Bills Committee on the Prevention of Child Pornography Bill

The Prevention of Child Pornography Bill and the Control of Obscene and Indecent Articles Ordinance

At the first meeting of the Bills Committee, the Administration is requested to consider including child pornography in the definition of an obscene article under the Control and Obscene and Indecent Articles (Cap. 390) (COIAO), and revising clause 22(b) of the Bill to provide for the Obscene Articles Tribunal (OAT) to classify an article as child pornography.

Administration's response

2. The COIAO prohibits the publication of articles which by reason of obscenity is not suitable to be published to any person, and to restrict the publication of articles which by reason of indecency is not suitable to be published to persons under the age of 18. The focus is on the protection of such young persons from the harmful effects of obscene and indecent materials as well as public morals. It should be noted that mere possession of obscene articles and materials not for publication is not an offence under COIAO. On the other hand, the Prevention of Child Pornography Bill proposes to prohibit the production, distribution, publication as well as possession of child pornography, and also the procurement of children for making pornography. The focus is on the protection of children from sexual exploitation. The aims and focuses of the COIAO and the Bill are different. The COIAO would not be able to address offences which are not related to publication. Therefore, amendments to the COIAO as suggested would not be able to serve the purpose of child protection which we intend to achieve with the Prevention of Child Pornography Bill.

3. Furthermore, the approaches in determining the obscenity of an article and outlawing child pornography are different. On the one hand, the OAT determines whether an article is obscene or indecent or neither with regard to a number of considerations, including the standards of morality, decency, and propriety that are generally accepted by reasonable members of the community, the dominant effect of the article as a whole, the class or age of the likely recipients, and whether the article has an honest purpose.

4. On the other hand, "child pornography" is very specifically defined under the Prevention of Child Pornography Bill, namely, "child pornography" is a pornographic depiction of a person who is or appears to be under the age of 16.

"Pornographic depiction" means –

(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, in a sexual manner or context, the genitals or anal region of a person or the breast of a female person.

5. 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 relevant definitions prescribed in the Bill, for example, an assessment of the age of the person depicted. The standard is "proof beyond a reasonable doubt". The court is therefore in the best position to make such a judgment, having regard to all relevant factors.

6. The OAT, on the other hand, makes a classification based on various considerations mentioned in paragraph 3 above, 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 for the reason that the standard of obscenity and indecency may vary depending on the prevailing standard of morality and decency 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.

7. Therefore, we have proposed that child pornography should be dealt with under a legislative scheme separate from that under the existing COIAO. The OAT should steer clear of child pornography matters, which should be dealt with by the court exclusively. For this purpose, we have proposed in Clause 22 of the Bill that the OAT should refuse an application for classification if it considers an article may be child pornography, and we are confident that the OAT will exercise vigilance in this regard.

8. We have also proposed an appropriate interface between the proposed child pornography law and the COIAO to avoid confusion under certain scenario. For example, OAT may, under the existing guideline prescribed in the COIAO, classify an article as Class II, i.e. the article may be published to persons above the age of 18. However, subsequent police investigation may reveal that the person depicted is in fact under 16 years of age and the depiction is a pornographic depiction as defined under the child pornography law. A question will arise as to whether a person who possesses or publishes it commit an offence under the Bill although the article has been classified by OAT as

Class II. Clause 4(4) of the Bill proposes a defence clause so that a person who possesses or publishes an article already classified as Class I or II under the COIAO may not be liable. This is reasonable because a person may have relied on the Class I or II status as an indication that the article can be published to a person above 18 lawfully; and for the latter to possess it. Since it is already proposed that the OAT shall refuse an application for classification if it considers an article may be child pornography, the chance of this happening should be rare. Besides dealing with the scenarios like the above, the proposed interface helps reflect the different purposes of the COIAO and the Bill, avoid any anomaly of jurisdiction between the OAT and the court, and helps the public understand the enforcement aspect of the Bill.

Security Bureau
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