

《防止兒童色情物品條例草案》

政府對二零零二年十一月二十九日會議上 所提事項的回應

條例草案委員會在二零零二年十一月二十九日舉行的第八次會議上，有議員詢問是否適宜在條例草案第 4 條的各項免責辯護條款中，均用“援引證據以提出合理疑點”（“raise a reasonable doubt by adducing evidence”）取代“證明”（“establish”）一詞，以及是否適宜使該項修訂適用於第 3 條所訂的各項罪行。有建議認為，這種減輕被告人責任的安排，應只適用於被控管有兒童色情物品的人。

2. 如採納這項建議，則涉及兒童色情物品的不同罪行，便會有不同的處理方法：

- (a) 一方面，被控干犯生產、進口、出口、發布或宣傳兒童色情物品等罪行的人，須按權衡相對可能性何者較高的原則確立其免責辯護。
- (b) 另一方面，被控干犯管有兒童色情物品罪行的人，則只須援引證據以提出合理疑點。

3. 我們曾從執法角度考慮這項建議，同時也顧及保護兒童的前提。我們相信，把較輕的舉證責任(援引證據以提出合理疑點)的適用範圍局限於第 3(3)條所訂的管有罪行，是可以接納和合理的。

4. 我們同意，把純粹管有兒童色情物品訂為罪行，較把生產、發布、進口、出口和宣傳兒童色情物品訂為刑事罪行更具爭議性。加拿大法院就 R v Sharpe 一案作出的裁決，以及美國法院就 Ashcroft v Free Speech Coalition 一案所作的裁決，充分反映了這些爭議。因此，我們同意，上文第 2 段提及的不同處理方法實際上是合理的。與從事生產、發布、進口、出口或宣傳兒童色情物品的人相比，管有但並無進一步處理(例如：進口、複製等)兒童色情物品的人，按道理來說，是較有可能不了解有關描劃的確實性質的。

5. 為了反映這一點，我們提議增訂新的第 4(6)條，以代替先前提出用“援引證據以提出合理疑點”取代各項免責

辯護條文內“證明”一詞的建議。新增的第 4(6)條內容大致如下(確實用字可加修飾)：

“(6) 如出現以下情況，被控犯第 3(3)條所訂罪行的被告人，須視為已確立根據第(2)、(3)或(5)款提出免責辯護而必須確立的事實 —

(a) 基於已援引的證據，已足夠就該項事實提出爭論；及

(b) 控方未有在毫無合理疑點的情況下提出相反證明。”

6. 建議新增的條文沒有規定只限被告人援引的證據才可用作提出爭議，因此，如基於有證據(不論是由被告人還是其他人援引)，就第 4(2)、4(3)或 4(5)條所指明事項有合理疑點，被告人即可以此作為免責辯護。然而，我們不建議完全略去對“證據”的提述，否則便無法說明合理的疑點須以證據證明。

7. 我們知道這做法可能令有關法例更複雜，但我們認為，這或許是在保障無辜者與避免產生任何漏洞(因而削弱對易受傷害兒童的保護)之間求取適當平衡，而須付出的代價。

8. 我們研究過英國的法例，發現以下例子也採取類似做法(英國法例的相關條文摘錄於附件 A(文件只具英文本))：

(a) 《2002 年煙草宣傳及推廣法令》(Tobacco Advertising and Promotion Act 2002)(2002 年第 34 章)規定，就某些而不是所有免責辯護來說，被告人可承擔較輕的舉證責任。

(i) 舉例來說，根據該法令第 9(1)條，某人如在業務運作期間給予英國的公眾人士任何產品或代用券，而此舉的目的或效果是推廣某種煙草產品(這包括超級市場進行推廣活動，讓顧客每購買一打可口可樂，便可獲贈印有“萬事發”標誌的搖搖)，即屬犯罪。

