

## INFORMATION NOTE

### Composition and operation of the Obscene Articles Tribunal

#### 1. Background

1.1 This information note aims to provide members of the Panel on Administration of Justice and Legal Services ("the AJLS Panel") with general information about the Obscene Articles Tribunal ("OAT"). It covers the Tribunal's statutory institutional set up, composition, functions, operation (including the procedures and guidelines for handling articles as well as caseload), and relevant issues of concern.

#### 2. Obscene Articles Tribunal

##### Establishment and composition of the Obscene Articles Tribunal

2.1 The *Control of Obscene and Indecent Articles Ordinance (Cap. 390)* ("COIAO") was enacted in 1987 to create an adjudication system featuring the establishment of OAT as part of the judiciary with exclusive jurisdiction in determining whether an article is obscene or indecent, or neither obscene nor indecent. Under COIAO, an "article" means anything consisting of or containing material to be read and/or looked at. In general, articles that are regulated by COIAO encompass newspapers, magazines, books, comic books, VCDs, DVDs, posters, computer games, electronically transmitted pictures and images, and Internet content.<sup>1</sup>

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<sup>1</sup> The Ordinance does not apply to films, film packaging and film advertising material covered under the *Film Censorship Ordinance (Cap. 392)* and television broadcasts regulated by the *Broadcasting Ordinance (Cap. 562)*.

2.2 The OAT system came into place in 1987 to replace the former system under the now repealed *Objectionable Publications Ordinance*<sup>2</sup> whereby the determination of whether an article was objectionable was made by a single magistrate. Such system was severely criticized for its lack of representativeness of the community's views. To address the concern, the Government decided to devise a more broad-based system that could reflect the standards held by the community in the process of classification and determination of articles. Consequently, OAT was set up comprising a presiding magistrate and two or more members of the public as adjudicators. The inclusion of lay adjudicators in OAT enables public standards of morality to be reflected in the classification process and allows for community participation in the judicial process on matters of public propriety.

### Functions of the Obscene Articles Tribunal

2.3 Under *COIAO*, OAT is required to perform two distinct functions:

- (a) administrative function – OAT classifies a submitted article as Class I (neither obscene nor indecent), Class II (an indecent article) or Class III (an obscene article).<sup>3</sup> In performing such classification duty (including both the interim classification and, upon appeal, the final classification on a submitted article), OAT acts only within the powers and limits set by *COAIO*, and does not possess the power and authority of a court<sup>4</sup>; and
- (b) judicial function – OAT determines whether an article referred to it by a court or a magistrate is obscene or indecent, and whether any matter publicly displayed is indecent. In this context, OAT does so as a court, possessing the powers and authority of a court.

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<sup>2</sup> The *Objectionable Publications Ordinance* was repealed and replaced by the *Control of Obscene and Indecent Articles Bill 1986*, which was passed in February 1987 to become *COIAO*.

<sup>3</sup> Class I articles may be published without restriction. Class II articles must not be published to persons under age 18, and when published or sold, must carry a statutory warning notice and be sealed in a wrapper. Class III articles are prohibited from publication.

<sup>4</sup> Review of the Control of Obscene and Indecent Articles Ordinance (2011).

### Panel of adjudicators

2.4 A panel of adjudicators is established under Section 5 of *COIAO*. Under the *COIAO* regulatory regime, OAT relies on the adjudicators to reflect the standards of morality generally accepted by reasonable members of the community. At present, there was a pool of 401 adjudicators, with 94 female and 307 male adjudicators.

2.5 The adjudicators are recruited through open invitation. They are appointed by the Chief Justice of the Court of Final Appeal. Persons who are ordinarily resident in Hong Kong, have so resided for at least seven years and are proficient in written English or written Chinese may apply to the Judiciary for appointment as adjudicators.

2.6 Adjudicators are appointed on the basis that persons from various age groups, education levels, professions and occupations will be selected so that the standard adopted by OAT is as akin to the social norm as possible and is representative. The adjudicators are appointed for a term of three years and are eligible for re-appointment. The Chief Justice may remove an adjudicator from the panel if he or she ceases to be ordinarily resident in Hong Kong, is convicted of any offence, declares a bankrupt, or neglects or is unable to perform his or her duty.

### Operation of the Obscene Articles Tribunal

#### *Classification process*

2.7 *COIAO* stipulates that such parties as authors, printers, manufacturers, publishers, importers, distributors, copyright owners or any person who commissions the design, production or publication of any article may submit articles to OAT for classification. Further, the Secretary for Justice and any authorized staff of the enforcement agencies, i.e. the Television and Entertainment Licensing Authority, the Hong Kong Police Force and the Customs and Excise Department, may also submit articles to OAT for classification. OAT does not solicit any articles for classification. There is also no requirement that articles must be submitted for classification before publication.

2.8 Upon receipt of a submitted article, OAT will conduct a first hearing in private (without the applicant or any other person in attendance), and make an interim classification within five days of the submission of the article. The hearing will be conducted by the presiding magistrate and two adjudicators. The results of the interim classification will be published in two newspapers. If the interim classification is not disputed and no request for review is lodged, it will be confirmed as the final classification.

2.9 If a request for review of the interim classification is lodged (within five days of the announcement of the results), OAT will set a date for a full hearing which is open to the public. The full hearing will be conducted by the presiding magistrate in charge of the interim classification and four or more adjudicators who are not previously involved in the interim classification. The appellant may make representations at the full hearing, either in person or through legal representative. The decision of the classification may be altered or confirmed, and the result of the full hearing will be final. In making classification rulings at both interim and full hearings, OAT is required to identify the part of the article causing the obscenity or indecency.

