

**立法會**  
***Legislative Council***

LC Paper No. CB(2)1597/01-02(03)

Ref : CB2/BC/7/01

**Bills Committee on Prevention of Child Pornography Bill**

**Background paper prepared by the Legislative Council Secretariat**

**Prevention of Child Pornography Bill**

**Purpose**

This paper gives a summary of issues and concerns raised by Members on the Administration's proposals in the Prevention of Child Pornography Bill.

**The Administration's Proposals**

2. At its meeting on 6 December 2001, the Panel on Security was consulted on the Administration's proposals in the Prevention of Child Pornography Bill to combat child pornography and child sex tourism with the objective of offering better protection to children against sexual exploitation. The Administration informed the Panel of its major proposals of the Bill as follows -

- (a) Creating offences of making, producing, publishing, importing, exporting, distributing, advertising and possessing pornography that depicted children under the age of 16;
- (b) Criminalising the use, procurement or offer of persons under the age of 18 for making pornography or for taking part in pornographic performances; and
- (c) Prohibiting the arranging or advertising of child sex tours, and providing extra-territorial effect to a number of sexual offences in relation to children.

3. The Administration proposed to define "child pornography" as -

- "(a) a photograph, film, computer-generated image or other visual depiction that is a pornographic depiction of a person who is or appears to be a child, whether it is made or generated by electronic or any other means, and whether or not it is created, adapted or modified; or
- (b) anything that contains a photograph, film, computer-generated image or other visual depiction referred to in paragraph (a)."

4. To comply with the International Labour Convention No. 182, the Administration also proposed to add provisions to the Crimes Ordinance to prohibit the use, procuring or offering of a person under the age of 18 to be pornographically depicted for making pornography or participate in a life performance. In this context, a two-tier definition for pornographic depiction involving children, i.e. for children under the age of 16 and for those between the age of 16 and 18 is proposed to give greater protection to children under the age of 16.

#### **Issues and concerns raised by Members**

5. While Members in general supported the principles and spirit of the Administration's proposals, they had also raised the following issues and concerns -

- (a) A member was concerned that the offence for procurement of persons under the age of 18 for making pornography or for taking part in pornographic performances was applicable to procurement acts committed in Hong Kong, but not to those outside Hong Kong. This might create a loophole allowing an offender to produce child pornography in a place outside Hong Kong and importing the product into Hong Kong legally;
- (b) Some members expressed concern that the use of the concept of "looks like under the age of 16" in the proposed definition of child pornography might lead to difficulties in enforcement;
- (c) A member raised query on whether offences involving children under 13 should attract heavier penalties and whether the proposed legislation should also cover paintings and sound records that depicted children;
- (d) A Member was concerned that the proposed two-tier definition for pornographic depiction involving children might lead to difficulties in prosecution. The Member pointed out that such a two-tier definition was not found in the relevant legislation of Canada and the United States;

- (e) A Member was of the view that the proposed maximum penalty of a fine of \$1 million and imprisonment of five years for the possession of child pornography might be too heavy from a human rights point of view; and
- (f) A member was concerned that the statutory defence to a charge under the offences referred to in paragraph 2(a) above available to the defendant if the alleged child pornography was found to have artistic merit might be easily abused. This was because different persons might have different views about whether an article was of artistic merit. A Member considered that artistic merit should not be included as statutory defence.

6. Members considered that these issues and concerns could be further discussed in the Bills Committee. Members may wish to refer to the extract of minutes of the meeting of the Panel on Security on 6 December 2001 in the **Appendix** for details of the discussion.

