

**Administration's Response to issues raised by
Assistant Legal Adviser at the Bills Committee meeting of
Prevention of Child Pornography Bill on
26 June 2002**

(A) Whether clause 4(3) of the Bill should be widened to also provide that it was a defence for a person who received a pornographic article to report the matter to a law enforcement agency, as in the relevant legislation of the United States.

Although it is not expressly stated in clause 4(3) that it is a defence for a person to report the child pornography to a law enforcement agency when it comes into his possession inadvertently, it is widely understood that the Police will not take action against persons who come to report the crime within a reasonable time. A statutory defence is considered unnecessary because prosecution will not be instigated in the first place if the person only comes across the child pornography inadvertently. However, if the person is found during the investigation to have committed other related offences such as production or distribution of child pornography, prosecution action may be taken against him.

2. Under subsection 2252A(d) of the US Criminal Code, it shall be an affirmative defence to a charge of violating subsection (a)(5) [possess] that the defendant -

- (a) Possessed less than three images of child pornography, and
- (b) Promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof -
 - (i) took reasonable steps to destroy each such image; or
 - (ii) reported the matter to a law enforcement agency and afforded that agency access to each such image.

3. However, it should be noted that such a defence of reporting to a law enforcement agency is not found in relevant legislation in UK, Australia or Canada. Furthermore, such a defence is also not available for other relevant offences in Hong Kong laws such as possession of dangerous drugs.

4. As a matter of fact, any person who comes across child pornography is expected to report the matter to the Police for investigation so that we can all work together to combat child pornography and protect our

children. Police will set up a hotline to facilitate reporting in the initial period when the Bill is enacted. A person simply reporting the child pornography in his possession will not be prosecuted provided he reports within a reasonable time, he had not asked for it and he is not related to the production, making, publication or distribution etc. of the child pornography. It is therefore not necessary to provide a statutory defence to achieve this effect.

(B) Whether a person with an article that the Obscene Articles Tribunal (OAT) had refused classification would be in breach of Clause 3(1) of the Bill relating to production of child pornography even though he had destroyed the article within a reasonable time.

5. An article may be submitted to the OAT for classification before publication under the Control of Obscene and Indecent Articles Ordinance (COIAO) (Cap. 390). Under the COIAO, an article means any thing consisting of or containing material to be read or looked at or both read and looked at, any sound recording and any film, video-tape, disc or other record of a picture or pictures. The OAT makes a classification in accordance with the guidance stipulated in section 10 of the COIAO. Under subsection 10(a), in determining whether an article is obscene or indecent or whether any matter publicly displayed is indecent, or in classifying an article, the OAT shall have regard to standards of morality, decency and propriety that are generally accepted by reasonable members of the community.

6. If a person who intends to print or distribute or publish an article which originate from overseas, for example, a foreign film, and takes it to the OAT for classification and the OAT refuses classification on the ground that the film may be child pornography, he may have a few options to deal with the matter. First, he may report the matter to the Police for investigation; second, he may destroy the film as soon as possible; third, he may report to the Police and then return the film to the sender (for example, the foreign film-maker or distributor), provided that he does not have the authority to destroy the film. In all these three options, he is not liable to prosecution for possession offence under Clause 3(3) of the Bill. Neither will he be prosecuted for production because he is not the producer.

7. However, the scenario is different if the one who submits the article is himself the producer of the article. In such an event, even if the producer destroys the article after learning that it is refused classification by the OAT, he is still liable to prosecution for producing child pornography provided the article is considered child pornography by the Police and Prosecutions following the subsequent investigation and sufficient evidence is available.

8. It should be noted that under Clause 4(4) of the Bill, it is a defence to a charge under section 3 for the defendant to establish that the thing that is alleged to constitute child pornography is, or was at the time the offence is alleged to have been committed, classified as a Class I or a Class II article under the Control of Obscene and Indecent Articles Ordinance (Cap. 390). However, it is not a defence if the thing has been refused classification on the ground that the OAT considers that it may be child pornography.

Security Bureau
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