

立法會
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Paper for the House Committee meeting on 20 June 2003

**Report of the Bills Committee on
Prevention of Child Pornography Bill**

Purpose

This paper reports on the deliberations of the Bills Committee on Prevention of Child Pornography Bill.

Background

2. The Prevention of Child Pornography Bill and the Crimes (Amendment) Bill 1999 (the latter for tackling the problem of child sex tourism) were introduced into the Legislative Council (LegCo) on 7 July 1999, but lapsed at the end of the previous legislative term on 30 June 2000 before priority was accorded for the Bills to be scrutinized by LegCo. In view of the common objective of protection of children against sexual exploitation, the Administration has decided that the two Bills should be combined as one to form the present Prevention of Child Pornography Bill.

The Bill

3. The Bill seeks -
- (a) to create offences of making, producing, publishing, importing, exporting, distributing, advertising and possessing pornography that depicts children under the age of 16;

- (b) to create an offence for any person who uses, procures or offers another person who is under the age of 18 for making pornography, or for a live pornographic performance, in which that other person is pornographically depicted; and
- (c) to extend the application of certain sexual offence provisions to acts committed against children outside Hong Kong and prohibiting the making of any arrangement relating to commission of those acts and advertisements for such arrangement.

The Bills Committee

4. At the House Committee meeting on 25 January 2002, Members formed a Bills Committee to study the Bill. The Bills Committee was activated on 22 March 2002. The membership list of the Bills Committee is in **Appendix I**.

5. Under the chairmanship of Hon Andrew CHENG Kar-foo, the Bills Committee has held 16 meetings with the Administration. The Bill Committee has met with 13 organisations, and has received written submissions from four other organisations. The names of these 17 organisations are listed in **Appendix II**.

6. Members of the Bills Committee also visited the Hong Kong Police Computer Forensics Laboratory on 14 January 2003 to better understand how computer forensics investigation and digital evidence recovery would be conducted.

Deliberations of the Bills Committee

Definition of child pornography

7. Child pornography is proposed to mean -

- "(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, whether or not it is a depiction of a real person and whether or not it has been modified; or
- (b) anything that incorporates a photograph, film, image or depiction referred to in paragraph (a),

and includes data stored in a form that is capable of conversion into a photograph, film, image or depiction referred to in paragraph (a) and anything containing such data."

8. Members have expressed concern about the use of the expression "appears to be a child" in the definition of child pornography, as the expression is not precise and different people may have different impressions as to the age of a person. Members have queried how a person would be determined as appearing to be a child, especially one who is near the age of 16. Members note that the Supreme Court of the United States (US) has struck down a ban on computer-generated images appearing to show children engaged in sex, and have queried why "computer-generated images" are included in the definition.

9. The Administration has explained that a person will not be convicted of a child pornography offence unless the prosecution proves beyond all reasonable doubt that the person depicted is or appears to be under the age of 16. The Bill does not aim at catching depictions of persons who marginally look like under 16. Rather, it aims at catching those that appear to be persons under 16 beyond all reasonable doubt. The effect will be that apart from depictions that are proved beyond all reasonable doubt to be of persons actually under 16, pornographic depictions of persons who are apparently under 16 will also be caught. Therefore, even where the prosecution fails to prove, for example, by producing the birth certificate, that the person depicted is actually under 16, the court may convict if the person depicted appears to be under 16 beyond all reasonable doubt.

10. The Administration agrees that "appears to be" is not a precise expression. However, if the "appears to be" limb is taken out, there will likely be significant enforcement difficulties. With advanced computer technology, it can be very difficult to distinguish a real person from a computer creation or composite. The Administration has pointed out that Hong Kong is not known to be a production centre of child pornography. The majority of child pornography found is imported or transmitted via the Internet. It is therefore often difficult to locate the person depicted and prove his or her actual age by locating the real child depicted. With the "appears to be" test, as long as it is apparent that the person depicted appears to be under 16, a conviction may be supported.

11. According to the information provided by the Administration, the expression "depicted as being" is used in the definition of child pornography in the Criminal Code of Canada which was upheld by the Supreme Court of Canada in its ruling in *R. v. Sharpe* on 26 January 2001. The expression has been held by the Canadian Court to involve an objective test, i.e. 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. Members have suggested that the expression "appears to be a child" be amended along the lines adopted by Canada.

