Prevention of Child Pornography Bill
Administration's Response to Issues Raised at the Meeting on 30 April 2003

To incorporate in the Bill an express provision that the Police should maintain the confidentiality of information on a case of possession of child pornography until prosecution was instituted

At the last Bills Committee meeting, some Members suggested that an express provision be incorporated to ensure that the Police should maintain the confidentiality of information e.g. identity, etc. of persons being investigated, in respect of the possession offence under the Bill to protect the reputation of suspects until prosecution was instituted.

2. Members at the meeting also quoted s.30 of the Prevention of Bribery Ordinance (POBO), Cap. 201 as an example. S.30(1) of POBO stipulates that –

> (1) Any person who knowing or suspecting that an investigation in respect of an offence alleged or suspected to have been committed under Part II is taking place, without lawful authority or reasonable excuse, discloses to-
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> (a) the person who is the subject of the investigation (the "subject person") the fact that he is so subject or any details of such investigation; or
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> (b) the public, a section of the public or any particular person the identity of the subject person or the fact that the subject person is so subject or any details of such investigation,
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> shall be guilty of an offence and shall be liable on conviction to a fine of $20 000 and to imprisonment for 1 year.

3. The effect of s.30 of the POBO is broad in that it prohibits by criminal sanction "any person" from disclosing to "the subject of an investigation" or to "the public, a section of the public or any particular person" either the identity of a person under investigation or any details of an investigation. However, that section is not entirely free from controversy, especially from the angle of the freedom of expression. In Ming Pao

Newspaper Ltd v AG of HK [1996] AC 907, s.30 was challenged as being inconsistent with the right to freedom of expression in article 16(2) of the Hong Kong Bill of Rights.

4. Though Section 30 was eventually approved by the Privy Council in Ming Pao Newspaper Ltd v AG of HK [1996] AC 907 as being a necessary and proportionate interference with the right to freedom of expression, yet the question of protection of the reputation of suspects is not treated as the primary concern by the Court. What the Court noted as the primary importance was the need to protect the integrity, confidentiality and efficacy of I.C.A.C. investigations, bearing in mind the difficulty to detect bribery offences and the maintenance of secrecy of an investigation in order not to put the suspect on his guard. The protection of the reputation of suspects was treated by the Court as being of "secondary importance" to the protection of the integrity of the investigation.

5. On the other hand, the Police have specific internal guidelines on disclosure of information on people involved in crime cases. The restrictions on disclosure of information to the media is laid down in the Police's Force Procedures Manual (FPM). Usually, only limited information which does not lead to disclosure of identity of the victims or suspects in a crime or an incident could be released by the Police in response to media enquiry or on other justifiable grounds. Furthermore, information which may affect investigation or prejudice future criminal or judicial proceedings is not disclosed.

6. The release of information contrary to the FPM may be dealt with by disciplinary action, and with appropriate penalty upon a finding of guilt in the disciplinary proceedings. If acceptance of advantage or monetary rewards are involved in any illegitimate or unauthorised disclosure of information, the offender may be liable to criminal prosecution.

7. In addition, the Police, as a data user, is bound by s.4 of the Personal Data (Privacy) Ordinance (PD(P)O), Cap. 486 not to do an act or engage in a practice, that contravenes a data protection principle unless the act or practice as the case may be is required or permitted under the Ordinance. Of the 6 data protection principles, principle 3 requires the data subject prescribed consent to the use of data for any purpose other than the purpose for which the data were to be used at the time of collection of the data, or a directly related purpose. Principle 3 may be departed from only if one of the exemptions provided in Part VIII of the Ordinance (which address specific aspects of public interests) applies. This provides individual members of the public with safeguards against misuse of personal information by the Police.

8. We understand Members' concern that if the identity of a person suspected of possessing child pornography is disclosed, he may be stigmatized and his reputation will be ruined even if no prosecution is eventually instituted. However, as explained above, protection of the personal data privacy of individual members of the public is already provided by PD(P)O and breaches of the Police's internal guidelines on the release of information may render the Police Officer liable to disciplinary actions or, if there is evidence of acceptance of advantage, criminal sanctions. The same protection is offered to suspects of all criminal offences. Therefore, we consider the inclusion of an express provision for the Police to maintain the confidentiality of information in cases of possession of child pornography until prosecution was instituted is not necessary or justified. The present mechanism already provides a proper balance between the interest of the suspect and the need to provide information to the media in a fair and responsible manner.

