





## 2. Adjudication System

### (A) Institutional Set Up

#### A1. Main Issues

The public considers it important for the OAT to make consistent decisions in classifying articles under the COIAO and to have sufficient representation to reflect community standards.

#### Focal Question

How do you improve the system to enhance consistency and representativeness, bearing in mind that changes in one area may have impact on issues in other areas?



## **A2. Detailed Discussion on the Institutional Set Up of the OAT**

### **(1) Existing Arrangement**

- 1.1 The OAT has exclusive jurisdiction to determine whether an article is obscene, indecent or neither for the purpose of the COIAO. Apart from enforcement agencies, prospective publishers may submit articles to the OAT on a voluntary basis to obtain classification rulings, so as to avoid breaching the law.
- 1.2 The OAT is a judicial body, which comprises a presiding magistrate and two members of the public appointed by the Chief Justice to serve as adjudicators. Currently there is a pool of some 300 adjudicators serving the OAT.
- 1.3 Upon receipt of a submitted article, the OAT will conduct a **first hearing** in private and give an **interim classification**. The hearing will be conducted by a presiding magistrate and two adjudicators. If the interim classification is not disputed and no request for review is lodged, it will be confirmed as the final classification.
- 1.4 If a request for review of the interim classification is lodged, the OAT will arrange a public **full hearing** which is to be conducted by the presiding magistrate in charge of the interim classification and four or more adjudicators who were not previously involved in the interim classification.

1.5 The adjudicators are all appointed by the Chief Justice of the Court of Final Appeal. Persons who are ordinarily resident in Hong Kong and have so resided for 7 years and proficient in written English or Chinese can apply to the Judiciary for appointment as adjudicators.

## (2) Areas for Improvement

### *Improving OAT*

2.1 As some people wish to see the OAT remain as a judicial body, one area for improvement is to build on the existing OAT, in particular to make it more representative. There are a number of possible ways to achieve this, for example:

- (a) draw adjudicators from the list of jurors (currently 570 000 jurors on the list) for each tribunal hearing or expand the existing panel of adjudicators (say, from 300 to 500 or above);
- (b) increase the number of adjudicators at each hearing. For instance, the number of adjudicators attending an interim hearing is to be increased from two to four, whereas the number of adjudicators for full hearings is to be increased from four to six;
- (c) expand the existing panel by including adjudicators from specified sectors and to prescribe in the legislation that each tribunal hearing should consist of adjudicators from specified sectors, e.g. education, cultural, social welfare, etc. But this may lead to public debates on which sectors should be included;

- (d) appoint individual adjudicators for no more than six years so that there is a proper turnover among the adjudicators; and
- (e) require the OAT to make public its reasons for interim classification so as to enhance public understanding of the parameters the OAT has adopted in classification. This is also in line with the OAT's practice in the full hearing.

## Reference Question:

How do you improve the representativeness of the OAT?

### Two-tier system

- 2.2 Another alternative for consideration is to separate the administrative and judicial functions<sup>1</sup> of the OAT.
- 2.3 One option may be to establish an independent classification board drawing in some 20 to 30 lay members for making interim classifications on articles. Members of the new independent board may be appointed by the Government from some representative sectors in the community, e.g. education, social welfare,

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<sup>1</sup> - It is an **administrative function** for the OAT to perform its statutory duty to make an interim classification and, upon appeal, a final classification on a submitted article. In performing such classification duty, the OAT does not possess the power and authority of a court.

- The OAT is also required to perform a **judicial function**. Upon referral by a court or a magistrate arising from a civil or criminal proceeding, the OAT determines whether an article is obscene or indecent. The OAT does so as a court, possessing the powers and authority of a court.

professionals, media, cultural services, academics and district organizations. The existing OAT will remain as a judicial body to consider appeals against the classification decisions of the board and deal with the determination of articles referred to the OAT by the court.

- 2.4 Under this new two-tier system, decisions made by the new independent board could be reviewed by the OAT as a judicial body, which would enhance transparency of the classification process. The two bodies would also have clear division of roles, functions and powers. *The challenges are how to address the issue of representativeness if the number of members on the new board may possibly be limited; and how to cope with the present caseload (some 70 000 classification cases annually) if such a limited number of members of the new board are not full-time adjudicators.*

### **Reference Question:**

If the independent classification board as described above were to be introduced, how do you ensure that its possibly limited number of members can reflect community standards and cope with the caseload?

