

For discussion on
6 December 2001

LegCo Panel on Security

Proposed Legislation for the Prevention of Child Pornography

Purpose

This paper seeks Members' views on the Administration's proposals to introduce the Prevention of Child Pornography Bill for combating child pornography and child sex tourism with the objective of offering better protection to children against sexual exploitation.

Summary of Proposals

2. The major proposals of the Prevention of Child Pornography Bill (referred to as the "the Bill" hereafter) are summarised as below –
 - (a) creating offences of making, producing, publishing, importing, exporting, distributing, advertising and possessing child pornography;
 - (b) criminalising the use, offering or procurement of children under the age of 18 for making pornography or for taking part in pornographic performances; and
 - (c) prohibiting the arranging or advertising of child sex tours, and providing extra-territorial effect to a number of sexual offences in relation to children.

Background

United Nations Convention on the Rights of the Child

3. Under the United Nations Convention on the Rights of the Child (UNCRC), which applies to the 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 pornographic performances and materials, prostitution or other unlawful sexual practices. Formulating

legislation in this regard will be a positive step forward in implementing our obligations under the UNCRC.

4. 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 paedophile activities.

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

5. Consultation on the proposed legislation were conducted 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. The Prevention of Child Pornography Bill and the Crimes (Amendment) Bill 1999 were therefore prepared. (Copies of the two Bills and the LegCo Briefs are at Appendix A) After their publication in the Gazette on 25 June 1999, they were introduced into the LegCo on 7 July 1999. However, the bills were not accorded priority for scrutiny by the LegCo and, hence, lapsed on 30 June 2000 when the LegCo term ended.

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 this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour. Under the Convention, “child” applies to all persons under the age of 18 years and “the worst forms of child labour” comprises, among other things, the procuring, use or offering of a child for the production of pornography or for pornographic performances. The Mainland is considering

ratifying the ILC 182 and the Administration also considers it appropriate to apply the ILC 182 to the Hong Kong Special Administrative Region. We therefore propose to 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. The enactment of the proposed legislation will enable the HKSAR to comply with the ILC 182.

Statistics in relation to child pornography

9. The number of reported cases of publishing or possessing for the purpose of publishing obscene articles which depict child pornography from 1996 to 2000 are as follows -

<u>Year</u>	<u>Number of reported cases</u>
1996	6
1997	8
1998	4
1999	7
2000	13

Major New Proposals or Amendments in the Revised Prevention of Child Pornography Bill

Definition of Child Pornography

10. 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.

11. Having considered the comments received 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).

12. Furthermore, *pornographic depiction* is proposed to mean –

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

13. 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 properly confined to achieve the object of protecting children from sexual exploitation.

Defence Clause

14. Under the 1999 Bill, a defence clause was available to the effect that
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“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.”

15. Since the publication of the 1999 Bill, the defence clause had been criticised for being vague and inappropriate. We therefore attempt to improve and clarify it. The revised proposal is that 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.

16. We are fully aware of the human rights concerns generated by the Bill and the arguments that the proposed provisions may interfere with the right to freedom of expression, given that, in particular, possession of child pornography is 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 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 for making pornography or for pornographic performances

17. To comply with the ILC 182, it is proposed to add provisions to the Crimes Ordinance (the proposed amendments are to be included in 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.

18. 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 12 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.

19. 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.

20. 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.

21. 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. Therefore, local distributors of foreign films will not be required to ascertain the age of the actors and actresses in the films to check whether procurement offences have occurred. 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

22. 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 criminalise the arranging and advertising of child sex tours; and
- (b) to provide extra-territorial effect to a number of sexual offences under the Crimes Ordinance, Cap. 200, if the victim is under 16 years of age. (Please refer to the list of offences at [Appendix B](#))

23. 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

24. 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 LegCo's consideration of the whole set of proposals during the legislative process. Subject to Members' views, the Bill will

incorporate the proposals explained in paragraphs 11 – 22 above. It will also reflect as appropriate the technical and textual comments received. Apart from these proposed amendments, the clauses of the Bill will be largely the same as the two relevant Bills published in 1999. For ease of reference, the major proposed offences of the Bill and penalty levels are summarised at Appendix C.

