

Brief summary of speaking points made by Nick Chan on “Prevention of Child Pornography Over the Internet under Hong Kong laws” on Feb 7, 2017

1. HK and the ICCPR

- Hong Kong is party to the International Covenant on Civil and Political Rights (ICCPR) [公民及政治權利國際公約]
- Since the covenant commits its parties to respect the civil and political rights of individuals, Hong Kong is under a duty to protect those human rights which are enumerated in the Covenant
- Among those rights is the freedom of expression (意見和發表的自由)

2. HK Basic Law and the Freedom of Expression

- In the Hong Kong Basic Law [香港基本法], human rights are safeguarded under Article 39, which expressly states that the provisions of the ICCPR as applied to Hong Kong shall remain in force
- Specifically, the freedom of expression is protected under Article 27 of the Basic Law
- The freedom of expression is a fundamental right, but this is not to say that it is unfettered and absolute
  - The Bill of Rights Ordinance (Cap 383) [香港人權法案條例] states that restrictions to this freedom are justifiable if they are provided by law and are necessary for respect of the rights or reputation of others; or for the protection of national security or of public order, or of public health or morals:  
“本條第(二)項所載權利之行使，附有特別責任及義務，故得予以某種限制，但此種限制以經法律規定，且為下列各項所必要者為限—  
(甲) 尊重他人權利或名譽；或  
(乙) 保障國家安全或公共秩序，或公共衛生或風化。”
  - As such, we see the freedom of expression curtailed in instances of defamation [誹謗], copyright infringement, etc.
- In a similar vein, the law seeks to limit the freedom of expression with regards child pornography

3. HK laws and the internet

- With the advent of the Internet, many traditional crimes are now committed over cyberspace
- However, The internet is not a realm which is free from regulation and the law
- While there are general ‘catch-all’ laws in Hong Kong which apply to both offline and online activities, there are laws which have been updated to account for, or which relate specifically to, online activities
  - An example of such a law is the Crimes Ordinance (Cap 200) [刑事罪行條例 (第 200 章)], which makes express provision for the regulation of computer access
  - Another example is the Electronic Transactions Ordinance (Cap 553) [電子交易條例 (第 553 章)], which gives electronic records and signatures the same legal status as their paper counterparts.

4. HK laws against and for the prevention of child pornography

- Child pornography is still accessible in traditional formats, such as printed materials and videotapes, however the Internet plays a major role in promoting child pornography
- As a result, Hong Kong has enacted specific laws and provisions which aim to prevent and prohibit child pornography

## Control of Obscene and Indecent Articles Ordinance (Cap 390) [淫褻及不雅物品管制條例]

- Prior to the Prevention of Child Pornography Ordinance [防止兒童色情物品條例], the Control of Obscene and Indecent Articles Ordinance was used to regulate child pornography
- 'Article' [物品]: anything consisting of or containing material to be read or looked at or both read and looked at, any sound recording, and any film, video tape, disc or other record of a picture or pictures
- 'Obscene' [淫褻]: an article is obscene if by reason of obscenity it is not suitable to be published to a juvenile
- 'Indecent' [不雅]: an article is indecent if by reason of indecency it is not suitable to be published to a juvenile
- Obscenity and indecency include "violence, depravity and repulsiveness"  
"淫褻" (obscenity) 及 "不雅" (indecency) 包括暴力、腐化及可厭。
- Whether an article is classified as obscene or indecent is up to the Obscene Articles Tribunal
- The ordinance makes it an offence to publish, possess or import for the purpose of publication any obscene or indecent articles
  - Fine of \$1,000,000 and term of imprisonment of three years
- However, many view this Ordinance as inadequate in light of the rising popularity of online content and new high-tech methods of producing explicit pornographic content.

## The Prevention of Child Pornography Ordinance (Cap 579) [防止兒童色情物品條例]

- This prohibits and criminalizes child pornography and addresses recent technological developments more adequately:

### A. Definition [定義]

- 'Child': a person under the age of sixteen
- 'Child pornography' [兒童色情物品]:
  - (a) a photograph, film, computer-generated image or other visual depiction that is a pornographic depiction of a person who *is or is depicted as being a child* (whether by electronic or any other means, whether or not it is a depiction of a *real person or whether or not it has been modified*);  
OR
  - (b) Anything that incorporates a photograph, film, image or depiction referred to above
- 'Pornographic depiction' [色情描劃]:
  - (a) a visual depiction that depicts a person as being engaged in explicit sexual conduct, whether or not the person is in fact engaged in such 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
- The definition is very broad: particularly because it includes computer-generated images (VR, AR) and someone who is in fact not a child, but is depicted as one ('pseudo photographs')

