

**Prevention of Child Pornography Bill
Administration's Response to Submission by
Law Society of Hong Kong dated 5.5.2003**

Possession as an offence

The Law Society of Hong Kong recently made another submission to the Bills Committee [LC Paper No. CB(2)1978/02-03(01)] to raise two major concerns, namely, on (i) criminalizing “simple possession” of child pornography, and (ii) the proposal to extend the law under Schedule 2 to have extra-territorial effect.

2. It is internationally recognized that child pornography is a serious form of sexual exploitation of children. Legislation should be in place to protect children from such harmful exploitation as they are usually unable to make informed decisions, and thus are vulnerable. The Prevention of Child Pornography Bill proposes to criminalize the printing, making, producing, reproducing, copying, importing, exporting, publishing, possession or advertising of child pornography to step up our protection of vulnerable children.

3. Possession of child pornography is proposed to be made an offence to deter the demand of child pornography at source. Similar “possession” offence exists in relevant laws in many other jurisdictions, including US, UK, Canada and Australia.

4. The Supreme Court of Canada, having thoroughly considered the need for child protection in this respect and the arguments based on freedom of expression, upheld a similar offence of possession of child pornography in the case of *R v. Sharpe* [2001]1S.C.R.

5. It is clear from the majority judgment of the Supreme Court of Canada in *R v Sharpe* that what is criminalized is not anti-social thoughts. That the person has in his possession child pornography causes harm to the person depicted. The judgment says -

“...The child is traumatized by being used as a sexual object in the course of making the pornography. The child may be sexually abused and degraded. The trauma and violation of dignity may stay with the child as long as he or she lives. Not infrequently, it initiates a downward spiral into the sex trade. Even when it does not, the child must live in the years that follow with the knowledge that the degrading photo or film may still exist, and may at any moment be being watched and enjoyed by someone.”

6. The Canadian judges acknowledged that possession of child pornography (a form of expressive material) is a form of expression protected by the Charter of Rights and Freedoms. However, the court noted that, in adopting s. 163.1(4) of the Canadian Criminal Code, which prohibits possession of child porn, the Parliament was pursuing the pressing and substantial objective of criminalizing the possession of child pornography that poses a reasoned risk of harm to children. The court accepted that possession of child pornography is connected with harm to children in five ways -

- (a) child pornography promotes cognitive distortions;
- (b) it fuels fantasies that incite offenders;
- (c) prohibiting its possession assists law enforcement efforts to reduce the production, distribution and use that result in direct harm to children;
- (d) it is used for grooming and seducing children; and
- (e) some child pornography is produced using real children (paragraphs 82 to 94 of the judgment).

7. A ban on possession of child pornography must not be confused with a ban on possession of political material. Again, the majority judgment in *R v Sharpe* is illuminating in that it identified the three core values of freedom of expression: (1) the search for truth; (2) participation in political decision-making; and (3) diversity in forms of self-fulfillment and human flourishing,

and went on to say -

“It is clear that the possession of child pornography contributes nothing to the search for truth. The impugned provision prohibits the possession of material which visually depicts children engaged in sexual activity or which has as its dominant characteristic the depiction, for a sexual purpose, of the sexual organ or the anal region of a child. The written material prohibited is that which advocates or counsels the commission of sexual offences against children. The message conveyed by child pornography perpetuates lies about children’s humanity. It promotes the false view that children are appropriate sexual partners and that they are sexual objects to be used for the sexual gratification of adults. It encourages and condones their sexual abuse. These messages contribute nothing to the search for truth and are in fact detrimental to that search.

It is equally clear that there is no link between the possession of “child pornography” (as defined in s. 163.1(1)) and participation in the political process. While children may not be accorded equal participation in our political process, they are deserving of equal treatment as members of our community. In *Keegstra*, supra, at p. 764, Dickson C.J. recognized that messages of degradation, which undermine the dignity and equality of members of identifiable groups, subvert the democratic aspirations of the expression guarantee by undermining the participation of those groups in the political process. In *Thomson Newspapers*, supra, at para. 92, Bastarache J. found that the same could be said of pornographic expression. He recognized that in *Irwin Toy*, supra, the interests of advertisers meant that there was a likelihood that their speech would manipulate children and would play on their vulnerability. In each of these cases, the type of speech involved systematically undermined the position of some members of society. Child pornography similarly undermines the position of children in society. In this sense, it is antithetical to the democratic values underlying

the guarantee of freedom of expression.

