The Review of the Control of Obscene and
Indecent Articles Ordinance ("COIAO") (Cap. 390)

The Judiciary's Response

I. Introduction

1. The Judiciary welcomes the Administration's review of the COIAO. The Judiciary had proposed such a review, particularly on the operation of the Obscene Articles Tribunal ("OAT"), on a number of occasions from 1995 to 2008 and believes that such a review is long overdue.

2. This paper sets out the Judiciary's response to the Administration's consultation exercise, as set out in the "Healthy Information for a Healthy Mind" consultation document ("the consultation document").

II. Outline

3. The OAT is part of the Judiciary. The Judiciary maintains that :

(a) The present statutory institutional set up of the OAT under the COIAO is highly unsatisfactory as the OAT is required by the law to perform both administrative and judicial functions; and

(b) The present system of adjudicators of the OAT under the COIAO is highly problematic.

The Judiciary will also make some additional specific comments on some issues raised in the consultation document.

III. Institutional Set Up of the OAT

(A) *The Existing Statutory Set Up*

4. The OAT was established by the COIAO in 1987 as a specialized tribunal under the Judiciary.

5. Under the COIAO, the OAT is required to perform two distinct functions:

(a) First, it **classifies** submitted articles as to whether they are obscene, indecent or neither pursuant to Part III of the COIAO ("the classification function"). Essentially, classification (both the interim classification and on being challenged, the classification after a full hearing) is an administrative function. The OAT discharges this function as an administrative tribunal. In this context, it is entitled to act only within the powers given to it by the Ordinance;

(b) Secondly, it **determines**, upon referral by a court or a magistrate arising from a civil or criminal proceeding, whether any article is obscene or indecent or any matter that is publicly displayed is indecent pursuant to Part V of the COIAO ("the determination function"). When the OAT makes such a determination upon referral by a court or a magistrate, it does so as a court, possessing the powers and authority of a court. In this respect, any findings made by the OAT will be taken as findings of fact by the referring court; and

(c) Hence, the OAT, though making reference to the same set of guidance under section 10, is in effect operating as two different bodies which possess different powers and subject to different procedures and rules of evidence when it is performing the two distinct functions of classification and determination under Parts III and V of the COIAO respectively.

6. The case law in the Court of First Instance and the Court of Appeal have recognised that the OAT has these two distinct functions: the administrative classification function and the different judicial determination function.[1]

[1] See *Three Weekly Limited v Obscene Articles Tribunal and Commissioner for Television and Entertainment Licensing Authority* (Court of Appeal) [2007]3 HKLRD 673, CACV 315 & 316/2006, 31.5.07, at paras 14 to 25; the decision in the Court of First Instance (Lam J) unreported HCAL 42/2003, 29.6.06, at paras 84, 91 and 126; and *Mong Hon Ming v Anthony Yuen* (Hartmann J) unreported HCAL 137/2004, 15.11.05, at paras 63, 69 and 70. See also *Ming Pao Newspapers Limited v Obscene Articles Tribunal and Commissioner for Television and Entertainment Licensing* (Lam J) unreported HCAL 96 & 101/2007, 21.10.08, at paras 21 to 25.

(B) Problems with the Existing Statutory Set Up

(1) Matters of Principle

7. First and foremost, the existing statutory set up obliges the OAT to perform the administrative classification function, in addition to the judicial determination function. The exercise of an administrative function by a judicial body may undermine the fundamental principle of judicial independence. It is not appropriate for the OAT, which is a judicial body, to perform administrative duties in respect of the same area, that is, the control of obscene and indecent articles.

8. Secondly, the OAT's administrative classification function may transgress its judicial determination function. The situation often arises that the same article is submitted to the OAT for administrative classification and later also referred by a court to the OAT for judicial determination. It is unsatisfactory that the OAT should perform these two distinct functions sequentially under different rules and procedures over the same article under the same set of statutory guidance, even though the panel of adjudicators in a determination proceeding will be different from that in the earlier classification proceeding.

9. Thirdly, there are grave problems with the existing procedures when the OAT is performing the classification function as an administrative tribunal. Even in relation to the administrative classification function, the OAT dealing with classification, review and reconsideration of its own decisions, though with different panels of adjudicators, has given rise to criticisms that the OAT is also dealing with "appeals" against its own decision.

(2) Problems of Perception

10. It is not only important for justice to be done, but also for justice to be seen to be done. The problems of perception generated by the existing statutory set up of the OAT are therefore of grave concern to the Judiciary. It is noted that throughout the years, there have been public criticisms of the functioning of the OAT. Many of these are related to the unsatisfactory statutory set up of the OAT in having both the administrative and the judicial roles.