Council Business Division 2  
Legislative Council Secretariat  
9 April 2002

# ***EXTRACT***

## **立法會**

### ***Legislative Council***

LC Paper No. CB(2) 834/01-02

(These minutes have been seen  
by the Administration)

Ref : CB2/PL/SE/1

#### **LegCo Panel on Security**

#### **Minutes of meeting held on Thursday, 6 December 2001 at 2:30 pm in the Chamber of the Legislative Council Building**

**Members present** : Hon James TO Kun-sun (Chairman)  
Hon LAU Kong-wah (Deputy Chairman)  
Hon Albert HO Chun-yan  
Dr Hon LUI Ming-wah, JP  
Hon Margaret NG  
Hon Mrs Selina CHOW LIANG Shuk-ye, JP  
Hon CHEUNG Man-kwong  
Hon WONG Yung-kan  
Hon Ambrose LAU Hon-chuen, GBS, JP  
Hon IP Kwok-him, JP  
Hon Audrey EU Yuet-mee, SC, JP

**Members attending** : Hon Cyd HO Sau-lan  
Hon CHAN Kwok-keung  
Hon SIN Chung-kai  
Hon Andrew CHENG Kar-foo  
Hon LEUNG Fu-wah, MH, JP

**Members absent** : Hon Andrew WONG Wang-fat, JP  
Hon Howard YOUNG, JP

**Public Officers attending** : Item III  
Mr Michael WONG  
Deputy Secretary for Security 3

Mr Alan CHU  
Principal Assistant Secretary for Security D

Mr K C CHOW  
Assistant Director of Immigration  
(Information Systems)

Mr C H CHEUNG  
Principal Immigration Officer (Information Systems)

Mr Albert LAI  
Chief Systems Manager  
Immigration Department

Mr CHOW Oi-tung  
Head of Control Points Command  
Customs and Excise Department

Item IV

Miss Eliza YAU  
Principal Assistant Secretary for Security E

Mr Rick CHAN  
Assistant Secretary for Security E3

Mr Ian Robert MACKNESS  
Chief Superintendent of Police (Crime)(Support)

Miss CHU Ming-po, Shirley  
Superintendent of Police (Crime)(Support)

Mrs DO PANG Wai-yee  
Principal Assistant Secretary for Education and Manpower 4

Item V

Mr Eddy YAU  
Principal Assistant Secretary for Home Affairs

Ms Miranda YEAP  
Assistant Secretary for Home Affairs

Ms Mimi LEE  
Principal Assistant Secretary for Security (Narcotics)

Ms Winnie SO  
Assistant Director of Food and Environmental Hygiene

Mr WONG Siu-wing  
Senior Superintendent of Food and Environmental Hygiene

Mr P R MORGAN  
Senior Superintendent of Police

Mr MO Kim-ming  
Assistant Director of Buildings

Mr LAU Kwai-shan  
Chief Officer of Fire Services

Mr WONG Chung-sing  
Divisional Officer of Fire Services

**Clerk in attendance** : Mrs Sharon TONG  
Chief Assistant Secretary (2)1

**Staff in attendance** : Mr Raymond LAM  
Senior Assistant Secretary (2)5

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**IV. Proposed legislation for the prevention of child pornography**  
(LC Paper Nos. CB(2) 547/01-02(04) and CB(2) 410/01-02)

25. At the invitation of the Chairman, Principal Assistant Secretary for Security E (PAS(S)E) briefed Members on the Administration's legislative proposal for combating child pornography and child sex tourism.

26. Mr CHEUNG Man-kwong expressed support for the introduction of legislative measures for combating child pornography. He expressed concern that the procurement offence as referred to in paragraph 18 of the Administration's paper was only applicable to procurement acts in Hong Kong but not to those outside Hong Kong. He considered that this would create a loophole allowing an offender to produce child pornography in a place outside Hong Kong and importing the product into Hong Kong legally.

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27. PAS(S)E responded that under the proposed legislation, the possession, production, distribution and advertisement of child pornography that indecently depicted a person aged under 16 pornographically, as defined in the Administration's proposal, would be an offence regardless of whether the procuring act was conducted in or outside Hong Kong. As regards child pornography depicting a person aged between 16 and 18 pornographically, it would not be an offence if the person concerned was procured outside Hong Kong, as the offence had no extra-territorial effect. However, this might result in an increase in the production cost. Furthermore, if it was found that the procurement act originated from Hong Kong, the procurer might be prosecuted, and the producer might be charged for aiding and abetting the procurement offence. She added that a company which imported a film might request the supplier to provide proof about the age of actors.

28. The Chairman asked whether the censorship guidelines related to child pornography would be revised. He also asked whether actions would be taken against a company or person who imported a film containing child pornography and repeatedly claimed that an actor in the film was not less than 16 years of age.