#### *The court*

- 2.5 Another option may be to abolish the OAT as some members of the public consider it more appropriate for a magistrate to classify articles. In doing so, the magistrate is required to reflect the community views on morality, decency and propriety.

2.6 In the light of the experience of some advanced jurisdictions, the ordinary court may be capable of dealing with the acceptability or otherwise of publications.

2.7 *The major challenge is how to ensure a single magistrate could reflect community standards if the OAT were to be abolished. It is also necessary to consider the issue of publishers not being able to obtain classification rulings in advance to enable compliance with the law as the court will not provide the administrative classification service; and the issue of the heavy burden imposed on the court leading to long waiting time for rulings.*

### **Reference Questions:**

Do you think it is appropriate to abolish the OAT?  
Which body do you think can replace the OAT?  
How do you ensure that any new body is sufficiently representative; able to address the needs of publishers; and able to cope with the caseload?

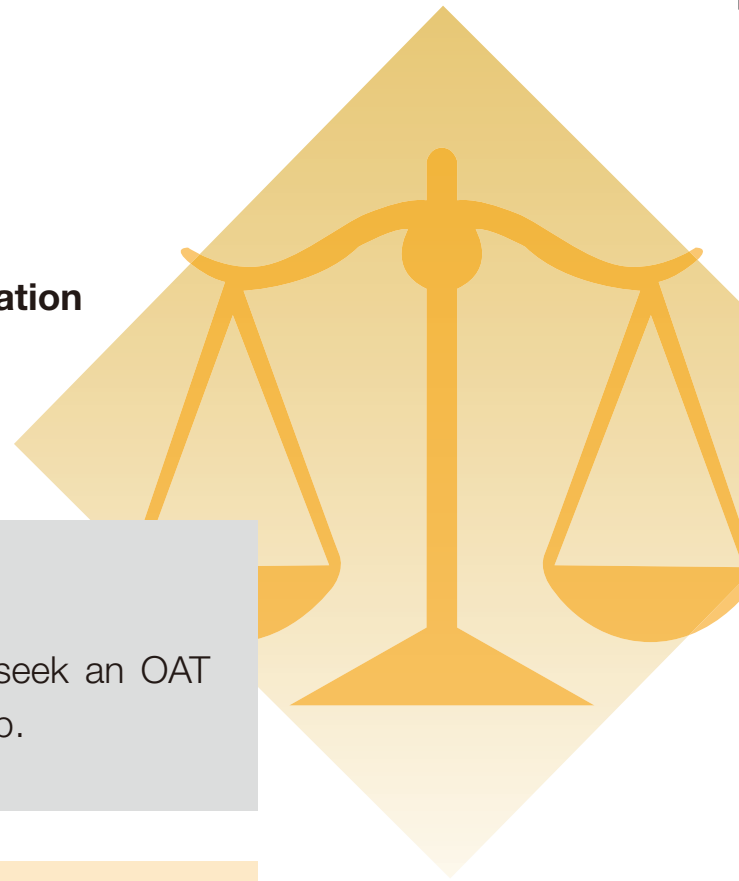
## **(B) Submission of Articles for Classification**

### **B1. Main Issues**

There are public views that the right to seek an OAT classification ruling should be opened up.

### **Focal Questions**

Is it appropriate for more people to be able to refer articles to the OAT for classification? How do you balance the increased access to OAT with OAT's capability to handle the workload?



## **B2 Detailed Discussion on Submission of Articles for Classification**

### **(1) Existing Arrangement**

1.1 Section 13 of the COIAO sets out who can submit articles to the OAT for classification. The law enforcement agencies (e.g. Television and Entertainment Licensing Authority (TELA), the Police and Customs and Excise Department (C&ED)) and the Secretary for Justice may submit articles to the OAT for classification. Publishers can also voluntarily submit articles to the OAT before publication to ensure compliance with the law. The existing arrangement seeks to ensure that the OAT will not be over-burdened and rulings can be handed down in a reasonable time.

