

**Administration's Response to Comments by Against Child Abuse Ltd.
on the Prevention of Child Pornography Bill**

Definition of Child Pornography

In drafting the definitions of “child pornography” and “pornographic depiction”, we have given full consideration to striking a balance between adequate protection for children on the one hand and the protection of freedom of expression and privacy on the other. Reference was also made to relevant legislation in other countries, such as UK, Australia, US and Canada, etc.

2. It is proposed that “child pornography” should only cover visual depiction, but not purely audio or written depiction mainly because the latter would pose greater difficulties in enforcement. For instance, it would be difficult to prove the age of the person depicted. On the other hand, audio or written depiction would less likely be used by paedophiles to entice children into unlawful sexual conduct. According to the Police, the vast majority of child pornography transmitted or exchanged on the Internet by paedophiles were visual depiction, rarely audio or written depiction. So far, the Police have not found any child pornography consisting purely of audio or verbal depiction. Therefore, we do not see the need to put this under control at this stage.

3. As to the definition of “pornographic depiction”, comments received after the Prevention of Child Pornography Bill was gazetted in 1999 indicated that the definition of “child pornography”, in particular “indecently depicts”, was too vague and ambiguous. After taking these comments into consideration and making reference to relevant legislation of other countries, it is proposed that “pornographic depiction” means -

- a) a visual depiction that depicts a person who is or appears to be engaged in explicit sexual conduct;
- b) a visual depiction that depicts, in a sexual manner or context, the genitals or anal region of a person or the breast of a female person,

but, for the avoidance of doubt, a depiction for a genuine family purpose does not, merely because it depicts any part of the body referred to in paragraph (b), fall within that paragraph.

4. We believe that the revised definition provides a clear meaning of “pornographic depiction” and eliminate any unnecessary confusion or doubts. We have to protect children on the one hand and protect an individual’s right to freedom of thought and expression on the other. Bearing in mind that the innocent should not be caught and that a proper balance should be struck among conflicting interests, we consider the present definition of “pornographic depiction” appropriate, not vague or too narrow.

A Two-tiered Definition for the Age of Protection

5. In prohibiting the making, production, publication, possession and advertising of child pornography, the Bill adopts a set of definitions for child pornography, namely :

“child” means a person under the age of 16, and

“child pornography” means-

- (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, whether or not it is a depiction of a real person and whether or not it has been modified; or
- (b) anything that incorporates a photograph, film, image or depiction referred to in paragraph (a),

and includes data stored in a form that is capable of conversion into a photograph, film, image or depiction referred to in paragraph (a) and anything containing such data.

“pornographic depiction” means -

- a) a visual depiction that depicts a person who is or appears to be engaged in explicit sexual conduct;
- b) a visual depiction that depicts, in a sexual manner or context, the genitals or anal region of a person or the breast of a female person,

but, for the avoidance of doubt, a depiction for a genuine family purpose does not, merely because it depicts any part of the body referred to in paragraph (b), fall within that paragraph.

6. Nevertheless, in prohibiting the use, procurement or offer of persons under the age of 18 for making pornography or for pornographic performances, we have proposed a two-tiered definition for pornographic depiction after careful consideration. The protection for persons under the age of 16 differs slightly from that for persons aged 16 or above but under 18. The proposals relating to the use, procurement and offer of children seek to comply with the International Labour Convention No.182 to eliminate the worst form of child labour. The Convention defines a child as a person under the age of 18.

7. On one hand, the definition of pornographic depiction referred to in paragraph 5 above applies to persons under the age of 16. On the other hand, pornographic depiction of a person aged 16 or above but under 18 means -

- (a) a visual depiction that depicts the person as being or appearing to be engaged in explicit sexual conduct; or
- (b) a visual depiction for sexual purposes, of which the dominant feature is the genitals or anal region of the person or, in the case of a female person, her breast.

8. Firstly, the age of consent for lawful heterosexual intercourse is 16. Generally speaking, persons under the age of 16 are mentally immature, prone to instigation by others and unable to make decisions or give consent on their own, so they should be better protected under the law. We therefore propose that the definition of pornographic depiction in paragraph 5 above be applied to persons under the age of 16. On the other hand, persons aged 16 or above but under 18 have a better grasp of things and a greater ability to judge between right and wrong. We therefore propose that a narrower definition in paragraph 7 above be adopted to prohibit the procurement of persons of this age group for making pornography or for pornographic performances.

