

Broadcasting (Amendment) Bill 2003

**Administration's Response to
the comments of the Legal Advisor to LegCo Bills Committee
dated 10 October 2003**

Scope of proposed section 6(1)(b)

(a) whether it should be specified that the offence refers to the possession of an unauthorized decoder with intent to use it for commercial purposes

1. The policy intent behind the proposed section 6(1)(b) is to impose criminal sanction on **possession or use** of unauthorized decoders, to avoid payment of subscription, for the purpose of, or in connection with, trade or business. We take the Assistant Legal Adviser's (ALA's) point that mere possession of an unauthorized decoder has not caused any loss to a pay TV licensee and hence the act of possession itself should not be criminalized unless the one possessing the unauthorized decoder also uses the unauthorized decoder. However, we are not sure if the ALA's proposed replacement of "possess" by "**possess and use**" would render enforcement extremely difficult. With this amendment, no one can then be prosecuted for possession of an unauthorized decoder unless he is also caught red-handed in using the unauthorized decoder. In fact, if we accept the ALA's argument, we can simply drop the word "possess", since to "use" an authorized decoder for commercial purposes is already a criminal offence under the proposed provision, irrespective of whether one also "possesses" the unauthorized decoder. There is thus no need to amend "possess" to "possess and use" as proposed by the ALA. Our view is that there is no reasonable justification for possession of unauthorized decoders for commercial purposes or in connection with trade or business, even though one is not caught using the decoders and possession alone does not cause a pay TV licensee any revenue loss. We cannot think of situations where possession of unauthorized decoders can be justified. Even if there are, the defendant can come up with the necessary defence in court. On balance, we have adopted the approach that **possession or use** of an unauthorized decoder for the purpose of, or in connection with, trade or business should be criminalized.

2. As regards the ALA’s alternative proposal to introduce mens rea (“with intent to use it”) into the provision, we consider that this will make the burden of proof too onerous for the prosecution. We consider that for an offence of this severity, which is by no means grave, it will be more appropriate to adopt a “strict liability” approach, offering a defendant reasonable defences, as provided in the Bill.

(b) whether “business” should be defined

3. We tend to think that “business” in “trade or business” will refer to the narrow sense of commercial transactions rather than the general sense of all activities, which is more likely if the word is used alone or in some other contexts. Our policy intent is that non-business and domestic offenders should only be subject to civil liabilities at this stage. We do not consider it necessary to specify the actus reus to be for profit by avoiding payment of subscription fee as we consider that “possession or use” of unauthorized decoders for commercial purposes sufficiently warrant criminal sanction.

(c) whether we should add “any” before “trade or business” in proposed section 6(1)(b) and (3)(b) and section 7A(1)(a)(ii) to cover any trade or business rather than confining to the defendant’s own trade or business

4. Since our policy intent is to cover any trade or business, we do not object to the ALA’s proposal to add “any” before “trade or business” in the above sections.

Presumption provided in proposed section 6(5)

(a) whether the presumption of possession meets the rationality and proportionality tests

Reverse onus clause

5. Our court has long recognised that the right to be presumed innocent under Article 11(1) of the Hong Kong Bill of Rights (HKBOR) is not absolute but can be limited under appropriate circumstances. In *AG of Hong Kong v Lee Kwong -kut*¹, Lord Woolf made the point that:

¹ [1993] 1 All ER 939.

“The issue involving the Hong Kong Bill of Rights should be approached with realism and good sense, and kept in proportion. If this is not done, the Hong Kong Bill of Rights will become a source of injustice rather than justice and it will be debased in the eyes of the public. In order to maintain the balance between the individual and the society, as a whole, rigid and inflexible standards should not be imposed on the legislature’s attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime.”

The above passage was cited with approval by the Court of Appeal in *R v Wang Shih-hung and Fong Chin-yue* and others².

6. In *Lambert*³, the House of Lords also adopted a flexible approach to reverse onus clauses. According to Lord Hope, the right to be presumed innocent under Article 6(2) of the European Convention of Human Rights (Convention) “is not absolute and unqualified, the test to be applied is whether the modification or limitation of that right pursues a legitimate aim and whether it satisfied the principle of proportionality”⁴.

7. In view of *Lee Kwong-kut*, *Fong Chin-yue* and *Lambert*, it is considered that the rationality and proportionality test established by the Court of Appeal in *Sin Yau-ming* must be applied with realism and in good sense or the Bill of Rights would become a source of injustice instead of justice and be debased in the public’s eyes.

