

Submissions on the *Prevention of Child Pornography Bill* by the Criminal Law and Procedure Committee of The Law Society of Hong Kong

The Society's Criminal Law and Procedure Committee has previously been consulted and made 2 submissions on the proposed legislation on 12 January 2000 ("*the first submission*") and 4 January 2002 ("*the second submission*") respectively. The Committee has now further reviewed the Prevention of Child Pornography Bill (gazetted on 11 January 2002) and has the following comments:

1. General comments

The Committee generally supports the Bill and believes that Hong Kong should assist the international community in its attempt to prevent the sexual abuse and exploitation of children in all forms. The central concerns of the Committee with the proposals however remain:

(a) '*Appears to be*'

The phrase '*appears to be*' is used in both the definitions of '*child pornography*' [*pornographic depiction*] of a child or of someone who '*appears to be*' a child], and '*pornographic depiction*' [a visual depiction that '*(a) depicts a person who is or appears to be engaged in explicit sexual conduct; or (b) depicts in a sexual manner or context the genitals of anal region of a person or the breast of a female person.*']

We have previously commented in the second submission that the reformulated definitions adopted in the latest Bill have struck a better balance. We are sympathetic to the Administration's reasons for including this phrase in the definition of both '*child pornography*' and '*pornographic depiction*', and there are obviously circumstances in which it would be entirely appropriate to found criminal liability on the fact a person is made to appear as a child, or is made to appear to be engaged in explicit sexual conduct. HOWEVER, we remain strongly concerned that this very open-ended phrase lies at the heart of the series of offences the Administration seeks to enact. We note in this regard that the US Supreme Court has recently struck down a ban on computer-generated images '*appearing to show*' children engaged in sex (see SCMP, 18 April 2002, p 13). While that decision was based on the First Amendment, it illustrates the potential difficulty with prosecutions founded on images which may be manipulated (by computer or otherwise) to '*appear*' to involve a child or make it '*appear*' that the person(s) depicted is engaged in explicit sexual conduct.

(b) Mental element

We remain concerned at the Administration's preference for drafting offences in this Bill without expressly addressing the policy question whether these new offences require proof of any mental element by the defendant. It seems to be the intent of the Administration that the offences should be established merely upon proof of the conduct specified in the proposed offences, effectively making them strict liability offences. This is evidenced by the defences proposed, which would oblige a defendant to establish certain matters to avoid liability, including for example under THE proposed section 4(2), that he or she '*did not know*' nor have reasonable cause to suspect, that child pornography was in fact child pornography.

Our concern at this approach is twofold. First, we query whether these offences need to impose strict liability, if that is the intent of the Administration. Second, we consider it bad law-making for the Administration to leave it to the courts to decide how to interpret these offences at a later date. Recent case law in the UK dealing with sexual offences and honest belief has cast considerable doubt on the present approach of the HK courts to '*halfway house*' defences (such as '*mistaken belief*') to strict liability offences. This concern relates not only to the new offences proposed in the Bill, but also applies as regards the interpretation of those existing sexual offences intended to be included in the list of offences to be given extra-territorial effect under clause 16 of the Bill. We consider it unacceptable for the Administration to push for the enactment of new offences and the extension of jurisdiction in relation to existing offences without clearly addressing this issue. In saying this, we acknowledge that the proposals do expressly deal with this policy issue in several instances, e.g. section 4(5): this requires any belief to be based on '*reasonable grounds*', but (unlike the recent UK case law) requires the defendant to '*establish*' the matters specified.

(c) Reciprocity re extra-territorial offences

We remain concerned that the Administration does not propose a reciprocity requirement as a condition of giving extra-territorial effect under clause 16 to the listed sexual offences, i.e. does not require the prohibited act to be unlawful in the place where it takes place.

Different jurisdictions have approached this issue differently, some requiring reciprocity (e.g. UK), others not so (e.g. Australia). In the absence of a reciprocity requirement, the fact that, for instance, the age of consent might be lower in the jurisdiction where the alleged offence takes place will be irrelevant to liability in HK. Instead, it is sufficient that the conduct would amount to an offence against HK law if committed in HK.

In the absence of any clear evidence that HK citizens present a significant sex-tourism problem, we consider that HK should approach this issue with some circumspection. Accordingly, we believe that reciprocity should be required at this stage.

2. Specific comments:

We note and endorse the specific queries raised by Legal Services Dept in their letter dated 14 March 2002 [LC Paper No. CB(2)1597/-1-02(04)]. In addition, we would make the following comments:

(a) Re Section 2 Interpretation:

Section 2(1):

'Child pornography':

- 'computer-generated image or other visual depiction'

Since the definition goes on to state that it does not matter whether or not the depiction is of a real person / whether or not it has been modified, this presumably includes the type of image recently rejected by the US Supreme Court, namely, a computer manipulated image?

- 'other visual depiction'

Would this include, e.g. a simple line drawing on paper, or a doodle?

- 'appears to be a child'

This means appears to be under the age of 16 - how is this to be determined? physical characteristics? manner of dress? Obviously, this can be readily established where the image is of an infant or young child, but what criteria will be used for persons near the age of 16?

