

Prevention of Child Pornography Bill

Administration's Response to Letter by Assistant Legal Adviser of the Legislative Council on 30 September 2002

In his letter of 30 September 2002, the Assistant Legal Adviser of the Legislative Council raised six follow-up questions on the Administration's response to his letter of 14 March 2002. The relevant questions and answers (Q1, Q13, Q21, Q30, Q35 and Q39) on which further questions are raised are extracted at Annex for easy reference.

Question A (Ref. Q1 & A1)

Is Tsing Ma Control Area Ordinance the only precedent? Why do you consider the amendments to Crimes Ordinance are "related amendments"?

2. It is not uncommon for an Ordinance to deal with more than one subject or to amend more than one Ordinance. For example, the Statute Law (Miscellaneous Provisions) Ordinance (No.23 of 2002) contains amendments relating to a variety of subject matters. Similarly, the Import and Export (Electronic Transactions) Ordinance (No.24 of 2002) amends various Ordinances; the unifying theme is the use of electronic means in carrying out certain transactions. The Tsing Ma Control Area Ordinance (2 of 1997) is a variation of the same approach, namely, a brand new Ordinance coupled with one or more related amendments to an existing Ordinance. It is a recent precedent that is most similar to the Prevention of Child Pornography Bill.

3. As stated in paragraph 2 of the Legislative Council brief, amendments to the Crimes Ordinance and the main body of the Prevention of Child Pornography Bill both have the common objective of protection of children against sexual exploitation. Paragraph 5 further said that dealing with the legislative proposals in one Bill should facilitate the Legislative Council's consideration of the whole set of proposals.

Question B (Ref. Q13 & A13)

Would you clarify your reason for saying that a person cannot project a child pornography to another person under Clause 2(2)(b)? But the question is why is it necessary to have "for another person" in paragraph (b) but not in paragraph (a)?

4. Clause 2(2) sets out the various ways in which a person may "publish" child pornography. The ways mentioned in Clause 2(2)(a) (namely,

“distributes, circulates, sells, hires, gives or lends”) pertain to child pornography in the form of tangible articles (a magazine, photograph, VCD). The child pornography is published by its being physically transferred from one person to another.

5. The ways mentioned in Clause 2(2)(b) (namely, “shows, plays or projects”) pertain to visual images. The child pornography is published by its being shown (e.g. by playing a VCD) to another person. It is not necessary to physically transfer some tangible articles from one person to another. Playing or projecting the image for another is sufficient. Further, in the English language, one can project an image onto a screen for a person but cannot project it to a person.

Question C (Ref. Q21 & A21)

The problem with Clause 4(3) is that how can a person endeavour to destroy a child pornography, even that is in his possession, if he has no knowledge about its existence at all? But if the mental element of knowledge is added to the subclause, the problem of its overlapping with Clause 4(2) will then arise.

6. Clause 4(2) provides a defence for a person who lacks knowledge about the child pornography. On the other hand, Clause 4(3) provides a defence if a person receives unsolicited child pornography and destroys it within a reasonable time. Knowledge is immaterial. A person can have opened the unsolicited child pornography, knowing it to be such and destroys it. Alternatively, he may just notice that some unsolicited e-mails have been sent to him and destroy them without opening it or caring about whether they are child pornography. If a person has no knowledge about its existence at all, he may deploy the defence in Clause 4(2).

Question D (Ref. Q30 & A30)

Do you have to provide expressly for Clause 12(1) to be subject to section 16 of the Building Management Ordinance?

7. Section 16 of the Buildings Management Ordinance (Cap. 344) is a general provision governing how others can take legal proceedings against owners of a building for liabilities in relation to the common parts of the building. It operates in the context of liabilities arising under any legislation, including Clause 12(1), if enacted. It is not necessary to provide that Clause 12(1) is subject to section 16.

Question E (Ref. Q35 &A35)

Please prepare CSA accordingly.

8. Agreed.

Question F (Ref. Q39 & A39)

It is appreciated that certain offences under new Schedule 2 have reference to age, for example sections 118C, 118D, etc. Then whether a mistake as to the age of the person is a defence for the purpose of new section 153P may very much depend on whether it is a defence for the relevant sexual offence provision. But how about certain offences in new Schedule 2 which do not contain any reference to age, for example, sections 118, 118A, etc., would it be necessary to provide for a defence of mistake or knowledge of the age of the victim?