Sin Yau-ming distinguished

8. We agree with the ALA’s observation that the presumed fact would only arise upon the proof of two facts, that is the finding of the unauthorized decoder on the premises and the proved fact that a person is the licensee⁵, tenant, lessee, occupier, person in charge or owner of the premises. The introduction of the latter burden on the prosecution indicates that the presumption would have a restrictive operation and a passer-by, a customer or even an employee would not be caught by the presumption. Viewed in this light, the ALA’s observation is not inconsistent with our view that the presumption satisfies the rationality

² [1995]1 HKCLR 193.

³ [2000]3 WLR 206.

⁴ *Ibid*, 237.

⁵ “Licensee” here refers to a person given the permission to occupy or use the premises and not a television programme service licensee. We already agree with the ALA that this should be clarified through Committee Stage Amendments.

and proportionality test of *Sin Yau-ming*⁶.

Annex

9. A comparison of the language used in the proposed s. 6(5) of the Bill and the repealed s. 47(1)(c) of the Dangerous Drugs Ordinance (DDO) (extract at **Annex**) would illustrate that s. 6(5) is more specific and the presumption only has a narrow and restricted application. The presumption in s. 47(1)(c) of DDO has the potential to catch “any person” who “ha[s] had in his possession or custody or under his control” “any place or premises or any part of any place or premises in which a dangerous drug is found”. The net cast under s. 47(1)(c) of DDO is much wider than proposed s. 6(5).

10. More importantly, the statutory language introducing the statutory defence in s. 47(1) of DDO and in proposed s. 6(5) of the Bill is markedly different. Under s. 47(1) of DDO, the accused would appear to bear a legal burden to prove on the balance of probabilities the statutory defence since the expression “until the contrary is proved” is used. In proposed s. 6(5), the word “proved” is not used and the accused only need to show that “there is evidence to the contrary”. It is quite clear that the legislative intent is to introduce an evidential burden, not a legal burden. As it was pointed out in our previous reply to a similar query raised by the Bar Association, the House of Lords in *Kebilene*⁷ and *Lambert*⁸ was of the opinion that an evidential burden is compatible with the presumption of innocence guaranteed under Article 6 of the Convention⁹. As the accused only needs to adduce sufficient evidence to raise the defence under proposed s. 6(5), it is very unlikely that the presumption would be inconsistent with Article 11(1) of the HKBOR.

11. In view of the legitimate objective of the Bill to protect the interests of the licensees and after taking into account the restricted application of the presumption and the lower evidential burden introduced by proposed s. 6(5), our view is that the sub-section does satisfy the rationality and proportionality test of *Sin Yau-ming*. Article 11(1) of the HKBOR is not infringed.

⁶ [1992] 1 HKCLR 127.

⁷ [2000] 2 AC 326, 373.

⁸ [2001] 3 WLR 206, 235-236.

⁹ See paras 14-15 of our response to Hong Kong Bar Association’s comments annexed to our letter the ALA dated 29 September 2003.

(b) whether the presumption of possession may be relied on in prosecuting an employer for importing, exporting, manufacturing, selling, etc. an unauthorized decoder

12. The prosecution may need to rely on the presumption in the situation stated in the reply to Q7 of our response to ALA's earlier queries dated 29 September 2003. Without the presumption, the enforcement staff will need to collect sufficient direct/circumstantial evidence to prove that the owner, tenant etc of the premises was in charge of the unauthorized decoders and hence in a position to import, export, manufacture, sell etc. the unauthorized decoders. We consider the presumption necessary so as to facilitate enforcement of the relevant provisions.

New Power of arrest

13. Since it is already a practice for OFTA officers to give the person arrested forthwith into the custody of a police officer, we do not object to providing express provision to this effect.

Warrant issued under proposed section 7A(3)

14. We do not object to replacing "an unauthorized decoder or a decoder" in proposed section 7A(3) with "anything liable to seizure under subsection (1)(d)" given the precedent case in the Telecommunications Ordinance.

Communications and Technology Branch
Commerce, Industry and Technology Bureau

October 2003

**The repealed section 47(1)(c) of
Dangerous Drugs Ordinance (Cap. 134)**

Presumption of possession and knowledge of dangerous drug

47(1) Any person who is proved to have had in his possession or custody or under his control –

(a)–

(b)–

(c) any place or premises or the part of any place or premises in which a dangerous drug is found,

(d)–

shall, until the contrary is proved, be presumed to have had such drug in his possession.