

Bills Committee on the Prevention of Child Pornography Bill

A Two-tier Definition of Pornographic Depiction

Purpose

In response to Members' request at the Bills Committee meeting held on 3 June 2002, this paper seeks to provide further reasons for proposing a two-tier definition of "pornographic depiction" in the Prevention of Child Pornography Bill and the problems that may arise if a two-tier definition is not adopted.

Background

2. At the Bills Committee meeting on 3 May, the Administration was asked to explain the rationale for the proposed two-tier definition of pornographic depiction involving children. In the Administration's response to the deputation of Against Child Abuse Ltd. later in May, we provided explanations on why such a distinction was necessary. At the Bills Committee's meeting on 3 June, that response was considered. The Administration was then asked to further explain the reasons and the problems that might arise if a two-tier definition was not adopted.

3. The whole set of proposals in the Bill shares the common objective of protection of children against sexual exploitation. The Bill seeks to create offences of making, producing, publishing, importing, exporting, distributing, advertising and possessing pornography that depicts children under 16 years of age. In order to comply with the International Labour Convention No. 182 - the Worst Forms of Child Labour Convention, which defines a child as a person under the age of 18. The Bill also proposes to criminalise the use, procurement or offer of children under the age of 18 for making pornography or for pornographic performances. Nevertheless, in prohibiting the use, procurement or offer of persons under the age of 18 for making pornography or for pornographic performances, we have proposed a two-tier definition for "pornographic depiction" (as extracted at Annex) after careful consideration. The two-tier definition makes a distinction between the level of prohibition against procurement of persons under the age of 16 and those aged 16 or above but under 18.

The proposed two-tier definition

4. The proposal has the merit of affording greater protection of persons under the age of 16 from being used, procured or offered for making child

pornography or for pornographic performances. We consider this proposed distinction is necessary and justified because children under 16 are more vulnerable. They may not be able to make independent decisions and give informed consent. The level of protection should therefore be proportionately higher. In formulating this proposal, the Administration has taken into account that in Hong Kong the age of consent for lawful heterosexual intercourse is 16. Persons under the age of 16 are generally considered to be mentally immature and prone to instigation by others, so they should be better protected under the law. We therefore propose that a slightly wider definition of pornographic depiction should be applicable to persons under the age of 16. On the other hand, persons aged 16 or above but under 18 are considered relatively more mature, have a better grasp of things and a greater ability to protect themselves. It is proportionate and reasonable for the Administration to propose a narrower definition to be applicable to prohibiting the procurement of persons of this age group for making pornography or for pornographic performances.

5. To illustrate by example, a depiction has to show the sexual parts of a person aged 16 or above but under 18 in a dominant way (for example, a close-up shot) for sexual purposes for it to be called a “pornographic depiction”. On the other hand, a depiction of the sexual parts of a person under 16 in a sexual manner or context will already constitute “pornographic depiction”. The latter definition covers a slightly wider scope and therefore the protection afforded to those under the age of 16 is broader. It means that with the definition, we should be able to catch the more “soft-core” pornographic depictions if the persons depicted are under 16.

Problems that may arise if a two-tier definition is not adopted

6. A definition of “pornographic depiction” in the Bill is indispensable. If a two-tier definition is not adopted, one option is to adopt the definition presently proposed to be applicable to persons aged 16 or above but under 18 (i.e. para. (b) of the definition set out at **Annex**), and make it applicable to any person under 18. The adverse consequence is that persons under the age of 16 may not be protected from being used, procured or offered for making certain types of “soft-core” pornography. For example, there will no longer be any prohibition of using children under 16 to make pornography in which their genitals are depicted in a sexual manner or context unless the genitals are the dominant feature of the depiction and the depiction is for sexual purposes.

7. Another option is to replace the proposed two-tier definition with the definition presently proposed to be applicable to persons under 16 (i.e. para. (a) of the definition set out at **Annex**), and make it applicable to any person under 18. However, adopting this option means, for example, there will be strict prohibition of any depiction of, say, the breast of female persons aged 16 or above but under

18 in a sexual manner or context. If the same protection is afforded to all persons under 18 with this option, it may be criticized for imposing too high a level of prohibition.

The Administration's considerations

8. In considering proposals in this regard, we have been mindful that the Bill seeks to criminalise some activities which may otherwise be lawful at present. For example, while it is illegal to publish an obscene article under the Control of Obscene and Indecent Articles Ordinance (Cap. 390), the procurement of a person aged 17 to pose for an obscene article is not. On the one hand, the Bill seeks to protect children against sexual exploitation. On the other hand, we do not intend to impose undue restriction on people's right to freedoms (including the freedom of expression and the freedom to seek, receive and impart information and ideas of all kinds). Prohibition on soft-core pornographic depictions of 16-year-olds who can lawfully consent to sex will be controversial. We have therefore proposed the two-tier definition of pornographic depiction.

Security Bureau
August 2002

Definitions

Under the new section 138A(4) (to be added to the Crimes Ordinance (Cap. 200)), to depict pornographically –

(a) in relation to a person under the age of 16, means –

- (i) to visually depict that person as being engaged, or appearing to be engaged, in explicit sexual conduct; or
- (ii) to visually depict, in a sexual manner or context, the genitals or anal region of that 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 subparagraph (ii), fall within that paragraph;

(b) in relation to a person of the age of 16 or above but under 18, means –

- (i) to visually depict that person as being engaged, or appearing to be engaged, in explicit sexual conduct; or
- (ii) to visually depict that person, for sexual purposes, where the dominant feature of the depiction is the genitals or anal region of that person or, in the case of a female person, her breast.

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