

Consultation Paper

Proposed Legislation for the Prevention of Child Pornography

Purpose

The Administration seeks the views of members of the public on its proposals to prohibit the procurement of persons under the age of 18 for making pornography or for taking part in live pornographic performance. The opportunity is also taken to invite comments on the proposed definition of “pornographic depiction” in the context of child pornography and on the relevant defence clause.

Background

United Nations Convention on the Rights of the Child

2. Under the United Nations Convention on the Rights of the Child (UNCRC), which applies to Hong Kong Special Administrative Region, children should be protected from all forms of sexual exploitation and sexual abuse, including the exploitative use of children in child pornography and child sex tours. Formulating legislation in this regard will be a positive step forward in implementing our obligations under the Convention.

3. Although the problems of child pornography and child sex tours are not known to be very serious in Hong Kong, we must formulate legislation to provide adequate deterrent effect for preventing and checking any proliferation of paedophilic activities.

4. Two rounds of consultation on the proposed legislation were carried out in late 1998 to early 1999 with concerned parties including non-governmental organisations, the legal profession, social welfare groups, Internet and journalist associations. The opinions received were in general supportive of the proposals to offer better protection to children.

The Prevention of Child Pornography Bill and the Crimes (Amendment) Bill 1999

5. The Prevention of Child Pornography Bill and the Crimes

(Amendment) Bill 1999 were therefore prepared. The two bills aimed at offering better protection to children against child pornography and child sex tourism respectively. After their publication in the Gazette on 25 June 1999, they were introduced into the Legislative Council on 7 July 1999. Their main proposals were –

- (a) criminalising the printing, making, producing, reproducing, importing, copying, distribution, publication, advertising and possession of child pornography, and procurement of children for making child pornography; and
- (b) providing for extra-territorial application of certain existing sexual offences against children and prohibiting the arranging and advertising of child sex tours.

However, the bills lapsed on 30 June 2000 when the Legislative Council term ended then.

6. The opportunity has been taken to revise, mainly, the Prevention of Child Pornography Bill before re-introduction because, after the publication of the bills in the Gazette, there were criticisms that the definition of “child pornography” was too broad and the defence clause was inappropriate. We have since taken into account these comments and sought to refine the proposed legislation.

International Labour Convention No. 182

7. While the revised Bill was under preparation, the Administration was asked to consider if the International Labour Convention No. 182 (ILC 182), which was adopted by the International Labour Organisation in 1999, should be applied to the Hong Kong Special Administrative Region. Its purpose was to prohibit and eliminate the worst forms of child labour.

8. The ILC 182 is an important and widely ratified international labour convention. Member States which ratify the ILC 182 shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour. Under the ILC 182, “child” applies to all persons under the age of 18 years and “the worst forms of child labour” comprises, among other things, the use, procuring or offering of a child for the production of pornography or for pornographic performances. The Administration considers that the ILC 182 should be applied to the Hong Kong Special Administrative Region for the better protection of children. It

is therefore important that we should impose sanctions on the procurement, use and offering of persons under the age of 18 for making pornography or for taking part in pornographic performances by including appropriate provisions in the revised Prevention of Child Pornography Bill (Please refer to paragraphs 16-19 below). The enactment of the proposed legislation will enable the HKSAR to comply with the ILC 182 and more importantly, to afford our children with adequate protection against exploitative use in pornography.

Definition of Child Pornography

9. In the Prevention of Child Pornography Bill published in 1999 (referred to as “the 1999 Bill” hereafter), *child pornography* meant –

- (a) a film, photograph, publication or computer-generated image or picture that indecently depicts a person who is, or looks like, a person under the age of 16 and includes data stored on a computer disc or by other electronic means which is capable of conversion into such a film, photograph, publication, image or picture; or
- (b) any object that indecently depicts a person who is, or looks like, a person under the age of 16.

10. Having considered the public comments received since and the definitions in similar legislation in US, Canada, Australia and an Optional Protocol under UNCRC, we have made an attempt to revise the definition to make it more clear and precise. Under our new proposals, *child* will still mean a person under the age of 16 years and *child pornography* means –

- (a) a photograph, film, computer-generated image or other visual depiction that is a pornographic depiction of a person who is or appears to be a child, whether it is made or generated by electronic or any other means, and whether or not it is created, adapted or modified; or
- (b) anything that contains a photograph, film, computer-generated image or other visual depiction referred to in paragraph (a).

11. Furthermore, *pornographic depiction* is proposed to mean a visual depiction that–

- (a) depicts a person who is or appears to be engaged in explicit sexual conduct; or
- (b) depicts in a sexual manner or context the genitals or anal region of a person or the breast of a female person.

12. The revised definition provides for two distinct levels of pornographic depiction, each of which is manifest in depicting a certain level of sexual element. We believe that such a definition is sufficiently tightly circumscribed to achieve the object of protecting children from sexual exploitation.

