

Prevention of Child Pornography Bill

Administration's Response to Issues Raised at the Meeting on 5 June 2003

To re-arrange the order of 4(1)(d) so that the defence provisions for Clause 3(3) offence are grouped together

The Administration agrees with Members' comments made at the last meeting on Clause 4(1). The Clause 4 defences have been re-arranged by absorbing the previous Clause 4(1) into the remaining clauses. The order of the defences as in the full set of draft CSAs at **Annex** is as follows –

Clause 4(1) - Defence applicable to all offences :

- (a) artistic merit ;
- (b) Class I or II status under COIAO;

Clause 4(2) - Defence applicable to offences other than possession :

- (a) educational, scientific or medical purpose;
- (b) public good;
- (c) has not seen and no reasonable cause to suspect;
- (d) reasonable and practicable steps to ascertain age + believed on reasonable grounds the thing was not child porn

Clause 4(3) - Defence applicable to possession only :

- (a) educational, scientific or medical purpose;
- (b) public good;
- (c) has not seen and did not suspect
- (d) not asked for and endeavoured to destroy;
- (e) believed the thing was not child porn

2. Furthermore, Members' attention is drawn to the draft CSA to the proposed section 153P(3) of the Crimes Ordinance (Cap. 200). Its proviso is proposed to be amended as follows (on page 6 of **Annex**) –

“Where a defendant is charged with an offence that is an offence by virtue of subsection (1) or (2) and involves a sexual act done by him with or to another person, it is a defence for the defendant to establish that – ”

3. The purpose of the proposed section 153P is to give extra-territorial application to certain sex offence provisions (listed in Schedule 2 of the Bill), where the “victim” is under 16 and either the “offender” or “victim” has a nexus with Hong Kong (for example, a Hong Kong permanent resident or a person who ordinarily resides in Hong Kong). In the blue bill, the proposed section 153P(3) is included to ensure that consensual conduct within marriage in a jurisdiction that allows marriage under 16 will not be an offence. On subsequent analysis, section 153P(3) seems too wide and the defence may be available to a husband procuring his wife under 16 for an unlawful sexual act with a third person. This is not the policy intention of the proposed defence. The draft CSA now seeks to narrow down the defence by referring to an offence involving a sexual act done by the defendant with or to another person, while the two other elements of the defence, namely, marriage and consent remain. Therefore, the defence as amended will not apply to offences involving assault of the victim, abduction or detention of the victim or procuring a sexual act with a third person.

4. The CSAs at **Annex** has incorporated comments made by the Bills Committee at earlier meetings, including a consequential amendment to Clause 10(2) to adjust the cross-referencing as a result of the proposed CSAs to Clause 4, and deletion of the word “himself” from the new section 153Q(4) under Clause 16(b). In addition, an amendment to rectify a clerical error in Clause 8(1)(a) identified by the Assistant Legal Adviser is also included. (The word “and” at the end of Clause 8(1)(a) should be replaced by “or”. The Chinese version of the blue bill already uses “或”.) Subject to any further comments that Members may have, these CSAs to be moved by the Administration will be finalised.

Offences listed in Schedule 2

5. The Administration was asked to list out the sexual offences stipulated in the Crimes Ordinance (Cap. 200) which are not included in Schedule 2 of the Bill. Below please find a list of sexual offences which

are not included in Schedule 2:

Section	Offence
118E	Buggery with mentally incapacitated person
118I	Gross indecency by man with male mentally incapacitated person
118L	Bestiality
118M	Abolition of buggery at common law
118N	Past offences of buggery and gross indecency by males [committed before 1991]
125	Intercourse with mentally incapacitated person
127	Abduction of unmarried girl under 18 for sexual intercourse
128	Abduction of mentally incapacitated person from parent or guardian for sexual act
129	Trafficking in persons to or from Hong Kong
131	Causing prostitution
133	Procurement of mentally incapacitated person
136	Causing or encouraging prostitution of mentally incapacitated person
137	Living on earnings of prostitution of others
138	(Repealed)
139	Keeping a vice establishment
142	Permitting mentally incapacitated person to resort to or be on premises or vessel for intercourse, prostitution or homosexual act
143	Letting premises for use as a vice establishment
144	Tenant etc. permitting premises or vessel to be kept as a vice establishment
145	Tenant etc. permitting premises or vessel to be used for prostitution

