

**Prevention of Child Pornography Bill**

**Administration’s Response to Issues Raised  
at the Meeting on 18 February 2003**

**Order of the Defence Provisions in Clause 4 of the draft CSAs**

At the last Bills Committee meeting held on 18 February 2003, a Member suggested that various defences in Clause 4 should be arranged according to the offences for which they are available. In response to the suggestion, the order of the defence provisions is re-arranged as indicated in the revised draft CSAs at Annex. Changes made to the latest draft seen by Members are in italics.

2. Below is a brief summary of the order of the defence provisions:

| Clause     | Subject matter  | Offence(s) for which defence is available                         |
|------------|---|---|
| 4(1)       | Child Pornography not asked for + steps to destroy or prevent                 | Possession only<br>(Clause 3(3))                                  |
| 4(2)       | Mistake of age  | Possession only<br>(Clause 3(3))                                  |
| 4(3)       | Mistake of age + steps to ascertain age                                       | Offences other than possession<br>(Clause 3 except subclause (3)) |
| 4(4)       | Class I or II status under Control of Obscene and Indecent Articles Ordinance | All offences under clause 3                                       |
| 4(5)       | Not seen child pornography, no knowledge or suspicion as to nature            | All offences under clause 3                                       |
| 4(6)       | Educational, scientific or medical purpose, public good                       | All offences under clause 3                                       |
| 4(7) & (8) | Burden of proof   | -   |

3. Please note that the various references in the defence provisions to “taking all such steps as may be reasonable and practicable in the circumstances of the case” are changed to “taking all such steps as were reasonable and practicable in the circumstances of the case” for grammatical accuracy. The effect remains the same i.e. an objective test taking into account particular circumstances. As mentioned in the previous paper entitled “Administration’s Response to Issues Raised at Previous Meetings”, this phrase reflects the fact that only steps that are reasonable and practicable in the circumstances of the

case will be taken into account. A technical amendment to clause 10(2)(b) is added, consequential to re-arrangement of defence provisions in clause 4. Proposed definition of “pornographic depiction” in clause 2(1) and proposed section 138A (4)(a) of the Crimes Ordinance under Clause 14 are also suggested to be slightly revised for drafting improvement.

### **Whether publicly displaying child pornography in private premises is an offence under the Bill**

4. At the last meeting, a Member queried that whether publicly displaying child pornography in private premises is an offence under the Bill. Clause 2(2)(b) stipulates that:

For the purposes of this Ordinance, a person publishes any child pornography if he, whether or not for any form of reward –

- (a) distributes, circulates, sells, hires, gives or lends the child pornography to another person; or
- (b) shows, plays or projects the child pornography to or for another person.

If one displays child pornography to the public in private premises, other than just hanging the child pornography in private premises, he allows others who visit the premises to see it, this falls within the scope of “showing child pornography to another person” and therefore amounts to publishing child pornography. Therefore, subject to the circumstances of the case, a person who displays child pornography in private premises may be charged with an offence of publishing child pornography under clause 3(2) of the Bill.

5. However, we notice that the Chinese rendition of “show” in clause 2(2) as “放映” may not be broad enough to cover the intended scope of “be allowed or cause to be seen”. Subject to Members’ comments, we will move a CSA to add “出示、” in addition to the originally suggested Chinese rendition of “show” as “放映” to reflect the full English meaning<sup>Note</sup>.

6. The policy intent of the Bill is to combat the proliferation of child pornography and to prevent harm to the child depicted that is caused by his

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<sup>Note</sup> Where the meaning of an English word cannot be fully reflected by a Chinese term, it is necessary to use more than one Chinese term as the Chinese equivalent of the English term. One precedent is the rendition of “publish” as “刊登或發表” in section 16(7) of the Electoral Affairs Commission (Registration of Electors) (Village Representative Election) Regulation (L.N. 47 of 2003).

being exploited for the sexual gratification of others who see pornographic depictions of him. A person who shows child pornography to another in private does cause harm to the child depicted and should be held responsible.

7. Further, even if a person hangs child pornography in his premises and does not allow any other person to enter the premises to see it, he still contravenes the prohibition against possession of child pornography under clause 3(3) of the Bill.

### **Preparation time needed before the enacted legislation come into operation**

8. The Administration was also requested to inform the Bills Committee the preparation time needed before the enacted legislation comes into operation. After the Legislative Council passed the Bill, we expect that a period of around four to six months is needed for preparation before the actual commencement of the legislation. The preparation work will include briefing of the law enforcement agencies' staff, the setting up of a Police hotline for handling matters regarding child pornography at the initial stage after commencement of the Bill, final preparation for implementation of the various publicity efforts, etc.