Public Consultation

25. A public consultation exercise was conducted from 2 to 30 November 2001 on the major proposals and amendments of the revised Bill as explained in paragraphs 11-22 above. The majority of comments received generally support our proposals of offering better protection to children. Some respondents, however, commented that the detailed provisions had to be carefully and clearly crafted so as to avoid any ambiguities. A couple of individual respondents were also concerned that the proposed legislation might infringe upon their freedom of creation and choice of themes in film production. We have briefed representatives of these concerned parties that the proposed legislation only seeks to prohibit visual depiction of child pornography which is to be tightly defined. As a result, only explicit sexual scenes involving children may be affected. Furthermore, the proposed legislation will also include appropriate statutory defence such as artistic merit or educational purpose as explained in paragraph 15 above.

Advice Sought

26. Members are invited to comment on the legislative proposals explained above.

Security Bureau
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Appendix B

Provisions of Crimes Ordinance which will be provided with extra-territorial effect

Section	Offence	Maximum Penalty of Imprisonment (Conviction upon Indictment)
118	Rape*	Life
118A	Non-consensual buggery*	Life
118B	Assault with intent to commit buggery*	10 years
118C	Homosexual buggery with or by man under 21*	Life
118D	Buggery with girl under 21*	Life
118F	Homosexual buggery committed otherwise than in private*	5 years
118G	Procuring others to commit homosexual buggery*	2 years
118H	Gross indecency with or by man under 21*	2 years
118J	Gross indecency by man with man otherwise than in private*	2 years
118K	Procuring gross indecency by man with man*	2 years
119	Procurement by threats*	14 years
120	Procurement by false pretences*	5 years
121	Administering drugs to obtain or facilitate unlawful sexual act*	14 years
122	Indecent assault*	10 years
123	Intercourse with girl under 13	Life
124	Intercourse with girl under 16	5 years
126	Abduction of unmarried girl under 16	10 years
130	Control over persons for purpose of unlawful sexual intercourse or prostitution*	14 years
132	Procurement of girl under 21*	5 years
134	Detention for intercourse or in vice establishment*	14 years
135	Causing or encouraging prostitution of, intercourse with, or indecent assault on, girl or boy under 16	10 years
140	Permitting girl or boy under 13 to resort to or be on premises or vessel for intercourse	Life
141	Permitting young person to resort to or be on premises or vessel for intercourse, prostitution, buggery or homosexual act*	14 years
146	Indecent conduct towards child under 16	10 years

Remarks

* Extra-territorial effect only given where victims are under the age of 16

Proposed Offences under the Prevention of Child Pornography Bill

(A) *Offences relating to Child Pornography*

Proposed Offence		Maximum Penalty	
		<i>Conviction upon Indictment</i>	<i>Summary Conviction</i>
1.	Printing, making, producing, reproducing, copying, importing or exporting child pornography	8 years and \$ 2,000,000	3 years and \$1,000,000
2.	Publishing child pornography	8 years and \$2,000,000	3 years and \$1,000,000
3.	Advertising child pornography	8 years and \$2,000,000	3 years and \$1,000,000
4.	Possessing child pornography	5 years and \$1,000,000	2 years and \$500,000

(B) *Procurement offences relating to pornography and pornographic performances*

	Proposed Offence	Maximum Penalty (Conviction upon Indictment)
1.	Using, procuring or offering a person under 16 to be pornographically depicted for making pornography or pornographic performances	10 years and \$3,000,000
2.	Using, procuring or offering a person of the age of 16 or above but under 18 to be pornographically depicted in pornography or pornographic performances	5 years and \$1,000,000

(C) *Offences relating to child sex tours*

	Proposed Offence	Maximum Penalty (Conviction upon Indictment)
1.	Arranging child sex tours	10 years and \$3,000,000
2.	Advertising child sex tours	10 years and \$3,000,000
3.	Extra-territorial effect of 24 offences under the Crimes Ordinance	(Please refer to <u>Appendix B</u>)