

**Administration's response to
outstanding issues raised in the Bills Committee meetings of
Prevention of Child Pornography Bill**

Bills Committee meeting on 3 May 2002

(A) To consider whether “virtual images” of child pornography should be dealt with under the Control of Obscene and Indecent Articles Ordinance (Cap. 390), instead of under the Bill.

We have sent an Administration's response on “the Prevention of Child Pornography Bill (the Bill) and the Control of Obscene and Indecent Articles Ordinance (COIAO), explaining in detail the rationale for having child pornography dealt with by the court under the Bill instead of the Obscene Articles Tribunal (OAT). Furthermore, under the COIAO, the OAT determines whether an article is obscene or indecent or neither with regard to a number of considerations, including the standards or morality, decency, and propriety that are generally accepted by reasonable members of the community, the dominant effect of the article as a whole, the class or age of the likely recipients, and whether the article has an honest purpose. No reference is made to the age of person depicted in the article in question, whether real or apparent. Nor is there any consideration as regards whether the article involves virtual images or not. Therefore, to specify separately that “virtual images” of child pornography should be dealt with under the COIAO may be incongruous with the legislative scheme of the latter.

2. Further, we consider that there should not be a differentiation between child pornography involving a real child or “virtual child pornography”. All kinds of child pornography should be under the jurisdiction of the court because harm is caused by child pornography, whether or not a real child is involved. In addition, in most cases, the person depicted cannot be identified and it may be impossible to tell whether a depiction is of a real person or not. Therefore, it will be impracticable and unnecessary confusion may be created if child pornography involving real children is dealt with by the court and “virtual child pornography” is dealt with by the OAT.

3. Furthermore, a judgment of whether an article is child pornography requires the consideration of a host of evidence, circumstances and expert opinions in the light of the relevant definitions prescribed in the Bill. For “virtual child pornography”, for example, a computer-generated

image, experts in computer forensics and/or computer graphic may have to be called upon to give evidence. The standard is “proof beyond all reasonable doubts”. The court is therefore in the best position to make such a judgment, having regard to all relevant factors.

(B) To explain how the defence provisions would apply to the possession of electronic mails and articles without the knowledge that they contain child pornography, to situations where a person forgot to delete an electronic mail containing child pornography, and to situations where a person had deleted an electronic mail containing child pornography but the mail was not yet deleted from the server.

4. The Bill does not aim at catching those people who unwittingly come across child pornography in either physical or electronic form. First of all, the Prosecution has to prove each and every essential element of the criminal charge, including that the defendant had the requisite knowledge. In the case of e-mails containing files of child pornography, the Police will question the suspect as to the circumstances in which the impugned materials come into the hands of the suspect and how the suspect deals with them. Then, the Police will verify the suspect's explanation through means such as obtaining evidence from computer forensic experts on whether the e-mail has been opened, whether the files contained in the e-mails have been opened and whether any alterations to the e-mail and/or files have been made. The Prosecution Division will assess the evidence to see whether the knowledge is proved before deciding to proceed with a prosecution.

5. Furthermore, statutory defences are provided under the Bill for innocent people who come across child pornography inadvertently. Under Clause 4(2) of the Bill, it is a defence to a charge under section 3 for the defendant to establish that he had not himself seen the child pornography and did not know, nor did he have any reasonable cause to suspect, it to be child pornography. For instance, a person who received an unsolicited e-mail with no connotation of child pornography in its title and has not opened it would not know about its contents. In such an event, he may invoke the defence. Expert opinion by computer forensics will be sought on whether the e-mail has ever been opened.

6. Under Clause 4(3), it is a defence to a charge under section 3(3) (possession) for the defendant to establish that he had not asked for any child pornography and after it came into his possession he endeavoured to destroy it within a reasonable time. If a person opens an unsolicited e-mail and finds that it contains child pornography and he deletes it within a reasonable time, he

may invoke the defence, even though the e-mail may still exist in the trash folder temporarily in the server.

7. In the event that a person opens an e-mail and finds child pornography but claims that he forgets to delete it, it appears more difficult to invoke the defence if, first, he has seen the child pornography and, second, he did not endeavour to destroy or delete it. The court would then have to consider other evidence of the case before making a decision.