11. First, many allegations and misunderstandings about the operation of the OAT, for example, concerning inconsistent rulings, arise mainly from the fact that it is difficult for the public to understand why the OAT is not making a court ruling when it is engaged in administrative classification since the OAT is part of the Judiciary.

12. Secondly, the OAT is criticized for lack of transparency in its interim classification procedure. It is problematic for the public to understand and accept that when the OAT is undertaking the interim classification function, it is operating as an administrative tribunal, to which the principle of open justice in judicial proceedings does not apply.

(C) The Judiciary's Proposal of Removal of the Administrative Function

13. Assuming that as a matter of policy, the Administration wishes to retain the administrative classification function, the Judiciary remains firmly and strongly of the view that such administrative function should be removed from the Judiciary (see paragraphs 7 to 12 above). As to whether such administrative classification function should be taken up by an executive agency, an administrative tribunal or any other body, this is a policy matter for the Administration. The administrative classification decision by whoever is charged with it will be subject to judicial review.

14. On the assumption that the administrative classification function is removed from the OAT, the OAT as part of the Judiciary will carry out only its judicial determination function under Part V of the existing COIAO.

IV. The System of Adjudicators

(A) The Existing System of Adjudicators

15. A panel of adjudicators is established under section 5 of the COIAO. Having a panel of adjudicators is intended to be conducive to ensuring that the COIAO operates on standards of morality, decency and propriety that are generally accepted by reasonable members of the community. The matters for consideration before the OAT often involve issues of artistic, moral and ethical values which are highly controversial in nature and may attract diverse opinions in the community.

16. Under the COIAO, the panel of adjudicators is appointed by the Chief Justice, who is the head of the Judiciary. They may be re-appointed or removed by the Chief Justice. To be eligible for appointment as an adjudicator, the person must (a) be ordinarily resident in Hong Kong and has so resided for 7 years; and (b) be proficient in written English or written Chinese. This means that a large number of Hong Kong residents may be eligible for appointment under the law. There are however no provisions on how the appointment system should operate in practice.

17. In dealing with administrative classification or judicial determination, a Tribunal shall consist of (a) a magistrate who shall preside; and (b) 2 or more adjudicators selected from the panel. Any point of law arising shall be determined by the presiding magistrate. But apart from any point of law, in the event of any difference between the members of a Tribunal, the decision shall be that of the majority of them or, in the event that they are equally divided, that of the presiding magistrate. This means that the presiding magistrate's view on classification or determination as to whether an article is obscene, indecent or neither may be a minority view.

(B) Problems with the Existing System

(1) Matters of Principle

18. First, the OAT when performing its classification function under Part III is operating as an administrative tribunal. Having regard to the considerations above (see paragraphs 7 to 12), the Judiciary considers it inappropriate and undesirable for the Chief Justice, who is the head of the Judiciary, to be the appointing authority of adjudicators who perform administrative functions. This reinforces the need to remove the administrative function from the OAT.

19. Secondly, as pointed out above, the presiding magistrate's view on classification and determination as to whether an article is obscene, indecent or neither may be a minority view. The Judiciary considers that it is inappropriate and undesirable for the view of a judge[2] to be subjected to the majority view of lay adjudicators.

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[2] The reference to a judge includes a judicial officer.

(2) *Operational Difficulties*

20. While the COIAO sets out the eligibility criteria for adjudicators, it does not provide how these eligible persons can be identified and it does not prescribe under what circumstances a particular nomination should be approved or rejected. On past experience, adjudicators have been appointed mainly through invitation of self-nomination by the relevant bureau of the Administration. At present, there are 288 adjudicators. This system has the following problems:

(a) The Chief Justice is in no position to operate a satisfactory appointment system under the existing framework, including identifying suitable candidates and vetting of nominations. It is impossible for the Judiciary to come up with an administrative system which can produce a large enough pool of adjudicators representing a wide spectrum of residents. Any proposal on the adoption of additional administrative criteria for selection of adjudicators may be criticized on the ground that they may lead to a tribunal which may not fairly reflect community standards;

(b) The present process of self-nomination is also subject to the criticism that the pool of adjudicators appointed through this process may not reflect a sufficiently wide spectrum of residents; and

(c) There are suggestions of minor improvements to the appointment system, e.g. widening the net of invitees and setting a limit on the number of terms of appointment. But such measures would not solve the fundamental problems of the appointment system.

