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(Attn : Mr Rick Chan
Assistant Secretary (Security) E3)

Dear Mr Chan,

Prevention of Child Pornography Bill

Further to our letter of 14 March 2002, we have further comments on the Bill.

Clause 14

In new section 138A, what is the difference between the reference to "in a sexual manner or context" in subsection (4)(a)(ii) and "for sexual purposes" in subsection (4)(b)(ii)?

In new section 138A(4)(b)(ii), what would constitute a "dominant feature"? Would it be a too illusive concept for the court to apply?

Clause 16

In new section 153P(3)(a) and (b), it is a defence to a charge for an offence that is an offence by virtue of subsection (1) or (2) for the defendant to establish that, among other things, there was a valid marriage at the time of the offence. Subsection (1) and (2) refer to, among other things, an offence under sections 123 and 124 of the

Crimes Ordinance (Cap. 200). However, section 123 does not provide for a defence of valid marriage at the time of the offence and section 124(2) provides for a defence even though, subject to specified conditions, the marriage is invalid. What is the justification for providing a defence under new section 153P(3)(a) and (b) to a person who has committed an offence under section 123 or 124 of the Crimes Ordinance outside Hong Kong, while similar defence is not available to a person who has committed similar offence within Hong Kong?

In new section 153P(3)(c), it is a defence to a charge for an offence that is an offence by virtue of subsection (1) or (2) for the defendant to establish that, among other things, at the time of the relevant act, the person in relation to whom the relevant act was committed consented to the act. Subsection (1) and (2) refer to, among other things, an offence under sections 123 and 124 of the Crimes Ordinance. Consent provides no defence under either section 123 (see *R v Beale* (1865)LR 1 CCR 10 and *R v Ryland* (1868) 18 LT 538) or 124 (see *R v Harling* [1938] 1 All ER 307). What is the justification for providing a defence under new section 153P(3)(c) to a person who has committed an offence under section 123 or 124 of the Crimes Ordinance outside Hong Kong, while similar defence is not available to a person who has committed similar offence within Hong Kong?

Apart from the above observation of a distinction between the defence to an offence committed within or outside Hong Kong under section 123 or 124 of the Crimes Ordinance, we wonder whether there are other provisions in new Schedule 2 under clause 18, when reading together with new section 153P(3) will provide a defence which is not otherwise available to a defendant when the same offence is committed within Hong Kong.

We look forward to receiving your reply, in both languages, before the Bills Committee commences the clause-by-clause examination of the Bill.

Yours sincerely,

(Stephen Lam)
Assistant Legal Adviser

c.c. D of J (Attn : Ms Betty Cheung, SGC)
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