

1. Definitions

Main Issues

Some members of the public consider it important for the Obscene Articles Tribunal (OAT) to achieve consistency in classifying articles under the Control of Obscene and Indecent Articles Ordinance (COIAO). They also expect OAT to have regard to public standards and cater for changing community needs when making classification decisions.

Focal Question

How would you translate public standards in respect of “obscenity” and “indecenty” into clear provisions to be applied by the OAT consistently?



Detailed Discussion

(1) Existing Arrangement

- 1.1 According to the COIAO, “obscenity” and “indecent” include “violence, depravity and repulsiveness”.
- 1.2 Section 10 of the COIAO provides a list of factors which the OAT, a judicial body presided by a magistrate and comprising adjudicators appointed by the Chief Justice to carry out the article classification function, is required to have regard to in determining whether an article is obscene or indecent: -
 - (a) standards of morality generally accepted by reasonable members of the community;
 - (b) the dominant effect of the article as a whole;
 - (c) the class or age of the likely recipients;
 - (d) the location at which the article is displayed; and
 - (e) whether the article has an honest purpose.

(2) Areas for Improvement

- 2.1 “Obscenity” and “indecent” are not absolute concepts but relative ones because the meaning of the concepts changes with time, place, culture and from individuals to individuals. *The challenge is how to provide for a comprehensive definition of “obscenity” and “indecent” on one hand and to keep pace with changing needs on the other.*

Expanding definitions

- 2.2 There are different ways to enhance the clarity of the statutory provisions. One possible way is to expand the existing definition under the COIAO and provide more concrete explanations for the terms “obscene” and “indecent”. For example, apart from covering the resultant inciting effect (i.e. “depravity and repulsiveness”), the definition may also cover the substance of “obscenity” and “indecency”, i.e., an article shall be deemed to be obscene or indecent if its dominant characteristic is “the undue exploitation of sex, horror, cruelty and violence”.
- 2.3 The public may better understand what “obscenity” and “indecency” refer to with the more concrete explanation, which may also give an indication of the factors to be taken into account when classifying articles. This may help enhance consistency in OAT’s rulings. *If the expanded definition is drawn up in general terms without going into specifics so as to retain flexibility, the challenge is how to fully explain what constitutes “obscenity” and “indecency”.*

Reference Questions:

How would you expand the definition of “obscenity” and “indecency”? What are your major considerations? How would you address the challenge of striking a balance between flexibility and clarity?

Statutory guidelines

- 2.4 Another possible option is to expand section 10 to provide clearer guidance to the OAT. These additional guidelines may continue to be phrased in general terms to provide flexibility, such as –
- (a) Whether the article is considered by reasonable members of the community to be harmful to persons below the age of 18 in terms of psychological development;
 - (b) Whether factors listed in section 28 of the COIAO, i.e. publication of an article may be considered to be intended for the public good if it is in the interests of science, literature, art or learning, or any other object of general concern should be incorporated.
- 2.5 This may facilitate the OAT to consider whether the article is suitable for young people as well as the nature of the article itself. It may help enhance consistency in OAT's rulings, though this may not solve all the problems of inconsistency. *The challenge is how to strike a balance between clarity and flexibility as the expanded guidelines will be stipulated in the law.*

Reference Questions:

What are the additional factors you think should be included in section 10 of the COIAO? What are your major considerations? How would you address the challenge of striking a balance between flexibility and clarity?

Supplementary administrative guidelines

- 2.6 If the classification body (i.e., the OAT) remains as a judicial body (please refer to Chapter 2 on the Adjudication System), some members of the public have suggested inviting the Judiciary to draw up general guidelines to supplement section 10 so as to give clearer guidance to the adjudicators. This may help enhance consistency in OAT's rulings. Bearing in mind the judicial nature of the judiciary, it would not be appropriate for it to draw up detailed administrative guidelines for performing a non-judicial function of classification of articles.
- 2.7 We also have to bear in mind that it would not be appropriate for the Government to make the guidelines for the OAT as this may be perceived as interference with judicial role.
- 2.8 If an independent body is to be set up to classify articles under a two-tier system whereby the OAT will only deal with appeals and determination cases referred by the court (please refer to Chapter 2 on the Adjudication System), there may be a case for the Government to issue detailed guidelines to supplement section 10 of the COIAO so as to give more guidance to the adjudicators of the independent classification body. *The major point of consideration is whether the Government should be directly involved in drawing up classification guidelines.*

Reference Questions:

If more specific guidelines are required to supplement section 10 of the COIAO, which agency would be suitable to draw up these guidelines? What are the advantages and disadvantages of your proposal?

