

LEGISLATIVE COUNCIL BRIEF

PREVENTION OF CHILD PORNOGRAPHY BILL

INTRODUCTION

At the meeting of the Executive Council on 15 June 1999, the Council **ADVISED** and the Chief Executive **ORDERED** that the Prevention of Child Pornography Bill, at the Annex, should be introduced into the Legislative Council to provide for various offences relating to child pornography.

BACKGROUND AND ARGUMENT

Present Position and Argument

2 Child pornography is a serious form of sexual exploitation of children. It is more harmful than adult pornography as children are less able to make independent decisions, and thus are vulnerable to extremely harmful exploitation. Child pornography is often used to break down children's barriers and encourage them to participate in other more heinous acts. There have been vocal calls from Legislative Council Members and non-

governmental organisations to enact specific legislation against child pornography.

3 Under Article 34 of the United Nations Convention on the Rights of the Child (UNCRC), which applies to Hong Kong, children should be protected from all forms of sexual exploitation and sexual abuse.

4 At present, there is no law treating child pornography as a specific offence. The Control of Obscene and Indecent Articles Ordinance (COIAO, Chapter 390) covers both adult and child pornography. It is an offence under section 21 of the COIAO to publish, to possess-for-publication or to import-for-publication obscene articles, including child pornography. Offenders are liable to a maximum fine of \$1 million and to imprisonment for a maximum of three years. The COIAO, however, does not provide for an offence of possession.

5 There are provisions in the Crimes Ordinance (Chapter 200) that protect children from sexual abuse. It indirectly prohibits the exploitation of children in the production of child pornography. For example, unlawful sexual intercourse with a girl under the age of 13 is subject to a maximum penalty of life imprisonment under section 123 of the Crimes Ordinance and indecent conduct towards a child under the age of 16 is subject to a maximum imprisonment of 10 years under section 146 of the Ordinance. However, the Crimes Ordinance does not directly deal with the production of child pornography.

6 The following figures for the period of 1 April 1995 to 31 March 1999 illustrate the problem of sales, publication and possession of child pornography in Hong Kong -

	Number of Cases with Prosecution		Number of Cases actionable but without Prosecution*		Total
	Arisen from Internet	Arisen from traditional means (such as publication or other materials)	Arisen from Internet	Arisen from traditional means (such as publication or other materials)	
1995/96	1	0	1	0	2
1996/97	2	2	0	0	4
1997/98	1	1	9	0	11
1998/99	0	0	5	2	7
Total	4	3	15	2	24

(* Cases which were actionable but were not prosecuted because there was insufficient evidence or would be actionable under the Bill when possession (apart from possession for the purpose of publication) became an offence.)

7 While the problem of child pornography is not very serious now, it may worsen quickly if no measures are taken to tackle the problem. Of particular concern is child pornography over the Internet because of the ease with which it can be distributed. Police records show that activities of child pornography were detected on Internet in Hong Kong in 45 newsgroups, 34 e-mail addresses and 43 web-sites during the period from 1 April 1995 to 31 March 1999. While some of the Internet sites ceased to exist during Police investigation, most other cases were not actionable due to insufficient evidence or the fact that the COIAO did not provide for possession offence. Several did lead to successful prosecutions and one e-

mail account was terminated by the Internet Service Provider (ISP) concerned.

8 While we should be careful that our proposals do not interfere with the development of the Internet as only a minute proportion of the Internet is devoted to child pornography, Police figures above do show that child pornography does pose a problem on the Internet. To demonstrate our commitment to protect children from sexual abuse, we propose to formulate new legislation with sufficient deterrent effect to prohibit child pornography, including child pornography on the Internet.

