

**Administration's Response to Submission by
Law Society of Hong Kong dated 15 May 2002 on
Prevention of Child Pornography Bill**

I. General Comments

(a) "Appears to be"

We agree that "appears to be" is not a precise term. However, a person will not be convicted of a child pornography offence unless the prosecution proves *beyond all reasonable doubt* that the person depicted *is or appears to be* under 16 years of age. In other words, if reasonable people disagree as to whether the person depicted appears to be under 16, the prosecution's burden is not discharged. The Bill does not aim at catching depictions of persons who *marginally* look like under 16. Rather it aims at catching those that appear to be persons under 16 *beyond all reasonable doubt*.

2. The effect will be that apart from depictions that are proved beyond all reasonable doubt to be of persons *actually* under 16, pornographic depictions of persons who are apparently under 16 will also be caught. Therefore, even where the prosecution fails to prove (e.g. by producing the birth certificate) that the person depicted is *actually* under 16, the court may convict if the person depicted *appears to be* under 16 beyond all reasonable doubt.

3. The proposal is justified because child pornography is considered to be connected to harm to children in the following ways : (1) child pornography promotes paedophiles' erroneous belief that sexual activity with children is acceptable; (2) it fuels fantasies that incite offenders to offend; (3) paedophiles use child pornography for seducing children to commit sexual acts; and (4) children are abused in the production of child pornography involving real children. The Bill is proposed for protection of children, one of the most vulnerable groups in society.

4. On the other hand, if the "appears to be" limb is taken out, there will likely be significant enforcement difficulties. With advanced computer technology nowadays, it can be very difficult to distinguish a "real" person from a computer creation or composite.

5. Hong Kong is not known to be a production centre of child pornography. The majority of child pornography found is imported or transmitted via the Internet. It is therefore often difficult to locate the person

depicted and prove his/her actual age by locating the real child depicted. With the “appears to be” test, as long as it is apparent that the person depicted appears to be under 16, a conviction may be supported.

6. Although it is no simple task to determine whether a child appears to be under the age of 16 in a pornographic depiction, the Police and prosecution will rely on the evidence available and all relevant factors to make an assessment.

7. The burden of proof is always upon the prosecution. The standard of proof is “beyond all reasonable doubt”. Types of evidence used may include :

- a) oral testimony: for example from a child, or persons who are in a position to reasonably indicate the child’s age, say relatives;
- b) documentary evidence: for example the depicted child’s birth certificate;
- c) expert’s opinion: for example from a suitably qualified paediatrician who expresses an opinion based on the physical development of the depicted ‘child’, the apparent and depicted age of that child.

Any evidence adduced by either the prosecution or defence is to assist the court in its determination.

8. Nevertheless, the Bill is not intended to catch depictions of simple line drawings, sketches, cartoons, or comics. In view of the concerns raised by Law Society and Members, we have explored several options for replacing “appears to be”, namely, “virtually indistinguishable from”, “obviously appears to be”, “appears no different from” or “depicted as being” in the definition of “pornographic depiction”.

9. Among the several options, we consider that “depicted as being” is preferred because of the following reasons -

- (a) “depicted as being” is used in the child pornography definition of Canadian Criminal Code¹ which was upheld by the Supreme Court of Canada in its ruling in R.v.Sharpe on 26 January 2001²;

¹ Under 163.1(1)(a)(i), child pornography means a visual representation of a person “who is or is *depicted as being* under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity”.

² The judgment of R.v.Sharpe case by the Supreme Court of Canada can be found at the following Web site : http://www.lexum.umontreal.ca/csc-scc/en/pub/2001/vol1/html/2001scr1_0045.html

and

- (b) the term has been held by the Canadian Court to involve an objective test : based on the depiction, rather than what was in the mind of the author or possessor, what would be conveyed to a reasonable observer.

(b) Mental element

10. All the elements of the offence have to be proved beyond all reasonable doubt. It must be proven that the accused had child pornography in his possession and that he knew he possessed child pornography. We will provide a separate paper to discuss the mental element of offences in relation to child pornography in more detail.

(c) Reciprocity regarding extra-territorial offence

11. Laws concerning sexual offences vary from one jurisdiction to another. We understand that “double criminality” with regard to child sexual offences (that is, prosecution action can only be taken if the alleged offence is also a criminal offence in the country where it is committed) is required in certain countries such as the United Kingdom and the Netherlands but not in other countries like Australia, France and Germany. There is no universal rule in applying this “double criminality” requirement.

