

Bills Committee on the Prevention of Child Pornography Bill

“Appears to be under the age of 16”

The Administration was requested to reconsider whether the concept of “appears to be under the age of 16” should be used in the definition of child pornography having regard to Members’ concerns that it was not clear how a judgement could be made in that regard.

Administration’s response

2. It is proposed in the Prevention of Child Pornography Bill that “child pornography” means, among other things, 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. “Child” means a person under the age of 16.

3. In Hong Kong, the age of consent for lawful heterosexual intercourse is 16. As the proposals of the Bill are for protection of children against sexual abuse, the age limit should be on a par with the age of consent. This is also in line with the age limit of most sexual offences.

4. The age of protection in child pornography legislation varies in other jurisdictions. For instance, the age of protection is 16 in UK and Australia and 18 in US and Canada. As a general observation, the higher the age of protection, the narrower the definition of “child pornography”. For instance, indecent photographs depicting a child who appears under the age of 16 are considered “child pornography” in UK whereas US adopts a tighter and more specific definition to the protection of children under the age of 18. It is believed that paedophiles may be sexually aroused even by soft-core child pornography and the “targets” of paedophiles are usually children under the age of 16. Therefore, we are inclined to propose a lower age of protection but a slightly wider definition than the US.

5. Members are concerned about the enforcement difficulties of the “appears to be under the age of 16” limb in the definition of “child pornography”. According to the Concise Oxford Dictionary, the relevant meaning of “appear” is “seem; give a specified impression”. Some Members’ concern has been that different people may have different impressions as to the age of a person and the meaning of “appears to be” cannot be determined with precision.

6. We agree that “appears to be” is not a precise term. However, a person will not be convicted of a child pornography offence unless the prosecution proves *beyond a reasonable doubt* that the person depicted *is or appears to be* under 16 years of age. In other words, if reasonable people disagree as to whether the person depicted appears to be under 16, the prosecution’s burden is not discharged. The Bill does not aim at catching depictions of persons who *marginally* look like under 16. Rather it aims at catching those that appear to be persons under 16 *beyond a reasonable doubt*.

7. The effect will be that apart from depictions that are proved beyond a reasonable doubt to be of persons *actually* under 16, pornographic depictions of persons who are apparently under 16 will also be caught. Therefore, even where the prosecution fails to prove (e.g. by producing the birth certificate) that the person depicted is *actually* under 16, the court may convict if the person depicted *appears to be* under 16 beyond a reasonable doubt.

8. The proposal is justified because child pornography is considered to be connected to harm to children in the following ways : (1) child pornography promotes paedophiles’ erroneous belief that sexual activity with children is acceptable; (2) it fuels fantasies that incite offenders to offend; (3) paedophiles use child pornography for seducing children to commit sexual acts; and (4) children are abused in the production of child pornography involving real children. The Bill is proposed for protection of children, one of the most vulnerable groups in society.

9. On the other hand, if the “appears to be” limb is taken out, there will likely be significant enforcement difficulties. With advanced computer technology nowadays , it can be very difficult to distinguish a “real” person from a computer creation or composite.

10. Hong Kong is not known to be a production centre of child pornography. The majority of child pornography found is imported or transmitted via the Internet. It is therefore often difficult to locate the person depicted and prove his/her actual age by locating the real child depicted. With the “appears to be” test, as long as it is apparent that the person depicted appears to be under 16 (e.g. a baby, a toddler), a conviction may be supported.

11. Similar provisions encompassing the concept of “appears to be” are adopted in other jurisdictions, e.g. Canada’s Criminal Code, s.163 1(1)(a) refers to “visual representation ... that shows a person who is or *is depicted as* being under the age of eighteen years”. Under UK’s Protection of Children Act 1978 s.2(3), “a person is to be taken as having been a child at any material time if it

appears from the evidence as a whole that he was then under the age of 16”. Section 7(8) also provides that “if the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph shall be treated ... as showing a child ...” Under the Crimes Act 1900 No. 40 of New South Wales of Australia, child pornography means a film, publication or computer game ... that depicts ... a person who is a child under 16 or who *looks like* a child under 16.

12. In Hong Kong law, the concept of “appears to be” can also be found in sections 5 and 19 of the Juvenile Offenders Ordinance, Cap. 226. Section 5 provides that “where a person *apparently* under the age of 16 years having been apprehended is not so released as aforesaid [on bail], the officer in charge of the police station to which such person is brought shall cause him to be detained in a place of detention...”. On the other hand, section 19 provides that “where a person, whether charged with an offence or not, is brought before any court and it *appears* to the court, after considering any available evidence as to his age, that he is a child [under 14] or young person [14 or upwards and under 16], an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to or presumed or declared by the court...”.

13. Although it is no simple task to determine whether a child appears to be under the age of 16 in a pornographic depiction, the Police and prosecution will rely on the evidence available and all relevant factors to make an assessment.

14. The burden of proof is always upon the prosecution. The standard of proof is “beyond all reasonable doubt”. Types of evidence used may include :

- a) oral testimony: for example from a child, or persons who are in a position to reasonably indicate the child’s age, say relatives;
- b) documentary evidence: for example the depicted child’s birth certificate;
- c) expert’s opinion: for example from a suitably qualified paediatrician who expresses an opinion based on the physical development of the depicted ‘child’, the apparent and depicted age of that child.

Any evidence adduced by either the prosecution or defence is to assist the court in its determination.

Security Bureau
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