

Prevention of Child Pornography Bill

Questions by Assistant Legal Adviser of LegCo and Administration's Response

General Comments

Q1. 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?

A1. One example is section 32 of the Tsing Ma Control Area Ordinance (TMCAO) (2 of 1997). The TMCAO except section 32 deals with the Tsing Ma Control Area. On the other hand, section 32 amends the Road Tunnels (Government) Ordinance (Cap. 368), which concerns various Government tunnel (e.g. the Aberdeen Tunnel, Airport Tunnel, Cross-Harbour Tunnel, Lion Rock Tunnel, Shing Mun Tunnels and Tseung Kwan O Tunnel). Section 32, therefore, is not consequential to any other provisions of the TMCAO. It is a related amendment that serves a substantive policy objective. More specifically, section 32 provides for the power of an authorized officer to stop a vehicle or to direct it to proceed to any place for the purpose of regulating vehicular and pedestrian traffic at the Government tunnels. This is in line with the power of an authorized officer of the Tsing Ma Control Area.

Clause 2(1)

The definition of "child pornography"

Q2. Would you give examples of "computer-generated image"?

A2. Images can be generated by computer technology to form so-called virtual child pornography. Examples are superimposing the head of a child onto the body of a nude adult, using the image of a child in a picture that simulates sexual intercourse with others, and using computer graphics to create an image of a child without using a real person.

Q3. Would you give examples of "other visual depiction"?

A3. "Other visual depiction" may include paintings and drawings. However, it should be noted that these depictions may not be child pornography unless the images depicted look like real children and they are pornographic depiction as defined under the Bill.

Q4. 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?

A4. The phrase "appears to be a child" has the meaning of "looks like a real person under the age of 16". There is no specific restriction on whether the consideration is confined to physical outlook, mentality or behaviour, in so far as these elements can be observed in the visual depiction concerned. By and large, some elements less readily lend themselves to such observations than others.

Q5. What is intended to be covered by "any other means"?

A5. "Any other means" may include other electronic, mechanical or magnetic means. For example, in the case of videotapes, images are recorded magnetically on a reel of plastic tape coated with iron oxide and require a videotape player and television set to view them. This phrase is also used to provide a more encompassing coverage of visual depiction that may be generated by possible new technology in future.

Q6. What is intended to be covered by "whether or not it has been modified"?

A6. The phrase "whether or not it has been modified" refers to whether the depiction is original or has been altered by whatever means.

Q7. Would you give examples of "anything that incorporates a photograph ... referred to in paragraph (a)"?

A7. Possible examples may include a mug, a T-shirt or a tile with child pornography printed on the surface of it.

Q8. Would you give examples of "data"?

A8. Examples of "data" are image files in formats, identified by a three-letter suffix following the period after the filename: GIF, JPG or ZIP.

Q9. 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).

A9. In the case of electronic data, anything containing such data can refer to the floppy disc or the hard disc. The offence of printing child pornography in section 3(1) is not targeted at a person who manufacture computers if the computers do not contain child pornography. However, if a computer manufacturer chooses to manufacture computers that contain in their hard disc electronic data that can be convertible into pornographic depictions of children, then the manufacturer may be found to have committed an offence of making child pornography under section 3(1).

Q10. Does the definition cover live performance transmitted on Internet?

A10. Live transmission of pornographic performance by children involves “making of child pornography” because it involves the conversion of the actual performance or visual depiction into electronic data, which is then transmitted via the Internet. In so far as the depiction or the performance falls under the definition of pornographic depiction, the transmission amounts to publication of child pornography.

The definition of “pornographic depiction”

Q11. Would you give examples of "a depiction for a genuine family purpose"?

A11. A snapshot of a baby taken during a bath, that is kept in a family photo album for viewing predominantly by family members and close friends is an example of “depiction for a genuine family purpose”.

Section 2(2)

Q12. Is the "reward" intended for the benefit of the publisher or another person or both?

A12. The “reward” applies to the benefit received by the person who publishes but not another person. Since the phrase is “whether or not for any form of reward”, it merely serves to clarify that the presence of reward is immaterial.

Q13. 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"?

A13. A person can distribute, circulate, sell, hire, give, or lend child pornography to

another person or he can show or play child pornography to another person. However, he can only project it for another person but not to another person. It is therefore not necessary to add “for another person” in Clause 2(2)(a).