- 'whether or not it is a depiction of a real person'

Does this include cartoons or animations?

- 'anything that incorporates'

Would this include, e.g. an HTML link to a (pornographic) website?

'Pornographic depiction':

- *'appears to be engaged in explicit sexual conduct'*

Our general concern about this phrase has been noted above. Could this be interpreted to include, e.g. an image of an adult and a child merely *'cuddling'* in a bed, though there are no other explicit sexual features?

Section 2(2)(b):

'Shows'

- would this include accidentally showing or displaying an image to another person?

(b) Re section 3 Offences

As mentioned above, we remain concerned that the Administration has drafted these offences without any express reference to proof of a mental element. In particular, is it necessary to prove that a defendant *'knew'* his conduct involved or related to *'child pornography'*? The presumption of mens rea would require proof of a mental element along these lines, but having regard to the proposed defences (e.g. section 4(2)), it seems that strict liability is intended. However, this interpretation is by no means assured, especially in the light of recent case law dealing with strict liability offences. In effect, the issue is simply being left for determination by the courts at a later stage. We believe this is an important policy issue, which should be addressed at this stage, not when the matter happens to fall into the hands of the courts.

We would hope that the Administration intends to take steps to warn visitors to HK of the existence of these offences, especially since mere possession is intended to be an offence, so that anybody carrying anything amounting to child pornography would be alert to the need to get rid of such material before coming to or entering HK.

Section 3(3)

In our first submission on the 1999 Bill, we expressed serious reservations about enacting an offence of mere possession. Repeating our comments:

'It is a most insidious provision, as it means that a person who has done nothing anti-social by involving others in any way is subject not just to stringent penalties, but also to the search provisions set out later. This is a provision that could be used in the most draconian way to search and seize computers from private residences. The Committee's concern is that a person who comes into possession of such material inadvertently could

be charged with an offence and forced to rely on the [proposed] defences. Examples could be: (a) a person who purchased a publication not knowing that there was say one photograph, which could be classified as 'child pornography', might find himself on trial; (b) a person who surfs the internet and visits a site which unexpectedly contains offending material. Even if he should click immediately to another site the images would remain on his computer until replaced by more recent information. Under [this offence], these persons could be prosecuted. The very fact of a charge being brought would in all likelihood destroy that person's reputation and career. Given the very small number of cases [prosecuted in HK] such a provision should be studied very cautiously.'

(c) Re section 4 Statutory Defences

Although this section is a substantial improvement on the original proposal, its effect is still to place the burden on a defendant of '*establishing by evidence*' that he or she has some '*defence*' for his or her conduct involving child pornography. As already mentioned, insofar as several of the proposed defences purport to oblige a defendant to establish lack of knowledge or reasonable cause to suspect, they place a heavy burden on a defendant. In effect, everybody who uses a computer to download material is at the risk of conviction even though he or she may have inadvertently downloaded images amounting to child pornography, unless one of these defences is available and can be '*established*' by the defendant. This is particularly problematic given the rather nebulous nature of the defences - on occasion it may be easy to establish that the depiction has '*artistic merit*' or is used for a '*genuine educational, scientific or medical purpose*', or '*serves the public good*', but this will more often be highly contentious.

In addition, it remains unclear how far, if at all, the Administration in drafting these defences has attempted to deal with recent English case law (*B(A Minor* and *R v K*) suggesting that at common law, a defendant is entitled to rely on an honest but mistaken belief as a '*defence*' to a strict liability offence (even in the sexual context), with the burden of disproving the belief lying on the prosecution (contrary to the judicial position presently adopted in HK (see *AG v Fong Chin Yue [1995] 1 HKC 23*). The present proposals largely proceed not by requiring the prosecution affirmatively to prove intention, knowledge or even risk-taking by a defendant, but rather by requiring a defendant to '*establish*' that he or she was not negligent - that he or she '*took all reasonable steps*', '*did not have any reasonable cause to suspect*' - in dealing with what turns out to be child pornography.

In relation to section 4(5), for example, how is a defendant to establish that he or she took '*all reasonable steps*' to ascertain the age of a person depicted in a photograph or an image downloaded on a computer, as required by paragraph (b)? '*Reasonable*' by whose standards?

(d) New offences of Procuring Persons under 18 for making Pornography or for Pornographic Performances

We generally support the inclusion of the new offences for inclusion in the Crimes Ordinance (set out in section 14). We note that the proposal now includes a statutory defence clause covering 'innocent' home movies, as previously suggested by us.

Once again we stress our concern that these offences do not expressly state the mens rea that must be proved, leaving this to be imputed at a later stage.

(e) Child Sex Tourism

Section 153P

We re-iterate our concern at the lack of a reciprocity requirement.

Section 153Q

We re-iterate our general concerns that there is no express indication whether a mental element is required to establish liability for the new offences to be created by proposed section 153Q, Crimes Ordinance (s16, Bill), that the burden of '*establishing*' a defence is simply placed upon a defendant, and that the recent case law concerning mistaken beliefs (e.g. as to age) has not been expressly considered.

**The Criminal Law and Procedure Committee
The Law Society of Hong Kong
15 May 2002**