12. If it is required that the acts specified in Schedule 2 need to be criminal offences in that overseas jurisdiction before prosecution can be made locally, the effect of the Bill will be considerably curtailed and children will not be adequately protected. It should be noted that the relevant provision seeks not only to protect children living outside Hong Kong but also local children who are taken overseas and abused. It would not be conducive to our objective of better protection of children against sexual exploitation if it is provided that the act committed outside Hong Kong must also be a criminal offence under the law of that jurisdiction.

II. Specific comments

(a) Section 2(1)

“Child Pornography”

(i) “computer-generated image or other visual depiction”

13. Images can be generated by computer technology to form so-called virtual child pornography. Examples are superimposing the head of a child onto the body of a nude adult, using the image of a child in a picture that simulates sexual intercourse with others, and using computer graphics to create an image of a child without using a real person.

14. With advanced technology nowadays, child pornography can be made by computer graphics and techniques without using a real children. However, such child pornography can also be used by paedophiles to lure children or arouse their sexual desires which may lead to child abuse. The heinous nature of these computer-generated images is no less serious than child pornography that involves real children. Despite the recent ruling by the US Supreme Court that only child pornography involving real children should be prohibited, we consider that child pornography without involving real children should be banned in Hong Kong, having regard to the justifications cited in paragraphs 3 – 5 above.

(ii) “other visual depiction”

15. No. “Other visual depiction” does not include a simple line drawing on paper, a doodle, sketches, or simple cartoons. However, any visual depiction / article may be caught if the images depicted look like real children and they are pornographic depiction as defined under the Bill.

(iii) “appears to be a child”

16. Please refer to the criteria for determining “appears to be a child” cited in paragraphs 6 and 7 above.

(iv) “whether or not it is a depiction of a real person”

17. This does not include cartoons or animations unless the images depicted look like real children and they are pornographic depiction as defined under the Bill.

(v) “anything that incorporates”

18. Hyper Text Markup Language (HTML) is a computer language used for producing pages of writing and pictures that can be put on the Internet.

As such, one cannot possess HTML as it is considered as a "language".

19. HTML Link (hyperlink) is a special word or picture in an Internet document that one can click on to move quickly to another part of the same document or to another document. It is similar to an "address" if the hyperlink connects to a specific Web site address or Uniform Resource Locator (URL).

20. A hyperlink to a child porn Web site is unlikely to be regarded as "anything that incorporates child pornography" for the following reasons:

- (a) The person who created the hyperlink might originally link to a "clean" website (without child porn material). However, the "clean" website later changes its content (containing child porn material) without the knowledge of hyperlink holder. As the hyperlink holder cannot always monitor the content of the linked websites and sometimes does not even know the website content has been changed, it is difficult to prove that hyperlink holder have intent to create such child porn hyperlink.
- (b) There are many dynamic Web sites on the Internet, such as "Yahoo", "Lycos" search engine, which serves as an index to other Web sites. As such Web sites can create its hyperlinks by keywords searching, the generated hyperlinks might uncontrollably link to some child porn materials. Though the above hyperlinks are child porn, the hyperlink holder probably have no intent to create it.

21. However, if a person operates a Web site that has a hyperlink to a child porn Web site, **indicating clearly that child porn is available on that linked site**, it may arguably be caught under Clause 3(4) for advertising child porn.

“Pornographic depiction”

“appears to be engaged in explicit sexual conduct”

22. An adult and a child merely cuddling in a bed, kissing, or hugging by itself does not fall within “explicit sexual conduct”.

23. Statutory definitions and judicial explanations from other jurisdictions are useful reference for the understanding as the term “explicit sexual conduct” can be understood in the light of relevant legislation in the United States and Canada. Under the U.S. Code: Title 18, Chapter 110 - Sexual

Exploitation and other abuse of children, section 2256, “sexually explicit conduct” means –

- (a) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
- (b) bestiality;
- (c) masturbation;
- (d) sadistic or masochistic abuse ; or
- (e) lascivious exhibition of the genitals or pubic areas of any person.

