

## **Prevention of Child Pornography Bill**

### **Administration's Response to Issues Raised at Previous Meetings**

#### **Proposed clause 4(3)(b) - Defence of steps to prevent possession**

At the Bills Committee meeting held on 17 January 2003, Members requested the Administration to explain the meaning of "took all reasonable and practicable steps" and consider improving the drafting of the expression as included the proposed clause 4(3)(b) in the draft Committee Stage amendments (CSAs) considered at that meeting and copied at Appendix I for ease of reference.

2. It should be pointed out that clause 4(3)(b) does NOT impose a duty on members of the public to take steps to prevent themselves from coming into possession of child pornography. Indeed, the idea of taking steps to prevent oneself from possession did not form part of the original legislative scheme under the blue bill. Clause 4(3) in the blue bill merely gives a person who is in possession of child pornography a defence if he gets child pornography unsolicited, and endeavours to *destroy* it. At previous meetings, some Members considered this inadequate and suggested that it may be too onerous to require a person to destroy, within a reasonable time, each and every child porn image he receives unsolicited. The Administration accepts that it may be inconvenient to a member of the public to watch out for child porn sent to him, unsolicited, on a recurrent basis. This is so especially if he has already asked the sender not to send child porn to him or if he has installed some filter device. It is against this background that clause 4(3)(b) is proposed.

3. In other words, a person, if he gets child porn unsolicited, should as soon as possible report to the police or destroy it. He already has a defence (under clause 4(3)(a)) even if he has taken no steps to prevent his receipt of child porn. The defence of taking steps to prevent

his coming into possession of child porn is an additional protection for the defendant if he has not destroyed child porn received within a reasonable time.

4. In preparation of this proposed sub-clause, we had made reference to a defence clause in the Canadian Criminal Code prohibiting child pornography, which specifies that –

“It is not a defence to a charge under subsection (2) [offences for making, printing, publishing or possessing child pornography for the purpose of publication] in respect of a visual representation that the accused believed that a person shown in the representation that is alleged to constitute child pornography was or was depicted as being eighteen years of age or more unless the accused took **all reasonable** steps to ascertain the age of that person and took **all reasonable** steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.”

5. The word “reasonable” connotes an objective test. We have proposed to add “practicable” to ensure that the defendant is only required to take reasonable steps that are practicable in the circumstances of his case. A defendant suspected of possessing child pornography will be able to avail himself of the defence if considering all the circumstances of the case, the court accepts his claim that (in the context of this sub-clause) he has taken all reasonable and practicable steps to destroy the child pornography within a reasonable time.

6. In respect of local legislation, similar expressions are found in various defence clauses under different ordinances. Extracts of the following are at Appendix II for reference –

- (a) s. 10 of Food Business Regulation (Cap. 132 sub. leg. X)
- (b) s. 13 of Securities (Insider Dealing) Ordinance (Cap. 395)
- (c) s. 47 of Aviation Security Ordinance (Cap. 494)
- (d) s. 39 of Human Reproductive Technology Ordinance (Cap. 561).

7. We cannot find any Canadian cases on the “reasonable steps to ascertain age” in the Canadian child pornography provision cited in paragraph 4 above. Concerning the UK defence that the defendant possessed indecent photograph unsolicited and but did not keep it for an unreasonable time, only one UK decision is found - *R (on the application of Harrison) v Isle of Wight Crown Court* (Hearing date: 10 April 2001)<sup>1</sup>. The defendant argued that the photographs were unsolicited and he, having kept them for 6 or 7 days, did not keep them for an unreasonable time. However, the court did not believe him and found that the photographs were sent to him on his order. As such, the question of what amounts to “keeping for an unreasonable time” is irrelevant.

8. The test of “reasonable steps to destroy” is an objective test. One has to look at whether and what steps the defendant has taken and assess whether on an objective standard he has done that which in the circumstances reasonably could be required of him.

#### **Proposed clause 4(5) - Defence of mistake as to age (possession cases)**

9. At the last meeting, some Members queried the Administration’s proposal to specify under the proposed clause 4(5) that one of the grounds of defence that a person accused of possessing child pornography may raise is that (a) he possessed it for reasonable personal use; and (b) he believed on reasonable grounds that the person pornographically depicted in the child pornography was not a child when depicted and that the person was not depicted as a child. Some Members queried the inclusion of “for his reasonable personal use”. The Administration was requested to consider improving the drafting and whether “for his reasonable personal use” may be deleted. The Administration has since reflected on the views expressed by the Bill Committee and reconsidered the sub-clause. We now propose to delete clause 4(5)(a). It will then be a sufficient defence to a possession offence for the defendant to establish just the proposed clause 4(5)(b) quoted above.