9 We believe that a new bill, as opposed to an amendment bill to amend the COIAO, is a better means to tackle child pornography. We consider that child pornography is a much more serious crime than offences covered by the COIAO and is arguably different in nature. The physical or psychological harm inflicted on children by paedophiles is likely to be more long-lasting and more serious. There is a need to tackle child pornography at source by deterring demand. We therefore propose to introduce a new type of offence, i.e. possession of child pornography, in our proposed bill, which is non-existent in the COIAO. The proposed legislation will also provide for much heavier penalties to reflect the seriousness of the offences. The formulation of new legislation to tackle child pornography will send a strong and clear signal to the community that we would not tolerate such heinous acts. Indeed, many countries, including Australia, USA and Canada, have enacted specific legislation to deal with the problem of child pornography.

The Proposal

- 10 The proposed legislation will -
- (a) define child pornography as any means that shows a person who is or who looks like a child under the age of 16 engaging in sexual activity or depicted in an indecent sexual manner or context. The definition of the term “child pornography” will cover computer files or electronic data which can be transmitted through the Internet, as well as pseudo-photographs, e.g. computer graphics. However, statutory defences will be available in cases where a person has a legitimate cause for distributing, showing or possessing child pornography; or where a person has not seen the child pornography and does not know the material to be child pornography. It will also be a defence if a person has not asked for any child pornography and has endeavoured to dispose of it after it comes into his possession;
- (b) prohibit the printing, making, producing, reproducing, copying, publishing and distribution of child pornography. The maximum penalty is a fine of \$2 million and imprisonment for eight years on conviction on indictment and a fine of \$1 million and imprisonment for three years on summary conviction;
- (c) create an offence for the possession of child pornography. The maximum penalty is a fine of \$1 million and imprisonment for

five years on conviction on indictment and a fine of \$500,000 and imprisonment for two years on summary conviction;

- (d) prohibit the advertisement of child pornography. The maximum penalty is a fine of \$2 million and imprisonment for eight years on conviction on indictment and a fine of \$1 million and imprisonment for three years on summary conviction; and
- (e) criminalise the procurement or employment of children under the age of 16 for making child pornography. The maximum penalty is a fine of \$3 million and imprisonment for 10 years on conviction on indictment.

11 The proposed maximum imprisonment term for possessing child pornography, being five years, is the same as those in USA, Canada and Australia.

12 For procurement or employment of children for production of child pornography, the proposed maximum imprisonment term is the same as that for “indecent conduct towards a child under the age of 16” under section 146 of the Crimes Ordinance. For advertisement and distribution of child pornography, we propose to set the maximum imprisonment at eight years, which reflects its relative seriousness as compared with the proposed offences of possession and procurement.

13 In introducing legislation criminalising the possession of child pornography, we have carefully considered the issue of child pornography

transmitted through the Internet. ISPs can be content providers or service providers. In the former case, the content provided by an ISP can be fully controlled. It is therefore reasonable to hold the ISP concerned responsible for the legality or otherwise of the content. However, in the latter case, the ISP re-sells bulk access capacities and provides temporary storage space to customers in the form of home pages, e-mail accounts, news groups, etc. The content is not within the control of the ISP concerned. It is therefore not practicable or reasonable to require the ISP concerned to patrol such temporary storage space or transit traffic for illegal material.

14 A legitimate defence clause has been included in the proposed legislation to address the above concern so that ISP providing only bulk access capacities and temporary storage space could invoke a defence of not knowing nor having any cause to suspect that child pornography is involved. For those who inadvertently come across a web site carrying child pornography, they will not be caught under the proposed legislation because possession offence already encompasses an element of knowledge or intent, which the prosecution must prove. They may also invoke a defence of not having asked for child pornography and of having endeavoured to dispossess it. Although not specified in the proposed legislation, legitimate causes generally include medical research, education or news reporting purposes. To protect the rights of privacy and freedom of speech, law enforcement officers are required to apply for warrants from a magistrate for conducting searches in premises.

15 We believe that the above proposals could bring the following benefits -

- a) it would be a step forward in implementing the UNCRC. Many countries have enacted legislation against the possession of child pornography. With the introduction of the proposed legislation, Hong Kong will be seen as contributing its part in the world-wide fight against child pornography;
- b) more stringent legislation can help protect children who are vulnerable and incapable of making independent decisions;
- c) it will send a strong message to the community that such heinous acts will not be tolerated; and
- d) making possession of child pornography an offence will tackle the problem at source by deterring demand for such articles.

