

**Prevention of Child Pornography Bill  
Administration's Response to Major Suggestions/Issues  
Raised by Members at Previous Meetings**

**Introduction**

At the 7<sup>th</sup> Bills Committee meeting on 8 November 2002, Members agreed to draw up a list of the major suggestions/issues they had raised in previous meetings and forward it to the Administration for responses. The list of issues was provided to the Administration on 16 November 2002. The four main issues raised by Members are reproduced in bold and responses by the Administration are also provided below.

**To reconsider the justification for placing the evidential burden on the defendant, especially for simple possession offence, to establish a defence under Clause 4(2) and (3), bearing in mind the unnecessary burden placed on innocent people to adduce evidence.**

2. The Administration has noted the concerns raised by some Members. We have reconsidered the justification for our proposal and wish to emphasize that the overall burden of proof remains on the prosecution. As we have explained in our paper entitled "Knowingly" (LC Paper No. CB(2) 58/02-03(01)), to establish that an offence under Clause 3(3) has been committed by the defendant, the prosecution must prove three essential ingredients of the offence beyond reasonable doubt. These ingredients are:

- (a) that the defendant possessed something in the sense that it was within his custody or control; (physical element of possession)
- (b) that the defendant knew that he possessed something; (mental element of possession)
- (c) that the something possessed by the defendant was child pornography.

3. The intent of the proposed legislative scheme is that the prosecution is required to prove the facts from the outset that the accused was in possession of the thing which was child pornography. Where these three ingredients are proved by the prosecution beyond reasonable doubt, the defendant may, if he elects to do so, provide an explanation.

4. The proposal is justified by the difficulties the prosecution will have if it were required to also prove from the outset the defendant's knowledge of the exact nature of the thing possessed. As explained in the earlier paper, the defence provisions only impose on the defendant an evidential burden, but not a

legal or persuasive burden. The defence need only adduce evidence to raise the issue of knowledge (in Clause 4(2) of the Bill). The level of proof is not the high level of beyond reasonable doubt, or even balance of probability. When the defendant raises the issue of knowledge, the judge will be required to explain the substance of Clause 4(2) to the jury and will also remind them that the burden of proving guilt is throughout on the prosecution. The defendant cannot be convicted if there is reasonable doubt as to his knowledge of the nature of the thing he is alleged to possess. Knowledge is therefore material to the issue of guilt and the burden of proving guilt beyond reasonable doubt is on the prosecution throughout the trial.

### Proposed amendments

5. The proposed defence provisions may be improved by an express provision on the defendant's burden being evidential such that a construction of the provisions as giving rise to a legal burden is not possible. For this purpose, the Administration has suggested earlier in its paper entitled "Knowingly" that it will propose to replace "establish" by "raise a reasonable doubt by adducing evidence" in all of the defence sub-clauses in Clause 4 of the Bill.

6. On the other hand, to address some Members' concern that innocent persons might be accused of possession of child pornography after they have received unsolicited child pornography through e-mail or the Internet, or somehow they come to possess child pornography inadvertently in some other way, we suggest to revise Clause 4(3) along the following line (the wording will be subject to fine-tuning) :

(3) Without prejudice to subsection (2), it is a defence to a charge under section 3(3) for the defendant to establish that –

(a) he had not asked for any child pornography and he could not have prevented himself from coming into possession of the child pornography by taking reasonable steps for this purpose; or

(b) he had not asked for any child pornography and after it came into his possession he endeavoured to destroy it within a reasonable time. For the avoidance of doubt, the mere fact that defendant is unsuccessful in destroying the child pornography does not prevent him from invoking the defence under Clause 4(3).

**To revise Clause 4(5), having regard to the fact that a defendant who believed on reasonable grounds that a pornographically depicted person was not a child would naturally consider it unnecessary to take further steps to ascertain the age of the person.**

Proposed amendments

7. On the defence under the sub-clauses of Clause 4(5), we have suggested earlier that the order of sub-clauses (a) and (b) may be swapped to avoid ambiguity in the sequence of events. We agree that it would be more logical for a person to first take steps to ascertain age, then form a belief as to the age of the person pornographically depicted.