** Sections 147 - 159L in PART XII (Sexual and Related Offences) of the Crimes Ordinance are not listed above as they cover matters such as prohibition of signs advertising prostitution, closure orders of premises etc.*

6. The 24 offences have been chosen to be included in Schedule 2 of the Prevention of Child Pornography Bill because they are most directly related to sexual exploitation of a person. Other sexual

and related offences listed above are considered less directly relevant. The Bill targets at combating child sex tourism by giving extra-territorial effects to certain sexual offences under the Crimes Ordinance. The primary objective is to protect children under the age of 16, especially against paedophiles who are known to travel abroad on sex tours to sexually exploit children. As the purpose of the proposal is to deal with a particular problem by extending the application of the existing sexual offences under Crimes Ordinance, the Administration considers that we should concentrate on the most directly relevant offences and the net should not be cast too wide. Extra-territorial effect is therefore not proposed to be extended to provisions which are not likely to be the principal offences committed by paedophiles.

7. A Member at the last meeting queried why the extra-territorial effect is not extended to cover offences committed against mentally incapacitated persons who may physically be above 16 but is mentally under 16. We consider that as the Bill primarily seeks to deal with the protection of children against sexual exploitation, extending the extra-territorial effect to those physically above 16 of age would be outside the scope of the Bill as the long title of the Bill states, "...to extend the application of certain sexual offence provisions of that [Crimes] Ordinance to acts committed against children outside Hong Kong...". Besides, there is no indication or information to show there exists a problem of people travelling overseas to sexually exploit mentally incapacitated persons or local mentally incapacitated persons being so exploited overseas, and therefore necessitating the provision of extra-territorial effects for the relevant offences. The Bill already provides for protection of all children aged under 16, including those who are mentally incapacitated, from being sexually exploited overseas. On the other hand, the relevant sections of the existing Crimes Ordinance already deal with sexual exploitation of mentally incapacitated persons that occurs locally.

8. Our approach is consistent with the United Nations Convention on the Rights of the Child (UNCRC), which promotes, among other things, the principle of non-discrimination irrespective of disability and the rights of the disabled child. Furthermore, apart from the UNCRC, there is no binding international obligation on the HKSAR to prohibit by legislation with extra-territorial effect sexual exploitation of mentally incapacitated persons unless that person is a child.

Information of similar child pornography law of other jurisdictions which excludes military aircraft and ship of war

9. In Clause 5 of the Bill (on Entry, search and seizure under warrant), subclause (5) excludes military aircraft and ship of war from the operation of Clause 5. A Member asked the Administration to provide information on whether similar law of other jurisdictions likewise excludes military aircraft and ship of war. We have browsed through the relevant laws on child pornography in US, UK, Canada and Australia and could not find similar provisions. However, there are likely to be similar provisions in some general laws in relation to foreign states immunity or sovereignty.

Forfeiture under Clause 9

10. A Member enquired whether items liable to forfeiture under Clause 9 of the Bill would include money raised from child pornography offences. If the money is, for example, found at the scene where the child pornography is sold, the money may be seized as evidence and liable to forfeiture under Clause 9(1)(c) of the Bill. However, for proceeds of offences in relation to child pornography, as the Bill currently does not contain proposed amendments to Schedule 1 of the Organized and Serious Crimes Ordinance (Cap. 455) (OSCO) to include child pornography offences, therefore the proceeds will not be forfeited. Our observation is that the production, publication and possession, etc. of such offences have not developed as an organized and serious crime in Hong Kong. Therefore, we do not consider it justified to propose inclusion of child pornography offences in Schedule 1 of OSCO. We will, however, keep the situation under review on a longer term basis and propose amendments to Schedule 1 of OSCO when the situation so warrants.

