

## **Prevention of Child Pornography Bill**

### **Administration's Response to Issues Raised at the Meeting on 29 November 2002**

At the 8<sup>th</sup> Bills Committee meeting held on 29 November 2002, a Member queried whether it was appropriate to effect the replacement of "establish" by "raise a reasonable doubt by adducing evidence" in all of the defence provisions in Clause 4 and make them applicable to all offences in Clause 3. There was a suggestion that such lowering of burden on the defendant should only be confined to those accused of possession of child pornography.

2. If this suggestion is adopted, there will be differential treatment among different offences in relation to child pornography -

- (a) On the one hand, a person charged with an offence of production, import, export, publication or advertising etc. needs to establish his defence on a balance of probabilities.
- (b) On the other hand, a person charged with an offence of possession needs only to raise a reasonable doubt by adducing evidence.

3. We have since considered the suggestion from the law enforcement angle, and also taking into account the interest of child protection. We believe that it is acceptable and justifiable to confine the lighter burden of proof (to raise a reasonable doubt by adducing evidence) to the possession offence under Clause 3(3).

4. We agree that making the mere possession of child pornography an offence is more controversial than criminalising the production, publication, import, export and advertising of child pornography. Its controversial nature has been fully reflected in the Canadian decision of *R v Sharpe* and US decision of *Ashcroft v Free Speech Coalition*. We therefore agree that the differential treatment highlighted in paragraph 2 above makes practical sense. As compared with persons who are engaged in the production, publication, import, export or advertising of child pornography, it is reasonable to argue that persons who possess child pornography without doing anything more active with it (e.g. import, reproduction) are more likely to be unaware of the exact nature of the depiction concerned.

5. In order to reflect the above, instead of our previous suggestion to replace “establish” with “raise a responsible doubt by adducing evidence” in all of the defence provisions, we propose to add a new clause 4(6) along the lines as follows (the exact wording is subject to fine-tuning) -

“(6) A defendant charged with an offence under section 3(3) shall be taken to have established a fact that must 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.”

6. This proposed new clause does not restrict the source of evidence to only those adduced by the defendant. Therefore, the defendant will have a defence if, on the evidence (whether adduced by the defendant or otherwise), there is reasonable doubt regarding matters specified in Clause 4(2), (3) or (5). However, we do not propose that the reference to “evidence” should be omitted altogether. Otherwise, it will not be clear that the reasonable doubt must be substantiated by evidence.

7. We understand that the legislation may become more complicated by this approach, but we consider that this may be a price to be paid for striking the fine balance between protecting the innocent on the one hand and avoiding creation of any loophole (and therefore compromising the protection of vulnerable children) on the other.

8. Our research into UK legislation reveals the following examples with a similar approach (extracts of relevant provisions of UK legislation are attached at Annex A) -

- (a) The Tobacco Advertising and Promotion Act 2002 (TAPA), 2002 C. 34, provides for a lighter burden of proof for the defendant with respect to some, but not all, defences.
  - (i) For example, under s.9(1) of TAPA, a person commits an offence if in the course of a business he gives any product or coupon away to the public in the United Kingdom, the purpose or effect of doing so is to promote a tobacco product. (This includes a promotion campaign of a supermarket that offers the prize of a yoyo printed with the

“Mild Seven” logo in return of every purchase of a dozen bottles of Coke.)

- (ii) S.9(3) of TAPA says no offence is committed if the tobacco product is given in the course of trade of a tobacco business to a manager or director of another tobacco business.
  - (iii) S.9(5) of TAPA says a person does not commit an offence under this section if he did not know and had no reason to suspect that the purpose is to promote a tobacco product or he could not reasonably have foreseen that the effect would be to promote a tobacco product.
  - (iv) s.17 of TAPA provides for a lighter burden of proof for a defence under s.9(5) but not s.9(3).
- (b) Likewise, the Anti-terrorism, Crime and Security Act 2001 (ATCSA), 2001 C. 24, provides for a lighter burden of proof for the defendant with respect to some, but not all, defences.
- (i) For example, under s.47(1)(c) and (d) of ATCSA, a person commits an offence if he has a nuclear weapon in his possession or participates in the transfer of a nuclear weapon.
  - (ii) S.49(1) of ATCSA says it is a defence for the accused to show that he did not know and had no reason to believe that the object to which the offence relates was a nuclear weapon.
  - (iii) S.49(3) of ATCSA says 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.
  - (iv) s.49(2) of ATCSA provides for a lighter burden of proof for a defence under s.49(1) but not s.49(3).

Defence available only under certain circumstances

9. As requested by the Assistant Legal Adviser, 2 examples of legislation that provide for a defence only under certain circumstances are -

(a) US Criminal Code provides in 2252A(d). –

*It shall be an affirmative defence to a charge of violating subsection (a)(5) [possession of child pornography] that the defendant –*

*(1) possessed less than three images of child pornography; and*

*(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof –*

*(A) took reasonable steps to destroy each such image; or*

*(B) reported the matter to a law enforcement agency and afforded the agency access to each such image.*

(b) The UK's Sexual Offences Act 1956 (SOA), Ch. 69, s. 6(1) makes it an offence for a man to have unlawful sexual intercourse with a girl under the age of sixteen (extract of relevant provisions attached at Annex B). Section 6(3) of SOA says a man is not guilty of that offence if-

(i) he is under the age of twenty-four;

(ii) he has not previously been charged with a like offence, and

(iii) he believes her to be of the age of sixteen or over and has reasonable cause for the belief.

10. These examples show that it is open to the legislature to stipulate that a defence is available only under certain circumstances.

**Security Bureau  
January 2003**

## **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)