

## Prevention of Child Pornography Bill

### Administration's Response to Letter by Assistant Legal Adviser of the Legislative Council on 17 May 2002

This paper sets out the Administration's response to the questions (in bold italics below) raised by the Assistant Legal Adviser of the Legislative Council in his letter of 17 May 2002 regarding the Prevention of Child Pornography Bill.

#### Clause 14

***A. In new section 138A, what is the difference between the reference to "in a sexual manner or context" in subsection 4(a)(ii) and "for sexual purposes" in subsection 4(b)(ii)?***

2. The phrase "in a sexual manner or context" is not defined in the Bill and therefore has to be interpreted in their ordinary dictionary meanings. According to the Concise Oxford Dictionary 10<sup>th</sup> Edition (revised) (2001) -

- "manner" means way in which a thing is done or happens; and
- "context" means the circumstances that form the setting for an event, statement, or idea, and in terms of which it can be fully understood.

3. "Sexual purpose" can also be found section 163.1(1)(a)(ii) of the Criminal Code of Canada which deals with child pornography. In this connection, the Supreme Court of Canada in Sharpe case has in the context of offences on child pornography discussed the meaning of the expression "sexual purpose" (see paragraphs 50 and 51 of the judgement). Following the judgment of the case, the phrase "for a sexual purpose" in the Bill should be interpreted in the sense of reasonably perceived as intended to cause sexual stimulation to some viewers.

4. Lord Devlin in *Chandler v DPP* [1962] 3 All ER 142 at 155 said of "purpose", "... A purpose must exist in the mind. It cannot exist anywhere else. The word can be used to designate either the main object which a man wants or hopes to achieve by the contemplated act, or it can be used to designate those objects which he knows will probably be achieved by the act, whether he wants them or not ..."

5. It can therefore be seen that the sexual elements involved in the

two phrases are different in nature and extent. On the one hand, “depict in a sexual manner or context” means that the depiction is done in a sexual way or that the circumstances that form the setting for the depiction and in terms of which it can be fully understood are of a sexual nature. Apparently, this level of sexual element is relatively more circumstantial and indirect.

6. On the other hand, in order to prove “for sexual purposes”, the prosecution need to prove that the intention behind the depiction is to cause sexual stimulation as perceived by reasonable members of the society. It encompasses, but goes beyond, what is covered by the phrase “in a sexual manner or context”. Even where the manner or circumstances of the depiction is of a sexual nature, it may or may not support an inference of an intention to cause sexual stimulation. “For sexual purposes” therefore connotes a sexual element that is stronger, more focused and explicit.

7. In formulating the legislative proposals, we considered that it was appropriate to offer different levels of protection of children against sexual exploitation by applying “in a sexual manner or context” to pornographic depiction of a person under the age of 16 and applying “for sexual purposes” to pornographic depiction of a person of the age of 16 or above, but under 18. These proposals were considered to be proportionate measures to deal with the different degrees of the seriousness of the problems and represented attempts to strike a balance between giving due protection to young children and refraining from undue interference with freedom of older children. However, as Members may recall, in our paper entitled “Administration’s response to major suggestions/issues raised by members at previous meetings” considered by Members at the Bills Committee’s meeting on 29 November 2002, we have, in view of Members’ concern, put forward an alternative that the proposed two-tier definition of pornographic depiction in the proposed section 138A(4)(a) and (b) be replaced by the one single definition. In other words, we will not define 2 different scopes of protection applicable respectively to (i) persons under 16 and (ii) persons of 16 or above but under 18. Instead, the definition that had been proposed to be applicable to persons under 16 (section 138A(4)(a)) will apply to all persons under 18. We explained the proposal at the last meeting and it seemed to be acceptable to Members. Accordingly, Committee Stage amendments will be moved to make the same definition to be applicable to all persons under 18 so that the same scope of protection will be provided to them.

***B. In new section 138A(4)(b)(ii), what would constitute a “dominant feature”? Would it be a too illusive concept for the court to apply?***

8. The judgment by Supreme Court of Canada in the Sharpe case, its paragraph 50 in particular, also shed light on the meaning of “dominant feature”. Following the judgment, “dominant feature” in the Bill can be determined on the basis whether a reasonable viewer, by looking at the depiction objectively and in context, would see its “dominant feature” as the depiction of the child’s genitals, anal region or, in the case of a female, her breast.

9. For instance, a close-up shot of the genitals or a picture with the genitals highlighted by visual effects or graphics may be regarded as “dominant feature”. This is not an illusive concept and the court should have no difficulty in making a judgment based on the circumstances and the way the genitals are depicted. As indicated in paragraph 7 above, the concern here will be overtaken by the amendment of adopting one definition instead of a two-tier definition.