THE BILL

16 The main provisions are -

- (a) Clause 3 creates various offences relating to child pornography and stipulates their respective maximum penalties. Major offences include the making, producing, publishing, importing, distributing of child pornography. Possession and advertising of child pornography and procurement and employment of a

person under the age of 16 for making child pornography will also be prohibited.

- (b) Clause 4 provides for defences to charges under the proposed legislation, except for a procurement or employment offence. The defence includes grounds of having a legitimate cause to deal with child pornography or not having seen and not knowing that child pornography is involved. Other defences specifically for possession offence include not having asked for child pornography and having endeavoured to dispossess it within reasonable time.
- (c) Clause 5 provides powers for police officers or members of the Customs and Excise Service to search and seize child pornography from specified places by warrant. Clause 6 sets out their ancillary powers in executing a warrant. Clause 7 confers upon them the power to seize child pornography in a public place. Clause 8 provides for an offence and a penalty for any person obstructing the exercise of powers or the execution of a warrant by police officers or members of the Customs and Excise Service.
- (d) Clauses 9 to 11 provide for the forfeiture of any child pornography and any other things seized and for the procedures relating to the forfeiture. Clause 12 stipulates that if a magistrate, upon the application of any public officer, is satisfied that any child pornography is publicly displayed, he

may order the owner of the building to remove or efface that child pornography. Clause 13 sets out the procedures before such an order is made.

LEGISLATIVE TIMETABLE

17 The legislative timetable will be -

Publication in the Gazette	25 June 1999
First Reading and commencement of Second Reading debate	30 June 1999
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

BASIC LAW IMPLICATIONS

18 The Department of Justice advises that the Bill does not conflict with those provisions of the Basic Law carrying no human rights implications.

HUMAN RIGHTS IMPLICATIONS

19 The Department of Justice advises that the proposed legislation is consistent with the human rights provisions of the Basic Law.

BINDING EFFECT OF THE LEGISLATION

20 The Bill applies to all persons.

FINANCIAL AND STAFFING IMPLICATIONS

21 The Child Protection Policy Unit of the Police, which is already in operation, will co-ordinate, among other things, resources available in Police Districts in implementing the proposed legislation. The Computer Crime Section of the Police will be involved in tackling child pornography on the Internet, whenever necessary. The Customs and Excise Department will also have a part to play in enforcing the proposed legislation. The additional workload arising from the proposed legislation will be absorbed from within the existing resources of the Police and the Customs and Excise Department.

22 There will be additional workload for the Judiciary arising from the warrant system and the new offences created under the Bill. The Judiciary will also absorb the additional workload from within its existing resources.

PUBLIC CONSULTATION

23 The Legislative Council Panel on Security and the Fight Crime Committee were consulted in September 1998 and they both supported the proposals. Two rounds of public consultation were conducted in November 1998 and February 1999 with over 80 selected organisations including social welfare agencies, youth organisations, concern groups, and associations in the fields of information technology, mass communication and law. All of them supported the proposals in principle.

PUBLICITY

24 A press release and a Legislative Council brief will be issued on 23 June 1999. A spokesman will be available for answering media enquiries.

ENQUIRIES

25 Any enquiries to this brief could be directed to Mr Tony LAM, Assistant Secretary for Security, at 2810 2433.

Security Bureau
23 June 1999

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A BILL

To

Provide for the prohibition of the production, possession and proliferation of child pornography and for connected purposes.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Prevention of Child Pornography Ordinance.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Security by notice in the Gazette.

