中華人民共和國香港特別行政區政府總部食物及衞生局

Food and Health Bureau, Government Secretariat
The Government of the Hong Kong Special Administrative Region
The People's Republic of China

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林女士：

《2015 年人類生殖科技(修訂)條例草案》

謝謝你於本年五月十三日的來信。就委員於二零一五年五月十二日的會議上提出的問題，我們的回覆載於附件。

食物及衞生局局長

(區蘊詩　　代行)

2015 年 5 月 26 日

副本送:
衞生署　　(經辦人：蘇佩嫦醫生)
律政司　　(經辦人：陸璟恒先生)

《2015 年人類生殖科技(修訂)條例草案》

就法案委員會
於 2015 年 5 月 12 日所提出的問題及意見的回應

政府就法案委員會於五月十二日的會議上所提出的問題及意見的回應載列於下文。

(1) 在罪行中加入提供證明獲得“財務利益”的要求

2. 有委員建議政府在建議訂立的罪行加入證明“財務利益”的要求。如在建議訂立的罪行中加入“財務利益”的因素，我們擔心政府須證明在無合理疑點之下，公布或安排公布的行為是為得到“財務利益”而進行，預期政府在以下的情況將會遇到困難：

(a) 由於有關廣告費用的支付時間可大幅延遲（例如在該廣告刊登數個月後），以致在調查期間不會出現支付廣告費的行為（即沒有“財務利益”）。

(b) 若要求刊登廣告的服務提供者與發布人（即發布廣告的人）有眾多不同業務交往，要從有關的帳目中找出相關交易，作發布該廣告的“財務利益”的證據是非常困難的。

3. 我們認為現有罪行的草擬方案較可取，當中是否須要負上刑事責任乃屬事實的問題。我們並不贊成加入“財務利益”這項因素的建議，讓法庭根據案件的實證作出裁決。

(2) 為公司僱員加入豁免或免責辯護條文

4. 我們理解委員關注在公布或分發，或安排公布或分發看來是推廣性別選擇服務的廣告的人士的僱員的潛在法律責任。根據《檢控守則 2013》的指導性原則，律政司在考慮會否對有關人士就建議訂立的罪行提出檢控時將考慮到 (a) 所得的可接納證據充分支持提出或繼續進行法律程序；(b) 基於一般公眾利益，必須進行檢控。在評估有關公眾利益的需要時，有關的考慮會包括罪行是否屬於輕微或屬技術性質、疑犯的罪責程度、罪行是否普遍，以及提出檢控會否有阻嚇力等。

5. 在參考上述的情況，我們的關注是為公司僱員加入豁免或免責辯護條文會否造成漏洞，並讓真正的犯罪者可逃避罪責，以僱員的身份作出違反條文的行為或指示僱員進行該違法行為。

6. 關於“安排（公布或分發）”一詞的涵蓋範圍，樞密院在 *Attorney General of Hong Kong v Tse Hung-lit [1986] AC 876* 一案之中裁定，“只有在被指稱一方預期或意欲該項違禁行為將隨之發生，或違禁行為是按被指稱一方的明訂權力或隱含權力而進行，或是因被指稱一方對另一人的控制或影響而進行的違禁行為，而這一般原則將會適用在安排另一人進行違法行為的法定罪行之中（見附件英文原文的 876F-H 段）”。“安排”一詞在法律的定義裡適用於確定刑事罪行的因素，在引申的時候必須審慎，不應給予比原定條文的立法原意為廣的意思。

(3) 涉及商業性質的代母安排或推廣有關活動的調查及檢控數字

7. 截至二零一五年四月底，人類生殖科技管理局（管理局）曾把 3 宗已知悉的懷疑涉及商業性質代母活動的個案轉介警方。在這 3 宗個案中，2 宗因證據不足而結案，其餘 1 宗仍在調查中。管理局並未獲悉有任何人曾被起訴。

(4) 關於禁制廣告的案例

8. 我們以“advertisement”及“offence”等字詞搜尋香港的案例，得到超過 200 個案例。在這些搜尋結果當中，並未找到關於“廣告”而與是次修訂有相關考慮或有相關的犯罪因素的刑事案例。

