

The Legislative Council's Bills Committee Meeting on 17th May, 2002

**THE BAR ASSOCIATION'S SUBMISSION
ON THE PREVENTION OF CHILD
PORNOGRAPHY BILL**

1. The Bar Association notes that child pornography is defined in extremely wide terms in clause 2(1) of the Bill
 - “(a) a photography, 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, whether or not it is a depiction of a real person and whether or not it has been modified; or”
2. The proscribed conduct encompasses the depiction of a person who, although in fact an adult, appears to be a child and electronic images even if it is not of a real person (“virtual child pornography”).
3. In the United States of America the Child Pornography Prevention Act 1996 expanded the Federal prohibition on child pornography to include not only pornographic images using actual children but also any visual depiction, including a computer – generated one that is, or appears to be, of a minor engaging in sexual explicit conduct. In **Ashcroft, Attorney General et al v Free Speech Coalition et al**, a decision of the Supreme Court decided on 16th April 2002, the Court considered the provisions of 18 U.S.C. 2256(8)[B] in the context of the First Amendment to the

Constitution and determined it was overbroad and unconstitutional. Section 2256(8) provides,

““child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where – (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;”

4. It is to be noted that the United States legislation also contained affirmative defences [see section 2252A(c)] but the Supreme Court nevertheless concluded that the provision abridged the freedom to engage in a substantial amount of free speech and was unconstitutional.
5. Notwithstanding the reference in Security Bureau’s Legislative Council Brief dated 8 January 2002 at paragraph 31 that the Department of Justice has advised that the Bill is consistent with the Human Rights provisions of the Basic Law it may be that further thought might be given to that conclusion in light of the matters set out above.
6. It is to be noted that the definition of pornographic depiction in Clause 2 of the Bill is wider than equivalent legislation in both Canada and the United States of America in that it includes the depiction of the breast of a female.