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires -

"authorized officer" (獲授權人員) means any person authorized by a warrant issued under section 5; "child pornography" (兒童色情物品) means -

(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;

"film" (影片) means -

(a) a cinematograph film and includes any sound-track associated with such film;

- (b) a videotape or laserdisc and includes any sound-track associated with such videotape or laserdisc;
- (c) a still film and includes any sound-track associated with such film;
- (d) any other record of visual moving images that is capable of being used for the subsequent screening of those images and includes any sound-track associated with such record;
- (e) any combination of the films referred to in paragraphs (a), (b), (c) and (d); or
- (f) an excerpt or a part of a film referred to in paragraph (a), (b), (c), (d) or (e);

"photograph" (照片) includes the negative as well as the positive version of a photograph;

"publication" (刊物) includes books, periodicals, magazines, posters, placards and billboards;

"still film" (定畫影片) means a slide, or a series of slides, including single frames of a film, of visual non-moving images that is or are capable of being used for the subsequent screening of those images.

(2) In this Ordinance references to indecently depicting a person shall be construed as references to depicting a person engaging in sexual activity or depicting a person in an indecent sexual manner or context.

3. Offences relating to child pornography

(1) Any person who prints, makes, produces, reproduces, copies, publishes or imports any child pornography commits an offence and is liable -

- (a) on conviction upon indictment to a fine of \$2,000,000 and to imprisonment for 8 years; or
- (b) on summary conviction to a fine of \$1,000,000 and to imprisonment for 3 years.

- (2) Any person who -
 - (a) gives or lends any child pornography, whether or not for any form of reward; or
 - (b) distributes or shows any child pornography,commits an offence and is liable -
 - (i) on conviction upon indictment to a fine of \$2,000,000 and to imprisonment for 8 years; or
 - (ii) on summary conviction to a fine of \$1,000,000 and to imprisonment for 3 years.
- (3) Any person who has in his possession any child pornography (unless he is the only person indecently depicted in the child pornography) commits an offence and is liable -
 - (a) on conviction upon indictment to a fine of \$1,000,000 and to imprisonment for 5 years; or
 - (b) on summary conviction to a fine of \$500,000 and to imprisonment for 2 years.
- (4) Any person who publishes or causes to be published any advertisement likely to be understood as conveying that any person distributes or shows any child pornography or intends to do so commits an offence and is liable -
 - (a) on conviction upon indictment to a fine of \$2,000,000 and to imprisonment for 8 years; or
 - (b) on summary conviction to a fine of \$1,000,000 and to imprisonment for 3 years.
- (5) Any person who employs a person under the age of 16 for the purposes of making child pornography indecently depicting the second-mentioned person or procures the second-mentioned person to be indecently depicted commits an offence and is liable on conviction upon indictment to a fine of \$3,000,000 and to imprisonment for 10 years.

4. Defence

(1) Where a person is charged with an offence under section 3(1), (2), (3) or (4), there shall be a defence for him if it is established by evidence that -

- (a) he had a legitimate cause for doing the act mentioned in section 3(1), (2) or (4) or having the child pornography in his possession (as the case may be); or
- (b) he had not himself seen the child pornography and did not know, nor did he have any cause to suspect, it to be child pornography.

(2) Without prejudice to subsection (1), where a person is charged with an offence under section 3(3), there shall be a defence for him if it is established by evidence that he had not asked for any child pornography and after it came into his possession he endeavoured to destroy it within a reasonable time.

(3) It is not a defence to a charge under section 3 that the defendant believed that a person depicted in a depiction that is alleged to constitute the child pornography was or was depicted as being 16 years of age or more unless -

- (a) the person indecently depicted was 16 years of age or more;
- (b) the defendant took all reasonable steps to ascertain the age of that person; and
- (c) where the person was 16 years of age or more, the defendant took all reasonable steps to ensure that he was not depicted as being under the age of 16.

5. Search and seizure under warrant

(1) A magistrate may, if he is satisfied by information on oath by a police officer or member of the Customs and Excise Service that there

is reasonable ground for suspecting that there is in or on any premises, place, vessel, aircraft or vehicle -

- (a) any thing in respect of which an offence under section 3 has been or is being or is about to be committed; or
- (b) any thing which is, or contains, evidence of the commission of any such offence,

issue a warrant authorizing any person being a police officer or member of the Customs and Excise Service to enter such premises, place, vessel, aircraft or vehicle, and search for, seize, remove and detain any such thing.

