

Administration's Response to Submissions from Deputations on Prevention of Child Pornography Bill

At least sixteen organizations have submitted their views on the various aspects of the Prevention of Child Pornography Bill. At the meeting held on 17 May 2002, the Bills Committee asked the Administration to provide its responses to these views.

2. The Administration has studied the deputations' views carefully. We have provided a separate paper in response to the submission of the Against Child Abuse Ltd. because its submission covers most of the issues that are also raised in other submissions. We have also issued a separate paper in response to the Hong Kong Christian Service's submission on "Audio Child Pornography" which is an issue that a number of other deputations have also raised. We have also issued a separate response to the Law Society's submission since it covers a range of legal and policy issues in some detail.

3. In respect of other submissions, most of the points raised have either been covered in the responses mentioned above or in the other papers that the Administration has prepared as responses to views raised by the Bills Committee earlier. There are, however, still a number of issues that have not been addressed to which we would like to respond in the ensuing paragraphs.

Movie Producers and Distributors Association of Hong Kong Limited

4. The Association has suggested that any person who intends to have child pornography for genuine educational, scientific or medical purposes or public good should have prior consultation with relevant professional/ expert groups.

5. The Administration agrees that such consultation is a practical measure that any person concerned may consider taking. However, it is not practicable to include the suggestion as a mandatory requirement in the Bill. Also, there may be more than one professional or expert group relevant to each of the grounds for invoking the statutory defence. It would be difficult to define in law which bodies should have the authority to tender appropriate advice. Our present proposals regarding statutory defence enable any person under investigation or being subject to a charge under Clause 3 of the Bill to provide any information, documentation and evidence to support his defence that the child pornography in question is produced, made, possessed etc. for genuine educational, scientific or medical purposes or public good. A

defendant may also produce any relevant opinions produced by experts or professionals in the field. It is not necessary to provide in the Bill that any person who intends to have child pornography for genuine educational, scientific or medical purposes or public good should have prior consultation with relevant professional/expert groups.

Hong Kong Committee on Children's Rights

6. The Committee has suggested that the Government should think of ways to set up an effective reporting system to seek public's cooperation on child pornography.

7. We are fully aware of the need to promote public understanding of the proposed legislation once it is passed so that members of the public will become aware of the legislation and avoid coming into contact, possessing, or taking part in the production etc. of child pornography or suspected child pornography. Furthermore, the Police may consider setting up a hotline and work with non-government organizations to encourage the public to report suspected cases of child pornography.

The Society for Truth and Light

8. The Society has suggested that child pornography having artistic merit may only be shown to persons above 18. Those for genuine educational, scientific or medical purposes may be shown to any person including those under 18.

9. The Bill aims to protect children from sexual exploitation and sexual abuse. On the other hand, the Control of Obscene and Indecent Articles Ordinance (Cap. 390) and Film Censorship Ordinance (Cap. 392), which aim at safeguarding public morals, provide protection of persons under 18 from indecent/obscene articles and films which could be harmful to them respectively. Further restriction that child pornography having artistic merit may only be shown to persons above 18 is not necessary.

Hong Kong Christian Service

10. The deputation has opined that criminalising accessing child porn Web sites should be considered.

11. The Bill proposes to impose criminal sanction where, at least, the accused is in possession of visual depiction in some physical form or some data that can be converted into a visual depiction. Because of enforcement

difficulty, policy is not to criminalise “viewing” child pornography that does not amount to possession. To do so will go beyond the legislative control on child pornography in overseas jurisdictions.

12. The Administration considers that although the purpose of the proposed offence of possession is to stop the demand at source, it is hard to tell what can be found in a Web site before actually seeing it. The proposed legislative scheme is also devised to avoid catching innocent persons who may have accessed Web sites containing child pornography inadvertently. This can happen given the volume of traffic on the Internet and ready access to various Web sites through Web surfing, search engines and hyper-links, and that child porn Web sites sometimes bear what may appear to be rather innocuous names. It will be difficult, if not impossible, to adduce sufficient evidence to distinguish persons who have accessed child porn Web sites purposefully from those who have accessed inadvertently. Therefore, we consider that proposing to criminalise accessing child porn Web sites may run the risk of introducing an offence that is considered unreasonable and not enforceable.