12. Having regard to the concern raised by members, the Administration agrees to replace the expression "appears to be a child" by "depicted as being a child" in the definition of child pornography.

13. Regarding the inclusion of computer-generated images in the definition, the Administration has advised that with advanced technology, child pornography can be made by computer graphics and techniques without using a real child. However, such child pornography can also be used by paedophiles to lure children or arouse their sexual desires which may lead to child abuse. The heinous nature of these computer-generated images is no less serious than child pornography involving real children. Despite the ruling by the US Supreme Court that computer-generated child pornography should not be prohibited, the Administration considers that child pornography, whether computer-generated or involving real children, should be banned in Hong Kong.

Whether publicly displaying child pornography in private premises is an offence under the Bill

14. Clause 2(2) of the Bill provides that for the purpose of this Ordinance, a person publishes any child pornography if he, whether or not for any form of reward distributes, circulates, sells, hires, gives or lends the child pornography to another person; or shows, plays or projects the child pornography to or for another person.

15. Members have sought clarification on whether publicly displaying child pornography in private premises is an offence under the Bill.

16. The Administration has explained that if a person displays child pornography to the public in private premises, other than just hanging the child pornography in private premises, he allows others who visit the premises to see it, this falls within the scope of showing child pornography to another person, and therefore amounts to publishing child pornography. Depending on the circumstances of the case, a person who publicly displays child pornography in private premises may be charged with an offence of publishing child pornography under clause 3(2) of the Bill.

17. The Administration has also pointed out that the policy intent of the Bill is to combat the proliferation of child pornography and to prevent harm to the child depicted that is caused by his/her being exploited for the sexual gratification of others who see pornographic depiction of him/her. A person who shows child pornography to another person in private does cause harm to the child depicted and should be held responsible. Furthermore, even if a person hangs child pornography in his premises and does not allow any other person to enter the premises to see it, he still contravenes the prohibition against possession of child pornography under clause 3(3) of the Bill.

18. At the suggestion of members, the Administration will move a technical amendment to clause 2(2) to improve the drafting.

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

19. To comply with the International Labour Convention No. 182, clause 14 of the Bill amends the Crimes Ordinance to make the use, procurement or offer of a person under the age of 18 for making pornography or for live pornographic performances an offence. In this context, a two-tier definition for pornographic depiction involving children is proposed in the Bill, i.e. for children under the age of 16 and for those above the age of 16 but under 18.

20. Members have expressed concern about the proposed two-tier definition as it is complicated and may cause confusion especially in enforcement. Members have queried the need for the proposal and asked about the problems that may arise if a two-tier definition is not adopted. Members have also pointed out that according to the information provided by the Administration, such a two-tier definition is not found in similar legislation in Australia, Canada, the United Kingdom and the US.

21. The Administration has explained that the proposed two-tier definition 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. In formulating the 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 immature and prone to instigation by others, so they should be better protected under the law. On the other hand, persons aged 16 or above but under 18 are considered to be relatively more mature and have a greater ability to protect themselves. It is proportionate and reasonable for a narrower definition of pornographic depiction to be applicable to this age group.

22. The Administration has further explained that if the definition of pornographic depiction presently proposed for persons aged 16 or above but under 18 is to be applicable to all persons under the age of 18, persons under the age of 16 may not be protected from being used, procured or offered for making certain types of "soft-core" pornography. However, if the definition presently proposed for persons under the age of 16 is to be applicable to any person under the age of 18, such a proposal may be criticized for imposing too high or too strict a standard. In the view of the Administration, the two-tier definition proposal can achieve the purpose of protecting children while not being too strict. The Administration also believes that there will not be particular difficulties in law enforcement and prosecution.

23. Despite the Administration's explanations, members maintain the view that the two-tier definition is complicated and difficult to comprehend. In the light of members' view, the Administration agrees to adopt the definition presently proposed for persons under the age of 16 to be applicable to all persons under the age of 18. The relevant amendment will be made by the Administration, notwithstanding the potential

drawback that the amended provision may be criticized for imposing too high a level of prohibition against visual depiction of persons aged 16 or above but under the age of 18.