Section 3

Q14. 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?

A14. A person who shows child pornography to another person, irrespective of whether he / she is the only person depicted in the child pornography and whether for reward or not, commits an offence of publishing child pornography under Clause 3(2). In accordance with Clause 2(2)(b), a person publishes child pornography if he shows the child pornography to another person.

Q15. 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."?

A15. It is not necessary to extend Clause 3(4) to cover the acts in Clause 3(1). Clause 3(4) relates to Clause 3(2) to curb the dissemination and proliferation of child pornography by prohibiting advertisement related to publishing child pornography. If a person makes the child pornography and advertises the publishing of it, he is caught by Clause 3(4). It is, however, not our intention to catch those who advertise merely the printing, making, producing, etc. of child pornography.

Clause 4(1)(a)

Q16. Would you illustrate by way of examples as how to establish "artistic merit"?

A16. In order to establish a defence of “artistic merit”, the defendant needs to adduce evidence to show that the impugned depiction concerned, if viewed reasonably and objectively, carries genuine artistic value. The evidence may include, but not limited to, the intention of the creator, the form and content of the work, its connections with artistic conventions, traditions or styles, opinions of experts, and the mode of production, display and distribution.

Clause 4(1)(b)

Q17. 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)?

A17. On the one hand, depiction for a genuine family purpose would not be child pornography in itself. The two are mutually exclusive. Even though the genitals of the child may be depicted, it should never be in a sexual manner or context if it is for a genuine family purpose. To avoid people mixing up the two or having any doubts, it is therefore proposed that a depiction for a genuine family purpose does not, merely because it depicts any part of the body referred to in paragraph (b) [of the definition of pornographic depiction], fall within that paragraph. In other words, depictions for a genuine family purpose are not regarded as child pornography in the first place and persons possessing or distributing these depictions will not be prosecuted under the Bill.

On the other hand, the defence of "genuine educational, scientific or medical purpose" under Clause 4(b) of the Bill deals with materials that are truly "pornographic depiction" and are the target materials of the Bill but they are used for some justifiable purposes. An example is the use of child pornography in research of how paedophiles may be medically and psychologically treated. Similar defence is also found in the Criminal Code [of Canada], R.S.C. 1985, c.C-46, Section 163.1(6).

Clause 4(1)(c)

Q18. Would you explain with examples as how to establish "the act the subject of the charge otherwise served the public good"?

A18. Similarly, the public good defence is modeled on section 163(3) of the Criminal Code [of Canada] which reads, "No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good."

In the *R v Sharpe* case the majority judgment of the Supreme Court of Canada mentioned some possibilities of the public good defence : "examples of possession of child pornography which could serve the public good include possession of child pornography by people in the justice system for purposes associated with prosecution, by researchers studying the effects of exposure to child pornography, and by those in possession of works addressing the political or philosophical aspects

of child pornography.” (para. 70 of the Chief Justice’s speech delivering the majority judgment which can be found in the following Web site:

http://www.lexum.umontreal.ca/csc-scc/en/pub/2001/vol1/html/2001scr1_0045.html)

Q19. Would you further explain the instances in which the act the subject of the charge extended beyond what served the public good?

A19. Whether the subject of the charge extends beyond the public good can only be determined with regard to the particular circumstances of each case. The court will have to weigh the public good served against the harm or risk of harm to children and decides whether the latter outweighs the former.

Clause 4(2)

Q20. 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)?

A20.

Clause 4(2) is an express statutory defence to avail a defendant, being charged with an offence under Clause 3 of the Bill, e.g. importing child pornography, who could establish that he had not himself seen the child pornography and did not know, nor he have any reasonable cause to suspect, it to be child pornography.

The express statutory defence in Clause 4(2) serves to ensure that blameless persons would not be convicted in the case of Clause 3 being construed as a strict liability offence.

A defendant charged under Clause 3 of the Bill need not rely on *AG v Fong Chiu Yue* because that case concerns strict liability offences with no express “reasonable belief” defence. The Court of Appeal held that even in the absence of an express provision, the “reasonable belief” defence is available, otherwise there would leave a gap through which the innocent would fall to their harm.

Clause 4(3)

Q21. Would it be appropriate to add "and he knew that it was a child

pornography," after "it came into his possession"?

A21. Clause 4(3) is without prejudice to Clause 4(2), the latter having dealt with knowledge. If a person does not know the material is child pornography, he can avail himself of the Clause 4(2) defence.