(2) An authorized officer may -

- (a) if he is a police officer, call on any member of the Customs and Excise Service; or
- (b) if he is a member of the Customs and Excise Service, call on any police officer,

to assist him in the exercise of the powers conferred by this section.

(3) An authorized officer or an assisting officer may, at any time of the day or night

-

- (a) enter and search any premises or place named in the warrant; or
- (b) stop, board and search any vessel, aircraft or vehicle named in the warrant.

(4) An authorized officer or an assisting officer may seize, remove and detain -

- (a) any thing in respect of which he reasonably suspects that an offence under section 3 has been or is being or is about to be committed; and
- (b) any thing which he reasonably suspects to be, or to contain, evidence of the commission of such an offence.

(5) In this section -

"aircraft" (飛機) does not include a military aircraft;

"vessel" (船隻) does not include a ship of war or a ship having the status of a ship of war.

6. Ancillary powers of officers under warrant

An authorized officer or an assisting officer may in relation to his powers under a warrant -

- (a) use such force as is reasonably necessary to enter any premises or place which he is empowered to enter and search;
- (b) use such force as is reasonably necessary to stop, board, or search any vessel, aircraft or vehicle which he is empowered to stop, board and search;
- (c) use such force as is reasonably necessary to remove any person or thing obstructing him in the exercise of those powers;
- (d) detain any person found in or on any premises, place, vessel, aircraft or vehicle which he is empowered to enter and search until it has been searched; and
- (e) prevent any person from approaching, boarding or leaving any vessel, aircraft or vehicle which he is empowered to enter and search until it has been searched.

7. Seizure by police officer or member of the Customs and Excise Service

In addition to any power he may have under section 5, any police officer or member of the Customs and Excise Service may seize, remove and detain -

- (a) any thing in a public place, in respect of which he reasonably suspects that an offence under section 3 has been committed or is being committed; and

- (b) any thing in a public place, which he reasonably suspects to be, or to contain, evidence of the commission of such an offence.

8. Obstruction

- (1) Any person who -
 - (a) obstructs an authorized officer or an assisting officer in the exercise of any power conferred by this Ordinance; or
 - (b) fails to comply with any reasonable requirement, direction or demand given or made by an authorized officer or an assisting officer in the execution of the warrant,

commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 6 months.

(2) Any person who obstructs any police officer or member of the Customs and Excise Service in exercising a power conferred by section 7 commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months.

9. Liability to forfeiture

(1) Any child pornography that has come into the possession of the police or the Customs and Excise Service shall be liable to forfeiture.

- (2) Any -
 - (a) machinery or apparatus used for projecting or showing any child pornography; or
 - (b) machinery, plate, implement, utensil, photographic film or material used for the purpose of an offence under section 3(1),

shall be liable to forfeiture.

(3) Any thing seized, removed or detained under section 5 or 7 shall be liable to forfeiture.

(4) Subsection (2) does not apply to anything that is used by a public officer in the due execution of his duties.

10. Order and direction for forfeiture

(1) Subject to subsection (2) and section 11, where an application is made to a magistrate for an order for forfeiture, he may, in the case of any thing that is before him and is liable to forfeiture under section 9, order it to be forfeited.

(2) An order for forfeiture shall not be made under subsection (1) if any ground of defence under section 4 is proved.

(3) An order for forfeiture of any thing may be made under subsection (1) notwithstanding that no person is convicted of any offence in connection with that thing.

(4) Any thing which is ordered to be forfeited under subsection (1) shall be disposed of in such manner as the magistrate directs.

11. Procedure in relation to forfeiture

(1) Subject to subsections (3) and (4), before making an order for forfeiture of any material or thing under section 10, the magistrate shall issue a summons to -

(a) the occupier of any premises or any place or, in the case of a stall, the owner or the occupier of the stall, in or from which the material or thing was seized;

(b) the owner of the material or thing seized,

to appear on a day specified in the summons to show cause why the material or thing should not be forfeited.