(5) 根據《不良廣告(醫藥)條例》（第 231 章）所提出的檢控數字及所涉及的人士分類數字

9. 《不良廣告(醫藥)條例》禁止任何人發布或安排發布任何相當可能導致他人使用任何藥物、外科用具或療法以預防或治療該條例訂明的疾病或病理情況的廣告。此外，《不良廣告(醫藥)條例》禁止有關墮胎的廣告，亦禁止／限制口服產品於廣告內作某類健康聲稱。

10. 根據衞生署的記錄，從二零一二年至二零一五年四月三十日，共

有 31 則廣告涉及違反《不良廣告(醫藥)條例》及被檢控定罪。成功被定罪的人士中有 8 位為出版商，14 位為療法提供者，11 位為產品供應商及 6 位為零售商。

(6) 有關於網上廣告的檢控數字

11. 我們以 “Internet”, “online”, “advertise”, “advertising” 及 “advertisement”等字詞在雙語法例資料系統中作搜尋，搜尋到超過 650 條的相關條文，涉及超過 220 條條例或附例。每一個與廣告有關的罪行均基於不同的背景及立法原意，有其獨特的本質。因此，我們不能就每一條條文進行全面的背景研究，並提供有關的檢控數字。

12. 我們亦希望指出修訂條例草案中建議的罪行，概括而言是建基於一個合理的人是否認為一個廣告看來推廣性別選擇服務的客觀判斷。要構成擬訂立的罪行，控方除了要證明*犯罪行為*，亦必須證明有關的*犯罪意圖，而兩者亦要同時發生*。在判決被告是否犯下該罪行之前，法庭會先確定所有的犯罪因素已被確立並且沒有合理疑點。

(7) 檢討《人類生殖科技條例》

13. 經過一九八九年及一九九二年的兩輪公眾諮詢後，政府於一九九八年向立法會提交《人類生殖科技條例草案》。立法會經過約 20 個月的研究後，通過了《人類生殖科技條例》（下稱《條例》）。管理局於二零零一年，根據《條例》第 4 條正式成立。

14. 《條例》訂定了香港就生殖科技程序及有關的事宜的規管框架，當中涉及精密並且發展中的科技事宜及甚具爭議性的道德及社會議題。管理局在多次諮詢持分者後，於二零零二年發出《生殖科技及胚胎研究實務守則》（《實務守則》），為服務提供者及研究人員提供指引，並於二零零七年《條例》全面生效時，發出《實務守則》的修訂版本。有見於持分者的意見及管理局的運作經驗，管理局於二零一三年再次修訂《實務守則》。

15. 過去多年，管理局一直有收到關於規管和牌照事宜的反饋和建議，當中可能有現時《條例》所涵蓋的範圍以外的事宜，並且涉及甚具爭議性的道德及社會課題，例如在不同的情況之下配子及胚胎的最長儲存期及一次體外授精程序中可植入一名婦女體內的胚胎數目等。有見於

委員及出席二零一五年四月二十七日會議的團體代表所表達的意見，政府會積極與管理局研究這些課題，包括醫療科技和臨床程序，以及更重要的是，對社會整體的廣泛的道德及社會的關注。我們會向立法會衞生事務委員會報告有關的進展。

食物及衞生局
衞生署
律政司
二零一五年五月

[PRIVY COUNCIL]

ATTORNEY-GENERAL OF HONG KONG . . . APPELLANT

AND

TSE HUNG-LIT AND ANOTHER . . . . . RESPONDENTS

[APPEAL FROM THE COURT OF APPEAL OF HONG KONG]

1986 April 24; May 22

Lord Bridge of Harwich, Lord Brightman, Lord Mackay of Clashfern, Lord Ackner and Lord Goff of Chieveley

Hong Kong—Crime—Export, prohibition on—Unmanifested and unlicensed goods carried by defendants—Goods to be transferred to vessel to be taken out of Hong Kong—Vessel failing to arrive—Whether defendants attempting to cause export of goods—Import and Export Ordinance (Laws of Hong Kong, 1982 rev., c. 60), ss. 2, 18(1)(b)—Import and Export (General) Regulations (Laws of Hong Kong, 1984 rev., c. 60, s. 31), reg. 4

The defendants agreed with another man for reward to take by speedboat 34 video cassette recorders, the export of which was prohibited except under licence, by virtue of regulation 4(1) of the Import and Export (General) Regulations,[1] to a prearranged meeting place inside Hong Kong territorial waters where they were to be transferred to a fishing boat which would take them to China. The defendants knew the recorders to be unlicensed and unmanifested. The fishing boat failed to arrive and as the defendants were returning they were arrested. They were jointly charged with attempting to export unmanifested cargo contrary to section 18(1)(*b*) of the Import and Export Ordinance[2] and attempting to export prohibited articles without a licence contrary to regulation 4 of the Import and Export (General) Regulations. They were convicted by the magistrate, but the Court of Appeal of Hong Kong allowed their appeals holding that they could not be convicted of attempting to export the goods within the meaning of section 2 of the Ordinance since they had not attempted to take the goods, or cause them to be taken, out of Hong Kong.