The expression at issue in this case is linked to the value of self-fulfillment, but only in a limited sense since s. 163.1(4) of the Criminal Code in no way impedes positive self-fulfillment. In *Butler*, supra, the Attorney General for Ontario argued that the only value underlying pornography as a form of expression was self-fulfillment in its most base aspect, that of pure physical arousal (at pp. 499-500). We find this argument particularly apposite in relation to child pornography. Child pornography is used to fuel the fantasies of paedophiles and is also used to facilitate their exploitation of children. It hinders children's own self-fulfillment and autonomous development by eroticising their inferior social, economic and sexual status. It reinforces the message that their victimization is acceptable. In our view, that message denies children their autonomy and dignity. In relation to adult pornography, Sopinka J. found in *Butler* that such expression does not stand on an equal footing with other kinds of expression which directly engage the "core" of the freedom of expression values (at p. 500). We agree with this statement and find it equally applicable in the context of child pornography."

8. Further, the judges stressed that protection of children is an important and universally accepted goal. The equality rights of children, along with their security of the person and their privacy interests are also protected under the Charter of Rights and Freedoms. On the other hand, as a form of expression, child pornography warrants less protection since it is low value expression that is far removed from the core values underlying the protection of freedom of expression. The court therefore concluded that the Parliament has enacted a law which is reasonable and justified in a free and democratic society.

9. In addition, under Article 3 of the Optional Protocol to the UN Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (the Optional Protocol), each state party has to ensure, inter alia, that possession of child pornography be made an

offence under its criminal law before it may comply with the Optional Protocol.

10. The Council of the European Union has also proposed a Framework Decision on combating sexual exploitation of children and child pornography in 2000. Under the Framework Decision, each Member State should ensure that possession of child pornography is made an offence.

11. From the above, it can be seen that the international community endorses the criminalization of possession of child pornography and many countries have enacted legislation to prohibit possession of child pornography. Such legislation is a crucial part of the international efforts put together to combat child pornography.

Extra-territorial effect of offences listed under Schedule 2

12. Sexual exploitation of children is known to have international dimensions. Child sex tourism, that is, arrangements which enable adults to travel from their home countries to other places, in particular less-developed places, to engage in sexual activities involving children, is known to exist around the world. Child sex tourism has inherent to it an extra-territorial element. Extra-territorial effect of the relevant offence provisions is essential for combating child sex tourism.

13. The Optional Protocol mentioned in paragraph 9 above also states that in its Article 4 each state party should take measures to establish its jurisdiction over the relevant offences in the following cases:

- (a) when the alleged offender is a national of that State or a person who has his habitual residence in its territory;
- (b) when the victim is a national of that State.

14. Hong Kong, as a member of the international community, has a compelling interest to protect children and to join in the concerted efforts in combating sexual abuse of children. We therefore propose to introduce legislative amendments to give extra-territorial effect to certain sexual offences under the Crimes Ordinance in respect of acts that relate to direct sexual

exploitation of children, where the perpetrator or the victim has a nexus with Hong Kong.

15. The new section 153P of the Crimes Ordinance confers jurisdiction on Hong Kong Courts to try certain offences committed outside the geographical boundaries of Hong Kong. If a person who is a Hong Kong permanent resident or who ordinarily resides in Hong Kong commits an offence under Schedule 2 of the Bill overseas, he could be arrested and prosecuted before Hong Kong Courts when he returns to Hong Kong. In this situation, evidence/witnesses will be required from the place where the offence was committed. This may involve liaison at the law enforcement level and/or a formal request for mutual legal assistance.

16. Depending on the circumstances, the perpetrator may be extradited and then prosecuted in Hong Kong. Extradition would usually only be sought if the place where the offence was committed could not or would not prosecute. And, of course, extradition to HK would have to be available as a matter of that place's domestic law and any applicable Agreement with Hong Kong.