(2) In addition to any person mentioned in subsection (1), any other person being the producer or manufacturer of any material or thing seized or a person into whose hands any such material or thing may have passed before seizure, or a person who has an interest in any material or thing seized, may appear before the magistrate on the day specified in the summons to show cause why the material or thing should not be forfeited.

(3) If the magistrate is satisfied that any person specified in subsection (1) cannot for any reason be found or ascertained, he may dispense with the issue of a summons to that person.

(4) If any summons issued under subsection (1) has not for any reason been served and the magistrate is satisfied that all reasonable efforts were made to serve the summons on the person named in the summons he may make an order for forfeiture under section 10 notwithstanding that the summons was not served and that the person named in the summons has not been given an opportunity to show cause why the material or thing should not be forfeited.

(5) An order for forfeiture of any material or thing shall, unless the magistrate considers that there are special reasons for directing otherwise, apply to the whole of the material or thing.

12. Obliteration of child pornography

(1) If, upon the application of any public officer, a magistrate is satisfied that any child pornography is publicly displayed on any building or other structure, he may order the owner of the building or structure to remove or efface that child pornography.

(2) If a person against whom an order is made under subsection (1) fails to comply with the order within the time specified in the order, or if no time is specified, within a reasonable time, the magistrate may by warrant empower any police officer, with such assistance as may be

necessary, to enter and if necessary to break into or forcibly enter such premises or place and execute that order.

(3) A police officer in executing an order under subsection (1) shall have all the powers of a police officer acting in the execution of a warrant under section 5, including the powers mentioned in section 6.

(4) The Commissioner of Police may apply to a magistrate for an order that a person who has failed to comply with an order made against him under subsection (1) shall pay any expenses reasonably incurred by a police officer in the execution of the order under this section and the magistrate may make an order for such payment.

13. Procedure in relation to obliteration

(1) Before making an order to remove or efface any child pornography under section 12 the magistrate shall, unless he is satisfied that the owner of the building or other structure mentioned in that section cannot for any reason be found or ascertained, issue a summons to him to appear on a day specified in the summons to show cause why an order should not be made to remove or efface that child pornography.

(2) In addition to the person mentioned in subsection (1) any other person being the owner, producer or manufacturer of the child pornography mentioned in section 12 may appear before the magistrate on the day specified in the summons to show cause why the order to remove or efface that child pornography should not be made.

(3) Subsections (4) and (5) of section 11 shall apply in relation to an order to remove or efface child pornography under section 12 as they apply in relation to an order for forfeiture under section 10.

Consequential Amendments

Customs and Excise Service Ordinance

14. Ordinances referred to in sections 17 and 17A

Schedule 2 to the Customs and Excise Service Ordinance (Cap. 342) is amended by adding "Prevention of Child Pornography Ordinance (of 1999)".

Explanatory Memorandum

The object of this Bill is to prohibit child pornography.

2. Clause 3 creates offences relating to child pornography. It will be an offence to make, pass on or distribute child pornography. Possession of child pornography and publication of an advertisement suggesting the availability of child pornography will also be prohibited. Employment of a child to make pornography will be liable to a fine of \$3,000,000 and to imprisonment for 10 years.

3. Clause 4 provides defences for certain offences under clause 3.

4. Clauses 5, 6 and 7 provide for search and seizure of child pornography.

5. Clause 8 makes it an offence to obstruct a police officer or customs officer in certain circumstances.

6. Clauses 9, 10 and 11 make provision for the forfeiture of child pornography and things seized under the Bill.

7. Clauses 12 and 13 provide for the obliteration of child pornography.

8. Clause 14 is a consequential amendment which amends the Customs and Excise Service Ordinance (Cap. 342) to empower a customs officer who is off duty to enforce the Bill and to empower customs officers to have general power of arrest and search for the purpose of the Bill.