24. In the judgment of the Sharpe case by the Supreme Court of Canada (paragraphs 44 to 49), "explicit sexual activity" refers to acts which viewed objectively fall at the extreme end of the spectrum of sexual activity -- acts involving nudity or intimate sexual activity, represented in a graphic and unambiguous fashion, with persons under or depicted as under 18 years of age. The law does not catch possession of visual material depicting only casual sexual contact, like touching, kissing, or hugging, since these are not depictions of nudity or intimate sexual activity. Certainly, a photo of teenagers kissing at summer camp will not be caught. At its furthest reach, the section might catch a video of a caress of an adolescent girl's naked breast, but only if the activity is graphically depicted and unmistakably sexual.

(b) Section 2(2)(b)

“Shows”

25. Whether something done by accident should attract criminal liability depends on whether the element of intention can be proved. One example is that a person keeps child porn in his briefcase with no intention whatsoever of showing it to another and rides on a bus. The bus abruptly stops, his suitcase breaks open and the child porn is thrown to the floor and can be seen by others. In this case, the person is not likely to be prosecuted for showing child porn though he may have contravened the possession offence. The fact that the child porn can be seen by others is not really attributable to the intention or deliberate act of the person but to the abrupt halt of the bus.

(c) Section 3 Offences

26. In proving any offence, the burden of proof is on the prosecution and the standard of proof is beyond all reasonable doubt.

Section 3(3)

27. Possession of child pornography is an offence because we have to deter demand at source. Similar “possession” offence exists in relevant laws in many other overseas jurisdictions, including US, UK, Canada, and Australia.

28. The Supreme Court of Canada in R.v.Sharpe cited above, having thoroughly considered arguments based on freedom of expression and right to privacy, upheld a similar offence of possession of child pornography. The Court accepted that the evidence establishes several connections between the possession of child pornography and harm to children : (1) child pornography promotes cognitive distortions; (2) it fuels fantasies that incite offenders to offend; (3) it is used for grooming and seducing victims; and (4) children are abused in the production of child pornography involving real children. Criminalizing possession may reduce the market for child pornography and the abuse of children it may involve.

29. The Supreme Court of Canada took the view that prohibiting the possession of child pornography is rationally connected to the aim of preventing harm to children and society. A possession offence plays an important part in an integrated law enforcement scheme which protects children against the harms associated with child pornography.

30. We are mindful that the legislative measures should be proportionate to the mischief we are tackling, and only limited to what is necessary. Besides, statutory defence is expressly provided in the proposed legislation including artistic merit, genuine education, scientific or medical purpose. Innocent people who come across child pornography inadvertently may also invoke the defences provided in Clauses 4(2) and (3) of the Bill. In view of the heinous nature of child pornography and the defences available, we consider that the possession offence is proportionate and necessary.

(d) Section 4 Statutory defences

31. Please refer to our papers on “Defence of Artistic Merit” and “Proposed Statutory Defence in relation to Age of Person Pornographically Depicted: Clause 4(5)(a) & (b)”.

32. As a matter of law, the burden of proof is on the prosecution and the standard of proof is beyond all reasonable doubt. In the case of a person

having a magazine containing only one photograph of child porn or a file downloaded from the Internet that contains one image of child porn, all he has to do is to “destroy” or “delete” the child porn if he sees it. If he had not seen the child porn and did not know, nor did he have any reasonable cause to suspect, it to be child porn, he can invoke a defence.

33. If the evidence is such that there is not a reasonable prospect of conviction, prosecution will not be initiated. It is for the Director of Public Prosecutions to decide whether a prosecution will or will not be commenced. Further, as in other criminal cases, before the Prosecution decide to initiate proceedings, they will take into account the seriousness of the offence and whether the consequences of prosecution be out of all proportion to the seriousness of the offence or to the penalty a court would be likely to impose. The Police and the Prosecution Division are well aware of the possible damage that prosecution proceedings may have on the reputation and career of the accused.

(e) New offences of Procuring Persons under 18 for Making Pornography or for Pornographic Performances

34. *We will provide a response to this comment in a separate paper.*

(f) “Child Sex Tourism”

Section 153P

35. Please refer to paragraphs 11 and 12 above on reciprocity (double criminality) requirement.

Section 153Q

36. *We will provide a response to this comment in a separate paper.*

Security Bureau
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