Hong Kong Web Hosting Association

13. We are pleased to note that Web Hosting Association (WHA) strongly supports prohibition of child pornography from being published and distributed through the Internet. It has however raised a number of questions in its submission.

14. The WHA pointed out that the business of web hosting is to provide services which include domain name registration, e-mail service and web data storage for domain name owners to publish their web content on the Internet and a hosting company does not manage the web content, which may contain child pornography without the hosting company’s knowledge. Paragraphs 3.1 and 3.2 of the WHA’s submission raised the concern that child pornography may be in the form of both published and un-published web data of which the hosting company may not be aware. Paragraph 3.3 of the submission seemed to suggest that specific exemption should be given to innocent web hosting companies. The Administration is of the view that the provisions of the Bill, while applicable generally, are adequate in catering for web hosting companies.

15. Under the Bill, child pornography includes *data stored* in a form that is capable of conversion into a photograph, film, computer-generated image or other visual depiction of a person who is or appears to be a child. WHA is concerned whether “data stored” include all electronic data stored on the web hosting companies’ servers. As a matter of principle, all kinds of data, no

matter where they are stored, are covered under the definition in so far as they are stored in a form that is capable of conversion into a visual depiction. As such, data stored on the web hosting companies' servers are no exception.

16. However, in proving an offence under Clause 3 of the Bill, the Prosecution has to prove beyond reasonable doubt that the defendant has the knowledge and intent of committing the offence. For instance, if a web hosting company simply provides the space to its clients for storing the data and has no knowledge of the contents of the data, he will not be charged for possessing child pornography even if the contents contain child pornography. The company may also invoke the defence of Clause 4(2) 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.

17. In practice, web hosting companies or Internet service providers are not required or expected to actively monitor the contents of the web pages posted by their clients. If these companies do not have any knowledge of the pornographic nature of the contents, they will not be held responsible. However, should they become aware of any child pornography in the web sites, for example, through a complaint by a user, they should report the matter to the Police.

18. Clause 4(2) of the Bill states clearly that it is a defence for a 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. This defence covers any person who may come into possession of child pornography in any form and includes the innocent parties who merely provide the communication medium, and tools to facilitate information exchange (referred to in paragraph 3.3 of the WHA's submission) without any knowledge of the contents of child pornography. We believe that this defence adequately covers web hosting companies and Internet service providers which can prove their lack of knowledge. A more specific defence for these companies is not considered necessary.

19. Paragraph 3.4 of the submission referred to Clause 12(1) of the Bill on removal or effacement of child pornography. It should be clarified that Clause 12(1) applies to display of child pornography in the form of a painting or a photograph outside a building or similar structures and is not intended for electronic data. This can be seen from the reference in Clause 12(1) to "child pornography .. publicly displayed on *any building or other structure*" and from Clause 2(3) of the Bill, which says-

Any child pornography that is displayed in or so as to be visible from –

- (a) any public street or pier, or public garden; or
- (b) any place to which the public have or are permitted to have access (whether on payment or otherwise),

shall for the purposes of this Ordinance be regarded as child pornography *publicly displayed.*”

20. With regard to web sites containing child pornography, the powers of entry, search and seizure under a warrant issued under Clause 5 apply. Any seizure will be limited to “any thing in respect of which an offence under section 3 has been or is being or is about to be committed or any thing that is, or contains, evidence of the commission of any such offence” (Clause 5(1) & (4)). Web hosting companies and Internet service providers will only be required to remove the specific contents depicting child pornography. It is not necessary to stop the entire server or remove other unrelated materials from a law enforcement angle.

Security Bureau
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