Offence of possession of child pornography and related defence

Penalty for possession

24. Under clause 3(3) of the Bill, any person who has in his possession any child pornography (unless he is the only person pornographically depicted in the child pornography) commits an offence and is liable on conviction on indictment to a maximum fine of \$1,000,000 and to imprisonment for five years, or on summary conviction to a maximum fine of \$500,000 and to imprisonment for two years.

The three elements of the possession offence

25. Members are in full support of objective of the Bill to protect children against sexual exploitation. However, members have expressed concern about the proposed offence of possession. Members are concerned that people may possess child pornography in the form of spam e-mail, unsolicited films or possibly publications circulated in public, but may not know that they contain child pornography. Despite the various defences provided in clause 4 of the Bill, for instance, in clause 4(3), it is a defence for child pornography received without request as long as the person endeavoured to destroy it within a reasonable time, members are still worried that innocent people may be caught by the offence. Members have pointed out that a person may receive unsolicited child pornography through electronic means on a recurrent basis. It would be too onerous to require a person to destroy, within a reasonable time, each and every child pornography image he receives unsolicited. Moreover, some people may not be well verse in handling computer, and may have difficulties to even destroy the unsolicited e-mail containing child pornography.

26. Members have also queried who would be held liable for the possession of child pornography found in a flat shared by two persons. Some members have suggested that an express mental element be included in clause 3(3) so that a person who knowingly has in his possession of child pornography commits an offence.

27. In addition, members have expressed concern about placing the evidential burden on the defendant, especially for simple possession offence to establish a defence under clause 4(2) and (3) of the Bill, bearing in mind the unnecessary burden placed on innocent people to adduce evidence.

28. The Administration has explained its policy intent that a person should not be guilty if he received unsolicited publication, e-mail or other electronic data and neither knew nor suspected the nature of the publication, e-mail or other electronic data being child pornography. To establish that an offence under clause 3(3) has been committed by the defendant, the prosecution must prove that -

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

The prosecution has the burden to prove these three elements beyond reasonable doubt. Therefore, if a certain thing is found in a flat shared by two persons, but it cannot be proved beyond all reasonable doubt which person has custody or control over the thing, neither one will be convicted. Likewise, if the jury has a reasonable doubt that something is slipped into the defendant's bag without his knowledge, he must be acquitted. On these three elements, there is no onus of proof on the defendant to adduce evidence to support his innocence.

29. The Administration has pointed out that the possession offence provisions in similar legislation of Australia, Canada and the United Kingdom are all silent on the mental element. The US is the only jurisdiction that includes in its offence provisions an express mental element. Although the word "knowingly" is not included in the legislation, mental element is one of the essential elements to be proved by the prosecution. If the word "knowingly" is included in the offence provision, the prosecution would have to prove at the outset that the defendant knew both that he had the child pornography in his possession and that its exact nature was child pornography. For instance, the Police may have found something that is child pornography in a defendant's bag. There is very often no direct evidence as to the defendant's actual knowledge of the exact nature of that thing being child pornography, let alone proof of that knowledge beyond reasonable doubt. The Administration considers that such an inclusion would cause serious difficulties in prosecuting the offence, thus undermining the efficacy of the legislation.

30. Regarding the evidential burden on the defendant, the Administration has explained that the defence provisions in clause 4(2) and (3) of the Bill only impose on the defendant an evidential burden, but not a legal or persuasive burden. The defendant needs only to adduce evidence to raise the issue of knowledge. 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. If the jury are satisfied beyond reasonable doubt that the accused possessed the impugned material in question but are not satisfied beyond reasonable doubt that he knew that it was child pornography, then the defendant should be acquitted. 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.

31. To address members' concern that innocent people might be accused of possession of child pornography after they have received unsolicited child pornography through e-mail or the Internet, or they come into possession inadvertently in some other way, the Administration has proposed to amend the defence provision in clause 4(2) and 4(5) of the Bill as explained in paragraphs 33 to 37 below.