29. PAS(S)E responded that according to paragraph 36(a) of the Censorship Guidelines for Censors 1999, the detailed or gratuitous depiction of a child who was, or who was apparently, under the age of 16 years and engaged in sexual activity should not be permitted in any film. This prohibition was in line with the Administration's legislative proposal. The latter would also criminalise the production, distribution, advertising and possession of such depictions. As already included in the Prevention of Child Pornography Bill (the 1999 Bill) published in the Gazette in 1999, merely claiming that the person being pornographically depicted was not less than 16 years of age was not a defence.

30. Mr CHEUNG Man-kwong expressed concern that the use of the words "looks like" in the proposed definition of child pornography was too vague and might lead to difficulties in enforcement. Ms Audrey EU said that it might be difficult for a defendant to prove that the person concerned did not look like a person under the age of 16. She asked about the statutory defence available.

31. PAS(S)E responded that the burden of proving that a person looked like one under the age of 16 was on the prosecution. In order to prove that the person in question looked like a person under the age of 16, the prosecution could, among other things -

- (a) seek to locate the child concerned;
- (b) identify documentary proof about the age of the child; and
- (c) seek the views of a specialist in paediatrics on the age of the child.

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32. PAS(S)E added that if a child of a younger age, say under 13 years, was depicted in the pornographic material, usually it should be quite obvious to reasonable adult persons that the depicted child looked like under the age of 16 even without paragraph 31(a) to (c) above.

33. Ms Audrey EU asked whether heavier punishment should be imposed on child pornography offences where the child concerned was under 13 years of age. She also asked whether the coverage of the proposed legislation should be widened to cover paintings and sound records.

34. PAS(S)E agreed that children under 13 years of age were obviously targets of protection. However, children aged between 13 and 16 years were usually in secondary school. They were learning to become less dependent on their parents or guardian and started to have their own friends. Therefore, it was proposed that the law should make it clear that they were equally protected as younger children to deter potential abusers.

35. PAS(S)E also clarified that paintings that depicted children who did not look like real persons were not covered by the proposed legislation. She added that the issue of whether sound records should be covered in the proposed legislation had been discussed at length within the Administration before the 1999 Bill was introduced. The proposal was not adopted owing to the difficulty in obtaining evidence.

36. While expressing support for the introduction of legislation to combat child pornography, Mr Andrew CHENG considered that the proposed two-tier definition for pornographic depiction involving children was unclear and might lead to difficulties in prosecution. To his knowledge, a two-tier definition for child pornography was not found in the Canada and the United States (US), where the age of 18 was used as a dividing line.

37. PAS(S)E responded that as children under the age of 16 were considered more vulnerable, they might not be able to make independent decisions and give informed consent. The Administration therefore considered that the level of protection for children under 16 should be higher than those aged between 16 and 18.

38. Mr Andrew CHENG said that the proposed maximum penalty of a fine of \$1 million and imprisonment of five years for the possession of child pornography might be too heavy from a human rights point of view. He asked whether consideration would be given to making possession of child pornography an offence only if it was intended for commercial purpose. He further said that a person might receive an electronic mail through the Internet without knowledge that the contents were child pornography. He added that the expression "looks like" was not found in the relevant legislation of Canada.

39. PAS(S)E responded that the proposed legislation would provide statutory defences for a person charged to establish that he had not seen the child pornography



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and did not know, nor did he have any reasonable cause to suspect, the material to be child pornography. She said that the definition of child pornography under the 1999 Bill, which was drawn up with reference to the relevant legislation of the United Kingdom (UK), was criticised as unclear. The revised definition of child pornography had been drawn up with reference to the definitions in similar legislation in Australia, Canada and US. In Australia, a child meant a person who was or looked like a person under the age of 16 and the definition had a wider scope. In Canada and US, the definitions of child pornography were more specific and a child meant a person who was or looked like a person under the age of 18. The definition adopted by Canada included the use of the expression "that shows a person who is or is depicted as being under the age of 18 and is engaged in or depicted as engaged in explicit sexual activity". She added that the Supreme Court of Canada had pointed out in the Sharpe Case that -

- (a) child pornography promoted cognitive distortions of paedophiles that having sex with children was normal behaviour;
- (b) child pornography fuelled fantasies that incited offenders to offend;
- (c) child pornography was used for grooming and seducing victims; and
- (d) children were abused in the production of child pornography involving real children.