9. Most sexual offence provisions under the Crimes Ordinance, Cap. 200, do not expressly provide for a defence of mistake as to age. Only section 124(2) of the Crimes Ordinance mentions that a person is not guilty for having intercourse with a girl under 16 if he believes on reasonable grounds that she is his wife even though the marriage is invalid. If the age of the victim is an essential ingredient of the offence about which the jury must be satisfied, then, if age is not admitted, it is necessary for the prosecution to prove the absence of a genuine belief on the part of the defendant that the victim was of the age stated in the offence or over. The Law Society has in their previous correspondence referred to recent cases like R v K (House of Lords) [2002] 1 AC 462 and B (a minor) v Director of Public Prosecutions (House of Lords) [2002] 2 AC 428. Assuming that these cases are followed in Hong Kong courts, mistake as to age will be available as a defence at common law for a sexual offence where age of the victim is an essential ingredient of the offence required to be proved by the prosecution.

**Security Bureau
January 2003**

**Extract of Questions and answers from
Administration's response to ALA's letter dated 14.3.2002**

Q1. The Bill includes substantive amendments to the Crimes Ordinance (Cap. 200) (Clauses 14-18) and other consequential amendments. We are given to understand that sections 14-18 (upon enactment of the Bill) will lapse upon their incorporation into the Crimes Ordinance in the loose-leaf edition of the Laws of Hong Kong. In this respect, is there any precedent of adopting similar approach in amending another ordinance by substantive provisions, i.e. other than consequential amendments, in a bill, other than an omnibus bill?

A1. One example is section 32 of the Tsing Ma Control Area Ordinance (TMCAO) (2 of 1997). The TMCAO except section 32 deals with the Tsing Ma Control Area. On the other hand, section 32 amends the Road Tunnels (Government) Ordinance (Cap. 368), which concerns various Government tunnel (e.g. the Aberdeen Tunnel, Airport Tunnel, Cross-Harbour Tunnel, Lion Rock Tunnel, Shing Mun Tunnels and Tseung Kwan O Tunnel). Section 32, therefore, is not consequential to any other provisions of the TMCAO. It is a related amendment that serves a substantive policy objective. More specifically, section 32 provides for the power of an authorized officer to stop a vehicle or to direct it to proceed to any place for the purpose of regulating vehicular and pedestrian traffic at the Government tunnels. This is in line with the power of an authorized officer of the Tsing Ma Control Area.

Q13. Why is it necessary to have "for another person" in paragraph (b) but not in paragraph (a)? Is it necessary to add "to other person" after "for another person"?

A13. A person can distribute, circulate, sell, hire, give, or lend child pornography to another person or he can show or play child pornography to another person. However, he can only project it for another person but not to another person. It is therefore not necessary to add "for another person" in Clause 2(2)(a).

Q21. Would it be appropriate to add "and he knew that it was a child pornography," after "it came into his possession"?

A21. Clause 4(3) is without prejudice to Clause 4(2), the latter having dealt with knowledge. If a person does not know the material is child pornography, he can avail himself of the Clause 4(2) defence.

Q30. The provision empowers a magistrate to order the owner or occupier of the building or structure to remove or efface a child pornography on the same. It is noted that, in this respect, section 16 of the Building Management Ordinance (Cap. 344) provides that when the owners of a building have been incorporated the rights and liabilities of the owners in relation to the common parts of the building are enforceable against the corporation to the exclusion of the owners. In the light of section 16 of the Building Management Ordinance, is the magistrate's power under Clause 12(1) exercised against the owner or occupier or an owners' corporation?

A30. Section 16 of the Buildings Management Ordinance, Cap. 344, reads –

“...the liabilities of the owners in relation to the common parts of the building shall, subject to the provisions of this Ordinance, be enforceable against, the corporation to the exclusion of the owners...”

In the light of section 16 of the Building Management Ordinance, the magistrate's power under Clause 12(1) to order the owner or occupier of the building to remove or efface the child pornography may be exercised against owners' corporation where the child pornography is found on the common parts of the building and the owners of the building have been incorporated. This however does not preclude an order against any occupier of the building if the circumstances warrant.

Q35. Under new section 138A(4)(a) and (b) of the Crimes Ordinance, what is the justification for having an "or" between paragraph (i) and (ii) respectively; while there is not an "or" between paragraph (a) and (b) in the definition of "pornographic depiction" under Clause 2(1)?

A35. It is agreed that “or” should be inserted between paragraphs (a) and (b) of the definition of “pornographic depiction” in Clause 2(1).

Q39. In new section 153P(1)(b)(ii) and (2)(b)(i), is knowledge of the person under the age of 16 an element of the offence? Is mistake as to the age of the person a defence under the provisions?

A39. The new section 153P applies specified existing sexual offence provisions to acts committed outside Hong Kong under certain circumstances. Whether a mistake as to the age of the person is a defence for the purpose of section 153P would depend on whether it is a defence for the relevant sexual offence provision.