9. For instance, in procuring a person aged 16 or above but under 18 for making pornography, it is not “pornographic depiction” unless any part of the body mentioned in paragraph (b) of the definition is depicted as a dominant feature for sexual purposes. On the other hand, a depiction in a sexual context of any part of the body mentioned in paragraph (b) of the definition is “pornographic depiction” if the person depicted is under the age of 16.

10. If we adopt only one definition to cover all persons under the age of 18, inadequacies may arise. There are two ways to standardize the definitions of “pornographic depiction”. One way is to narrow down the definition to cover hard-core pornographic depictions only, but not soft-core pornographic

depictions. In doing so, there will not be adequate protection for children under the age of 16 against being used for making soft-core pornography. The other way is to adopt a wider definition so that children under the age of 16, as well as persons aged 16 or above but under 18, will be protected against being depicted in soft-core pornography. In such an event, the law may be considered as imposing too high or too strict a standard. Although a two-tiered definition is relatively complicated, it can achieve the purpose of protecting children while not being too strict. Moreover, the Bill has made a clear distinction between the two definitions. We believe that there will not be particular difficulties in law enforcement and prosecution.

Descriptions of Offences which Disentitle Persons from being or Continuing to be Registered Social Workers

11. Clause 26 of the Bill proposes that the new sections 138A and 153Q(1) of the Crimes Ordinance (Cap. 200) be added to item 2 of Schedule 2 to the Social Workers Registration Ordinance (Cap. 505) in order to disentitle persons convicted of those offences from being or continuing to be registered social workers. We have made a similar proposal in respect of childminders to protect children against possible harm. Whether similar provisions should be made in respect of other child care professions may be considered further. It is noted that, however, a number of ordinances governing statutorily registered professionals already have provisions that deal with the professionals convicted of certain criminal offences (such as section 21 of Medical Registration Ordinance (Cap.161), section 17 of Nurses Registration Ordinance (Cap.164) and sections 46 and 47 of Education Ordinance (Cap. 279), please refer to **Annex** for the provisions). However, if the committee has any further views, we will refer them to relevant bureaux and departments for consideration and discuss with them.

Obscene Articles Tribunal

12. Clause 22 proposes that the Tribunal shall refuse an application to make a classification if it is of the opinion that the article may be child pornography as defined in the Bill. At the same time, the Tribunal may report the case to the Police, just as a good citizen would do, to fulfil his civic responsibility, upon which the Police will take appropriate action having regard to the circumstances and evidence of the case.

Potential Difficulties in Enforcement

13. As to the definition of “appears to be under the age of 16”, please refer to the relevant paper we submitted to the Bills Committee. The Bill is intended to crack down on people who have committed child pornography offences. In order that no innocent people would be affected, the Bill sets out in the definition of “pornographic depiction” that, for the avoidance of doubt, a depiction for a genuine family purpose shall not be regarded as “pornographic depiction” just because it depicts the genitals or anal region of a person or the breast of a female person. In addition, Clause 4 also sets out various defences, including artistic merit, that the defendant had not himself seen the child pornography and did not have any reasonable cause to suspect it to be child pornography, etc.

Treatment and Counselling

14. We agree that effective treatment and counselling should be provided to the children victimised and their families. At present, social workers and clinical psychologists of the Social Welfare Department provide appropriate treatment and psychological counselling services to the children and their families. As regards the proposal of providing mandatory therapy to the defendants, since such matters do not fall within the ambit of this Bureau, we will refer the suggestion to the relevant bureau and departments for consideration.

Gravity of the Problem

15. The “Child Protection Policy Unit” of the Police collects information and maintains record of child pornography and child sex tourism. Analysis and assessment are conducted to assess the gravity of the problem and to map out countermeasures. The Police also maintain close contact with overseas law enforcement agencies and exchange information with them in joint efforts against related offences.

16. As the Bill is closely related to the public in terms of protection for children, we will arrange for publicity and education after it is passed by the Legislative Council so that the public may understand the spirit, aim, definitions and other details of the legislation and join us in the work of protecting children from sexual abuse.

Prevention is Better Than Cure

17. Concerning the proposal on corresponding arrangements in curriculum, textbooks and teacher training, we will refer the proposals to the relevant bureaux and departments for consideration. As a matter of fact, the Police, Social Welfare Department and Education Department have already started to jointly organize relevant training for teachers and school-based social workers of kindergartens, primary and secondary schools. The purpose is to inculcate in them the knowledge of “child sexual abuse” offences and methods of handling these offences so that they can identify such cases promptly for referral to the relevant departments for follow-up action. Since the beginning of this year, two workshops relating to the subject have been organized, with over 300 participants. If necessary, we will continue to organize similar workshops.

Security Bureau
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