ALA's draft CSAs to reflect the 3 scenarios suggested by Members in the last Bills Committee

9. Members at the last Bills Committee meeting also requested the LegCo's Assistant Legal Advisor (ALA) to prepare draft CSAs to reflect the following 3 scenarios –

(a) in respect of the "passive possession" of child pornography received by means of electronic transmission, to provide that the defendant's knowledge of the exact nature of the thing in possession was to be proved by the prosecution; if a person has not asked for child pornography but received it involuntarily through spam mail, etc., then prosecution would have to prove that the person has knowledge of the exact nature of the child pornography he possessed;

(b) retaining clause 3(3) of the Bill but removing as far as practicable the objective standard in clause 4 relating to a charge under clause 3(3); and

(c) to add the element of "knowingly" to the possession offence and adjust the relevant defences in Clause 4 accordingly.

10. We noted that ALA has already prepared draft CSAs to reflect the above 3 scenarios as far as possible (in the form of 3 proposed models) for Members' consideration (LC Paper No. LS 119/02-03). The Administration's views on the 3 proposed models are set out below for Member's reference –

General Comments

11. The Administration's policy all along is that a person should not be guilty if he received unsolicited e-mail or other electronic data and neither knew nor suspect the nature of the e-mail or electronic data being child pornography. As early as the gazetted version, the Bill specifically provides in clause 4(3) and (2) for -

(a) a defence for child pornography received without request as long as he endeavoured to destroy it within a reasonable time; and

(b) a defence if the defendant had not seen the child pornography and neither knew nor had reasonable cause to suspect it to be child pornography.

That means, a defendant who was in possession of unsolicited e-mail or other electronic data is not guilty unless he has seen it, or knew or suspected it to be child pornography, but nevertheless kept it.

12. Members' objection seems to be that the defendant should not be required to prove his innocence. Instead, Members wish to require the prosecution to prove in the case of unsolicited e-mail etc. that the defendant knew it was child pornography.

13. It is well established that the burden is on the prosecution to prove that a defendant is guilty of an offence, not for the defendant to prove his innocence. For an offence of possession, the prosecution needs to prove beyond reasonable doubt that the defendant has custody or control of a thing, that he knew he has custody or control of the thing, that it is child pornography. It is only where these 3 elements are proved that an explanation is called for from the defendant.

14. Further, the defendant needs only adduce evidence to raise the defence, the burden is even lower than proof on the balance of probabilities. He needs not satisfy the judge or jury that his explanation is more probable than the prosecution's case. Rather, even if the judge or jury feels that the prosecution's case is more probable, the defendant cannot be convicted if there is a reasonable doubt. Therefore, the Administration's proposal does not actually require the defendant to prove his innocence; it merely puts the burden on him to adduce evidence to raise an issue.

15. It is a novel proposal to have a special provision to require the prosecution to prove, in the case of unsolicited e-mail etc., the defendant's

knowledge that the unsolicited e-mail etc. is child pornography ("the proposal"). Regardless of the form of the child pornography, a person is not guilty of possession of child pornography if he did not know of the existence of the thing in question. It is not necessary to deal with unsolicited e-mail etc. in a separate provision. Indeed, such differential treatment is not found in the legislation of UK, Canada, Australia and US that have been considered by the Bills Committee.

16. The offence in question is possession of child pornography. For possession offences, it is not necessary to prove that the defendant has asked for the thing possessed. If whether or not the defendant has asked for the child pornography is made a further element of the relevant offence, the prosecution will additionally have to prove how the defendant came into possession of the child pornography besides proving knowledge of its nature being child pornography.

Model 1

17. The ALA's proposed Clause 3(3A) will require prosecution to prove at the outset that, for cases involving "child pornography being electronic data received with a computer", the defendant has full knowledge of the exact nature of the child pornography he possessed. However, the clause does not distinguish the treatment between electronic materials received with a computer which are at the request of the person and those received by him involuntarily.

18. We consider it deviates from Members' intentions and undesirable from our policy point of view that the proposed Clause 3(3A) requires the prosecution to prove at the outset that a defendant "knowingly" possesses child pornography, being **any** electronic data received with a computer.

19. We have considered whether it is possible to include "not at the request of the defendant" or "received involuntarily by the defendant" as an element of the offence as Members suggested and identified certain problems.

