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BY FAX

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(Attn : Mr Rick Chan
Assistant Secretary (Security) E3)

Dear Mr Chan,

Prevention of Child Pornography Bill

We are scrutinizing the legal and drafting aspects of the Bill. We have the following comments on the Bill.

General comments

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?

Clause 2(1)

The definition of "child pornography"

- (a) Would you give examples of "computer-generated image"?
- (b) Would you give examples of "other visual depiction"?

- (c) What is intended to be covered under "appears to be a child"? Does it refer to the physical outlook or mentality or behaviour of a person?
- (d) What is intended to be covered by "any other means"?
- (e) What is intended to be covered by "whether or not it has been modified"?
- (f) Would you give examples of "anything that incorporates a photograph ... referred to in paragraph (a)"?
- (g) Would you give examples of "data"?
- (h) Is it appropriate to include "anything containing such data" in the definition? The anomaly arises when the definition with the limb of "anything containing such data", which may be a computer containing computer-generated pornographic image, applies to clause 3. For example, a person cannot commit an offence by printing any child pornography under clause 3(1), if that means "anything containing such data". The same anomaly applies to clause 3(2) to (4).
- (i) Does the definition cover live performance transmitted on Internet?

The definition of "pornographic depiction"

Would you give examples of "a depiction for a genuine family purpose"?

Section 2(2)

Is the "reward" intended for the benefit of the publisher or another person or both?

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"?

Section 3

Should the provision cover the situation where a person, who is the only person pornographically depicted in the child pornography, shows his pornographic photograph on a private premises to another person to view for reward, if that is not covered?

Should clause 3(4) be extended to cover the activities in clause 3(1),

i.e. "Any person who publishes or causes to be published any advertisement that conveys or is likely to be understood as conveying the message that any person has printed, made, produced, reproduced, copied, imported, or exported; prints, makes, produces, reproduces, copies, imports or exports; intends to print, make, produce, reproduce, copy, import or export any child pornography commits an offence."?

Clause 4(1)(a)

Would you illustrate by way of examples as how to establish "artistic merit"?

Clause 4(1)(b)

What is the relationship between the element of "a depiction for a genuine family purpose" in paragraph (a) of the definition of "pornographic depiction" and the defence that the defendant committed the act that is the subject of the charge for a genuine educational, scientific or medical purpose under clause 4(b)?

Clause 4(1)(c)

Would you explain with examples as how to establish "the act the subject of the charge otherwise served the public good"?

Would you further explain the instances in which the act the subject of the charge extended beyond what served the public good?

Clause 4(2)

In AG v. Fong Chin Yue [1995]1HKC23, the Hong Kong Court of Appeal held that it would be a defence to strict liability offences, if a defendant could prove on a balance of probabilities that he believed for good and sufficient reason, though erroneously, that the statutory provisions in question had been complied with. Do you consider that a defendant, being charged with an offence under clause 3 (which appears to be a strict liability offence), who could establish that he has not seen the child pornography and honestly believed for good and sufficient reason, though erroneously, that it was not a child pornography will avail himself of a defence under clause 4(2)?

Clause 4(3)

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

Since clause 4(4) and (5) are general defence to a charge under clause 3, would it also be appropriate to add "subsections (4) and (5)" after

"subsection (2)"?

Clause 4(4)

Why is it appropriate to provide for "Without prejudice to subsection (2)" alone, without reference to other subclauses which also provide for a general defence (subclauses (4) and (5))?

Clause 4(5)

Why is it not necessary to provide for "without prejudice to subsection (2)" as formulated in subclauses (3) and (4)?

Do you consider that a defendant, being charged with an offence under clause 3 (which appears to be a strict liability offence), who could establish that he had not seen the child pornography and honestly believed for good and sufficient reason, though erroneously, that it was not a child pornography will avail himself of a defence under clause 4(5)(a)? (see the argument under clause 4(2))

Would you illustrate with examples as to how a person, who is not a child, but is depicted as a child?

Clause 5(5)

What is the justification for excluding military aircraft and a ship of war?