### **(2) Areas for Improvement**

2.1 One possible option to enhance accessibility to the OAT is to expand the existing categories to allow more sectors to submit articles to the OAT for classification, e.g. educational bodies, social work organisations, etc. This could enhance community participation in the classification process. *The challenges are how to determine which sectors should have access to the OAT; and how to reach a consensus on such sectors.*

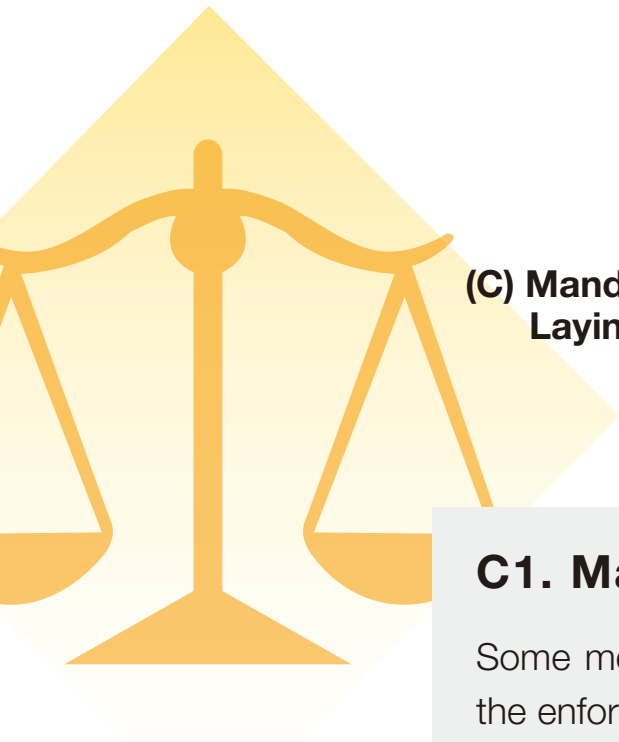
### **Reference Questions:**

How do you determine which sectors should have access to the OAT? What are your major considerations?

2.2 Another option is to allow all members of the public to submit articles to the OAT without restrictions and upon payment of a prescribed fee. This will enable members of the public to take the initiative to seek classification rulings on dubious articles. *The challenges are how to avoid overburdening the OAT; how to handle malicious and frivolous submissions; and how to ensure that opening up the accessibility would not lead to an abuse of the process.*

### **Reference Questions:**

How do you enhance the accessibility by the public to the OAT and at the same time avoid overburdening the OAT? How do you ensure that such open access would not lead to abuse of the classification process?



## **(C) Mandatory Classification prior to Laying of Charges**

### **C1. Main Issues**

Some members of the public consider it important for the enforcement agencies to submit articles to the OAT for classification before laying charges.

### **Focal Questions**

Should the enforcement agencies be required to seek OAT's classification ruling before laying charges? How could this be done without undermining the flexibility for the enforcement agencies and compromising enforcement efficiency?

## **C2 Detailed Discussion on Classification Prior to Laying of Charges**

### **(1) Existing Arrangement**

- 1.1 At present, there is no legal requirement that an article has to be classified before prosecution against the publisher is made. The enforcement agencies can choose to submit articles for classification before laying charges or to lay charges without seeking classification, depending on the merits of individual cases.
- 1.2 The current arrangement provides flexibility for the enforcement agencies. Prosecution can be made more efficiently, taking into account the large volume of articles which may be involved in straightforward cases (e.g., over thousands of pornographic VCDs seized in one single video shop).

### **(2) Areas for Improvement**

- 2.1 If we are to retain the current practice of allowing the enforcement agencies to decide whether or not to submit articles for classification before laying charges, one option is to adopt a set of clear guidelines, requiring the enforcement agencies to make submission to the OAT for classification in borderline cases.

2.2 Another option is to require the enforcement agencies to make submission to the OAT for classification before laying charges. This would avoid the enforcement agencies making their own judgment before the submission of articles to the OAT for classification. *The major challenge is how to ensure that effective enforcement would not be compromised, particularly in cases where swift action is necessary, as enforcement agencies will not be able to take enforcement actions until the classification of the article(s) concerned is announced. Another issue that needs to be addressed is how the OAT could cope with a much greater caseload if all cases have to obtain its prior classification before charges are laid.*

### **Reference Questions:**

Is it practical to make it a mandatory requirement to seek an OAT classification ruling prior to prosecution in all cases? How do you address the issue of overburdening the OAT?