8. In considering whether a prosecution should be instituted, the Police and the Prosecution will carefully consider the explanation of the suspect and assess –

- (a) whether all the elements of the offence (including the mental element) can be proved beyond all reasonable doubt; and
- (b) whether the circumstances are such that the case falls within defence under clause 4(2) or (3), or indeed any other defences.

9. These guiding principles of prosecution and invoking defence also apply to physical forms of child pornography.

Bills Committee meeting on 17 May 2002

(A) To provide information on overseas practices in respect of mandatory therapy for offenders who had committed sexual offences, whether the existing therapy service in Hong Kong was sufficient, and whether mandatory therapy could be implemented in Hong Kong.

Services for Victims

10. Comprehensive therapeutic and counselling services are offered to victims of sexual abuse. The five Family and Child Protective Services Units of the Social Welfare Department (SWD) and some non-government organizations (NGOs) offer counselling services to child abuse victims and their family members known to them. Intervention from clinical psychologists for assessment and treatment would be enlisted if required. The SWD and NGOs also offer counselling services to adults who were victims of abuse in their childhood.

11. Clinical Psychologists in SWD offer individual as well as group psychological interventions to the abused children. When necessary, treatment would be offered for the child's non-offending parent. A brief, initial

psychological assessment would first be conducted to establish initial diagnosis and to formulate treatment strategies. Priority will be given to treatment of the psychological trauma experienced by the child, as such trauma may affect the emotional and social functioning of the child as well as its self-esteem and trust in others. If necessary, a detailed psychological assessment will be undertaken. Depending on the initial clinical formulation of the case, the child would be engaged in play therapy, other forms of individual or group psychotherapy. The effectiveness of psychological counselling depends on the severity of the psychological trauma, family support, and the victims' receptiveness to psychological treatment. With the joint involvement of social workers, who take care of the social needs of the child and other problems in the family, most cases respond positively to psychological counselling and the children are able to resume their normal functioning.

12. For adult victims of rape, indecent assault and other sexual offences etc., social workers of SWD and NGOs in family services centres/integrated family service centres or medical social services units offer counselling and arrange referrals for other social services, including clinical psychological service, financial assistance, legal service referral, schooling arrangement and job placement etc. Furthermore, the first rape crisis centre – "RainLily" operated by an NGO – was set up in December 2000. The centre offers one-stop-shop hotline service, 24-hour outreaching crisis intervention, therapeutic group, co-ordination with other concerned professionals for counselling, medical examination, reporting to Police and collecting evidence etc., to assist the women victims to overcome the trauma, rebuild their self-esteem and self-confidence and resume normal living.

Services for Abusers

13. At present, counselling is taken up by abusers on a voluntary basis. However, the court may order convicted child abuse offenders to receive compulsory counselling treatment under a probation supervision order under the Probation of Offenders Ordinance (Cap. 298). With regard to services for abusers in child abuse cases, social workers always motivate the perpetrators to receive counselling services as far as possible. If the perpetrators are the parents of the child victims, counselling services for them form part of the intervention process.

14. Clinical psychologists (CPs) of the SWD also offer treatment for various types of sexual offenders when they are not incarcerated. They work closely with the Department's probation officers to provide individual as well as group treatment for sex offenders who are put on probation. The CPs are

often involved in the pre-sentencing assessment of the sex offenders and they make recommendations to the courts on these offenders' rehabilitation needs. Treatment by CPs can be made a condition of the probation order if deemed necessary by the courts. The offenders of less violent sexual offence or those not involving confrontation with the victims such as voyeurs and exhibitionists who are put on probation can receive treatment from the CPs of SWD.

15. For the more serious sexual offences such as child sexual abuse, rape and incest, the offenders are more often than not incarcerated and hence they receive treatment from the CPs of the Correctional Services Department (CSD). Offenders who sexually abused children will be arranged to undergo treatment programmes at the Sex Offender Evaluation and Treatment Unit run by the clinical psychologists in the CSD. For offenders of incest, the CPs of CSD will alert the CPs of SWD (when the victims are receiving treatment from them) and they will hold a joint pre-discharge meeting if either the CPs or the offender himself consider it necessary for further psychotherapy when the offender is discharged. Unless the case is put on Post-Release Supervision Scheme (PRSS), continued treatment for the offenders after their release will be entirely voluntary.

