

Legislative Council

Panel on Administration of Justice and Legal Services

**The Role of the Judiciary in the Adjudication System under
the Control of Obscene and Indecent Articles Ordinance**

Purpose

This paper aims to set out the Judiciary's position on its role in the adjudication system under the Control of Obscene and Indecent Articles Ordinance (Cap. 390) ("COIAO").

Background

2. The Obscene Articles Tribunal ("OAT") is part of the Judiciary. The Judiciary considers that the present statutory institutional set-up of the OAT under the COIAO is highly unsatisfactory as the OAT is required by law to perform both administrative classification and judicial determination functions. The Judiciary firmly considers that the problems with the existing statutory set-up of the OAT should be addressed by completely removing the administrative classification function from the Judiciary, leaving the OAT to deal only with its judicial function.

3. The Judiciary welcomes the Administration's review of the COIAO. In fact, the Judiciary has consistently proposed such a review, particularly on the operation of the OAT, on many occasions from 1995 to 2008, and firmly believes that such a review is long overdue.

4. During the first round of the Administration's public consultation on the review of the COIAO in 2008, the Judiciary made a written response reiterating its concern on the institutional set-up of the OAT. At the Ceremonial Opening of the Legal Year 2009, the former Chief Justice also raised the Judiciary's principled concern on the matter and called for a fundamental reform of the OAT.

5. Since the first round of public consultation, the Judiciary has consistently reflected its position on the matter to the Administration on numerous occasions.

6. The Judiciary's position on its role in the adjudication system under the COIAO is recapitulated in the following paragraphs.

Institutional Set-up of the OAT

(A) Existing Institutional Set-up

7. The OAT was established under the COIAO in 1987 as a specialized tribunal as part of the Judiciary.

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

- (a) firstly, 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; and
- (b) secondly, it **determines**, upon referral by a court or a magistrate arising from a civil or criminal proceeding, whether (i) any article is obscene or indecent; or (ii) 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.

9. Hence, the OAT, though making reference to the same set of guidance under section 10 of the COIAO, 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.

10. The case law in the Court of First Instance and the Court of Appeal has recognized that the OAT has these two distinct functions: the administrative classification function and the different judicial determination function¹.

(B) Problems with the Existing Statutory Set-up

(1) Matters of principle

11. Firstly, 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 classification function by a judicial body may undermine the fundamental principle of judicial independence. It is therefore 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.

12. 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 highly 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 the determination proceedings will be different from that in the earlier classification proceedings.

¹ See *Three Weekly Limited v Obscene Articles Tribunal and Commissioner for Television and Entertainment Licensing Authority* [2007] 3 HKLRD 673, CACV 315 & 316/2006 (Court of Appeal, 31 May 2007), at paragraphs 14 to 25; *Three Weekly Limited v Obscene Articles Tribunal and Commissioner for Television and Entertainment Licensing Authority*, unreported, HCAL 42/2003 (Court of First Instance, 29 June 2006), at paragraphs 84, 91 and 126 (Lam J); *Mong Hon Ming v Anthony Yuen*, unreported, HCAL 137/2004 (Court of First Instance, 15 November 2005), at paragraphs 63, 69 and 70 (Hartmann J). See also *Ming Pao Newspapers Limited v Obscene Articles Tribunal and Commissioner for Television and Entertainment Licensing*, unreported, HCAL 96 & 101/2007 (Court of First Instance, 21 October 2008), at paragraphs 21 to 25 (Lam J).

13. Thirdly, there are grave problems with the existing procedures when the OAT is performing the administrative 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 decisions.

(2) Problems of perception

14. 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. 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 having both administrative and judicial functions.

15. Firstly, many allegations and misunderstandings about the operation of the OAT, for example, concerning the inconsistent rulings, arise mainly because 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.

16. Secondly, the OAT has been criticized for lack of transparency in its interim classification procedures. It is difficult 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) Proposal of Removal of the Administrative Function from the Judiciary

17. The Judiciary remains firmly and strongly of the view that the existing set-up of the OAT is not acceptable and the administrative classification function must be removed from the Judiciary. The Judiciary urges the Administration to reform the set-up of the OAT accordingly.

18. Upon the removal of the administrative classification function from the Judiciary:

- (a) the OAT as part of the Judiciary will carry out only its judicial functions under Part V of the existing COIAO; and
- (b) it is a policy matter for the Administration to decide whether the administrative classification function should be retained; and if so whether it should be taken up by an executive agency, an administrative tribunal or any other body. Any administrative classification decision by whoever is charged with it will be subject to judicial review.

(D) Others' Views

(1) Views of the legal profession

19. The Judiciary notes that the separation of the administrative and judicial functions of the OAT is strongly supported by the legal profession including the Hong Kong Bar Association and the Law Society of Hong Kong.

20. The Hong Kong Bar Association agrees with the Judiciary's view that the present statutory institutional set-up of the OAT under the COIAO is highly unsatisfactory. The co-existence of a judicial jurisdiction to determine the nature of an article in connection with extant legal proceedings with an administrative function to classify submitted articles is detrimental to the independence of the tribunal as a judicial body. The administrative classification must at least be removed, if not abolished. A new institutional arrangement for censorship of publications for the protection of public morals should be explored and established.

21. The Law Society of Hong Kong also supports the Judiciary's recommendation that the administrative classification functions of the OAT should be removed from the Judiciary.

(2) Views of some Legislative Council Members

22. The Judiciary also notes that some Members of the Legislative Council have also voiced their support for the Judiciary's position on the removal of the administrative classification function during the first round of the Administration's public consultation on the COIAO.

(3) Views of the public

23. The Judiciary notes that according to a telephone public opinion survey conducted by the University of Hong Kong during the first round of public consultation, a majority of respondents (63%) supported establishing an independent classification board for making interim classification on articles, while the existing OAT will remain as a judicial body to consider appeals against the classification decisions of the board.

Advice Sought

24. Members are invited to note the content of this paper.

Judiciary Administration
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