#### *Determination process*

2.10 OAT's determination of articles referred by a court or a magistrate is conducted in open court. Similar to the classification process, OAT identifies the part of the article which gives rise to obscenity or indecency at the determination proceedings. A party may appeal on a point of law to the Court of First Instance of the High Court against the decision of OAT.

*Guidelines for classification and determination*

2.11 In determining whether an article is obscene or indecent, whether any matter publicly displayed is indecent, or in classifying an article, OAT will take into consideration a number of factors provided in Section 10 of *COIAO*. These include:

- (a) the standards of morality generally accepted by reasonable members of the community;
- (b) the dominant effect of the article or of the matter as a whole;
- (c) the class or age of the likely recipients;
- (d) in case of matter publicly displayed, the location where the matter is displayed and the class or age of the likely recipients; and
- (e) whether the article or the matter has an honest purpose.

*Caseload of the Obscene Articles Tribunal*

2.12 The caseload of OAT and the waiting time for its cases between 2008 and 2010 are shown in **Tables 1** and **2** respectively. According to **Table 1**, the caseload of OAT fluctuated significantly from year to year. During the period, the majority of articles were referred to OAT by the Magistrates' Courts for determination of whether the articles were obscene or indecent.

2.13 As shown in **Table 2**, the actual waiting time for the cases for both classification (requiring two to three days) and determination (ranging from 18 to 20 days) during 2008-2010 were shorter than the targets set by OAT at five and 21 days respectively. In particular, the actual waiting time for articles submitted for classification was 40% to 50% shorter than the OAT target.

**Table 1 – Caseload of the Obscene Articles Tribunal**

Purpose of article submission	Caseload			Case disposal <sup>(1)</sup>		
	2008	2009	2010	2008	2009	2010
Determination	43 533	12 746	37 677	42 404	13 894	36 191
Classification	931	761	671	933	762	671
Review	2	0	2	2	0	2
Reconsideration <sup>(2)</sup>	0	0	0	0	0	0
<b>Total</b>	<b>44 466</b>	<b>13 507</b>	<b>38 350</b>	<b>43 339</b>	<b>14 656</b>	<b>36 864</b>

Notes: (1) Case disposal refers to:

- (a) those articles which have been determined or classified;
  - (b) those in respect of which determination or classification is not required with consent of both the party who publishes the article and the one who refers it to the Tribunal; and
  - (c) those in respect of which determination or classification have been reviewed or reconsidered.
- (2) A classification may be reconsidered by OAT itself or at the request of the person submitting the article in question.

Source: Hong Kong Judiciary Annual Report (2010).

**Table 2 – Waiting time (number of days) for cases in the Obscene Articles Tribunal**

	Target	2008	2009	2010
From referral by a magistrate to commencement of determination of the subject matter of a court case	21	18	18	20
From receipt of application to classification	5	2	2	3
From receipt of application to review	Not applicable. <sup>(1)</sup>	19	*	26
From receipt of application to reconsideration	Not applicable. <sup>(1)</sup>	*	*	*

Notes: (1) According to the Judiciary, targets were no longer set for application to review and reconsideration cases in OAT from 2007 onwards.

\* No relevant application was filed.

Source: Hong Kong Judiciary Annual Report (2010).

### **3. Review of the Control of Obscene and Indecent Articles Ordinance**

#### Relevant concern

3.1 The Government commenced a review of *COIAO* at the end of 2008 with two planned rounds of public consultation. The first round was conducted between October 2008 and January 2009, whereas the timetable for the second round has not yet been announced by the Government. During the first round of public consultation, the Judiciary and some members of the legal sector took the view that the administrative classification function should be removed from OAT, leaving it to carry out only its judicial determination function under Part V of *COIAO*. According to the Judiciary's response to the review, the need for such arrangement has arisen as a result of the following problems with the statutory institutional set up of OAT:<sup>5</sup>

- (a) the exercise of an administrative function by a judicial body may undermine the fundamental principle of judicial independence;
- (b) OAT's administrative classification function may transgress its judicial determination function. This is often the case when an article is submitted to OAT for administrative classification, and later the same article is referred by the court to OAT for judicial determination. Although different panels of adjudicators are involved in the classification and determination proceedings, it is not satisfactory that OAT performs two distinct functions under different rules and procedures over the same article according to the same set of statutory guidelines; and
- (c) under the existing procedures, OAT deals with classification, review and reconsideration of its own decisions. While different panels of adjudicators are involved, such practice has incurred criticisms that OAT is also dealing with "appeals" against its own decision.

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<sup>5</sup> Judiciary of the Hong Kong Special Administrative Region (2008).

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## Members' concern

3.2 The major findings of the first round of public consultation on the review of *COAIO* were discussed by members of the Panel on Information Technology and Broadcasting on 13 July 2009. Having regard to the aforementioned views of the Judiciary and other legal professionals, some members considered that it was not appropriate for OAT to carry out both the administrative and judicial functions, and expressed their support for the removal of the administrative classification function from OAT. They urged the Administration to liaise with the Judiciary to address the issues and improve the operation of OAT. According to the Administration, all the views collected in the first round of public consultation would be consolidated and analyzed for drawing up more concrete proposals for the second round of public consultation which was initially scheduled to commence in the end of 2009. Regarding OAT's dual role of performing both administrative and judicial functions, the Administration would seek to improve the adjudication system and the operation of OAT by discussing the issue with the Judiciary and relevant stakeholders.

3.3 During the AJLS Panel's visit to the Judiciary in July 2009, participating Members agreed that the Panel should follow up on the issue. The AJLS Panel has since then requested the Commerce and Economic Development Bureau to propose an appropriate timing for discussion but to no avail. The Panel has requested the Bureau to explain to members at its meeting on 30 January 2012 why it cannot address the Judiciary's concern which has been expressed to the Administration for such a long time.

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