8. We understand some Members are still concerned that some persons, especially those who are accused of possessing child pornography, may be less able to take reasonable steps to ascertain the age of the person depicted in the child pornography or it is not practicable for them to take any effective steps to ascertain that age. To address this concern, we suggest that the existing sub-clause (a) may be singled out, which by itself will be a defence that a suspect may invoke to defend against a charge under Clause 3(3). However, to avoid a loophole for persons who possess child pornography for publication to evade legal sanction, we suggest to add a sub-clause that this defence will not apply to a person found to possess more than three copies of the same child pornography material. Under this proposed additional defence, a person accused of possessing child pornography may raise that he believed on reasonable grounds that the person pornographically depicted in the child pornography was not a child at the time of the depiction and the person was not depicted as a child, provided he does not possess more than three copies of the same child pornography material. Unlike under the existing Clause 4(5), he does not have to raise a defence on the basis of all of its sub-clauses.

**To consider amending “appears to be a child” in the definition of child pornography.**

Proposed amendments

9. After taking into account Members’ concern that the term “appears to be” may be subjective, we suggest replacing “appear to be” by “depicted as being” in the definition of child pornography for the following reasons:

- (a) “depicted as being” is used in the definition of child pornography in the Canadian Criminal Code, which was upheld by the Supreme Court of Canada in its ruling in R v. Sharpe on 26 January 2001,

and

- (b) the term has been held by the Canadian Court to involve an objective test, that is, based on the depiction and what it would be conveyed to a reasonable observer rather than what was in the mind of the author or possessor.

10. The Supreme Court of Canada upheld on 26 January 2001 in *R v. Sharpe* the child pornography legislation in Canada as justifiable restrictions on the freedom of expression.

11. Sharpe was charged with two counts of possession of child pornography under section 163.1(4) of the Criminal Code and other counts. He challenged the constitutionality of section 163.1(4), alleging a violation of his constitutional guarantee of freedom of expression.

12. “Child pornography”, as defined in section 163.1(1) of the Code, includes visual representations that show a person who is or is depicted as being under the age of 18 years and is engaged in or is depicted as engaged in explicit sexual activity and visual representations the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of 18 years. Under that Code, “Child pornography” also includes visual representations and written material that advocates or counsels sexual activity with a person under the age of 18 years.

13. Despite the accused’s challenge of section 163.1(4) on the ground, among others, of infringement of the freedom of expression, all nine judges of the Supreme Court of Canada, having applied the tests of rationality, proportionality and minimal impairment, upheld section 164.1(4) and affirmed -

- (a) the ban on visual works of the imagination as well as depictions of actual people; and
- (b) the ban on visual depictions that a reasonable observer would perceive as representing (i.e. depicted as being) a person under the age of 18 years and engaged in explicit sexual activity.

14. In considering whether the child pornography legislation was justified, the Supreme Court of Canada had examined in detail all of the elements contained in the definition of “child pornography”, including “depicted as being”. The Court concluded that the ban on pornographic visual depiction not actually involving a child under 18 is reasonable and justified because the Court is convinced that child pornography posed a reasoned risk of harm to

children such as cognitive distortion of paedophiles. Also with the quality of contemporary technology, it can be very difficult to distinguish an image of a “real” person from an image of a “person” which is a computer creation or composite.

**To consider the need for a two-tier definition of pornographic depiction involving persons under the age of 16 and persons of the age of 16 or above but under 18**

15. We note that some Members are concerned that a two-tier definition of pornographic depiction (in proposed new section 138A(4) to be added to the Crimes Ordinance) may not be justified and may cause confusion. The Administration has earlier prepared a paper entitled “A Two-Tier Definition of Pornographic Depiction” (LC Paper No. CB(2)2799/01-02(01)) in response to Member’s concern in this respect. A copy of this paper is attached at Appendix for ease of reference. The relevant two-tier definition is extracted at Annex of the attached paper. 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 for making child pornography or for live pornographic performances, for reasons given in paragraphs 4 and 5 of the attached paper.

Proposed amendments

16. We have since reconsidered the proposed new section 138A(4). We recognize that the law will be less complicated and easier to comprehend if one definition is used to cover all child pornography related legislation. Subject to Members’ views, we may consider replacing the proposed two-tier definition of pornographic depiction with the definition presently proposed to be applicable to persons under 16, and make it applicable to all persons under 18. The same scope of protection will then be provided to all persons under 18. The only fallback of this proposed amendment is that the provision may be criticized for imposing too high a level of prohibition regarding visual depiction of persons aged 16 or above but under 18. However, as it is our policy objective to protect persons aged under 18 from being procured for making pornography or for live pornographic performances, this proposed amendment is acceptable to the Administration. It is therefore put forward for Members’ consideration.

**Advice Sought**

17. Members are invited to comment on the above, particularly the proposed amendments.

Security Bureau  
November 2002

**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  
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**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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