Q22. 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)"?

A22. Clauses 4(3) and 4(4) are made "subject to subsection (2)" because they may overlap with Clause 4(2). Clause 4(2) concerns the case where the accused had not seen the child pornography. Clause 4(3) concerns the case where he has not asked for the child pornography and he may not see it even if the child pornography has been sent to him for some time, which is a Clause 4(2) scenario. Clause 4(4) concerns the case where a person deals with (e.g. possess) a Class I or II article and the person may simply rely on the classification without actually looking at the content of the article. Clause 4(5) concerns the belief of age of the person pornographically depicted. Clauses 4(4) and 4(5) do not overlap with Clause 4(2). Therefore, it is not appropriate to add "subsections (4) and (5) after "subsection (2)".

Clause 4(4)

Q23. 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))?

A23. Please refer to the answer to Q22 above.

Clause 4(5)

Q24. Why is it not necessary to provide for "without prejudice to subsection (2)" as formulated in subclauses (3) and (4)?

A24. Clause 4(5) on the other hand concerns the case where the accused has looked at the child pornography but believed that the person depicted is not a child. It does not overlap with Clause 4(2).

Q25. 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))

A25. Please see the reply on the Clause 4(2). In addition, we consider that the defence in Clause 4(5) (comprising 3 elements in its paragraphs (a), (b) and (c)) adequately and properly deals with the issue of mistake of age in the context of child pornography.

Q26. Would you illustrate with examples as to how a person, who is not a child, but is depicted as a child?

A26. For example, a person aged over 16 may be depicted as a person under 16 if he / she is very young looking or by means of make-up, art direction, props or accessories. The depiction may also be digitally modified to create the impression that the person is depicted as a child.

Clause 5(5)

Q27. What is the justification for excluding military aircraft and a ship of war?

A27. Clause 5 is drafted with reference to section 34 of the COIAO for the sake of consistency as both provisions deal with articles of similar nature. The definitions of “aircraft” and “vessel” are modeled on section 34 of the COIAO and considered reasonable.

Q28. Why is a military vehicle not excluded?

A28. We intend to exclude military vehicles. We have no objection to state the express exclusion of military vehicles in Clause 5.

Clause 11(1)(a)

Q29. Is it necessary to add "owner or" before "occupier of a premises"?

A29. In the case of premises, the occupier may have more knowledge than the owner of what are the things found inside the premises because he is the one who occupies or lives in the premises. For a stall, however, the occupier, for example, the shop assistant in the stall may or may not have inspected each and every article being sold whereas the owner may have better knowledge. Furthermore, additional safeguards are provided in subsection 11(1)(b) where a summons will be issued to the owner of the thing seized. Therefore, we consider that it is not necessary to add “the owner or” before “the occupier of any premises”.

Clause 12(1)

Q30. 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?

A30. Section 16 of the Buildings Management Ordinance, Cap. 344, reads –

“...the liabilities of the owners in relation to the common parts of the building shall, subject to the provisions of this Ordinance, be enforceable against, the corporation to the exclusion of the owners...”

In the light of section 16 of the Building Management Ordinance, the magistrate’s power under Clause 12(1) to order the owner or occupier of the building to remove or efface the child pornography may be exercised against owners’ corporation where the child pornography is found on the common parts of the building and the owners of the building have been incorporated. This however does not preclude an order against any occupier of the building if the circumstances warrant.

Clause 14

Q31. 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?

A31. The acts of “using a child for making pornography” and “publishing the pornography” are two separate acts. The person may be prosecuted for both offences if he committed both acts.

Q32. 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)?

A32. The act of procuring, using or offering a child for making pornography or pornographic performances is considered more heinous because the procurer is the one who directly exploits the child. He may also have the first-hand information to ascertain the age of the child and prevent exploitation of the child if he so wishes. On the other hand, the person who prints or publishes the child pornography may less likely have the means to ascertain the age of the child. It is therefore considered that the varying levels of penalty are proportionate and appropriate.

Q33. Under new section 138A(2) of the Crimes Ordinance, what is the justification for leaving out "offering" in the defence provision?

A33. The new sections 138A(2) and (3) omit the word "offering" because they are defence provisions intended for the scenario where the accused person uses or procures a child for making pornography or a live pornographic performance for the benefit of the accused himself (see section 138A(2)(b) and (3)(b)). These may properly fall within the scope of private sexual activities between the two persons. The word "offer" involves the accused offering a child to a third person which amounts to exploitation of the child and therefore should not be given a defence.