On the Attorney-General's appeal to the Judicial Committee:—

Held, dismissing the appeal, that the general rule applicable to a statutory offence of causing another person to do a prohibited act was that the offence was only committed if the accused had contemplated or desired that the act would ensue and it was done on his express or implied authority or as a result of him exercising control or influence over the other person; that there was nothing in the provisions of either the Import and Export Ordinance or the Import and Export (General) Regulations that displaced that general principle; and that, therefore, since the defendants had had no control,

[1] Import and Export (General) Regulations, reg. 4: see post, p. 885B–C.

[2] Import and Export Ordinance, s. 2: ". . . 'export' means to take, or cause to be taken, out of Hong Kong any article other than an article in transit; . . ."

S. 18: "(1) Any person who . . . (*b*) exports any unmanifested cargo, shall be guilty of an offence. . ."

A influence or authority over the fishing vessel and they had not attempted to take the goods out of Hong Kong themselves, they had not attempted to commit the statutory offences charged (post, pp. 883C–E, E–F, G–H, 884A–C, 886B–C).

O'Sullivan v. Truth and Sportsman Ltd. (1957) 96 C.L.R. 220 applied.

Decision of the Court of Appeal of Hong Kong affirmed.

B The following cases are referred to in the judgment of their Lordships:

McLeod (or Houston) v. Buchanan [1940] 2 All E.R. 179, H.L.(Sc.)
O'Sullivan v. Truth and Sportsman Ltd. (1957) 96 C.L.R. 220
Shave v. Rosner [1954] 2 Q.B. 113; [1954] 2 W.L.R. 1057; [1954] 2 All E.R. 280, D.C.
Watkins v. O'Shaughnessy [1939] 1 All E.R. 385, C.A.

C The following additional cases were cited in argument:

Alphacell Ltd. v. Woodward [1972] A.C. 824; [1972] 2 W.L.R. 1320; [1972] 2 All E.R. 475, H.L.(E.)
Bertschy v. The Queen [1967] H.K.L.R. 739
Po Koon-tai v. The Queen [1980] H.K.L.R. 492
D *Reg. v. Chiu Tai-hung* (unreported), 1 November 1985, Supreme Court of Hong Kong (Appellate Jurisdiction), Magistracy Criminal Appeal No. 630 of 1985
Saxton v. Police [1981] 2 N.Z.L.R. 186
Shulton (Great Britain) Ltd. v. Slough Borough Council [1967] 2 Q.B. 471; [1967] 2 W.L.R. 1289; [1967] 2 All E.R. 137, D.C.
Suen Chuen v. The Queen [1963] H.K.L.R. 630

E APPEAL (No. 6 of 1986) by the Attorney-General of Hong Kong with special leave from a judgment of the Court of Appeal of Hong Kong (Huggins V.-P. and Cons J.A., Fuad J.A. dissenting) given on 23 April 1985 allowing the appeals of the defendants, Tse Hung-lit and Chan Yat-sing, and quashing their convictions on 2 January 1985 in the magistrate's court at Tsuen Wan (Mr. A. R. Upham) of attempting to F export unmanifested cargo and attempting to export prohibited articles without a licence.

The facts are stated in the judgment of their Lordships.

J. M. Duffy Q.C., Director of Public Prosecutions, Hong Kong, and *P. J. Dykes*, Crown Counsel, Hong Kong, for the Attorney-General of G Hong Kong. There is no dispute about the facts or the concept of attempt. The issue is the meaning of the word "export" in the Import and Export Ordinance and the Import and Export (General) Regulations. In this context export means taking articles or causing them to be taken out of Hong Kong. Causing means causing an event rather than causing another person to do an act. There is a distinction in law between causing an event and causing another to perform the event, and it is H only in the separate instance of causing another person to do an act that concepts of control, dominance or compulsion are relevant. Accordingly, in construing this legislation the principles in the earlier authorities should be modified.