- (ii) 該法令第 9(3)條表明，如果該煙草產品是某人在煙草業務運作期間，給予另一家煙草業務經營機構的經理或董事的，則該人不屬犯罪。
 - (iii) 該法令第 9(5)條表明，某人如不知道也沒有理由懷疑有關行為的目的是推廣煙草產品，或他不可能合理地預見該行為會產生推廣煙草產品的效果，則該人並無干犯該條所訂罪行。
 - (iv) 該法令第 17 條就第 9(5)條所列的免責辯護，訂明較輕的舉證責任；但沒有就第 9(3)條所訂的免責辯護作此規定。
- (b) 同樣地，《2001 年反恐怖活動、罪行和保安法令》(Anti-terrorism, Crime and Security Act 2001)(2001 年第 24 章)規定，就某些而不是所有免責辯護來說，被告人可承擔較輕的舉證責任。
- (i) 舉例來說，根據該法令第 47(1)(c)和(d)條，某人如管有核子武器或參與轉移核子武器，即屬犯罪。
 - (ii) 該法令第 49(1)條表明，被控人如能證明本身既不知道也沒有理由相信與罪行有關的物件是核子武器，則可以此作為免責辯護。
 - (iii) 該法令第 49(3)條表明，被控人如能證明本身知道或相信有關物件是核子武器，但他一知道或相信這個事實，即在合理可行的範圍內盡快採取一切合理步驟，把所知道或相信的事通知國務大臣或警務人員，則亦可以此作為免責辯護。
 - (iv) 該法令第 49(2)條就第 49(1)條所列的免責辯護，訂明較輕的舉證責任；但沒有就第 49(3)條所列的免責辯護作此規定。

只有在某些情況下才可提出免責辯護

9. 現按助理法律顧問的要求列舉兩個法例作為例子，這些法例訂明只有在某些情況下才可提出免責辯護：

- (a) 美國《刑事法典》(Criminal Code)第 2252A(d)條訂明：

被控干犯第(a)(5)款[管有兒童色情物品]罪行的被告人，可以下列情況作為免責辯護 —

- (1) 管有少於三個兒童色情影像；及
- (2) 已迅速和本着誠意，並在沒有保留或容許任何人(執法機關除外)接觸有關影像或其複製本的情況下 —
 - (A) 採取合理步驟以銷毀所有這類影像；或
 - (B) 向執法機關舉報，並讓執法機關取得所有這類影像。

- (b) 根據英國《1956年性罪行法令》(Sexual Offences Act 1956)(1956年第69章)第6(1)條，一名男子與未滿16歲的女孩進行非法性交，即屬犯罪(有關條文摘錄於附件B(文件只具英文本))。該法令第6(3)條訂明，在下列情況下，該男子並無干犯該罪行：

- (i) 他未滿24歲；
- (ii) 他以前從未被控干犯類似罪行；及
- (iii) 他相信該女孩年齡在16歲或以上，而且有合理因由使他相信這一點。

10. 以上的例子顯示，立法機關有權訂明只有在某些情況下，才可提出免責辯護。

保安局
二零零三年一月

Tobacco Advertising and Promotion Act 2002, Ch. 36, (Eng.)

9. Prohibition of free distributions

- (1) A person is guilty of an offence if in the course of a business he --
 - (a) gives any product or coupon away to the public in the United Kingdom, or
 - (b) causes or permits that to happen,
and the purpose or effect of giving the product or coupon away is to promote a tobacco product.
- (2) It does not matter whether the product or coupon accompanies something else, or is given away separately.
- (3) No offence is committed under subsection (1) if--
 - (a) the business referred to in subsection (1) is part of the tobacco trade,
 - (b) the product or coupon is given away for the purposes of that trade,
 - (c) each person to whom it is given--
 - (i) is engaged in, or employed by, a business which is also part of the tobacco trade, and
 - (ii) falls within subsection (4), and
 - (d) the product or coupon is given to each such person in his capacity as such a person.
- (4) A person falls within this subsection if--
 - (a) he is responsible for making decisions on behalf of the business referred to in subsection (3)(c)(i) about the purchase of tobacco products which are to be sold in the course of that business,
 - (b) he occupies a position in the management structure of the business in question which is equivalent in seniority to, or of greater seniority than, that of any such person, or
 - (c) he is the person who, or is a member of the board of directors or other body of persons (however described) which, is responsible for the conduct of the business in question.