Q34. Under new section 138A(3) of the Crimes Ordinance, what is the justification for leaving out "offering" in the defence provision?

A34. Please refer to the answer to Q33.

Q35. 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)?

A35. It is agreed that "or" should be inserted between paragraphs (a) and (b) of the definition of "pornographic depiction" in Clause 2(1).

Q36. 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"?

A36. Live pornographic performances involve the performance of a real person with audience on the spot. If the performance is transmitted by any other means such as by television or via the Internet, the subject transmission may become

pornographic depiction and may be prosecuted for contravening offences relating to child pornography under the Bill.

Section 138(A) targets at protecting children under the age of 18 from being exploited for making pornography or pornographic performances. The offences involves direct contact between the accused and the victim. This section is crafted to comply with the International Labour Convention No. 182 which defines a child as a person under the age of 18 (but not a person who is or appears to be under the age of 18). Therefore, it is not necessary to add "who is or appears to be under 18" after "a person".

Q37. 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"?

A37. Please see the answer to Q36.

Clause 16

Q38. 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?

A38. Laws concerning sexual offences vary from one jurisdiction to another. If it is required that the acts specified in Schedule 2 need to be criminal offences in that overseas jurisdiction before prosecution can be made locally, the effect of the Bill will be considerably curtailed and children will not be adequately protected. It should be noted that the relevant provision seeks not only to protect children living outside Hong Kong but also local children who are taken overseas and abused. It would not be conducive to our objective of better protection of children against sexual exploitation if it is provided that the act committed outside Hong Kong must also be a criminal offence under the law of that jurisdiction.

Q39. 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?

A39. The new section 153P applies specified existing sexual offence provisions to acts committed outside Hong Kong under certain circumstances. Whether a mistake as to the age of the person is a defence for the purpose of section 153P would depend on whether it is a defence for the relevant sexual offence provision.

Clause 18

Q40. 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.

A40. The 24 offences included in Schedule 2 are chosen because they relate more directly to sexual exploitation of children. Other sexual offences such as living on earnings of prostitution of others (section 137), keeping a vice establishment (section 138), etc. are considered less directly relevant. As extra-territoriality involves greater efforts and complications in enforcement, prosecution, collecting evidence and the judiciary process, we seek to limit the list of offences in Schedule 2 to the most necessary to achieve our objectives of child protection.

Clause 19

Q41. 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)?

A41. The definition of "child" in section 79A of the Criminal Procedure Ordinance, Cap. 221 refers to the age of the child at the time when video recording is conducted for the purpose of evidence taking under section 79C. The definition of "child" for the purpose of Clause 3 of the Prevention of Child Pornography Bill concerns the age of the child at the time he / she is depicted for making child pornography. It is therefore not necessary to align the two definitions of "child".

Clause 22

Q42. 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.

A42. After the Bill has been passed by the Legislative Council and enacted as proposed, then when the Tribunal is requested to make a classification of a submitted article that may involve a child, it has to consider whether the article may be child pornography as defined in the Bill. It should decide on two aspects. First, whether the person depicted appears to be under the age of 16 and, second, whether the depiction may fall within the definition of pornographic definition as defined under the Bill. If the Tribunal considers that answers to the above two questions are in the affirmative, then the Tribunal may come to a conclusion that it considers the subject article may be child pornography and should refuse to make a classification. There is no need for the Tribunal to apply the concept of obscenity or indecency once it is satisfied that the article is child pornography.

If the Tribunal considers the subject article not child pornography, it can proceed to classify it as Class I (neither obscene nor indecent), Class II (indecent) or Class III (obscene) based on the guidance to Tribunal as stipulated in section 10 of the COIAO.

Q43. 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?

A43. Where an article is submitted and the Tribunal refuses to classify it on consideration that it may be child pornography, the Tribunal may refer the matter to the Police for further action, just as any good citizen may do in the circumstances.

Clause 24

Q44. Why is it necessary to add "for the purposes of this Ordinance" to various places in the provision?

A44. The phrase "for the purposes of this Ordinance" is added merely to put it beyond doubt that the OAT does not have exclusive jurisdiction over questions of indecency or obscenity for the purpose of other legislation.

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