Statutory Defence Clause

13. The 1999 Bill sought to create offences to prohibit printing, making, producing, reproducing, importing, copying, distributing, publishing, advertising and possessing child pornography. Appropriately high penalty levels were proposed to provide sufficient deterrent effect. For the avoidance of doubt and to ensure that innocent people would not be inadvertently caught under the Bill, a statutory defence was available to the effect that -

“Where a person is charged with an offence under the Bill, there shall be a defence for him if it is established by evidence that he had a legitimate cause for doing the act.”

14. Since the publication of the 1999 Bill, the defence clause had been criticised for being vague and inappropriate. We decided therefore to improve and clarify it. The revised proposal is that a statutory defence to the offences will be available to the defendant if the alleged child pornography is found to have artistic merit or is for a genuine educational, scientific or medical purpose or for a genuine family purpose or that the act otherwise served the public good and did not extend beyond what served the public good.

15. We are fully aware of the human rights concerns that the Bill may generate and that the proposed provisions may interfere with a person’s right to freedom of expression, particularly because mere possession of child pornography is proposed to be made an offence. Nevertheless, we believe that by clearly and carefully defining what is included as “child pornography”, in conjunction with the availability of the statutory defence, a right balance

between offering adequate protection to children and refraining from unnecessary infringement of freedom of expression is struck.

Procurement of persons under 18 years old for making pornography or for pornographic performances

16. To comply with the ILC 182, it is proposed to add provisions under the Crimes Ordinance (to form part of the Prevention of Child Pornography Bill) to prohibit the use, procuring or offering of a person under the age of 18 to be pornographically depicted for making pornography or to participate in a live performance. In this connection, children under the age of 16 are considered more vulnerable. They may not be able to make independent decisions and give informed consent. We therefore consider that the level of protection for children under 16 should be higher than those of the age of 16 or above but under 18 (referred to as “between 16 and 18” hereafter), and propose a two-tier definition for pornographic depiction involving children.

17. On the one hand, procuring a person under the age of 16 is prohibited if the subject pornography or pornographic performance is a pornographic depiction within the proposed definition in paragraph 11 above. On the other hand, procuring a person between 16 and 18 is prohibited if the subject pornography or pornographic performance visually depicts the person –

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

18. This two-tier definition makes a distinction between the level of prohibition against procurement of children under 16 and those between 16 and 18. While category (a) of the two definitions is the same, the level of protection of children under 16 is higher in respect of category (b). For instance, visual depiction in a sexual manner or context of the sexual parts of a person under 16 may constitute an offence for procurement even without showing the sexual parts as dominant feature. Taking into account the need to offer stronger protection to children under 16, we believe that this distinction is proportionate and necessary. However, it should be noted that no defence

clause will be proposed for these procurement offences because in procuring a child, actual contacts are made with the child concerned. The exploitation is similar and in many circumstances no less serious than that incurred in other sexual offences involving a child. Furthermore, a procurer is in a position to ascertain the age of the child being procured and is the one who directly exploits the child. Given the tight definition of pornographic depiction and the heinous nature of procurement offences, it would not be appropriate to provide a statutory defence clause.

19. Nevertheless, this procurement offence is only applicable to acts conducted in Hong Kong. In other words, procurement acts that occur outside Hong Kong will not be governed by the proposed legislation. Likewise, local distributors of foreign films will not be required to ascertain the age of the actors and actresses in the films. However, after the Bill is passed, local film-makers or scouting agents should refrain from procuring or employing persons under 18 to be pornographically depicted in pictures or movies with reference to the two-tier definition of pornographic depiction under the Bill.

Child Sex Tourism

20. Our proposals concerning child sex tourism will remain largely the same as those contained in the published Crimes (Amendment) Bill 1999, in which we proposed –

- (a) to provide extra-territorial effect to a list of sexual offences under the Crimes Ordinance, Cap. 200, if the victim is under 16 years of age; and
- (b) to criminalise the arranging and advertising of child sex tours.

21. During the consultation in 1998/1999, the relevant proposals were widely supported. Further comments were received after the Amendment Bill's publication in the Gazette but they were mainly on the technical and textual aspects.

Combination into One Bill

22. In view of the common objective of protection of children against sexual exploitation, we have decided that the Prevention of Child

Pornography Bill and the Crimes (Amendment) Bill 1999 should be combined as one bill. This should facilitate the Legislative Council's consideration of the whole set of proposals during the legislative process. Subject to public views and comments, the Bill will incorporate the proposals explained in paragraphs 9 – 21 above. It will also reflect as appropriate the technical and textual comments on the published Bills.

Public Consultation

23. We welcome the views of the public on the deliberated proposals which are summarised as follows –

- (a) the more specific definition of child pornography as set out in paragraphs 10 and 11;
- (b) the revised defence clause as proposed in paragraph 14; and
- (c) the new proposals to prohibit the procurement of persons under 18 for making pornography and for participating in pornographic performances in paragraphs 17 and 18.

24. Please forward your views and comments to us *before 30 November 2001* at –

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