**Security Bureau**  
**March 2003**

## PREVENTION OF CHILD PORNOGRAPHY BILL

## COMMITTEE STAGE

Amendments to be moved by the Secretary for SecurityClauseAmendment Proposed

- 2(1) (a) In the definition of "child pornography", in paragraph (a), by deleting "appears to be" and substituting "is depicted as being".
- (b) In the definition of "pornographic depiction", in paragraph (a), by deleting "who is or appears to be engaged in explicit sexual conduct;" and substituting "as being engaged in explicit sexual conduct, whether or not the person is in fact engaged in such conduct; or".
- 2(2) (b) In the Chinese text, by adding "出示." before "放映".
- 4 By deleting the clause and substituting -
- "4. Defences**
- (1) It is a defence to a charge under section 3(3) for the defendant to establish

that -

- (a) he had not asked for any child pornography and he could not have prevented himself from coming into possession of the child pornography by taking all such steps as were reasonable and practicable in the circumstances of the case for this purpose; or
- (b) he had not asked for any child pornography and, within a reasonable time after it came into his possession, he took all such steps as were reasonable and practicable in the circumstances of the case to destroy it.

(2) It is a defence to a charge under section 3(3) for the defendant to establish that he believed on reasonable grounds that the person pornographically depicted in the child pornography was not a child when originally depicted and that the person was not depicted as a child.

(3) It is a defence to a charge under section 3 (other than section 3(3)) for the defendant to establish that -

- (a) he took all such steps as were reasonable and practicable in the circumstances of the case to ascertain the age of the

person pornographically  
depicted in the child  
pornography when originally  
depicted;

- (b) in so far as the defendant  
was able to influence in any  
way how the person was  
depicted, he took all such  
steps as were reasonable and  
practicable in the  
circumstances of the case to  
ensure that the person was  
not depicted as a child; and
- (c) he believed on reasonable  
grounds that the person was  
not a child when originally  
depicted and that the person  
was not depicted as a child.

(4) It is a defence to a charge under  
section 3 for the defendant to establish  
that the thing that is alleged to constitute  
child pornography is, or was at the time the  
offence is alleged to have been committed,  
classified as a Class I or a Class II  
article under the Control of Obscene and  
Indecent Articles Ordinance (Cap. 390).

(5) It is a defence to a charge under  
section 3 for the defendant to establish  
that he had not himself seen the child  
pornography and did not know, nor did he  
have any reasonable cause to suspect, it to  
be child pornography.

(6) It is a defence to a charge under  
section 3 for the defendant to establish

that -

- (a) the depiction that is alleged to constitute child pornography has artistic merit;
- (b) the defendant committed the act that is the subject of the charge for a genuine educational, scientific or medical purpose;
- (c) the act that is the subject of the charge otherwise served the public good and did not extend beyond what served the public good; or
- (d) if the defendant is charged with having in his possession child pornography, the possession -

- (i) was for a genuine educational, scientific or medical purpose; or
- (ii) otherwise served the public good and did not extend beyond what served the public good.

(7) A defendant charged with an offence under section 3(3) is to be taken to have established any fact that needs to be established for the purpose of a defence under subsection (1), (2) or (5) if -

- (a) sufficient evidence is

adduced to raise an issue  
 with respect to the fact; and  
 (b) the contrary is not proved by  
 the prosecution beyond  
 reasonable doubt.

(8) Unless subsection (7) applies, a  
 defendant is to establish any fact that  
 needs to be established for the purpose of a  
 defence under this section on the balance of  
 probabilities."

5(5) By adding -  
 ""vehicle" (車輛) does not include a military  
 vehicle;"

10(2) (b) By deleting "4(1) or (4)" and substituting "4(4)  
 or (6)".

11(1) (a) By adding "and" after the semicolon.

14 (a) By deleting the proposed section 138A(4) and  
 substituting -

"(4) For the purposes of this  
 section, to depict a person  
 pornographically means -

- (a) to visually depict a  
 person as being engaged  
 in explicit sexual  
 conduct, whether or not  
 the person is in fact  
 engaged in such conduct;  
 or
- (b) to visually depict, in a  
 sexual manner or context,



the genitals or anal region of a person or, in the case of a female person, her breast, but, for the avoidance of doubt, a depiction for a genuine family purpose does not, merely because it depicts any part of the body referred to in paragraph (b), fall within that paragraph."

- (b) In the proposed section 138A(5), in the definition of "pornography", in paragraph (a), by deleting ", whether or not it is a depiction of a real person".