The Ordinance was designed to control the import and export of articles into and out of Hong Kong by land, sea and air. The Hong Kong authorities are anxious to preserve the integrity of its trading practices. The manifest and licensing provisions of the Ordinance and the Regulations are stated in terms which relate to normal international commercial activity, and so the word "export" should be construed by reference to that activity. Section 18(1) of the Ordinance has been construed by the courts in Hong Kong as creating an offence of strict liability. A person who causes unmanifested cargo to be exported is guilty of an offence even if he does not know that the cargo was not manifested. The owner of the vessel, aircraft or vehicle is given a defence by section 18(2) but not, for example, the ship's captain. The offence created by regulation 4 of the Regulations is also one of strict liability, and there is no defence for the owner of the vessel, aircraft or vehicle.

The definition of "export" in section 2 of the Ordinance recognises the different roles of those who carry goods out of Hong Kong and those who consign them for carriage. The normal principles of causation should be applied, and it is a question of fact and law whether any person involved in a chain of events between the consignment and ultimate export of goods is guilty of an offence. A person can only be guilty of an offence under section 18(1)(*b*) of the Ordinance or regulation 4(1) of the Regulations if he knows of the agreement to export the goods and he is a party to acts carried out in pursuance of the agreement. The defendants were the agents of the consignor. Their position was like that of a road haulage firm taking goods from a warehouse to the docks for loading onto a carrier which takes the goods across the international boundary, and the firm is thereby causing the goods to be exported.

There was a criminal joint enterprise to export the unlicensed and unmanifested recorders, and the defendants and others were all involved in it. The defendants knew that the goods were not manifested or licensed, and their acts of loading the goods onto the speedboat and going to the meeting place were important acts done in pursuance of that conspiracy. The relationship between Ah Fai and the defendants was one of principal and agent. They were all involved in a joint enterprise and although there was no exercise of control over the carriers by the defendants they were attempting to cause the recorders to be taken out of Hong Kong. "Export" includes both carrying goods out of Hong Kong and causing goods to be carried out of Hong Kong, and it would be repugnant to commonsense to introduce any concepts of control or dominance because to do so would render the Ordinance ineffectual.

The word "cause" in the definition of export in section 2 of the Ordinance should be given its ordinary everyday meaning of bringing about a result. Reliance is placed upon *Suen Chuen v. The Queen* [1963] H.K.L.R. 630; *Alphacell Ltd. v. Woodward* [1972] A.C. 824; *Bertschy v. The Queen* [1967] H.K.L.R. 739 and *Saxton v. Police* [1981] 2 N.Z.L.R. 186.

A The final act was to be the sailing of the fishing boat with the unlicensed and unmanifested goods taking them out of Hong Kong and into China, and the defendants did everything in their power to bring about that result. They were an immediate and proximate cause of the event, namely the export of the goods, taking place. They were attempting to bring about that result and they played a significant part in the enterprise. All the participants in the joint enterprise intended that B the goods would be exported to China, and not merely that the goods should be taken to a point just inside Hong Kong territorial waters. Where the offence is one of strict liability a person's acts may be an effective cause even if he is a party to a result which he did not intend. There is a difference between causing something and bringing about an event. For a person to be guilty of causing unlicensed and unmanifested C goods to be taken out of Hong Kong he must have intended to bring about that event, but although he must have had the intention to export the goods he did not have to know that they were unlicensed or unmanifested. There was a joint enterprise between Ah Fai and the defendants whereby the defendants were to act in such a way that the goods would be caused to be taken out of Hong Kong. The defendants were a link in the chain doing all that they had to do, and if the D enterprise had succeeded they would have been part of the cause of the export of the goods.

Under the Ordinance a person who causes unmanifested articles to be taken out of Hong Kong is guilty of an offence by reason of his own actions in bringing about the prohibited act, and not because of what someone else has done. The criminality of the carrier is different from E that of the consignor. They are both exporters, and if there is some illegality they are each guilty of causing that export. The relationship between the persons involved is not a relevant consideration in this case, which is concerned with causing an event and not with causing another person to do a particular act.