Security Bureau
June 2003

PREVENTION OF CHILD PORNOGRAPHY BILL

COMMITTEE STAGE

Amendments to be moved by the Secretary for Security

<u>Clause</u>	<u>Amendment Proposed</u>
2(1)	<p>(a) In the definition of "child pornography", in paragraph (a), by deleting "appears to be" and substituting "is depicted as being".</p> <p>(b) In the definition of "pornographic depiction", in paragraph (a), by deleting "who is or appears to be engaged in explicit sexual conduct;" and substituting "as being engaged in explicit sexual conduct, whether or not the person is in fact engaged in such conduct; or".</p>
2(2)	<p>By deleting paragraph (b) and substituting -</p> <p>"(b) shows the child pornography in any manner whatsoever to another person (including but not limited to showing, playing or projecting the child pornography to or for another person using any machinery or apparatus and publicly displaying the child pornography).".</p>
4	<p>By deleting the clause and substituting -</p> <p>"(1) It is a defence to a charge under section 3 for the defendant to establish -</p>

- (a) that the depiction that is alleged to constitute child pornography has artistic merit; or
- (b) that the thing that is alleged to constitute child pornography is, or was at the time the offence is alleged to have been committed, classified as a Class I or a Class II article under the Control of Obscene and Indecent Articles Ordinance (Cap. 390).

(2) It is a defence to a charge under section 3 (other than section 3(3)) for the defendant to establish -

- (a) that he committed the act that is the subject of the charge for a genuine educational, scientific or medical purpose;
- (b) that the act that is the subject of the charge otherwise served the public good and did not extend beyond what served the public good;
- (c) that he had not seen the child pornography and did not know, nor did he have any reasonable cause to suspect, it to be child pornography; or
- (d) that -
 - (i) he took all such steps as were

- reasonable and practicable in the circumstances of the case to ascertain the age of the person pornographically depicted in the child pornography when originally depicted;
- (ii) in so far as the defendant was able to influence in any way how the person was depicted, he took all such steps as were reasonable and practicable in the circumstances of the case to ensure that the person was not depicted as a child; and
- (iii) he believed on reasonable grounds that the person was not a child when originally depicted and that the person was not depicted as a child.

(3) It is a defence to a charge under section 3(3) for the defendant to establish -

- (a) that his possession of the child pornography was for a genuine educational, scientific or medical purpose;
- (b) that his possession of the child pornography otherwise served the public good and did not extend beyond what served the public good;
- (c) that he had not seen the child pornography and did not know, nor did he suspect, it to be child pornography;
- (d) that he had not asked for any child pornography and, within a reasonable time after it came into his possession, he endeavoured to destroy it; or
- (e) that he believed that the person pornographically depicted in the child pornography was not a child when originally depicted and that the person was not depicted as a child.

(4) Unless subsection (5) applies, a defendant is to establish any fact that needs to be established for the purpose of a defence under this section on the balance of probabilities.

(5) A defendant charged with an offence under section 3(3) is to be taken to have established any fact that needs to be established for the purpose of a defence

under subsection (3)(c), (d) or (e) if -

- (a) sufficient evidence is adduced to raise an issue with respect to the fact; and
- (b) the contrary is not proved by the prosecution beyond reasonable doubt."

5(5) By adding -

"vehicle" (車輛) does not include a military vehicle;".

8(1)(a) By deleting "and" and substituting "or".

10(2)(b) By deleting "or (4)" and substituting ", (2)(a) or (b) or (3)(a) or (b)".

11(1)(a) By adding "and" after the semicolon.

14 (a) By deleting the proposed section 138A(4) and substituting -

"(4) For the purposes of this section, to depict a person pornographically means -

- (a) to visually depict a person as being engaged in explicit sexual conduct, whether or not the person is in fact engaged in such conduct; or
- (b) to visually depict, in a sexual manner or context, the genitals or

anal region of a person
or, in the case of a
female person, her
breast,

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."

- (b) In the proposed section 138A(5), in the
definition of "pornography", in paragraph
(a), by deleting ", whether or not it is a
depiction of a real person".

16

- (a) By deleting the proposed section 153P(3) and
substituting -

"(3) Where a defendant is charged
with an offence that is an offence by
virtue of subsection (1) or (2) and
involves a sexual act done by him with
or to another person, it is a defence
for the defendant to establish that -

- (a) at the time of the
sexual act, there
existed between the
defendant and that other
person a marriage that
was valid, or recognized
as valid, under the law
of -

- (i) the place
where the
marriage was

solemnized;

(ii) the place
where the
sexual act was
done; or

(iii) the place of
the
defendant's
residence or
domicile;

(b) when it was solemnized,
the marriage was
genuine; and

(c) at the time of the
sexual act, that other
person consented to the
sexual act.".

(b) In the proposed section 153Q(4), by deleting
"himself".