The Supreme Court of Canada thus concluded that criminalising possession might reduce the market for child pornography and the abuse of children, and therefore, justified. The Administration had taken these considerations into account in preparing its latest proposal.

40. On the local front, PAS(S)E referred to two recent appeal cases related to the possession of obscene materials for the purpose of publication. Child pornography was involved in both cases. In one of the cases, the judge had stated that only the sickest persons would be interested in such pornographic materials depicting children and that the maximum sentence of three years' imprisonment for such possession was insufficient and should be reviewed.

41. On the human rights issues, PAS(S)E recalled that in the recent consultation exercise, a concern group on the rights of children had opined that the prevention of child pornography was a part of the protection of human rights. The Administration had considered other human rights concerns and believed that the proposed legislation had struck a balance between offering adequate protection to children and refraining from unnecessary infringement of freedom of expression.

42. As a Bills Committee would likely be formed to study the bill on prevention of child pornography when introduced into the Council, Mr Andrew CHENG asked the Administration to provide information on the deliberations of the relevant committees

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that scrutinised the relevant legislative proposal in Canada to facilitate Members' understanding of the merits and shortcomings of the definition adopted by Canada. The Chairman suggested that the Administration should provide more information about the difference between defining a child as a person under 16 and 18 years of age.

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43. Referring to the difference in statutory defence between the 1999 Bill and the revised legislative proposal, Mr LAU Kong-wah asked why the statutory defence in the revised legislative proposal would not contain the news reporting purpose referred to in the 1999 Bill, while other defences including artistic merit, genuine family purpose and acts that served public good were added. He pointed out that as different persons might have different views about whether an article was of artistic merit, this statutory defence might be easily abused by defendants.

44. PAS(S)E responded that the statutory defences referred to in the LegCo Brief for the 1999 Bill were examples rather than the actual provisions in legislation. As there were criticisms that the defence clause in the 1999 Bill was inappropriate, the Administration had taken the opportunity to set out the statutory defence in clearer and more specific terms. She said that the reference to genuine family purpose would be incorporated in the defence provision in view that many pregnant women displayed posters of babies in the nude in their bedrooms and some parents took nude photos of their own babies. She further said that acts that served public good would cover those which served genuine news reporting purpose. The defence of artistic merit was also provided as a statutory defence under the Control of Obscene and Indecent Articles Ordinance (Cap. 390) (COIAO). In response to the Chairman, PAS(S)E said that according to information available to her, artistic merit had not been presented as a defence before the court since COIAO came into operation.

45. Miss Cyd HO expressed support for the introduction of legislative measures to combat child pornography. She asked whether a film or photograph would fall within the definition of child pornography if a person who was aged over 18 and appeared to be engaged in explicit sexual conduct was made to look like a person aged under 16. She added that legislation on child pornography should be more stringent and artistic merit should not be included as a statutory defence.

46. PAS(S)E responded that the proposed legislation aimed at protecting children as well as preventing and checking any proliferation of paedophilic activities. A producer had to ensure that a person aged over 18 to be engaged in explicit sexual conduct would not look like a person aged below 16. She considered it important to avoid conveying to children the false message that engagement of children in such conduct was acceptable. In response to Miss Cyd HO's comment that the expression "looks like" might result in difficulties in law enforcement, PAS(S)E said that the burden of proof would be on the prosecution, which had to prove that a person in question looked like a person aged under 16.

47. At the request of the Chairman and Mr CHEUNG Man-kwong, PAS(S)E agreed to provide information on the experience of overseas countries in

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prosecutions against child pornography, especially those related to the expression "looks like".

48. The Chairman concluded that while different concerns had been expressed by Members, there was a consensus view that children should be protected from child pornography. He said that the details of the legislative proposal might be studied by a Bills Committee.

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Council Business Division 2  
Legislative Council Secretariat  
9 January 2002