

PREVENTION OF CHILD PORNOGRAPHY BILL

CSAs to be moved by
the Secretary for Security
As at 15 February 2003

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires—
“assisting officer” (協助人員) means a member of the Customs and Excise Service or a police officer called on to assist an authorized officer under section 5(2);

“authorized officer” (獲授權人員) means any person authorized by a warrant issued under section 5;

“child” (兒童) means a person under the age of 16;

“child pornography” (兒童色情物品) means—

(a) a photograph, film, computer-generated image or other visual depiction that is a pornographic depiction of a person who is or ~~appears to be~~ a child, whether it is made or generated by electronic or any other means, whether or not it is a depiction of a real person and whether or not it has been modified; or

(b) anything that incorporates a photograph, film, image or depiction referred to in paragraph (a),

and includes data stored in a form that is capable of conversion into a photograph, film, image or depiction referred to in paragraph (a) and anything containing such data;

“distribute” (分發) includes making any message or data available through any means of electronic transmission;

“film” (影片) means—

(a) a cinematograph film and includes any sound-track associated with such film;

(b) a videotape or laserdisc and includes any sound-track associated with such videotape or laserdisc;

(c) a still film and includes any sound-track associated with such film;

(d) any other record of visual moving images that is capable of being used for the subsequent screening of those images and includes any sound-track associated with such record;

(e) any combination of the films referred to in paragraphs (a), (b), (c) and (d); or

(f) an excerpt or part of a film referred to in paragraph (a), (b), (c), (d) or (e);

“photograph” (照片) includes the negative as well as the positive version of a photograph;

“pornographic depiction” (色情描劃) means—

(a) a visual depiction ~~that depicts a person who is or appears to be engaged in explicit sexual conduct;~~

(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,

but, for the avoidance of doubt, a depiction for a genuine family purpose does not, merely because it depicts any part of the body referred to in paragraph (b), fall within that paragraph;

“still film” (定畫影片) means a slide, or a series of slides, including single frames of a film, of visual non-moving images that is or are capable of being used for the subsequent screening of those images.

↑ is depicted as being

↑ of a person who is engaged in
or is depicted as being engaged in explicit
sexual conduct; or

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- (2) For the purposes of this Ordinance, a person publishes any child pornography if he, whether or not for any form of reward—
- (a) distributes, circulates, sells, hires, gives or lends the child pornography to another person; or
 - (b) shows, plays or projects the child pornography to or for another person.
- (3) Any child pornography that is displayed in or so as to be visible from—
- (a) any public street or pier, or public garden; or
 - (b) any place to which the public have or are permitted to have access (whether on payment or otherwise),
- shall for the purposes of this Ordinance be regarded as child pornography publicly displayed.

4. Defences

(1) It is a defence to a charge under section 3 for the defendant to establish that—

- (a) the depiction that is alleged to constitute child pornography has artistic merit;
- (b) the defendant committed the act that is the subject of the charge for a genuine educational, scientific or medical purpose;
- (c) the act that is the subject of the charge otherwise served the public good and did not extend beyond what served the public good; or
- (d) if the defendant is charged with having in his possession child pornography, the possession—
 - (i) is for a genuine educational, scientific or medical purpose; or
 - (ii) otherwise served the public good and did not extend beyond what served the public good.

(2) It is a defence to a charge under section 3 for the defendant to establish that he had not himself seen the child pornography and did not know, nor did he have any reasonable cause to suspect, it to be child pornography.

~~(3) Without prejudice to subsection (2), it is a defence to a charge under section 3(3) for the defendant to establish that he had not asked for any child pornography and after it came into his possession he endeavoured to destroy it within a reasonable time.~~

△ (3) It is a defence to a charge under section 3(3) for the defendant to establish that -

- (a) he had not asked for any child pornography and he could not have prevented himself from coming into possession of the child pornography by taking ~~all~~ reasonable and practicable steps all such steps as may be reasonable and practicable in the circumstances of the case for this purpose; or
- (b) he had not asked for any child pornography and, within a reasonable time after it came into his possession, he took ~~all reasonable and practicable steps~~ all such steps as may be reasonable and practicable in the circumstances of the case to destroy it.