In section 24 of the Ordinance export is defined as meaning to take or cause to be taken out of Hong Kong any article other than an article F in transit, and there is a conceptual difference between causing another to do an illegal act to which one is not a party and actually doing an act which is the cause of an event taking place. The Ordinance imposes responsibility on each party to see that so far as he is concerned goods are imported and exported in accordance with the Ordinance.

O'Sullivan v. Truth and Sportsman Ltd. (1957) 96 C.L.R. 220 is G distinguishable in law. The majority decision of the Court of Appeal was wrong in finding that the defendants were not guilty of the offences charged because they had no control or authority over those in the fishing boat. Any contract or agreement between them that the goods should be carried out of Hong Kong was sufficient in law to amount to causing the goods to be taken out of Hong Kong.

Regard must be had to the context in which the word "cause" H appears. The word "cause" was considered in *Reg. v. Chiu Tai-hung* (unreported), 1 November 1985, Supreme Court of Hong Kong (Appellate Jurisdiction), Magistracy Criminal Appeal No. 630 of 1985. The fisherman would have derived their authority to export the goods

from Ah Fai through the defendants, and they were all involved in the agreement and would have been the cause of the goods being taken out of Hong Kong.

Desmond Keane Q.C. (of the English and Hong Kong Bars) and *Timothy Corner* for the defendants. The majority decision of the Court of Appeal is correct. The defendants should have been charged with conspiracy. They had agreed to assist Ah Fai to export the goods illegally, and they knew that they were doing something wrong. They took the goods in the speedboat with the purpose of enabling others to take them out of Hong Kong, but there was no contract or other arrangement between the defendants and the fishermen.

It is common ground that both the offences charged are offences of strict liability. Knowledge that there is no manifest or licence is not necessary. The express provision of a defence in section 18(2) of the Ordinance shows that an accused has no defence unless he comes within that subsection.

The word "cause" has a recognised meaning in this context, and an element of authority, direction or control is required. If the fishing boat had arrived at the meeting place and had gone across the boundary of territorial waters with the goods the defendants would have been guilty of aiding and abetting the fishermen to take the goods out of Hong Kong. The defendants attempted to aid and abet the commission of an offence and that is not an offence: see *Po Koon-tai v. The Queen* [1980] H.K.L.R. 492.

The words "cause to be taken" in section 2 involve some person other than the person charged taking the goods out of Hong Kong. Although section 2 does not say "cause someone else to take out" that is what it means. The earlier authorities are indistinguishable, and reliance is placed upon *Watkins v. O'Shaughnessy* [1939] 1 All E.R. 385; *McLeod (or Houston) v. Buchanan* [1940] 2 All E.R. 179; *Shave v. Rosner* [1954] 2 Q.B. 113; *Shulton (Great Britain) Ltd. v. Slough Borough Council* [1967] 2 Q.B. 471 and *O'Sullivan v. Truth and Sportsman Ltd.*, 96 C.L.R. 220. For a person to be guilty of causing another to do an act prohibited by statute he must have had control, influence, authority or direction over that other person. A contractual relationship between them is sufficient and persuasion may be if it constitutes dominance. There are cumulative requirements for causing, namely the desire that a result will ensue and also the element of control or influence over the person doing the act. Ah Fai used the defendants only as couriers, and in reality it was only Ah Fai who exercised any control or direction over the fishermen.

There is no conflict between the cases on which the defendants rely and *Alphacell Ltd. v. Woodward* [1972] A.C. 824, which dealt with the different situation of causing an event where there was no independent third party involvement. *Suen Chuen v. The Queen* [1963] H.K.L.R. 630 was correctly decided on its own facts.

Duffy Q.C. in reply. This case is not concerned with interpersonal relationships and they have no bearing on the meaning of "cause" because it is causing an event which is material and not causing a person to do something. Questions of control, authority and dominance are

only relevant to causing someone to do something. Ah Fai arranged for the fishermen to take the goods from the speedboat, and the defendants agreed to take the goods to the fishermen. They were all going to act as a result of an agreement, and the defendants would have caused the fishermen to take the goods out of Hong Kong.

Cur. adv. vult.

22 May. The judgment of their Lordships was delivered by LORD BRIDGE OF HARWICH.

This is an appeal from the majority decision of the Court of Appeal of Hong Kong (Huggins V.-P. and Cons J.A., Fuad J.A. dissenting) allowing appeals by the defendants against their convictions by the magistrate's court at Tsuen Wan of attempting to export unmanifested cargo and attempting to export articles without the required export licence.