(3) *Problems of Perception*

21. There are strong criticisms that the panel of adjudicators is not sufficiently "representative", and that the decisions of the Tribunal are left to a limited group of adjudicators who do not reflect the prevailing standards of the community. This public perception is difficult to dispel even if the pool of adjudicators is considerably enlarged. It is impossible to reach a consensus on how big the pool has to be in order to make the panel sufficiently "representative".

(C) The Judiciary's Proposal of Adopting the Jury System

22. It is assumed that the administrative classification function will be removed from the Judiciary and that the OAT under the Judiciary will continue to be charged with the existing judicial determination function. On these assumptions, having regard to the existing problems of the adjudicators system, the Judiciary proposes that the system of OAT adjudicators should be replaced by a jury system, similar to that adopted in the High Court and the Coroner's Court.

23. The Judiciary considers that the jury system has many advantages:

(a) At present, there are roughly about 598,000 persons on the jury list[3]. The same jury list could be used for the OAT. It is obvious that the juror system will address the problems of the small size and the nomination of the pool of adjudicators, and would much better reflect the prevailing standards of the community;

(b) The determination of whether an article is obscene, indecent or neither will be entirely a matter for the jury. As with all juries, the jury will deliver a verdict but will not give reasons for their decision;

(c) With the introduction of the jury system, the role of the presiding magistrate in the OAT should be re-defined to one which is similar to that being undertaken by a judge in a court with a jury. He will rule on questions of law, including the admissibility of evidence, and give directions to the jury on the law and the evidence. Under the revamped system, the presiding magistrate would not take part in the determination of whether an article is obscene, indecent or neither, but will only be responsible for guiding the panel of jurors by appropriate directions to reach a decision in accordance with the law and the evidence. This would avoid the problem whereby a magistrate's view may turn out to be a minority view;

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[3] The Judiciary notes that the Law Reform Commission is currently conducting a consultation exercise on the criteria for serving as jurors, and depending on the outcome of the review exercise and the implementation of the eventual recommendations, the pool of jurors may be further enlarged in the future.

(d) The question of the size of the jury for each hearing has to be addressed. The number could be larger than the present number of adjudicators. It should be an odd number, with decisions by simple majority. A juror having served on one or more occasions could be exempted from service within a reasonable period. This would avoid the current perception problem that the decisions of the OAT are concentrated in the hands of a limited group of people who are willing to volunteer their service;

(e) The Judiciary has already been administering the jury system in the High Court and the Coroner's Court. It would be relatively straightforward to extend the system to the OAT, though some additional resources would be involved; and

(f) Any appeal from the OAT with a jury may be to the Court of First Instance on the ground that no reasonable jury properly directed could have come to the verdict. It may also be on the grounds that the presiding magistrate had made rulings which were wrong in law or had misdirected the jury. A further appeal to the Court of Final Appeal may be provided where a point of law of great and general importance is involved.

V. Summary

24. The Judiciary is firmly and strongly of the view that any review of the COIAO should address the problems concerning the existing statutory set up of the OAT and the existing system of OAT adjudicators discussed above and that the solutions to them are:

(a) Removing the administrative classification function from the Judiciary, leaving the OAT within the Judiciary to deal only with judicial determination; and

(b) Replacing the adjudicators system in the OAT with the jury system.

The Judiciary notes that in the past, it has made essentially these proposals repeatedly to the Administration.

VI. Additional Specific Comments on the Consultation Document

25. The Judiciary would like to make a few specific comments on the consultation document as follows:

(a) Chapter 1 (Definitions), page 10, paragraph 2.6

For reasons set out in Part III above, the Judiciary does not consider it appropriate for it to perform the administrative function of classification at all or to draw up administrative guidelines to supplement the definition of "obscenity" and "indecency" under section 10 of the COIAO.

(b) Chapter 2 (Adjudication System)

(i) Improving the OAT, page 16, paragraph 2.1

As set out in Part IV above, the Judiciary suggests replacing the adjudicators system in the OAT with the jury system. It is not clear whether this is the same as the option at 2.1 (a) of the document, which refers to drawing adjudicators from the list of jurors. The Judiciary considers that the adjudicators system should be entirely replaced with the jury system (see paragraphs 22 and 23), rather than merely retaining the adjudicators system but drawing the panel of adjudicators from the jury list.

(ii) Two-tier system, page 17, paragraphs 2.2 to 2.4

As stated above, the Judiciary strongly supports the proposal to separate the administrative and judicial functions of the OAT. This would address the fundamental problems with the existing statutory set up of the body as set out in Part III above. As to whether such administrative classification function should be taken up by an executive agency, an administrative tribunal or any other body, this is a policy matter for the Administration.

Judiciary Administration
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