32. Addressing members' concern about the evidential burden on the defendant, the Administration has proposed an amendment to provide a lower standard of proof in respect of the defence provisions in clause 4. The effect of the proposed amendment is that a defendant charged with an offence of possession (clause 3(3)) is to be taken to have established any fact that needs to be established under the defence provisions, if sufficient evidence is adduced to raise an issue with respect of the fact, and the contrary is not proved by the prosecution beyond reasonable doubt. In addition, the Administration has proposed to expressly provide that the standard of proof is on a balance of probabilities in cases other than possession.

Defence of mistake as to age in possession cases

33. Clause 4(5) provides that it is a charge under section 3 for the defendant to establish that -

- (a) the defendant 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;
- (b) the defendant took all reasonable steps to ascertain the age of the person; and
- (c) in so far as the defendant was able to influence in any way how the person was depicted, the defendant took all reasonable steps to ensure that the person was not depicted as a child.

34. Members have expressed concern that some people, 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, the Administration has proposed to single out clause 4(5)(a) so that the provision by itself will be a defence that a suspect may invoke to defend against a charge under clause 3(3).

Proposed amendments concerning defences to the possession offence

35. Members discussed the proposed amendments put forward by the Administration, and considered that the objective standards in clause 4 relating to defence to a charge under clause 3(3), i.e. offence of possession of child pornography, should be removed as far as practicable. For instance, the reference to "on reasonable grounds" in the defence of mistake as to age in possession cases in clause 4(5)(a) should

be deleted so that it is a defence for the defendant to establish that he believed that the person pornographically depicted in the child pornography was not a child when originally depicted and that the person was not depicted as a child. In respect of clause 4(2), "have any reasonable cause to" should be deleted to form a separate defence provision for a person charged under clause 3(3) so that it is a defence for him to establish that he had not seen the child pornography and did not know, nor did he suspect, it to be child pornography.

36. The Administration is of the view that if all the objective standards in the defence provisions are removed, the prosecution, in order to refute the defence, will need to prove beyond reasonable doubt that the defendant believed that the person depicted was a child and that he believed the depiction was pornographic in nature. This is practically impossible since the defendant's belief is a matter solely within his knowledge. Moreover, the standard of proof to be adopted for assessing whether the defence is established is one of "by adducing evidence to raise an issue", but not "proved beyond reasonable doubt" or even "balance of probabilities".

37. Members maintain the view that if clause 3(3) is to be retained in its present form, the objective standards in the proposed defence provisions in clause 4 should be removed. In the light of members' views, the Administration has agreed to remove the objective standards in the proposed defence provisions, and introduce the relevant amendments.

Liability of courier service operators and Internet service providers

38. Members have expressed concern about the liability of courier service operators and Internet service providers on child pornography materials deposited by their users. Members have requested the Administration to consider exempting courier service operators and Internet service providers which have complied with a code of practice on materials deposited by their users from the offence of possession of child pornography.

39. The Administration has responded that under the existing law, there are various offences of possession, e.g. possession of dangerous drugs, controlled chemicals, and explosives. With the new offence of possession of child pornography, the liability of courier service operators will depend on the extent of the courier's knowledge of the thing they deliver, just as in the case of other existing possession offences. There is no need to treat child pornography differently from other goods delivered by the courier. Concerning the liability of Internet service providers (ISP), the Administration has advised that given the enormous amount of information on the web pages posted or messages transmitted by clients of an ISP, in the absence of evidence to the contrary, ISPs are not taken to have knowledge of the specifics of the web pages or messages nor held responsible for the contents. Moreover, with the proposed defences as now amended in place which will be available to all defendants, including courier service operators and ISPs in case questions are raised on their liability, the

Administration considers that an express provision to exempt their liability is not necessary.

Whether the offence of possession is a strict liability offence

40. Regarding members' query on whether the offence of possession under clause 3(3) is a strict liability offence, the Administration has explained that a strict liability offence is an offence that does not require intention, recklessness or even negligence as to one or more elements in the actus reus. The offence of possession under clause 3(3) does not fit into this description, and hence is not a strict liability offence

Other defences

Defence of mistake as to age (offences other than possession)

41. The Administration has proposed amendments to specifically provide for defence of mistake as to age for offences other than possession referred to in clause 3. For those who make, produce, reproduce, copies, publish, import, or export any child pornography, it is a defence for defendant to established that -

- (a) he took all such steps as were reasonable and practicable in the circumstances of the case to ascertain the age of the person pornographically depicted in the child pornography when originally depicted;
- (b) in so far as the defendant was able to influence in any way how the person was depicted, he took all such steps as were reasonable and practicable in the circumstances of the case to ensure that the person was not depicted as a child; and
- (c) he believed on reasonable grounds that the person was not a child when originally depicted and that the person was depicted as a child.