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(4) [↑] Without prejudice to subsection (2), it is a defence to a charge under section 3 for the defendant to establish that the thing that is alleged to constitute child pornography is, or was at the time the offence is alleged to have been committed, classified as a Class I or a Class II article under the Control of Obscene and Indecent Articles Ordinance (Cap. 390).

~~(5) It is a defence to a charge under section 3 for the defendant to establish that—~~

- ~~(a) the defendant believed on reasonable grounds that the person pornographically depicted in the child pornography was not a child at the time of the depiction and the person was not depicted as a child;~~
- ~~(b) the defendant took all reasonable steps to ascertain the age of the person; and~~
- ~~(c) in so far as the defendant was able to influence in any way how the person was depicted, the defendant took all reasonable steps to ensure that the person was not depicted as a child.~~

[↑] It

△ (5) It is a defence to a charge under section 3(3) for the defendant to establish that -

~~(a) he possessed the child pornography for his reasonable personal use; and~~

~~(b) he believed on reasonable grounds that the person pornographically depicted in the child pornography was not a child when the person was originally depicted and that the person was not depicted as a child.~~

(6) It is a defence to a charge under section 3 (other than subsection (3) of it) for the defendant to establish that -

- (a) he took ~~all reasonable and practicable steps~~ all such steps as may be reasonable and practicable in the circumstances of the case to ascertain the age of the person pornographically depicted in the child pornography when the person was originally depicted;
- (b) in so far as the defendant was able to influence in any way how the person was depicted, he took ~~all reasonable and practicable steps~~ all such steps as may be reasonable and practicable in the circumstances of the case to ensure that the person was not depicted as a child; and
- (c) he believed on reasonable grounds that the person was not a child when the person was originally depicted and that the person was not depicted as a child.

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(7) Unless subsection (8) applies, a defendant is to establish any fact that needs to be established for the purpose of a defence under this section on a balance of probabilities.

(8) A defendant charged with an offence under section 3(3) is to be taken to have established any fact that needs to be established for the purpose of a defence under subsection (2), (3) or (5) if -

- (a) sufficient evidence is adduced to raise an issue with respect to the fact; and
- (b) the contrary is not proved by the prosecution beyond reasonable doubt.

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5. Entry, search and seizure under warrant

(1) If, on an application made by a police officer or member of the Customs and Excise Service by laying an information on oath, a magistrate is satisfied that there are reasonable grounds for suspecting that there is in or on any premises, place, vessel, aircraft or vehicle—

- (a) any thing in respect of which an offence under section 3 has been or is being or is about to be committed; or
- (b) any thing that is, or contains, evidence of the commission of any such offence,

he may issue a warrant authorizing any person being a police officer or member of the Customs and Excise Service to enter or board such premises, place, vessel, aircraft or vehicle, and search for, seize, remove and detain any such thing.

(2) An authorized officer may—

- (a) if he is a police officer, call on any member of the Customs and Excise Service; or
- (b) if he is a member of the Customs and Excise Service, call on any police officer,

to assist him in the exercise of the powers conferred by this section.

(3) An authorized officer or an assisting officer may, at any time of the day or night—

- (a) enter and search any premises or place named in the warrant; or
- (b) stop, board and search any vessel, aircraft or vehicle named in the warrant.

(4) An authorized officer or an assisting officer may seize, remove and detain—

- (a) any thing in respect of which he suspects on reasonable grounds that an offence under section 3 has been or is being or is about to be committed; and
- (b) any thing that he suspects on reasonable grounds to be, or to contain, evidence of the commission of such an offence.

(5) In this section—

“aircraft” (飛機) does not include a military aircraft;

“vessel” (船隻) does not include a ship of war or a ship having the status of a ship of war.

△>

△ “vehicle” () does not include a
military vehicle; .

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11. Procedure in relation to forfeiture

(1) Subject to subsections (3) and (4), before making an order for forfeiture of any thing under section 10, the magistrate shall issue a summons to—

(a) the occupier of any premises or any place or, in the case of a stall, the owner or the occupier of the stall, in or from which the thing was seized; \triangle

(b) the owner of the thing seized,

to appear on a day specified in the summons to show cause why the thing should not be forfeited.

