

立法會 CB(2)2423/01-02(02)號文件

LC Paper No. CB(2)2423/01-02(02)

Mr. Raymond Lam

25 June 2002

Dear Mr. Lam,

Re: Bills Committee on Prevention of Child Pornography Bill

Please find enclosed the letter we sent on 11 June 2002 to all members of the Bills Committee on Prevention of Child Pornography Bill for your information. I apologize for my delay in sending you a copy. If there is any questions, please contact me at 2351 1177.

Thank you for your attention.

Your sincerely,

Priscilla Lui (Mrs.)

Director

11 June2002

Members of Bills Committee on Prevention of Child Pornography Bill
Legislative Council

Dear Sir,

Re: Prevention of Child Pornography Bill

Thank you for inviting (be Against Child Abuse to attend the Bills Committee Meeting on the captioned Bill on 17 May 2002. Responding to members' suggestion we are sending our further views in support of the captioned Bill Please refer to Article number.

First, we would like to draw your attention to **the Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography.**(Refer to <http://www.ecpat.net/eng/csee/faq/optionals%20protoeol.pdf>) My understanding is that, though China has not yet ratified the Protocol, China has signed the Protocol in the year 2000 and the protocol came into force early this year.

The Optional Protocol calls for the criminalisation of possession of child pornography, but it is limited to possession with intent to distribute. We are calling for criminalising of also possession for private use as possession contributes to the market for child pornography and in turn its production which involves exploitation of children. .

With regard to protection for persons that receive child pornography in their email without knowledge, our understanding from international experts is that this is not generally a problem due to a basic principle in criminal law as follows.

In general, criminal legislation relies - unless otherwise specified - on the fact that the accused must also have intent to commit the crime, without intent they can/should not be prosecuted. Thus if some one possess child pornography without knowing of it, there is no intent and therefore it is not an offence.

It is for the prosecutor to prove possession with knowledge.

2. Interpretation(1)3 para

Regarding the age of the Child, the fact is than the terminology "depicts" is used in court to underline the prurient nature of the material and to minimise the argument of artistic merit, Therefore, the age of the child is less important than the age depicted and the use of the material for sexual purposes. Artistic merit is usually an issue which has to be litigated in some countries, but few perpetrators go to the length of being willing to appear in court to argue this issue.

There are no objective parameters which would allow any objective differentiation between a child of 16 and a child of 18. Therefore, to use 16 as the cut-off age would make this law totally ineffective and subject to endless litigation. We would therefore recommend the age limit for such legislation be 18.

2. Interpretation (1) "child pornography"(a)

As for Audio, writing and drawing such material is a recording of a sexual offence against a Child in exactly the same way as a videotape or photograph. Thus it should be treated in the same way. With the advance in multimedia technology it is even more important not to leave a gap in the legislation as it should be neutral concerning the form of dissemination.

Ireland is one of the countries that criminalise writing/drawings and audio. Several other countries do so through laws against obscenity.

Regarding Virtual Child Pornography, the same arguments apply. That is, even though a child was not necessarily involved in the production of the material, it may be used as a tool to sensitize children, and to desensitize potential offenders.

Upon debate about Freedom of Speech we believe that the right of children for protection against sexual exploitation should override considerations of privacy and free speech for adults.

Thus child pornography is never protected speech in our view. (Refer to Appendix 1, John Cara's "Pseudo Pornography and Freedom of Speech").

2. Interpretation (1) "pornographic depiction" (b) 2 para.

The exception for genuine family purpose is not needed and may create confusion. A visual depiction that depicts, in a sexual manner or context, the genitals, anal region of a person or the breast of a female person can NEVER have a genuine family purpose. Therefore, this reference should be deleted.

However, we support the allowance of a defence on artistic merits, or if the material is defensible for other reasons, such as research or in the government draft the defense is for "public good"

3. Offences relating to child pornography (3)1 para.

The exception for possession of child pornography of one self should be deleted. There is no reason for this exception as such child pornography may be used for the same purposes as virtual child pornography.

4. Defences (5) (a-c)

While most of the defences available in the law are somewhat reasonable in my opinion, the ones listed under (5) goes beyond what is needed for protection of the accused.

The danger is that they rely on the subjective view of the offender. This means that the offender will raise this defence in every case and the prosecutor must prove that each individual offender did in fact realize that it was child pornography or that they

tried to ascertain that it was not child pornography. A very difficult fact for the prosecution to prove beyond reasonable doubt.

The definition of child pornography should be strictly objective. That is, if it appears objectively to be child pornography the person should be convicted even if that person do not think it is child pornography

The availability of this defence may seriously undermine the enforceability of the provision.

Amendments to Crime Ordinance Furthermore we think that performances involving children under 18 years of age Should be dealt with equally. There is no reason to allow children between 16-18 years to consent to appear in pornographic performance. A child, while having sexual freedom cannot consent to be commercially sexually exploited

Finally we urge for the problem's Prevention and that Mandatory Treatment Programs be made available to rehabilitate parties involved, victims, perpetrators and non-offending family members. Such programs must be research based with built in measurement to reflect outcome.

To conclude, it is our believe that children should be empowered to participate to sharing their views on an important matter as this one.