The facts may be inferred from the defendants' statements and from the findings of the magistrate. The defendants agreed for reward with a man named Ah Fai to load 34 video cassette recorders on board a speedboat, carry them to an agreed meeting place within Hong Kong waters and there transfer them to a fishing boat. As the defendants knew, it was intended that the crew of the fishing boat would then take the video cassette recorders to China. The export of video cassette recorders from Hong Kong to any country without a licence is prohibited. No licence for the export of these video cassette recorders had been issued. Needless to say, there was no cargo manifest. In the event the defendants took the video cassette recorders to the agreed meeting place where they waited for some hours, but the fishing boat never arrived. On the return journey the defendants' speedboat was intercepted by a police launch.

The defendants were convicted by the magistrate of the offences of attempt already mentioned. On appeal a new point was taken, which had not been taken before the magistrate. The defendants, it was submitted, could not be convicted of any attempt to export the goods because, if the fishing boat had arrived and taken the goods to China, the defendants would not have been guilty as principals of the relevant offences. This was the argument which the majority of the Court of Appeal accepted. It is common ground that the defendants could properly have been convicted of conspiracy to commit the relevant offences. On the other hand, the prosecution do not seek to support the convictions on the ground that, if the goods had been exported by the crew of the fishing boat, the defendants could have been convicted of aiding and abetting or of counselling and procuring the offences. For the purpose of both the offences which the defendants were accused of attempting to commit the prohibited activity was to "export" and this is defined in section 2 of the Import and Export Ordinance (c. 60) as meaning "to take, or cause to be taken, out of Hong Kong any article other than an article in transit." Nothing turns on the degree of proximity of what the defendants did to the completion of the offences. If the video cassette recorders had been transferred to the fishing boat

within Hong Kong waters and taken out of Hong Kong aboard that boat, it was only faintly suggested for the Attorney-General that the defendants could have been convicted on the basis that they themselves had taken the goods out of Hong Kong. Their Lordships are satisfied they could not. The real issue in the appeal is whether, in those circumstances, the defendants, on the true construction of the definition of "export" as applied to the two offences, could properly be said to have "caused to be taken out of Hong Kong" the unlicensed and unmanifested cargo.

Questions of causation arise in many different legal contexts and no single theory of causation will provide a ready made answer to the question whether A's action is to be treated as the cause or a cause of some ensuing event. The approach must necessarily be pragmatic, as is well illustrated by the many more or less imprecise distinctions which the common law draws between what is and what is not to be treated as an effective cause in different legal situations. When, as here, the word "cause" is used in a statutory definition which falls to be applied in ascertaining the ingredients of criminal offences, care must be taken to give it no wider meaning than necessary to give effect to the evident legislative purpose of the enactment.

The argument for the Attorney-General, briefly summarised, is that the taking of goods out of Hong Kong is an event and that any action in a chain of circumstances which foreseeably leads to and facilitates the occurrence of that event may be said to be a cause of that event, so as to bring the action within the relevant definition of "export." It is immaterial, according to this submission, whether or not the independent action of a third party may intervene between the action of the person alleged to have exported goods by causing them to be taken out of Hong Kong and the event of the goods crossing the Hong Kong border. So here, it is said, the defendants, if the fishing boat had kept the appointment and taken the video cassette recorders out of Hong Kong, would have been a necessary link in the chain of causation between Ah Fai, who planned and initiated the operation, and the crew of the fishing boat, who brought it to fruition. The defendants knew that the goods were to be taken out of Hong Kong, they played their allotted part in attempting to effect that result and, if the plan had not miscarried, they could properly be said to have caused the goods to be taken out of Hong Kong.

This is a formidable argument which perhaps gains in attraction from the consideration that its application to the circumstances of the instant case would cause no injustice whatever. The defendants have no merit and were fully alive to the criminality of the enterprise in which they were prepared to participate. But it is important to bear in mind that, if the enterprise had succeeded, the question whether the defendants caused the video cassette recorders to be taken out of Hong Kong would have fallen to be answered independently of their guilty knowledge of the illegality of the exportation.