(2) In addition to any person mentioned in subsection (1), any other person being the producer or manufacturer of any thing seized or a person into whose hands any such thing may have passed before seizure, or a person who has an interest in any thing seized, may appear before the magistrate on the day specified in the summons to show cause why the thing should not be forfeited.

(3) If the magistrate is satisfied that any person mentioned in subsection (1) cannot for any reason be found or ascertained, he may dispense with the issue of a summons to that person.

(4) If any summons issued under subsection (1) has not for any reason been served and the magistrate is satisfied that all reasonable efforts were made to serve the summons on the person named in the summons, he may make an order for forfeiture under section 10 notwithstanding that the summons was not served and that the person named in the summons has not been given an opportunity to show cause why the thing should not be forfeited.

(5) An order for forfeiture of any thing shall, unless the magistrate considers that there are special reasons for directing otherwise, apply to the whole of the thing.

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△ 138A. Use, procurement or offer of persons
under 18 for making pornography or
for live pornographic performances

(1) Any person who uses, procures or offers another person who is under the age of 18 for making pornography, or for a live pornographic performance, in which that other person is or is to be pornographically depicted, commits an offence and is liable on conviction on indictment—

(a) if the offence is committed in relation to a person under the age of 16, to a fine of \$3,000,000 and to imprisonment for 10 years;

(b) if the offence is committed in relation to a person of the age of 16 or above but under 18, to a fine of \$1,000,000 and to imprisonment for 5 years.

(2) It is a defence to a charge of using or procuring a person of the age of 16 or above but under 18 for making pornography for the defendant to establish that—

(a) at the time of the alleged offence, the person pornographically depicted for making pornography consented to being so depicted; and

(b) the pornography so made is solely for the personal use of the defendant and the person depicted.

(3) It is a defence to a charge of using or procuring a person of the age of 16 or above but under 18 for a live pornographic performance for the defendant to establish that—

(a) at the time of the alleged offence, the person pornographically depicted for the performance consented to being so depicted; and

(b) the audience of the performance consisted of the defendant only.

~~(4) For the purposes of this section, to depict pornographically~~

(a) in relation to a person under the age of 16, means—

(i) to visually depict that person as being engaged, or appearing to be engaged, in explicit sexual conduct; or

(ii) to visually depict, in a sexual manner or context, the genitals or anal region of that person or, in the case of a female person, her breast,

but, for the avoidance of doubt, a depiction for a genuine family purpose does not, merely because it depicts any part of the body referred to in subparagraph (ii), fall within that subparagraph;

(b) in relation to a person of the age of 16 or above but under 18, means—

(i) to visually depict that person as being engaged, or appearing to be engaged, in explicit sexual conduct; or

(ii) to visually depict that person, for sexual purposes, where the dominant feature of the depiction is the genitals or anal region of that person or, in the case of a female person, her breast.

(4) For the purposes of this section, to depict a person pornographically means -

(a) to visually depict the person who is engaged in or is depicted as being engaged in explicit sexual conduct; or

(b) to visually depict, in a sexual manner or context, the genitals or anal region of the person or, in the case of a female person, her breast,

but, for the avoidance of doubt, a depiction for a genuine family purpose does not, merely because it depicts any part of the body referred to in paragraph (b), fall within that paragraph.

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(5) In this section—

“live pornographic performance” (真人色情表演) includes any play, show, exhibition, act, entertainment, presentation, display or other performance of any kind in which a person is pornographically depicted;

“pornography” (色情物品) means—

(a) a photograph, film, computer-generated image or other visual depiction that depicts a person pornographically, whether it is made or generated by electronic or any other means; ~~whether or not it is a depiction of a real person and whether or not it has been modified; or~~

(b) anything that incorporates a photograph, film, image or depiction referred to in paragraph (a), and includes data stored in a form that is capable of conversion into a photograph, film, image or depiction referred to in paragraph (a) and anything containing such data.