

ASIA PACIFIC FORUM OF NATIONAL HUMAN RIGHTS INSTITUTIONS



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INAUGURAL SESSION OF THE ADVISORY COUNCIL OF JURISTS

8 - 9 August 2000
Rotorua, New Zealand

Reference on Child Pornography on the Internet

Final Report

December 2000

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On August 8 - 9 2000 the Advisory Council of Jurists considered two issues referred to it by the Forum. Seven Forum members have nominated representatives to the Council. As the most recent member to the Forum, Nepal is yet to nominate its representative to the Council. The Jurists present at the meeting were the Honourable Justice Dame Silvia Cartwright of New Zealand (President), Sir Ronald Wilson of Australia, Professor J E Sahetapy of Indonesia and Mr Sedfrey Ordonez of the Philippines. The Jurists present at the meeting decided to solicit the comments of the absent Members before distributing their final report as they felt that the final report should reflect the views of all Members. The Council invites the Forum to consider action it might take in light of the following recommendations.

The Council has been asked to advise on the validity of measures taken to regulate child pornography on the internet and whether such measures can be reconciled with national and international laws guaranteeing the rights of freedom of expression, privacy and freedom of information.

Before deciding whether measures are valid the Council considers that it is first necessary to define,

- "child"; and
- the meaning of "pornography"

Definition of child

In defining a child, the Council notes the definition in Article 1 of the Optional Protocol to the Convention on the Rights of the Child which defines a child as a person

... below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

In many countries this definition means that the threshold age at which a child is protected against exploitative use in pornography is determined by the age of consent. The Council believes that the standard should apply to all children under the age of 16, regardless of the age of consent.

The Council recommends that, in determining the age of a child for the purposes of child pornography, the standard in the Convention is accepted as the general rule **subject** to there being no exception for children who are, or appear to be, under the age of 16 years.

Pornography

The Council considers that, while there are a large number of definitions of child pornography, the definition in Article 2 (c) of the recent Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography to be the most appropriate.

Article 2 (c) defines child pornography as,

... any representation by whatever means, of a child engaged in real, or simulated explicit sexual activities or any representation of the sexual parts of a child, the dominant characteristic of which is depicted for a sexual purpose.

The Council considers that it is important to recognise that the subject matter of a representation includes any abuse or mistreatment of a child for sexual purposes.

International standards

The Council considers that the means adopted to combat child pornography on the internet must be consistent with international human rights norms. In this context the Council noted the competing rights of freedoms of expression, privacy and freedom of information and those which protect and promote the best interests of the child. However, the Council concluded that the child's best interests should be given paramountcy given the proven physical and emotional harm inflicted on them by child pornography. In this regard the Council notes that all Forum member countries have ratified the Convention on the Rights of the Child and find that the principles in Article 3 of the Convention on the Rights of the Child should govern the resolution of this matter. Article 3 states that,

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Council considers that the rights of the child should not simply be *a* paramount consideration but rather *the* paramount consideration, an interpretation supported by Articles 32 and 34 of the Convention which state that,

Article 32

I. States Parties recognize the right of the child to be protected from economic exploitation and from performing work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;*
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;*
- (c) The exploitative use of children in pornographic performances and materials.*

There may be those who argue that freedom of expression should be paramount on the basis of a decision by the British Columbia Court of Appeal which found that a law relating to child pornography contravenes the Charter of Rights and Freedoms.¹ However, the Council notes that,

- a. (in the words of the Court) "The law is flawed because it has the potential to penalise people for possessing and creating material that may merely be the product of imagination and not intended for distribution"; and
- b. The decision is currently subject to appeal.

¹ *R v Sharpe* (BCCA 1999, 416)

Ensuring effective regulation

In the hope that it may be of assistance to Forum members, the Council offers the following suggestions on the implementation of regulatory control.

That Forum members move to ratify the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

In order to address effectively child pornography on the internet the Council recommends a move towards the establishment of a network of laws in Forum countries, together with a hotline supported by legislation which would permit government intervention.

The Council considers that there is a need for a Forum wide approach to the prevention of child pornography on the internet and considers that giving priority to a consultative approach rather than a punitive one would be more effective and appropriate. To this end it suggests the establishment of a Standing Commission of the Forum to develop a model law in consultation with internet service providers and monitor its operation with a view to ensuring its efficiency and improvement. The development of Codes of Practice should occur on a Forum wide basis. The sophisticated and unlimited potential of the technology requires an approach that is cooperative and educative, and which combines prevention with on going monitoring.

The Standing Commission would have the additional responsibility of:

- formulating and revising codes of practice and monitoring compliance;
- advising and assisting parents and other carers of children in relation to the supervision and control of children's access to internet content;
- conducting and coordinating community education programmes about internet services;
- conducting research into issues relating to internet content and usage;
- liaising with other relevant regulatory bodies about cooperative arrangements for the regulation of online content;

- informing itself, and advising on technological developments and service trends in the internet industry.²

The Council also notes that it is necessary for the effective regulation of child pornography on the internet to create a set of appropriate offences.

² See, for example, the Code of the Australian Broadcasting Authority