The defendants rely on a line of English and Scottish authority in which a variety of expressions have been used to limit and define the nature of the relationship which is required to be established before one

person can be convicted under a criminal statute of "causing" another person to act in a way which the statute prohibits. The principal cases are *Watkins v. O'Shaughnessy* [1939] 1 All E.R. 385; *McLeod (or Houston) v. Buchanan* [1940] 2 All E.R. 179; and *Shave v. Rosner* [1954] 2 Q.B. 113. Their Lordships are relieved of the duty of undertaking an independent review of these authorities since this task has, in their Lordships' respectful opinion, been so thoroughly and admirably performed by the High Court of Australia in *O'Sullivan v. Truth and Sportsman Ltd.* (1957) 96 C.L.R. 220. The question at issue in that case was whether the respondent newspaper publishers could properly be convicted of "causing to be offered for sale" by a newsagent a newspaper containing certain prohibited matter, in circumstances where the publishers distributed the paper to the newsagent for the very purpose of making it available for sale to the public. The High Court of Australia answered the question in the negative. After a review of the relevant English authorities, the judgment of Dixon C.J., Williams, Webb and Fullagar JJ. contains the following statement of the principle to be derived from them, at p. 228:

> "This appears to mean that when it is made an offence by or under statute for one man to 'cause' the doing of a prohibited act by another the provision is not to be understood as referring to any description of antecedent event or condition produced by the first man which contributed to the determination of the will of the second man to do the prohibited act. Nor is it enough that in producing the antecedent event or condition the first man was actuated by the desire that the second should be led to do the prohibited act. The provision should be understood as opening up a less indefinite inquiry into the sequence of anterior events to which the forbidden result may be ascribed. It should be interpreted as confined to cases where the prohibited act is done on the actual authority, express or implied, of the party said to have caused it or in consequence of his exerting some capacity which he possesses in fact or law to control or influence the acts of the other. He must moreover contemplate or desire that the prohibited act will ensue."

Later, in considering whether the English principle should be followed, the judgment adds, at p. 229:

> "It tends to greater certainty in interpretation. It provides a sensible and workable test, which, at the same time, is hardly open to objection as inelastic. Without some such interpretation the words might be used to impose criminal sanctions in a manner that could not be foreseen on conduct vaguely and indefinitely described. But being a question of the meaning of terms the definition can provide only a primary meaning which context or any other sufficient indication of a different intention would displace. In the present case no contrary intention appears and the words 'cause to be offered for sale or sold' in section 35(1) [of the Police Offences Act 1953 (No. 55 of 1953) (S.A.)] should accordingly be understood as bearing the meaning stated."

Their Lordships gratefully adopt both these passages, the first as an accurate and succinct statement of the general principle prima facie to be applied, the second as a salutary reminder that the principle may be displaced by the context in which it is made an offence for one person to cause another to act in a particular way.

If the general principle is here applicable, it appears to their Lordships to afford to the defendants a complete defence. Had the fishing boat kept the appointment with the defendants and taken the video cassette recorders out of Hong Kong, there would have been a plain inference that the crew of that boat were acting on the authority of Ah Fai, the organiser of the forbidden exportation, and expecting no doubt, like the defendants, to be rewarded by Ah Fai. But there was nothing in the evidence led by the prosecution which could have justified the inference that the defendants were in any position, in fact or in law, to control or influence the crew of the fishing boat, or that, if the plan had been carried through, the crew of the fishing boat would have been acting on the express or implied authority of the defendants.

The question then is whether the context of the relevant Hong Kong legislation requires a different approach to the interpretation of the expression "cause to be taken out of Hong Kong." In his dissenting judgment Fuad J.A. answered that question affirmatively. After a review of the authorities and reference to *O'Sullivan's* case, 96 C.L.R. 220, he said:

> "In my respectful judgment, different considerations apply in the case before us. Here, we are not concerned with an offence of the kind discussed in the cases to which I have referred. Although it would be a rare case that an intervening human agency is not involved, the offence here essentially is not causing someone else to do a prohibited act, but the very act of 'exporting,' which can be done by the person charged either by taking the controlled goods out of Hong Kong himself, or by causing them to be taken out of Hong Kong. Put another way, there is a conceptual difference, it seems to me, between causing another to do an illegal act to which one is not a party in the usual sense, on the one hand, and being the actual perpetrator of an act which is the cause of an event taking place, on the other. It is only in the former case that considerations of 'control, dominance or compulsion' (*Watkins v. O'Shaughnessy* [1939] 1 All E.R. 385) are relevant. In my view, these authorities do not require us to give a restricted meaning to the words 'cause to be taken out' in the context of the Import and Export Ordinance."