### B. Offences [罪行] → Section 3 of the Ordinance

- It is an offence to print, make, produce, reproduce, copy, import or export, any child pornography
  - Maximum fine of \$2,000,000 and imprisonment for 8 years

- If it is an offence to publish any child pornography
  - Maximum fine of \$2,000,000 and imprisonment for 8 years
- It is an offence to possess child pornography
  - Maximum fine of \$1,000,000 and imprisonment for 5 years
- It is an offence to publish or cause to be published any advertisement that conveys or is likely to be understood as conveying the message that any person has published, publishes, or intends to publish any child pornography
  - Maximum fine of \$2,000,000 and imprisonment for 8 years

#### C. Defences [免責辯護]

- There are many possible defences under section 4. These include:
  - Defendant showing that the alleged pornography has artistic merit
  - Possession was for a genuine education, scientific or medical purpose
  - Defendant believes that the person pornographically depicted was not a child when originally depicted and the person was not depicted as a child
- The burden of proof is on the defendant

#### D. Sentencing [判刑]

- CA laid down sentencing guidelines for possession of child pornography involving *real* children in *Secretary for Justice v Man Kwong Choi and Secretary for Justice v Ho Yan Kiu* [律政司司長訴萬廣財及律政司司長訴何恩橋]
- Level 1: Images depicting erotic posing with no sexual activity → maximum 1-6 months imprisonment
- Level 2: sexual activity between children, or solo masturbation by a child → immediate custodial sentence of up to 9 months
- Level 3: non-penetrative sexual activity between adults and children → sentences of 6-12 months
- Level 4: penetrative sexual activity between children and adults; sadism or bestiality → 12-36 months imprisonment

#### Crimes Ordinance (Cap 200) [刑事罪行條例 (第 200 章)]

- Section 161: Access to computer with criminal or dishonest intent [有犯罪或不誠實意圖而取用電腦]
- Any person who obtains access to a computer—
  - With intent to commit an offence;
  - With a dishonest intent to deceive;
  - With a view to dishonest gain for himself or another; or
  - With a dishonest intent to cause loss to another
 Commits an offence and is liable on conviction upon indictment to imprisonment for 5 years
- Some say this is a kind of 'catch all' or 'fall back' provision which seeks to regulate all crimes perpetrated through the use of a computer

#### 5. Self-regulation

- Self-regulation → helps to preserve the freedom of information
- HKISPA supported filtering software to help remove and regulate any obscene or indecent articles which have been published online
- HKISPA has a Code of Practice
  - Measures include the posting of warnings and reminders not to post obscene and indecent articles

- Where a member of the HKISPA breaches the Code of Practice, the HKISPA may impose a sanction on that member.
- Are these measures enough? We want to strike a balance between safety on the Internet and the free flow of information

#### 6. Deficiencies in the law/practical challenges:

- Many view the sentencing under the Prevention of Child Pornography Ordinance to be too 'light' and doesn't do enough to deter the activities of pedophiles
  - A defendant was sentenced to a term of eighteen months imprisonment when he pleaded guilty to two charges of possession; the first for having 1,724 pornographic VCDs for the purpose of publication and publishing obscene articles and the second for possession of 1,608 pornographic VCDs
  - In another case, the sentence was also eighteen months, but the defendant had pleaded guilty to three charges of publishing obscene articles and one charge of possessing. Furthermore, the defendant sold the materials for commercial gain
  - Sentences seem quite lenient
- Age of a 'child': should we be including 17-year olds in the definition of a 'child'? Are seventeen year olds considered to have adequate autonomy and decision-making facilities as compared to a 16 year old?
- What about new types of media such as GIF files (which are multiple images, rather than video files) → arguably this is addressed by the Prevention of Child Pornography Ordinance which defines child pornography as anything that includes images
- Are you still considered to be in 'possession' if someone sends pornographic content to a Whatsapp groupchat?
- Who is liable for materials placed on bulletin boards, in newsgroups, and on the Internet? Would it be the creator or producer of materials, the person who merely reads it and passes it on, the ISPs, or the person who downloads the material?

#### 7. Wrap-up

- Glad to be here and to be able to contribute to such a great and important initiative.