42. In response to members' query on whether a defendant has taken all reasonable and practicable steps to ascertain the age of the person pornographically depicted in the child pornography in the proposed provision, the Administration has explained that it is necessary to look at the enquires the defendant has made and assess whether on an objective standard what he has done were the reasonable steps he could practicably take in the circumstances of the case. For instance, a producer who plans to produce or make pornography may be considered to have taken reasonable and practicable steps to ascertain the age by requiring the person to be depicted to show his/her identity card to prove his/her age and possibly keep a record of that checking. If the identity card shown in a particular case is apparently a forged document to a reasonable person, further enquiries should be made as far as it is reasonable and practicable.

Artistic merit defence

43. Under the Bill, artistic merit defence is provided for offences under clause 3, i.e. printing, making, producing, reproducing, copying, importing, exporting, publishing, possessing, and advertising child pornography. However, no artistic merit defence is provided for offences under clause 14, i.e. the use, procurement or offer of persons under the age of 18 for making pornography or for live pornographic performances. Members have queried whether artistic merit defence should be provided for the production of child pornography in Hong Kong.

44. The Administration has explained that if a person producing child pornography is directly involved in manipulating the child during the production, he may be prosecuted for using a child for making pornography under clause 14 for which artistic merit defence is not available. On the other hand, a person may produce child pornography without using a real child, for example, by making use of computer-generated images. In such a case, artistic merit defence should be available for the person who did not make any contact with a real child. In the view of the Administration, artistic merit defence should be available for production of child pornography from a perspective of balancing protection of children against safeguarding freedom of speech.

45. Regarding members' query on whether it is appropriate for the courts to determine whether an article which is alleged to constitute child pornography has artistic merit, the Administration has advised that before the defence of artistic merit may be invoked, the defendant will have to adduce evidence to satisfy the court that the impugned depiction has artistic merit. Despite the fact that different people may have different views on artistic merit, it is up to the court to come to a decision having regard to a variety of factors and evidence, including expert opinion and documentation available.

46. The Administration has pointed out that a defence in the interests of art is also provided in section 28 of the Control of Obscene and Indecent Articles Ordinance (COIAO). The Criminal Code of Canada also provides a defence for a representation or written material that constitutes child pornography if it has artistic merit. The Administration is of the view that the court is in the best position to make a judgment, having regard to the circumstances of the case.

Forfeiture of child pornography and other things seized

47. Clause 9 of the Bill provides for the forfeiture of child pornography and other things seized which are suspected to be relating to child pornography. In response to members' query on whether items liable to forfeiture would include money raised from offences of child pornography, the Administration has advised that if money, for example, is found at the scene where the child pornography is sold, the money may be seized as evidence and liable to forfeiture under the Bill. However, proceeds of offences

of child pornography will not be forfeited. The Administration does not consider it justified to propose inclusion of child pornography offences in Schedule 1 of the Organized and Serious Crimes Ordinance (OSCO), as the production, publication and possession, etc. of such offences have not developed as an organized and serious crime in Hong Kong. However, the Administration will keep the situation under review and would propose amendments to Schedule 1 of OSCO when the situation so warrants.

Rationale for child pornography to be dealt with by the court instead of by the Obscene Articles Tribunal

48. Clause 22(b) of the Bill provides that the Obscene Articles Tribunal (OAT) shall refuse to classify an article if it is of the opinion that the article may be child pornography within the meaning of the Bill. Members have queried the rationale for child pornography to be dealt with by the court, instead of by the OAT, and what criteria will be used by the OAT to refuse classification of an article. Members have also suggested that the Bill should provide for the OAT to classify an article as child pornography, and that the definition of child pornography be provided in the COIAO.