It is appropriate to test this approach by reference to the statutory language creating the two offences which the defendants were accused of attempting to commit. The offence of exporting unmanifested cargo is created by section 18 of the Import and Export Ordinance. Read with the substitution for the word "export" of the relevant terms of the definition, section 18 provides:

> "(1) Any person who . . . (*b*) takes, or causes to be taken, out of Hong Kong any unmanifested cargo, shall be guilty of an offence

A and shall be liable on conviction to a fine of $50,000 and to imprisonment for six months. (2) It shall be a defence to a charge under this section against the owner of a vessel, aircraft or vehicle, if the owner proves that he did not know and could not with reasonable diligence have known that the cargo was unmanifested."

The offence of exporting articles without a licence is created by B regulation 4 of the Import and Export (General) Regulations. Read with the like substitution, the regulation provides:

"(1) No person shall take, or cause to be taken, out of Hong Kong any article specified in the second column of the Second Schedule to the country or place specified opposite thereto in the third column of that Schedule except under and in accordance with a licence. (2) C Any person who contravenes paragraph (1) shall be guilty of an offence and shall be liable on conviction to a fine of $500,000 and to imprisonment for two years."

In Schedule 2 "Electrical products (powered by mains supply)" are specified in the second column and "All countries" are specified opposite thereto in the third column.

D It is unnecessary for the purposes of this judgment to express any conclusion as to whether a defence of lack of knowledge would be available to a defendant who was not the "owner of a vessel, aircraft or vehicle" charged with causing unmanifested cargo to be taken out of Hong Kong. It is common ground that the offence created by regulation 4 is one of strict liability. Their Lordships express no view as to whether an offence under regulation 4 of causing to be taken, as E opposed to taking, out of Hong Kong could theoretically be committed, as Fuad J.A. thought, without any intervening human agency. Let it be assumed that it could. Nevertheless the plain purpose of including among those absolutely liable for the export of goods without the appropriate licence persons who cause such goods to be taken out of Hong Kong as well as those who take them out is to apply the same F criminal sanction to the consignor and his forwarding agent, who arrange and organise the illicit exportation, as to the owner of the ship, aircraft or vehicle which effects the exportation by actually taking the goods out of Hong Kong. Persons in these or similar categories would properly be held, on the narrow construction of the words "cause to be taken out of Hong Kong" to be exporting. The goods are taken out of Hong Kong by others acting on their express or implied authority. It seems entirely G appropriate that those responsible for arranging the exportation of goods, as well as those who directly perform the act of exportation, should be responsible for ensuring that any appropriate licence has been obtained and should be held criminally liable in the absence of such a licence. But what of others who merely play a physical part in the sequence of events which leads to exportation? The road haulage contractor who brings goods from the warehouse to the dockside and H the stevedoring firm which loads the goods on board the ship know full well that the goods are to be exported, but are in no position to give and do not purport to give any authority to the shipowner to effect the exportation. Yet, if the Attorney-General's construction of the language

of the legislation is adopted, they too must be held to have caused the goods to be taken out of Hong Kong and will act at their peril unless they ensure in every case that the appropriate export licence has been obtained. Their Lordships fully appreciate the necessity in such a community as Hong Kong for the authorities to exercise strict control over imports and exports, but can discern no good reason why it should be necessary, in order to make such control effective, that the criminal net should be cast as widely as it would be if the construction urged by the Attorney-General were accepted.

In the light of this analysis their Lordships cannot accept that there is anything to be found in the context of the relevant Hong Kong legislation creating the offences of "causing to be taken out of Hong Kong" either unmanifested cargo or articles without the required export licence which is apt to displace the principle prima facie applicable to statutory offences of this kind as expressed in *O'Sullivan's* case, 96 C.L.R. 220. Nor, with respect, can their Lordships accept that there is a "conceptual difference" between "causing another to do an illegal act to which one is not a party in the usual sense" and "being the actual perpetrator of an act which is the cause of an event taking place" which provides a relevant basis on which *O'Sullivan's* case and the earlier authorities there considered can properly be distinguished.

Accordingly their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

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