We call for prompt action and decision to formulate effective policies and . If further clarification is required, please contact the undersigned by phone at 2351 1177 or by email to priscilla@aca.org.hk.

Yours sincerely

Priscilla Lui (Mrs.)
Director
Against Child Abuse

Chow Chun Bong (Dr.)
Chairperson
Hong Kong Committee on Children's Rights

c.c. Organisations present at the meeting of the Bills Committee on Prevention of Child Pornography Bill held on 17 May 2002

Pseudo Pornography and Freedom of Speech

By John Carr

In the US and in several other jurisdictions, historically the justification for banning child pornography was that its production necessarily involved an actual child being criminally abused.

However, modern computers and software can artificially create entire pictures which present a child pornographic image that is indistinguishable from a depiction of a real event. Alternatively, computers can take a picture of a wholly innocent event and change it into something completely different and obscene, or parts of an innocent image can be grafted on to an existing indecent image to create a new image. The new picture may contain edited parts of a real child's body, or even the full representation of a whole child, but either way the event depicted never actually happened. This is what is now known as *pseudo-pornography* and in most countries no distinction is made between it and actual child pornography.

In 1996 the US tried to join this happy band of nations when it passed the Child Pornography Prevention Act. However Congress did not reckon with the so-called Free Speech Coalition, an "adult trade association", who challenged the legality of the Act. The case has just been heard by the US Supreme Court. On a 6-3 majority and, sadly, the Free Speech Coalition seem to have won. However, the Justices expressly did not rule out the possibility that a more narrowly drawn law might succeed in the future.

One of the more disingenuous points the Coalition advanced was that they were worried that if Congress could make laws in this area it would inevitably lead American society down the "slippery slope of suppression". You always know you have won the argument when the other side trots out the *slippery slope*. It is another way of saying "OK you are right about this, and we know it, but if you obtain the change you are seeking it will inevitably lead to other things, which will probably also be right, but which we do not want because they will cost us money or harm our business interests." In other words it is egregiously immoral.

A full report of the case is still not available but observers were hoping that the Justices would take the opportunity to clarify several grey areas of the law. For one thing, where any part of the body of a particular child has been used to create an image in such a way as to allow anyone to identify the child in question, the image cannot truly be called "pseudo". For that child it will be very real and, amongst many other things, almost certainly a violation of their right to privacy. And what if the image of the child is wholly artificial but one or more real adults involved?

Civilized society has declared, or ought to, that any image which purports or seeks to show children being sexually abused is undesirable and unacceptable in principle. This is not just because of the harm it does to any children who may be its actual or immediate victims. By its very nature child pornography also has wider consequences and a broader impact that cannot be overlooked. Viewing child pornography can desensitise adults and lead them towards further harmful or abusive behaviour, and therefore puts other children at risk. In a study carried out by the US Postal Inspection Service it was established that over 35% of those arrested initially for *mere possession* of child pornography were also contemporaneously engaged in sexually abusing children.

As Sir William Utting (People Like Us, HMSO, 1996) and others have noted, child pornography can be highly instrumental in nature, desensitising or sexualising children in inappropriate ways. Child pornography is used by sexual predators quite deliberately to lure children into abusive relationships. They try to prove with pictures that sex between an adult and a child is *normal* and *fun*. In that context, therefore, whether or not the image is real or artificial is of absolutely no significance. If it looks like child pornography it should be treated as if it were child pornography.

Seeking to make, essentially theological differences between different types of equally realistic images, is irrelevant in the real world. Does anyone imagine, anyway, that the producers of pseudo-pornography will faithfully emblazon all their work with a health warning saying "All the characters in this image are completely artificial. Any resemblance between them and real persons is completely unintended." No! The very point of doing it is to represent real events. And imagine the absurdity of arrested child pornographers arguing that every image is artificial and then it is for the prosecution to show that the images are in fact real. Will the prosecution have to produce the actual children in court and get them to testify as to the genuineness of the events depicted and their part in them? Are children to be forced to relive the trauma of the original abuse?

The great bulk of child pornography today is found on the Internet. Huge numbers of children are very frequent visitors to cyberspace. Thus, perhaps for the first time ever, children themselves are at risk of being exposed to child pornography on a substantial scale. What is the Free Speech Coalition proposing to say to them? That, actually, they believe images of children having sex are OK, providing only that it can be established the persons depicted are not real? And just how are they proposing

perspectives

to ensure that the children know the persons are not real? Truly this is a case where we should judge the book by looking only at its cover?

Societies frequently have to balance the rights of private individuals against wider societal interests and we should all instinctively be wary of allowing the state greater powers in relation to what individuals may or may not do. So what this case comes down to is a question of priorities. Is it more important for the state to protect the right of someone to view certain forms of child

pornography than it is to protect children from the harm that those images could cause? To ECPAT members and supporters the answer is obvious. Seemingly it wasn't to the US Supreme Court Justices.

John Carr is Associate Director of the Children & Technology Unit at NCH, one of the UK's leading children's charities (www.nch.org.uk). He is also a member of the UK Government's Task Force on Child Safety on the Internet and is Internet Adviser to the UK's Children's Charities Coalition on Internet Safety.