

**Administration's Response to issues
raised in the Bills Committee meeting of
Prevention of Child Pornography Bill on
26 June 2002**

(A) The Bills Committee requested the Administration to provide information on overseas court cases relating to the possession of child pornography for the purpose of publication and explain the practical difficulties in enforcement and human rights implications of an offence provision for such possession.

Two cases from the United Kingdom and one case from the United States relating to the possession of child pornography for the purpose of publication are found.

2. The Court of Appeal of the UK upheld in two cases the convictions for having in possession indecent photographs with a view to their being distributed or shown. Evidence of distribution activities was available in both cases. In *R v. Land*¹, the evidence was that the Defendant and his partner ran a mail order business dealing in the supply of obscene video tapes, which included 2 video cassettes showing children engaging in sexual activities. In *R v. Fellows; R v. Arnold*², Accused 1 used a computer to store images in digital form which enabled it to display and print out indecent pictures of children. He also made that data available on the Internet, but the archive could only be assessed by those to whom a password was given.

3. In *United States of America v. Michael Patrick Stanton*³, the accused was convicted of receiving material involving the sexual exploitation of a minor (2 magazines described as containing photographs of nude girls aged 6 to 16 engaging in sexual activities). He was sentenced on the basis of his "possession with intent to distribute" by his admission that he intended to resell the magazines to a friend for a ten dollar profit after photographing the pictures he liked.

4. In all these three cases, the defence did not contest the element of "with a view to their being distributed or shown" (in the case of the UK) or

¹ [1999]QB 65

² [1997]2 All ER 548, [1997]1 Cr App Rep 244, [1997] Crim LR 524, Court of Appeal (Crim. Div.)

³ No. 92-1894WM, UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

"with intent to distribute" (in the case of the US).⁴ There was clear evidence of activities to publish child pornography (a business dealing in video tapes, making available child pornography on the Internet) or intent to do so by the accused's own admission of the intent to resell. In fact, we are not able to find any case that turns on the issue of "intent" or "purpose". We also cannot find any case where the accused was convicted of "possession for the purpose of publication" by relying on a presumption as to "intent" or "purpose" based on the quantity of child pornography possessed.

5. Experience with the offence of "possession of dangerous drugs for the purpose of trafficking" illustrates the difficulties in proving "purpose". Formerly, the Dangerous Drugs Ordinance⁵ provided for certain presumptions. For example, if certain primary facts are proved (such as possession of more than 0.5 of a gram of narcotic or more than five packets containing the narcotic) there will be a presumption that the dangerous drugs are possessed for the purpose of trafficking. The burden was on the defendant to rebut, on a balance of probabilities, the presumption. In *R. v. Sin Yau Ming*⁶ the Court of Appeal struck down the presumptions as being contrary to the right to be presumed innocent under Article 11 of the Hong Kong Bill of rights Ordinance, Cap. 383. As a result, the prosecution can no longer rely on possession of a certain quantity of drugs as raising a presumption as to "purpose of trafficking" in its favour. Subsequently, the Dangerous Drugs (Amendment) Ordinance 1992 was enacted to amend the definition of "trafficking" by adding after the words "the dangerous drug" the phrase "or possessing the dangerous drug for the purpose of trafficking" and to increase the sentence for simple possession.

6. In short, unless evidence of publication is available or the suspect admits his intent to publish, it is rather difficult to prove the suspect's intent to

⁴ The issues in dispute are briefly as follows -

- In *R v. Land*, the issue was whether the prosecution needed to prove not just that the accused had an indecent photo of a child but that he knew that the photo was of a child. There was no direct evidence about the identity of any of the participants in the sexual activities depicted in the photos in 2 video cassettes.
- In *R v. Fellows; R v. Arnold*, the issue was whether the accused "showed" indecent photographs by using a computer to store images in digital form and making that data available on the Internet, with the archive accessible by those to whom a password was given.
- In *United States of America v. Michael Patrick Stanton*, the main issue is entrapment. As part of a sting operation to identify and apprehend persons trafficking in child pornography, Island Ventures (an undercover alter ego of the Postal Inspection Service) sent a questionnaire requesting information on sexual interests to the accused. The accused replied to the questionnaire and eventually ordered from Island Ventures the child pornography.

⁵ then contained in sections 46(c), 46(d)(v), 47(1)(a) and 47(1)(d) of the Ordinance

⁶ [1992] 1 HKLR 127

publish based on evidence only of his possession of the child pornography. Any presumption of "intent" or "purpose" based on the quantity of child pornography possessed is likely to be subject to challenge under the Bill of Rights.

7. Nevertheless, if a person is convicted of "possession of child pornography" and the evidence against the defendant is that he possessed a large quantity of child pornography, as opposed to just a few, it is likely that the Prosecution would submit to the court that a heavier penalty ought to be imposed upon the defendant. This is based on the aggravating feature that the defendant indeed possessed a large quantity of child pornography, and hence potentially caused more exploitation and harm to vulnerable children.

(B) The Bills Committee requested the Administration to explain the difference between possession for the purpose of distribution and for the purpose of publication.

8. The terms "publish" and "distribute" are similar in meaning in the present context and convey the meaning of "making available to another" or "dissemination". Their respective meanings according to the Concise Oxford Dictionary are as follows -

"Distribute v. 1. hand or share out to a number of recipients. 2. (be distributed) be spread over an area. 3. supply (goods) to retailers. 4. Logic use (a term) to include every individual of the class to which it refers." [emphasis, as underlined, added]

"publish v. 1. prepare and issue (a book, journal, or piece of music) for public sale; print in a book or journal so as to make generally know. 2. formally announce or read (an edict or marriage banns) 3. Law communicate (a libel) to a third party." [emphasis, as underlined, added]

9. Section 163.1 of the Criminal Code of **Canada** uses both the concepts of "publish" and "distribute". The Crimes Act 1900 of **New South Wales, Australia** defines "publish" to include "distribute". Section 578C(1) says -

"publish includes:

(a) distribute, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell, offer for sale, let on hire or offer

- to let on hire, or*
- (b) *have in possession or custody, or under control, for the purpose of doing an act referred to in paragraph (a), or*
 - (c) *print, photograph or make in any other manner (whether of the same or of a different kind or nature) for the purpose of doing such an act."*

10. The Protection of Children Act 1978 of the **United Kingdom** uses "distribute or show" without defining the expression. The cases of *R v. Land*⁷ and *R v. Fellows; R v. Arnold*⁸ show that the expression encompasses running a business dealing in the supply of obscene video tapes and making child pornography data available on the internet. The **US** Criminal Code uses "possesses with intent to sell".

11. In the case of the Prevention of Child Pornography in Hong Kong, Clause 2(2) of the Bill says -

- "(2) For the purposes of this Ordinance, a person publishes any child pornography if he, whether or not for any form of reward –*
- (a) distributes, circulates, sells, hires, gives or lends the child pornography to another person; or*
 - (b) shows, plays or projects the child pornography to or for another person."*

Hence, under the Bill, the concept of "publish" includes "distribute".

12. It can be seen from the above that both the offence of possession for the purpose of publication and the offence of possession for the purpose of distribution target at similar activities and that they are offences of a similar nature. However, it should be noted that the Bill provides for, among others, offences of possessing, publishing and distributing child pornography, but possession for the purpose of publication or distribution is not a stipulated offence.

Security Bureau
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⁷ [1999]QB 65

⁸ [1997]2 All ER 548, [1997]1 Cr App Rep 244, [1997] Crim LR 524, Court of Appeal (Crim. Div.)