Why is a military vehicle not excluded?

Clause 11(1)(a)

Is it necessary to add "owner or" before "occupier of a premises"?

Clause 12(1)

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?

Clause 14

Under new section 138A(1) of the Crimes Ordinance, a person commits an offence by using another person under the age of 16 for making pornography. If the same person subsequently publishes the child pornography, he commits another offence under clause 3(2) of the Bill. Will that person be prosecuted for the two offences in the circumstance?

Under new section 138A(1)(a) of the Crimes Ordinance, a person commits an offence by using another person under the age of 16 for making pornography and is punishable with a fine of \$3,000,000 and imprisonment for 10 years. In this respect, a person prints, etc. any child pornography under clause 3(1) or publishes any child pornography under clause 3(2) commits an offence and is punishable, on conviction on indictment, with a fine of \$2,000,000 and imprisonment for 8 years respectively. What is the legal policy thinking behind the disparity of sentence in new section 138A(1)(a) and clause 3(1)(a) and (2)(a)?

Under new section 138A(2) of the Crimes Ordinance, what is the justification for leaving out "offering" in the defence provision?

Under new section 138A(3) of the Crimes Ordinance, what is the justification for leaving out "offering" in the defence provision?

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)?

Under new section 138A(5), in the definition of "live pornographic performance", would it be necessary to describe the medium through which the performance is brought to the audience, for example electronic means? In the same definition, would it be necessary to add "who is or appears to be a person under 18" (c.f. the definition of child pornography in clause 2(1)) after "a person"?

Under new section 138A(5), in paragraph (a) of the definition of "pornography", would it be necessary to add "who is or appears to be a person under 18" (c.f. the definition of child pornography in clause 2(1)) after "a person"?

Clause 16

In new section 153P, would it be necessary to provide that the act committed outside Hong Kong is also an offence under the law of the place?

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?

Clause 18

In new Schedule 2, would you explain the reason for not including certain substantive offences under the part of sexual offences (sections 118-128 of the Crimes Ordinance) and the part of exploitation of other persons for sexual purposes (sections 129-139 of the Crimes Ordinance) and the part of use of premises, etc. for illicit sexual purposes (sections 140-145A of the Crimes Ordinance) and the part of miscellaneous offences and provisions (sections 146-153 of the Crimes Ordinance)? In this regard, it is appreciated that reason will be given for individual provision of the Crimes Ordinance which is not included in new Schedule 2.

Clause 19

In section 79A of the Criminal Procedure Ordinance, in the definition of "offence of sexual abuse", a new paragraph is added to cover an offence against section 3 of the Prevention of Child Pornography Ordinance (upon enactment). In this respect, it is noted that under the Prevention of Child Pornography Bill, the term "child" is defined to mean a person under the age of 16. However, under section 79A of the Criminal Procedure Ordinance, the term "child" is defined to mean a person who, in the case of an offence of sexual abuse, is under the age of 17 years of age. Would it be necessary to amend the definition of "child" under section 79A of the Criminal Procedure Ordinance to mean a person under the age of 16 years of age in the case of an offence against section 3 of the Prevention of Child Pornography Ordinance (upon enactment)?

Clause 22

In relation to the interface between the Bill and the Control of Obscene and Indecent Articles Ordinance (Cap. 390) (the COIAO), how would the Tribunal under the COIAO distinguish between the concepts of "obscene" and "indecent" on the one hand under the COIAO and "pornographic depiction" under the Bill on the other hand? It is already noted that the terms "obscenity" and "indecent" are defined under the COIAO to include violence, depravity and repulsiveness.

If the Tribunal refuses to classify an article under the COIAO on the ground that it is a child pornography, should it be under a duty to refer the matter to the appropriate authority for investigation or prosecution?

Clause 24

Why is it necessary to add "for the purposes of this Ordinance" to various places in the provision?

It is appreciated that your reply, in both languages, could reach us as soon as possible.

Yours sincerely,

(Stephen Lam)
Assistant Legal Adviser

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