

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 (Clause 3(3))
4(2)	Mistake of age	Possession only (Clause 3(3))
4(3)	Mistake of age + steps to ascertain age	Offences other than possession (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^{Note}.

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

^{Note} 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".