalia and the U.S. In fact, the CRC is seen as one of the most quickly ratified international human rights instruments.

Traditionally, children and young people are perceived as objects rather than rightful subjects of the law. This is because the vast majority of adults, from parents as guardians and care providers to teachers, doctors and priests have themselves been brought up and educated as children perceived as objects that are required to obey adults unconditionally.[93] This perception is aptly reflected in the traditional parental maxim "Children are to be seen, not heard."

In changing our perception and treating children as the subjects of the law, we note one guiding principle of the Convention of the Rights of the Child (CRC), Art. 3, which provides:

> "The best interests of children must be the primary concern in making decisions that may affect them. All adults should do what is best for children. When adults make decisions, they should think about how their decisions will affect children. This particularly applies to budget, policy and law makers".[94]

It is our contention that government and regulators should be mindful of the principles enunciated by the CRC when making policy decisions, and promulgating laws for society and the community. In fact, if we look at Art. 12 of the CRC, we note that when adults are making decisions that affect children, children have the right to say what they think should happen and have their opinions taken into account.[95] In providing for such right, the Convention recognised that the level of a child's participation in decisions must be appropriate to the child's level of maturity.[96] It is not uncommon for adults in the circumstances to give greater weight to the opinions of the children as they mature. Ideally, a child's input on matters affecting him as an individual should be encouraged, when framing policies, and in decision-making processes.

However, we believe that this rarely happens. For example, we have seen popular social networking sites such as MySpace, Friendster and Facebook blocked in the US by filtering software in schools and colleges because of the possibility that the sites are used by on-line predators.[97] Although we agree that the decision was taken to protect children and youngsters from the possibility of harm from such predators, it is uncertain whether the views of the younger members of society had been considered or whether viable alternatives had been explored before a decision was taken. This re-inforces the point that children and young people are subjects of the law and are entitled to a certain degree of freedom and privacy. The CRC recognises this autonomy in terms

93 See Convention on the Rights of the Child at http://www.crin.org/resources/treaties/CRC.asp?legal&ID=6
94 Supra.
95 Supra n. 91.
96 Supra n. 91.
97 U.S. seeks to block social networking sites, August 1 2006; available at www.tech2.com/india/news/antivirus-security-internet/us-seeks-to-block-social-networking-sites/1086/0

of a child's right to access to information and material from a range of sources, rights against arbitrary or unlawful interference with his privacy, family, home or correspondence and the right to freedom of expression.[98] In respect of the latter, it includes the right to seek, receive, impart, and share information regardless of the medium concerned. This therefore includes the peer to peer communications via *inter-alia*, chat rooms, and social networking sites. Thus, we remark that the input from the perspective of the child and young person may positively influence the design of content regulation.

(B2) The establishment of content advisory committees. We opine that in addition to the youngster's input, it will be highly beneficial for regulators to keep abreast with, and be better informed of the changes that are occurring (a) within technologies, (b) within the applications and how the applications are being used, and (c) within the usage in the community (for example, changes in social attitudes and/or reaction to new technology and content choices). This will provide the necessary advice and guidance to the regulator so as to ensure that the strategy adopted remains efficient, viable, and up-to-date.

(B3) The use of incentives. Our investigations have indicated that the provision of incentives for interested parties and stakeholders will be a positive measure in the right direction to encourage compliance and support for the new content regulatory framework. A common form of incentive envisaged is tax benefit. Tax benefits can thus be granted upon proof that viable and effective measures have been adopted in compliance with lessons (5) access control mechanisms, (6) adherence to the code of practice, (7) active sponsorship in media literacy awareness and education programs/campaigns, and (8) the adoption of self help mechanisms.

7.7.1 The Hong Kong position

As an aside from the lessons learnt from our comparative observations of other jurisdictions, and the elements which we regard as significant value, we provide in Section 7.8, possible reasons for the Territory's 'position' on its existing content regulatory framework. We advocate that the reasons are compelling since they provide a brief insight as to

1 how the lessons derived from other jurisdictions can be readily understood in its proper perspective, and
2 whether the lessons might effectively be applied in the formulation of a viable content regulatory framework for Hong Kong.