20. It may be difficult to distinguish whether the e-mail or other electronic data is requested or non-requested, unless the user admitted, or there is e-mail history or other record. If the element of "not at the request of the defendant" or "received involuntarily" is incorporated in Clause 3(3A), it may render all possession of child pornography in a computer not enforceable as this will mean that we may have to prove the element of at the request of the

defendant and received with a computer/by any means of electronic transmission. There is very serious implication to law enforcement.

21. The effect of a provision that says the prosecution must, in the case of unsolicited e-mail or other electronic data, prove that the defendant knew it was child pornography goes beyond what it says. Members may have in mind the Trojan virus attack or spam e-mail cases in which persons receive child pornography involuntarily. However, the Prosecution may not be able to point to a positive request in all other cases and they will have to be regarded as child pornography "received involuntarily" or "not at the request of the defendant".

22. As long as the prosecution cannot prove beyond reasonable doubt that the defendant asked for the e-mail or electronic data, it will be taken to be unsolicited e-mail or data and the prosecution must prove beyond reasonable doubt that the defendant knew that the e-mail or data was child pornography. That being so, the offence of possession of child pornography in the form of e-mail or other electronic data becomes -

(a) possession of child pornography that has been received at the defendant's request (or in other words, purchase of child pornography or obtaining child pornography from another person); and

(b) possession of child pornography, with the knowledge that it was child pornography.

23. The act of purchasing or obtaining child pornography can happen within a few seconds and through various means, including verbal request. If those brief moments escape Police's attention, the charge cannot be substantiated under category (a) of paragraph 22. The prosecution needs to fall back on category (b).

24. As to category (b), the Administration has explained in previous papers the difficulty in proving that the defendant knew or suspected of the nature of the thing in the defendant's possession, which is a matter within the defendant's knowledge. It may be difficult for the Police to have evidence at the outset to prove beyond reasonable doubt that the defendant knew he had child pornography.

25. In short, the proposal that the prosecution needs to prove the defendant knew of the nature of e-mail or other electronic data as child pornography unless the defendant requested it will create a major loophole in the offence provision.

26. Furthermore, the proposed Clause 3(3A) will have the effect of subjecting all child pornography being electronic data received with a computer to that clause. This has a much wider scope than that requested by Members at the Bills Committee meeting on 30 April 2003.

27. On the technical front, the meaning of "received with a computer" is not without doubt. In a computing device environment, "received" could also include loading via DVD or VCD. In such cases, the proposed CSA may create the anomaly that prosecution of possession of DVDs or VCDs will have to be brought under clause 3(3) but data loaded from such disks and stored in the computer will have to be brought under Clause 3(3A) and the defendant's knowledge of their being child pornography will additionally have to be proved beyond reasonable doubt in the latter case.

28. The Internet is a major means of transmission of child pornography. It is pervasive, secretive and difficult to detect. Cases where the Police can obtain a warrant and find child pornography in a computer are likely to be only a fraction of all actual cases. The proposal, if adopted, will seriously curtail the effectiveness of the Bill in pursuing the goal of combating child pornography on the Internet.

Model 2

29. The objective standards in the defence provisions are removed in Model 2 as suggested by a Member in the last Bills Committee meeting. However, we are of the view that if all the objective standards in the defence provisions are removed, the prosecution, in order to refute the defence, will need to prove beyond reasonable doubt that the defendant believed that the person depicted was a child and that he believed the depiction was pornographic in nature. This is practically impossible since the defendant's belief is a matter solely within his knowledge. The standard of proof to be adopted for assessing whether the defence is established is one of "by adducing evidence to raise an issue", not "proved beyond reasonable doubt" or "even balance of probabilities".

Model 3

30. Model 3 includes the word "knowingly" in Clause 3(3), with adjustments to the relevant defence provisions. As explained in our earlier paper entitled "Knowingly", case laws like R. v. Lambert state that even without the word 'knowingly' in the possession offence, prosecution also needs to prove

that : -

(a) that the defendant possessed something in the sense that it was within his custody or control;

(b) that the defendant knew he possessed that something; and

(c) that the something possessed by the defendant was child pornography.

31. Adding “knowingly” will require the prosecution, in addition to the above 3 elements, to prove at the outset that the defendant has full knowledge of the exact nature of child pornography he possessed. This will create great enforcement and prosecution difficulties, thus undermining the efficacy of the legislation.

Security Bureau
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