49. The Administration has pointed out that the focus of the COIAO and the Bill are different. The former is on the protection of public morals and persons under the age of 18 from the harmful effects of obscene and indecent materials, while the latter is on the protection of children from sexual exploitation. The mere possession of obscene or indecent articles is not an offence under COIAO. On the other hand, the Bill proposes to prohibit the production, distribution, publication and possession of child pornography, as well as the procurement of children for making pornography. Therefore, amendments to the COIAO as suggested would not be able to address offences which are not related to publication.

50. The Administration has further pointed out that the OAT makes a classification of an article based on various considerations, including the general community standards of morality and decency. The COIAO does not prescribe a specific definition or a specified list of articles which should be classified as indecent or obscene having regard to the prevailing standard of obscenity and indecency generally accepted by reasonable members of the community. Including child pornography in the definition of an obscene article will inevitably tamper with the existing classification principles and mechanism under the COIAO. A judgement of whether an article is child pornography requires the consideration of a host of evidence, circumstances and expert opinions in the light of the definitions of child pornography and pornographic depiction in the Bill, for instance, an assessment of the age of the person depicted. As the standard of proof is "beyond reasonable doubt", the court is in the best position to make such a judgment, having regard to all relevant factors. The Administration considers that child pornography should be dealt with by the court under a legislative scheme separate from that under the COIAO.

51. Regarding the operation of the provision, the Administration has advised that on receipt of an application for classification of an article, the OAT would refuse to classify the article if it considers that the article may be child pornography having regard to the definition in the Bill.

Extra-territorial effect of sexual offence provisions listed in Schedule 2 of the Crimes Ordinance

52. The new section 153P of the Crimes Ordinance to be added by the Bill extends the application of 24 sexual offence provisions listed in the new Schedule 2 to the Crimes Ordinance to an act committed against a child outside Hong Kong if the defendant or the child has connections with Hong Kong. Valid marriage between the defendant and the victim will be a defence to a charge of extra-territorial sexual offences under the Bill provided that the victim consented to the act.

53. On the rationale for the proposed provisions, the Administration has explained that sexual exploitation of children is known to have international dimensions. Child sex tourism is known to exist around the world, and has inherent to it an extra-territorial element. Extra-territorial effect of the relevant offence provisions is essential for combating child sex tourism. Permanent residents and persons who ordinarily reside in Hong Kong, irrespective of their nationality, should be prohibited from engaging in the heinous acts of child sex tourism occurred outside Hong Kong. They should therefore be covered under the Bill.

54. Regarding the enforcement of the provisions, the Administration has explained that if a person who is a Hong Kong permanent resident or who ordinarily resides in Hong Kong commits an offence under new Schedule 2 overseas, he could be arrested and prosecuted before Hong Kong courts when he returns to Hong Kong. In this situation, evidence/witnesses will be required from the place where the offence was committed. This may involve liaison at the law enforcement level and/or a formal request for mutual legal assistance. Depending on the circumstances, the perpetrator may be extradited and then prosecuted in Hong Kong.

55. Members have queried whether the defence provided in the proposed new section 153P(3) of the Crimes Ordinance would also be available to a husband procuring his wife under the age of 16 for an unlawful sexual act with a third person. As this is not the policy intent, the Administration will introduce amendments to narrow down the defence by referring to an offence involving a sexual act done by the defendant with or to another person, while the two other elements of the defence, i.e. marriage and consent, will be retained. Thus, the defence as amended will not apply to offences involving assault of the victim, abduction or detention of the victim or procuring a sexual act with a third person.

56. Members have asked why certain substantive offences under the part of sexual offences and the part of exploitation of other persons for sexual purpose in the Crimes Ordinance are not included in new Schedule 2. Members have also queried why extra-territorial effect is not extended to cover offences committed against mentally incapacitated persons who may be above the age of 16 but is mentally under 16.

57. The Administration has explained that the 24 offences are included because they relate more directly to sexual exploitation of children. Other sexual offences, such as living on earnings of prostitution of others, keeping a vice establishment etc. are considered less directly relevant. As the purpose of the proposal is to deal with a particular problem by extending the application of the existing sexual offences under the Crimes Ordinance, the Administration considers that efforts should be focused on the most directly relevant offences and the net should not be casted too wide. Extra-territorial effect is therefore not proposed to be extended to offences which are not likely to be the principal offences committed by paedophiles.