98 Articles 13, 16 and 17 of CRC; available www.ohchr.org/english/law/crc.htm

Essentially, we remark that the lessons learnt cannot be transposed automatically in the Hong Kong case. Rather, an understanding must be made of the local culture and the community to ensure the regulatory framework best reflects the requirements of the community in its need to protect children and young people. We re-iterate that there is 'no one size fits all' solution to regulatory and societal concerns that arise. The design and formulation of a legal and regulatory framework is unique to each jurisdiction, and must be shaped by a combination of local legislations, economics, culture, and politics.

7.8 Our proposals

It is apparent from our investigations that social concerns, such as those raised in our RQ1 in Chapter 4 with regards to (1) the potential hazards of mobile communication technology, and (2) the impact that such hazards have on children and young people (Chapter 5), are issues that neither receive sufficient coverage nor invite rigorous debate in Hong Kong as compared to countries in the European Union or Australia. Indeed, we observe that the Territory's regulatory regime for content regulation is (a) fragmented, (b) exhibits signs of general lethargyness, and (c) lacks focus. This lack of regulatory direction is distinctive when compared to the "active" participation and expression of ideas and policies prevalent in the European Union, and Australia. Our observations lead us to indicate two contributory factors that led to the absence of discourse on the ills of modern communication technology: (1) the historical origins of the Hong Kong Chinese community, and (2) the Territory's style of governance. We believe that these factors have considerable influence on our proposals and also on the follow-up of the lessons learnt. In the Subsections 7.8.1 and 7.8.2 we provide a brief discussion of the factors (1) and (2).

7.8.1 The historical origins of the Hong Kong Chinese community

The ancestral origins of the Hong Kong Chinese can be traced back to the early years when Hong Kong was viewed as a stepping stone to a better life. This could be partly due to (a) the desire to escape poverty and oppression in China, and (b) the Territory's liberal trading policy. Many early migrants also saw Hong Kong as a temporary transit country with a view to finding 'permanent residence' in third countries such as the United States, United Kingdom, and Taiwan. This as S.K Lau (1984) suggested, had a significant impact that originated from their socio-political, socio-cultural, and socio-economic point of view since their normative orientation was (1) short term, (2) material-

istic, (3) valuing social stability above political participation, and (4) securing their families' longer term futures.[99]

Hong Kong is an administrative region. Before its sovereignty was reverted to the Peoples' Republic of China on 1 July 1997, Hong Kong had been a British colony for 154 years. Thus, the Hong Kong Chinese was governed socially, economically, and politically by a small community of European elite. S.K Lau (1984) further suggested that with the exclusion from the political sphere of all but a smaller circle of Chinese elite provided them with no opportunity (a) to influence civic affairs, or (b) to invite or encourage a vibrant debate on matters that affect the private and public lives of the local community. One consequence of this 'ethos of the Hong Kong Chinese' was low participation in political and civic affairs. In fact Y.C Lau (2005) suggested that the exclusion from the political sphere of all but a small group of Chinese elite provided them with no opportunity to influence civic affairs.[100] According to Y.C Lau this led to a lack of lively public debate and general civic apathy around controversial areas such as the new media, the Internet, and the impact of such medium on public and private life. Thus, discussions on the protection of children with regards to potential hazards of mobile communication, such as how the new media and communication technologies should be monitored, policed, or regulated to protect children and young people are painfully weak or virtually non-existent.