Mandatory Therapy

16. We are aware that mandatory counselling for child abusers is practised in some overseas countries, but the degree of success varies. Unmotivated abusers may refuse to co-operate. We will keep the issue under review.

17. The Committee on Child Abuse has endorsed in its last meeting on 23 April 2002 to conduct a research study. Areas of the research may include the effectiveness of different treatment programmes available for abusers in Hong Kong, and the feasibility and effectiveness of adopting mandatory counseling as an alternative to prosecution/imprisonment, drawing experiences from overseas countries as appropriate.

(B) To provide information on the criteria adopted by the Film Censorship authority in approving the exhibition of the movies "lolita" and "Blue Lagoon".

18. Films submitted to the Film Censorship Authority for classification are viewed by censors before making a decision. Under section 10(2) of the Film Censorship Ordinance, Cap. 392, a censor shall view the

film and consider the following matters for the purpose of making his decision –

- (a) whether the film portrays, depicts or treats cruelty, torture, violence, crime, horror, disability, sexuality or indecent or offensive language or behaviour; and
- (b) whether the film denigrates or insults any particular class of the public by reference to the colour, race, religious beliefs or ethnic or national origins or the sex of the members of that class.

19. Under section 10(3), the censor shall, in viewing the film and considering the matters referred to in subsection (2), also take into account the following matters -

- (a) the effect of the film as a whole and its likely effect on the persons likely to view the film;
- (b) *the artistic, educational, literary or scientific merit of the film and its importance or value for cultural or social reasons; and*
- (c) in relation to the intended exhibition of the film, the circumstances of such exhibition.

20. In addition, section 36 of the Film Censorship Guidelines for Censors 1999 stipulates that certain acts are commonly held to be injurious to the community's well-being or likely to endanger public health or morals, or to offend accepted standards of public decency. Therefore, the following materials should not be permitted in any film –

- (a) *detailed or gratuitous depiction of a child who is, or who is apparently, under the age of 16 years engaging in sexual activity or crime;*
- (b) explicit or gratuitous depiction of sexual violence or sexual acts under coercion or non-consent of any kind;
- (c) detailed or gratuitous depiction of extreme violence or cruelty;
- (d) detailed instruction or encouragement in dangerous or criminal techniques which are imitable;
- (e) detailed promotion, incitement or instruction on the use of dangerous drug; and
- (f) depiction of bestiality, necrophilia, sexual acts accompanied by offensive perversion (such as sadism or masochism) or exploitative incestuous behaviours.

21. With regard to the two films in question, “Lolita” was classified as Category III in 1997 without excision in accordance with

provisions in the Film Censorship Ordinance and Film Censorship Guidelines. “Blue Lagoon” was given permission for public exhibition without excision in 1980 as “unsuitable for children”.

Bills Committee meeting on 3 June 2002

(A) To consider whether artistic merit defence should be provided for the production of child pornography within the territory of Hong Kong.

22. Under the Bill, artistic merit defence is provided for offences under Clause 3, that is, printing, making, producing, reproducing, copying, importing, exporting, publishing, possessing, and advertising child pornography. However, no artistic merit defence is provided for offences under Clause 14, that is, use, procurement or offer of persons under 18 for making pornography or for live pornographic performances. This is because a procurer is the person who directly exploits the child and he is in a best position to ascertain the age of child.

23. We do not consider it necessary or appropriate to take away the artistic merit defence available to the producer. Firstly, if a person producing child pornography is directly involved in manipulating the child during the production (which is likely the case), he may be prosecuted for using a child for making pornography under Clause 14 for which artistic merit defence is not available. Secondly, a person may produce child pornography without using a real child, for example, by making use of computer-generated images. In such an event, artistic merit defence should be available for the person who did not make any contact with a real child.

24. Therefore, from a perspective of balancing protection of children against safeguarding freedom of speech, we consider that artistic merit defence should be available for production of child pornography.

(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 - Privacy on an aircraft is treated as if it were privacy 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.

Security Bureau
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