17. There is no time limitation to prosecute these offences in Hong Kong. As long as the offender or victim is a Hong Kong permanent resident or ordinarily resides in Hong Kong while the offence is committed, Hong Kong Courts have jurisdiction to try these offences committed overseas.

18. Many countries, by their domestic laws, assert jurisdiction over extraterritorial offences committed by their nationals or where the victim of the extraterritorial offence is one of their nationals. In Hong Kong's situation, Hong Kong permanent residents and persons who ordinarily reside in Hong Kong can be substituted for nationals. Permanent residents and persons who ordinarily reside in Hong Kong, irrespective of their nationality, should be prohibited from engaging in the heinous acts of child sex tourism occurred outside Hong Kong. Therefore they should be covered under the Bill.

19. The new section 153Q of the Crimes Ordinance should also be noted. This provision confers jurisdiction on Hong Kong Courts to try any person who makes arrangements in Hong Kong to commit certain offences outside the geographical boundaries of Hong Kong.

20. We believe that protection should be offered to children who are sexually exploited overseas irrespective of the nationality of the offender or victim, as long as they have a nexus with Hong Kong. In local legislations, extraterritoriality is usually applied to either permanent residents of Hong Kong or irrespective of the nationality or citizenship of the persons committing the crimes. This issue was also discussed in the paper entitled “Administration’s response to outstanding issues raised in the Bills Committee meetings of Prevention of Child Pornography Bill” submitted to the Bills Committee of the “Prevention of Child Pornography Bill” earlier, which discuss the relevant local legislations in details (a copy of the relevant extract of the paper is attached at Annex for reference).

Security Bureau
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**Extracts of the paper entitled
“Administration’s response to outstanding issues raised in the
Bills Committee meetings of Prevention of Child Pornography Bill”**

(B) To explain whether references to residency status was generally found in provisions on extraterritorial effect in other local legislation, and to explain why reference to residency status is made in Clause 16 of the Bill instead of reference to nationality.

25. Please refer to the following examples of legal provisions in which extra-territoriality of offences are applied –

(a) offence on aircraft – Aviation Security Ordinance Cap. 494

Section 3 - Hong Kong has jurisdiction to prosecute crimes on Hong Kong - controlled aircraft while in flight elsewhere than in or over Hong Kong. The conduct must be such that it would have been an offence against Hong Kong had it been committed in Hong Kong. Under s. 2(1), “Hong Kong - controlled aircraft” means an aircraft:

- (1) which is for the time being registered in Hong Kong; or
- (2) which, being for the time being registered outside Hong Kong, is for the time being chartered by demise to a person who, or to persons each of whom
 - (a) is a person qualified to be owner of a legal or beneficial interest in an aircraft registered in Hong Kong; and
 - (b) resides or has his principal place of business in Hong Kong; or
- (3) which is not for the time being registered in any place but in the case of which either the operator of the aircraft or each person entitled as owner to any legal or beneficial interest in it
 - (a) is a person qualified to be the owner of a legal or beneficial interest in an aircraft registered in Hong Kong; and
 - (b) resides or has his principal place of business in Hong Kong.

The provisions do not make reference to the nationality or citizenship of the person committing the crimes. It appears the provisions apply whatever the citizenship or nationality of the person committing the offence.

Section 5 - Piracy on an aircraft is treated as if it were piracy on the high seas. The courts of Hong Kong have jurisdiction to try crimes in the nature of piracy committed on the high seas regardless of whether the ship is a Hong Kong ship or whether the accused is a Hong Kong permanent resident : see s23B of the Crimes Ordinance Cap. 200, copy attached.

Section 8(1) - any person who hijacks an aircraft in flight is liable to prosecution in Hong Kong [according to Halsbury's Laws of Hong Kong Vol. 9 para. [130.557], prosecution may be brought regardless of the place in which the aircraft the subject of the hijacking is registered and regardless of the nationality of the person who commits the offence].