**Clause 16**

***C. What is the justification for providing a defence under new section 153P(3)(a) and (b) to a person who has committed an offence under section 123 and 124 of the Crimes Ordinance outside Hong Kong, while similar offence is not available to a person who has committed similar offence within Hong Kong?***

***D. What is the justification for providing a defence under new section 153P(3)(c) to a person who has committed an offence under section 123 and 124 of the Crimes Ordinance outside Hong Kong, while similar defence is not available to a person who has committed similar offence within Hong Kong?***

10. Questions C and D may be dealt with together but they should be broken down into several issues.

**What constitutes the defence under section 153P(3)?**

11. Section 153P gives extra-territorial effect to the 24 offence provisions listed in the new Schedule 2 to be added by Clause 18 of the Bill. A defence is provided for in section 153(P)(3) which reads -

*“(3) It is a defence to a charge for an offence that is an offence by virtue of subsection (1) or (2) for the defendant to establish that -*  
*(a) at the time of the act that is the subject of the charge (“the relevant act”), there existed between the defendant and the person in relation to whom the act was committed a marriage that was valid, or recognized as valid, under the law of –*  
*(i) the place where the marriage was solemnized;*  
*(ii) the place where the relevant act was committed; or*  
*(iii) the place of the defendant’s residence or domicile;*  
*(b) when it was solemnized, the marriage was genuine; and*  
*(c) at the time of the relevant act, the person in relation to whom the relevant act was committed consented to the act.”*

12. It should be noted, however, that the defence section 153P(3) is available only where ALL conditions under section 153P(3)(a) to (c) are satisfied ((a), (b) and (c) are connected by “and”). That means the defence is only available if a valid marriage exists between the accused and the victim of the act that contravenes any extra-territorial offence provisions AND the “victim” consents to the act.

13. In other words, the defence under section 153P(3) is NOT available if a man has sexual intercourse with a girl under 16 outside Hong Kong against her will even if the “victim” is his wife under the laws of a place outside Hong Kong. Consent is an essential element to the defence. **Similarly**, the defence under section 153P(3) is NOT available if a man has sexual intercourse with a girl under 16 outside Hong Kong with her consent if he has NO marital relationship with the “victim” under the laws of a place specified in s.153P(3)(c)(i) to (iii). Consent by itself is not a defence if no valid marriage subsists between the accused and the victim. Hence, the cases cited in which the accused and the victim are not husband and wife are not pertinent.

Why is it necessary to provide for this special defence under s.153P(3)?

14. It is to cater for the fact that the sexual offences will have extra-territorial application and that it is possible that another jurisdiction may allow lawful marriage at an age under 16.

15. Sections 123 and 124, taken by themselves, concern acts of persons in Hong Kong. By virtue of the new sections 153P(1) and (2), sections 123 and 124 will have extra-territorial application. However, it is possible that another jurisdiction may allow lawful marriage at an age under 16. New sections 153P(1) and (2) may therefore have the effect of

criminalizing consensual sexual conduct in another jurisdiction between parties lawfully married there if one or both parties are under 16. This is not our intention. Section 153P(3) hence makes it clear that it is NOT AN OFFENCE for a man to have intercourse with his wife in a place outside Hong Kong with her consent. Because of the extra-territorial element involved, s.153P(3) specifies that the marital relationship will be assessed on the basis of the laws of -

- (i) the place where the marriage was solemnized;
- (ii) the place where the relevant act was committed; or
- (iii) the place of the defendant's residence or domicile.

***E. Are there other provisions in new Schedule 2 under Clause 18, when reading together with new section 153P(3), that provide a defence which is not otherwise available to a defendant when the same offence is committed within Hong Kong?***

16. As explained above -

- (a) section 153P(1) and (2) gives extra-territorial application to each of the sexual offence provisions listed in Schedule 2 in so far as the offence concerned is committed against a child under 16 and other conditions in that section are satisfied;
- (b) the defence in section 153P(3) is available only if -
  - (i) a valid marriage exists between the accused and the victim of the act that contravenes any extra-territorial offence provisions; AND
  - (ii) the "victim" consents to the act.
- (c) Since it is possible that another jurisdiction may allow lawful marriage at an age under 16 and the policy is that consensual sexual conduct in another jurisdiction between parties lawfully married there should not be interfered with even if one or both parties are under 16, section 153P(3) is designed to reflect this policy.

17. Question E compares an offence committed in Hong Kong and an offence committed outside Hong Kong with reference to the provisions in

new Schedule 2 under Clause 18. It should be noted that s.153P(1) and (2) at the outset concerns sexual offences against children under 16. In Hong Kong, a child under 16 cannot lawfully marry. In other words, in an offence situation referred to in s.153P(1) or (2) that takes place in Hong Kong (i.e. a sexual offence against a child under 16), normally there will not be a valid marriage between the child and the defendant. That means the valid marriage element in section 153P(3) does not exist and the defence under that section cannot be invoked.

18. When considering our response to Question E, the Administration notes a separate issue with section 153P: Does a man have a defence if he procures a sexual act between his wife (lawfully married in a place outside Hong Kong) who is a child and a third person with the wife's consent? On further examination, the Administration considers it may not be justified that the defence under s.153P(3) should be available if the offence involves a third person committing a sexual act against the child. Subject to Members' views, Committee Stage amendments may be proposed to clarify this point.

**Security Bureau**  
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