58. On the question of mentally incapacitated persons, the Administration has explained that as the Bill primarily seeks to deal with the protection of children against sexual exploitation, extending the extra-territorial effect to those who are above the age of 16 would be outside the scope of the Bill. Besides, there is no indication or information to suggest that there exists a problem of people travelling overseas to sexually exploit mentally incapacitated persons or local mentally incapacitated persons being so exploited overseas. The present approach is consistent with the United Nations Convention on the Rights of the Child.

Publicity plan after enactment of the Bill

59. To promote public awareness of the implementation of the Bill after its enactment, the Administration would carry out publicity on the key contents of the Bill, including the message that possessing child pornography is a criminal offence. The publicity plan of the Administration would include broadcasting of Announcement of Public Interest on television and radio, and distribution of posters and pamphlets to provide more information on the Bill. Posters would also be put up at appropriate public places, including the Public Enquiry Centres of the Home Affairs Department. In addition, the Police will also set up a hotline at the initial stage after commencement of the Bill to handle enquiries and non-urgent reports of suspected cases under the Bill. For urgent cases, members of the public are advised to report to the nearest police stations or dial 999 in case of emergency.

Committee Stage amendments

60. Apart from the Committee Stage amendments (CSAs) in paragraphs 12, 18, 23, 32, 34, 37, 41 and 55 above, the Administration has agreed to move other minor and technical amendments to the Bill. A copy of the draft CSAs is in **Appendix III**.

Follow-up action by the Administration

61. The Administration has undertaken to carry out publicity on the key contents of the Bill as detailed in paragraph 59 above.

Recommendation

62. The Bills Committee supports that the Second Reading debate on the Bill be resumed at the Council meeting on 9 July 2003, subject to the CSAs to be moved by the Administration.

Advice Sought

63. Members are invited to note the deliberations of the Bills Committee and the recommendation of the Bills Committee in paragraphs 62 above.

Council Business Division 2
Legislative Council Secretariat
18 June 2003

**Bills Committee on
Prevention of Child Pornography Bill**

Membership list

Chairman	Hon Andrew CHENG Kar-foo
Members	Dr Hon David CHU Yu-lin, JP Hon Cyd HO Sau-lan Hon Eric LI Ka-cheung, JP Hon Margaret NG Hon CHEUNG Man-kwong Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP Hon SIN Chung-kai Hon YEUNG Yiu-chung, BBS Hon Miriam LAU Kin-yee, JP Hon CHOY So-yuk Hon Henry WU King-cheong, BBS, JP Hon Michael MAK Kwok-fung Hon WONG Sing-chi Hon Audrey EU Yuet-mee, SC, JP Hon MA Fung-kwok

(Total : 16 Members)

Clerk Mrs Sharon TONG LEE Yin-ping

Legal Adviser Mr Stephen LAM

Date 17 April 2002

Bills Committee on Prevention of Child Pornography Bill

A. Organisations and individuals which/who have given oral representations to the Bills Committee

1. End Child Sexual Abuse Foundation
2. Hong Kong Joint Secretariat for Colloquium of Religious Leaders
3. Movie Producers and Distributors Association of Hong Kong Limited
4. The Hong Kong Committee on Children's Rights
5. Against Child Abuse Limited
6. Hong Kong Film Directors' Guild
7. The Society for Truth and Light
8. Hong Kong College of Paediatricians
9. Hong Kong Christian Service
10. Hong Kong Internet Service Providers Association
11. Hong Kong Web Hosting Association
12. Hong Kong Kowloon and New Territories Motion Picture Industry Association Limited
13. The Law Society of Hong Kong