Section 8(2) - if both the place of take-off and the place of landing are within the territorial limit of the country or territory in which the aircraft is registered, subsection (1) shall not apply unless-

- (a) the person seizing or exercising control of the aircraft is a Hong Kong permanent resident;
- (b) his act is committed in Hong Kong; or
- (c) the aircraft is registered in Hong King.

Sections 9, 11 and 12 - Hong Kong has jurisdiction to try offences of destroying, damaging or endangering safety of aircraft (ss.9 & 11), and act of violence on aircraft regardless of the place where the offence occurs (s.12). The offence of destroying an aircraft in service etc under s9 applies regardless of the place where the offence occurs. The offence of destroying or damaging property where the destruction, damage is likely to endanger the safety of the aircraft in flight (s.11(1)) and the offence of communicating any false information which endangers the safety of an aircraft in flight (s.11(3)) do not apply to any act unless either the act is committed in Hong Kong, or, where it is committed outside Hong Kong-

- (a) the person committing it is a Hong Kong permanent resident.

- (b) the act endangers or is likely to endanger the safety in flight of a Hong Kong-controlled aircraft; or
- (c) the act is committed on board an aircraft which lands in Hong Kong with the person who committed the act still on board.

Section 11(1) - also does not apply to any act committed outside Hong Kong in relation to property which-

- (a) is situated outside Hong Kong; and
- (b) is not used for the provision of air navigation facilities in connection with international air navigation,

unless the person committing the act is a Hong Kong permanent resident.

Section 10 - Possession of restricted articles on a Hong Kong registered aircraft anywhere in the world is an offence in Hong Kong. The same conduct in an aerodrome or air navigation installation in Hong Kong or over Hong Kong is also an offence. There is no reference to the nationality of the person committing it. It appears the provisions apply whatever the nationality or citizenship of the person committing the offence.

Section 15 - endangering safety at aerodromes is an offence in Hong Kong. The extra-territorial component comprises of the definition of “aerodrome” in s.15(5) “as including any area of land or water outside Hong Kong which would have fallen within the definition of ‘aerodrome’ in s.2(1) if it were in Hong Kong”. There is no reference to the nationality of the person committing the offence. It appears the provisions apply whatever the nationality or citizenship of the person committing the offence.

(b) **offering an advantage to or acceptance by a public servant – s.4 of Prevention of Bribery Ordinance Cap. 201**

A public servant whether in Hong Kong or elsewhere accepts an advantage is liable to prosecution in Hong Kong. There is no reference to the nationality of the person committing the offence but a public servant is not necessarily a Hong Kong permanent resident.

(c) **offence in connection with dangerous drugs – s.40 of the Dangerous Drugs Ordinance Cap. 134**

Any person who aids, abets, counsels or procures the commission in a place outside Hong Kong of an offence punishable under a corresponding law in force in there place, or does not act preparatory to, or in furtherance of, an act which if committed in Hong Kong would constitute an offence under section 4 or 6 is liable to prosecution in Hong Kong. The provisions apply to every one who does the act of aiding, abetting, etc in Hong Kong.

26. As can be seen from the above provisions, extra-territoriality is applied, in many cases, to permanent residents or ordinary residents of Hong Kong irrespective of the nationality or citizenship of the persons committing the crimes.

27. Many countries, by their domestic laws, assert jurisdiction over extra-territorial offences committed by their nationals or where the victim of the extra-territorial offence is one of their nationals. In Hong Kong's situation, permanent residents can be substituted for nationals. In this regard, it is noteworthy that our negotiating partners in relation to Transfer of Sentenced Persons Agreements have all accepted that inward transfers to Hong Kong should be of permanent residents and that outward transfers should be of the partner's nationals.

28. Under the proposed section 153P to be added to the Crimes Ordinance, extra-territoriality applies to cases, among others, where the offender or the victim is **a Hong Kong permanent resident or who ordinarily resides in Hong Kong** if a sexual offence listed in Schedule 2 is committed outside Hong Kong. Owing to the compelling interest in protection of children against the heinous acts of child sex tourism and a need to make concerted efforts on an international basis, permanent residents and persons who ordinarily resides in Hong Kong, irrespective of their nationality, are covered under the Bill.