- (5) A person does not commit an offence under this section--
 - (a) where it is alleged that the purpose of giving the product or coupon away was to promote a tobacco product, if he did not know and had no reason to suspect that that was its purpose, or
 - (b) where it is alleged that the effect of giving the product or coupon away was to promote a tobacco product, if he could not reasonably have foreseen that that would be its effect.
- (6) “Coupon” means a document or other thing which (whether by itself or not) can be redeemed for a product or service or for cash or any other benefit.
- (7) The Secretary of State may make regulations providing for this section to apply to making products or coupons available for a nominal sum or at a substantial discount as it applies to giving them away.
- (8) If regulations under subsection (7) provide for this section to apply to making products or coupons available at a substantial discount, the regulations must provide for the meaning of “substantial discount”.
- (9) The regulations may provide that this section is to apply in that case with such modifications (if any) specified in the regulations as the Secretary of State considers appropriate.

17. Defences: burden of proof

- (1) This section applies where a person charged with an offence under this Act relies on a defence under any of sections 5(1) to (6), 6(1), 9(5), 10(3) and (4) and 15(3).
- (2) Where evidence is adduced which is sufficient to raise an issue with respect to that defence, the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

Anti-terrorism, Crime and Security Act 2001, Ch. 24, (Eng.)

47. Use etc of nuclear weapons

- (1) A person who--
 - (a) knowingly causes a nuclear weapon explosion;
 - (b) develops or produces, or participates in the development or production of, a nuclear weapon;
 - (c) has a nuclear weapon in his possession;
 - (d) participates in the transfer of a nuclear weapon; or
 - (e) engages in military preparations, or in preparations of a military nature, intending to use, or threaten to use, a nuclear weapon, is guilty of an offence.
- (2) Subsection (1) has effect subject to the exceptions and defences in sections 48 and 49.
- (3) For the purposes of subsection (1)(b) a person participates in the development or production of a nuclear weapon if he does any act which--
 - (a) facilitates the development by another of the capability to produce or use a nuclear weapon, or
 - (b) facilitates the making by another of a nuclear weapon,
knowing or having reason to believe that his act has (or will have) that effect.
- (4) For the purposes of subsection (1)(d) a person participates in the transfer of a nuclear weapon if--
 - (a) he buys or otherwise acquires it or agrees with another to do so;
 - (b) he sells or otherwise disposes of it or agrees with another to do so; or
 - (c) he makes arrangements under which another person either acquires or disposes of it or agrees with a third person to do so.
- (5) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life.
- (6) In this section “nuclear weapon” includes a nuclear explosive device that is not intended for use as a weapon.

- (7) This section applies to acts done outside the United Kingdom, but only if they are done by a United Kingdom person.
- (8) Nothing in subsection (7) affects any criminal liability arising otherwise than under that subsection.
- (9) Paragraph (a) of subsection (1) shall cease to have effect on the coming into force of the Nuclear Explosions (Prohibition and Inspections) Act 1998 (c 7).

49. Defences

- (1) In proceedings for an offence under section 47(1)(c) or (d) relating to an object it is a defence for the accused to show that he did not know and had no reason to believe that the object was a nuclear weapon.
- (2) But he shall be taken to have shown that fact if –
 - (a) sufficient evidence is adduced to raise an issue with respect to it; and
 - (b) the contrary is not proved by the prosecution beyond reasonable doubt.
- (3) In proceedings for such an offence it is also a defence for the accused to show that he knew or believed that the object was a nuclear weapon but, as soon as reasonably practicable after he first knew or believed that fact, he took all reasonable steps to inform the Secretary of State or a constable of his knowledge or belief.

Sexual Offences Act 1956, Ch. 69 (Eng.)

6. Intercourse with girl between thirteen and sixteen

- (1) It is an offence, subject to the exceptions mentioned in this section, for a man to have unlawful sexual intercourse with a girl . . . under the age of sixteen.

- (2) Where a marriage is invalid under section two of the Marriage Act 1949 or section one of the Age of Marriage Act 1929 (the wife being a girl under the age of sixteen), the invalidity does not make the husband guilty of an offence under this section because he has sexual intercourse with her, if he believes her to be his wife and has reasonable cause for the belief.

- (3) A man is not guilty of an offence under this section because he has unlawful sexual intercourse with a girl under the age of sixteen, if he is under the age of twenty-four and has not previously been charged with a like offence, and he believes her to be of the age of sixteen or over and has reasonable cause for the belief.

In this subsection, “a like offence” means an offence under this section or an attempt to commit one, or an offence under paragraph (1) of section five of the Criminal Law Amendment Act 1885 (the provision replaced for England and Wales by this section)