B. Organisations and individuals which/who have provided written submissions only

1. Oxfam Hong Kong
2. Committee on Child Abuse
3. Hong Kong Bar Association
4. Social Workers Registration Board

PREVENTION OF CHILD PORNOGRAPHY BILL

COMMITTEE STAGE

Amendments to be moved by the Secretary for Security

<u>Clause</u>	<u>Amendment Proposed</u>
2(1)	<p>(a) In the definition of "child pornography", in paragraph (a), by deleting "appears to be" and substituting "is depicted as being".</p> <p>(b) In the definition of "pornographic depiction", in paragraph (a), by deleting "who is or appears to be engaged in explicit sexual conduct;" and substituting "as being engaged in explicit sexual conduct, whether or not the person is in fact engaged in such conduct; or".</p>
2(2)	<p>By deleting paragraph (b) and substituting -</p> <p>"(b) shows the child pornography in any manner whatsoever to another person (including but not limited to showing, playing or projecting the child pornography to or for another person using any machinery or apparatus and publicly displaying the child pornography).".</p>
4	<p>By deleting the clause and substituting -</p> <p>"(1) It is a defence to a charge under section 3 for the defendant to establish -</p> <p>(a) that the depiction that is alleged to constitute child pornography has artistic merit;</p> <p>or</p>

(b) 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).

(2) It is a defence to a charge under section 3 (other than section 3(3)) for the defendant to establish -

(a) that he committed the act that is the subject of the charge for a genuine educational, scientific or medical purpose;

(b) that the act that is the subject of the charge otherwise served the public good and did not extend beyond what served the public good;

(c) that he had not seen the child pornography and did not know, nor did he have any reasonable cause to suspect, it to be child pornography; or

(d) that -

(i) he took all such steps as were reasonable and practicable in the circumstances of the case to ascertain the age of the person pornographically depicted in the child pornography when originally depicted;

(ii) in so far as the defendant was able to influence in any way how the person was depicted, he took all such steps as were reasonable and practicable in the circumstances of the case to ensure that the person was not depicted as a child; and

(iii) he believed on reasonable grounds that the person was not a child when originally depicted and that the person was not depicted as a child.

(3) It is a defence to a charge under section 3(3) for the defendant to establish -

(a) that his possession of the child pornography was for a genuine educational, scientific or medical purpose;

(b) that his possession of the child pornography otherwise served the public good and did not extend beyond what served the public good;

(c) that he had not seen the child pornography and did not know, nor did he suspect, it to be child

pornography;

- (d) that he had not asked for any child pornography and, within a reasonable time after it came into his possession, he endeavoured to destroy it; or
- (e) that he believed that the person pornographically depicted in the child pornography was not a child when originally depicted and that the person was not depicted as a child.

(4) Unless subsection (5) applies, a defendant is to establish any fact that needs to be established for the purpose of a defence under this section on the balance of probabilities.

(5) A defendant charged with an offence under section 3(3) is to be taken to have established any fact that needs to be established for the purpose of a defence under subsection (3)(c), (d) or (e) if -

- (a) sufficient evidence is adduced to raise an issue with respect to the fact; and
- (b) the contrary is not proved by the prosecution beyond reasonable doubt."

5(5) By adding -
"vehicle" (車輛) does not include a military vehicle;"

8(1)(a) By deleting "and" and substituting "or".

10(2)(b) By deleting "or (4)" and substituting ", (2)(a) or

(b) or (3)(a) or (b)".

11(1)(a) By adding "and" after the semicolon.

14 (a) By deleting the proposed section 138A(4) and substituting -

"(4) For the purposes of this section, to depict a person pornographically means -

(a) to visually depict a person as being engaged in explicit sexual conduct, whether or not the person is in fact engaged in such conduct; or

(b) to visually depict, in a sexual manner or context, the genitals or anal region of a 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 paragraph (b), fall within that paragraph."

(b) In the proposed section 138A(5), in the definition of "pornography", in paragraph (a), by deleting ", whether or not it is a depiction of a real person".

16 (a) By deleting the proposed section 153P(3) and substituting -

"(3) Where a defendant is charged with an offence that is an offence by virtue of subsection (1) or (2) and

involves a sexual act done by him with or to another person, it is a defence for the defendant to establish that -

(a) at the time of the sexual act, there existed between the defendant and that other person a marriage that was valid, or recognized as valid, under the law of -

(i) the place where the marriage was solemnized;

(ii) the place where the sexual act was done; or

(iii) the place of the defendant's residence or domicile;

(b) when it was solemnized, the marriage was genuine; and

(c) at the time of the sexual act, that other person consented to the sexual act."

(b) In the proposed section 153Q(4), by deleting "himself".