7.8.2 Hong Kong's style of governance

The Territory follows a top down governing structure with the power to govern firmly in the hands of the Chief Executive (CE) (before the handover in 1997, the Govenor). The CE is supported (a) by Executive and Legislative Councils of which roles are mainly advisory, (b) a by vast network of administrative officers who were encouraged (i) to make policy assessments and decisions and (ii) to assume responsibility from a young age in preparation for their eventual rise to heads of departments and policy branches, and (c) by consultative and advisory bodies that by and large consist of wealthy entrepreneurs from the trade, business, financial, and industrial sectors.[101]This leads to Lau's (2005) suggestions that three prevailing principles underline the Territory's style of governing i.e., (1) maintaining Hong Kong as a free trading port, (2) maintaining stability, and (3) maintaining prosperity.[102] Thus the government primarily adopted a laissez-faire attitude in that, unless a

99 Lau, S.K., *Society and Politics in Hong Kong*, 1984, Chinese University of Hong Kong Press, Hong Kong p. 67-71.

100 Lau, Y.C., Governance in the Digital Age: Policing the Internet in Hong Kong, in *Cyber-crime: The Challenge in Asia*, Broadhurst, R., and Grabosky, P., (eds.) 2005, Hong Kong University Press, Hong Kong.

101 Supra.

102 Supra.

serious potential risk is perceived to threaten social order and its economic status, the government will be reluctant to intervene. We believe that this attitude indicates and reflects a general lack of enthusiasm on the part of the Territory to react proactively on regulatory issues.

However, the scholars He Z and Zhu Jonathan J.H (2007) suggest that the general lack of enthusiasm is a characteristic of the model of transactional regulation.[103] In comparison to the model of manipulative control, He and Zhu (2007) view the transactional regulation as a regulatory undertaking characterised by (a) a lack of vision, (b) a continuous swing between extremes, and (c) the regulators efforts to trade regulations and laws for political support or for justification of the government legitimacy and achievements.[104] The scholars continue by opining that in political terms, the Territory is striving for recognition and legitimacy. This is contributed by the fact that the CE is elected by a small group of people, a practice legitimised by the Basic Law.[105] The CE is in a difficult position of having on the one hand, to meet the rising expectations of the local people in the wake of abolished colonial rule and yet on the other hand, having to please the Chinese Central Government. He and Zhu (2007) offer an explanation that suggests Hong Kong's regulatory model is a transactional model. According to He and Zhu (2007), the Hong Kong economy is dominated by few oligopolies and billionaires who have successfully supported and had the support of the Central Government. The billionaires either themselves or through their representatives represent the force behind the elite group that elects the CE. It is apparent that the special dynamics of this elite group and other business interest groups have considerable political influence and clout in Hong Kong thereby resulting in a significant impact on Hong Kong's regulatory model.[106]

7.9 CHAPTER CONCLUSION

From the discussion above, we may conclude that the Territory's social, cultural, and political norms have a significant resultant impact on the community's serious lack of (a) public knowledge and (b) public debate on non-economic and non-commercial issues. In particular, we may add, a serious level of public knowledge and of public debate on the social impact of mobile phone usage on children and young people. We opine that with better understanding and knowledge of the capabilities and hazards of mobile usage, the

103 He, Z., and Zhu, J.H. Jonathan., Regulating the New Media in China and Hong Kong: Manipulation and Transaction, available at Policy and Regulation in New Media: www.newmedia.cityu.edu.hk/cyberlaw/gp1/intro.html

104 Supra.

105 The Basic Law is a mini constitution of Hong Kong.

106 Supra He and Zhu, n. 103.

community as a whole will be able to participate actively and contribute creatively to a framework that best reflects the local culture, circumstance, and standard of morality, decency, and propriety.

Whilst we observe that weak political will and public support due to the lack of public knowledge and public debate may be the result of (1) the Territory's political tradition of a non-democratic form of governance which, we opine breeds democratic immaturity and (2) the Territory's social and cultural norms which neither promotes the expression of collective public opinion nor encourages active community participation, we opine that the lessons we derive from the other jurisdictions are invaluable, and will provide a comprehensive guiding framework from which we can derive essential elements for the formulation of a viable framework for mobile content regulation.

In the next chapter, we set ourselves the task of considering various regulatory theories.