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<sup>1</sup> CO/2980/00

**Proposed clause 4(6)(a) - defence of mistake as to age (offences other than possession)**

10. The Administration was requested to give examples to explain the “reasonable and practicable steps” in the proposed clause 4(6)(a), and to consider improving the drafting of the proposed clause 4(6)(a). On whether a defendant took all reasonable and practicable steps to ascertain the age of the person pornographically depicted in the child pornography, one has to look at the enquiries the defendant has made and assess whether on an objective standard he has done that which in the circumstances of the case reasonably and practicably could be required of him. A producer who plans to produce or make pornography may be considered to have taken reasonable and practicable steps to ascertain the age by requiring the person to be depicted to show his identity card to prove his age and possibly keep a record of that checking. However, what amounts to his having taken all reasonable and practicable steps will depend on the circumstances of each case. For example, if the identity card shown in a particular case is apparently a forged document to a reasonable person, further enquiries should be made as far as it is reasonable and practicable. Another example may be that for an ordinary computer user, if he receives an unsolicited pornographic image and he wants to save it, keep it and/or forward it to a friend but is not certain about the age of the person pornographically depicted, he may ask the sender to provide the information. If a reply is not obtained or the answer does not help him to ascertain that age, depending on the actual circumstances, he may still contend that he had taken all reasonable and practicable steps in that particular case. Whether the defendant has taken all reasonable and practicable steps should be considered by taking into account all the circumstances of the case. In fact, as indicated in paragraphs 4 and 5 above, the defence provision of the Canadian legislation only states that the defendant has to take “all reasonable steps”. Our proposal of “all reasonable and practicable steps” is more favorable to the defendant as the steps that he is required to show to have taken are those that were the reasonable steps that he could practicably take in the circumstances of that particular case.

**Sub-clauses (a), (b) and (c) of the proposed clause 4(6) - defence of mistake as to age (offences other than possession)**

11. The Administration was also requested to consider whether sub-clauses (a), (b) and (c) of the proposed clause 4(6) should be linked by the word “or” instead of “and”. To replace “and” with “or” will have the effect that a defendant charged for an offence under clause 3 only has to establish any one of the defence sub-clauses to establish his defence.

12. At the outset, one should have a clear idea as to the context in which clause 4(6) may be invoked.

- (a) Clause 4(6) is targeted not at those who possess child pornography, but those who make, produce, publish, import, export etc. child pornography.
- (b) Commonly, in a child porn offence, the person depicted cannot be identified but clause 4(6) is NOT concerned with such a case -
  - (i) child pornography (under the definition as revised by CSAs) involves a pornographic visual depiction of a person who is or is being depicted as a child.
  - (ii) to invoke clause 4(6), there must be reasonable grounds to believe that the person depicted is not a child and is not depicted as a child. Reasonable persons may hold different views as to whether an unidentified person depicted is a child. In such case, the prosecution is unlikely to prove beyond reasonable doubt that the person is “depicted as a child”.
  - (iii) almost the only possibility is that the child can be identified and his age proved to be under 16.
- (c) Clause 4(6) (“mistake of age” defence) pertains to a relatively rare scenario -
  - (i) the person depicted appears [to a reasonable observer] to be above 16 (either because the child is slightly under 16 or because the child appears mature);

- (ii) the Police has evidence to prove the actual age of the person depicted beyond reasonable doubt - possibly because the child made a complaint that child porn has been made of him or her.
- (iii) the Police managed to find the accused who make, produce, publish, import, export etc. the image.

13. The policy intent behind clause 4(6) is that a defendant must comply with sub-clauses (a), (b) and (c) to establish the defence although sub-clause (b) is only applicable to those who are able to influence in any way how the person was depicted in a suspected child pornography. As mentioned above, clause 4(6) involves cases likely to be where a real person depicted can actually be identified and his age is actually under 16. Printing, making, producing, reproducing, copying, importing or exporting of child pornography is involved. These activities are related to the proliferation of child pornography. Making and producing of child pornography are likely to involve contact with a real child. It is what the proposed legislation aims to combat. The accused's act caused actual serious harm to the child. It is not sufficient for a person accused of such acts to establish a defence merely by his having a reasonable belief that the person pornographically depicted was not a child. We propose that such persons must also be required to show that he took all reasonable and practicable steps to ascertain the age of the person so depicted. Taking into account the definition of "child pornography" in the Bill, the materials so covered are explicit sexual depictions and if the depicted persons are possibly under 16 years old or depicted as being under that age, persons who handle them (whether or not they are involved in the pornography industry) and have no intention to deal with child pornography, should take into account their own circumstances and the pornographic materials before them, and take all reasonable and practicable steps to ascertain the age of the persons so depicted. It is in their own interest as well as in the interest of child protection. Therefore, we do not propose to link the sub-clauses (a), (b) and (c) by the word "or" instead of "and".

14. We have taken note of some Members' comments at the last meeting that there may be situations where the defendant received a pornographic material and the person pornographically depicted appears

obviously to be over 16 years old to the defendant. It may be reasonable for him not to take any steps to ascertain the age of the person depicted. Critics may point to the possibility that a person who looks 25 and is depicted as such may actually be under 16. Since the defendant has reasonable belief on such grounds, it is reasonable for him not to take any steps to ascertain the age. The **Court of Appeal, in *R v Land* [1999] QB 65**, said in relation to this possibility as follows -

**“The anxiety expressed by [the defence counsel] for the individual who does not know that the material depicts someone who is in fact a child is misplaced. Ignoring members of the child’s own family, who will know his or her age, it will be rare in the extreme for a complete stranger to be in possession of indecent photographs of someone who although appearing to be mature could nevertheless be proved by the prosecution to be a child. A glance will quickly show whether the material is or may be depicting someone who is under 16 and if it is or may be then prosecution will be avoided by destroying or having nothing further to do with it.”**

15. Even then, to cater for such highly improbable case, the Administration proposes to replace “taking all reasonable and practicable steps” by “taking all such steps as may be reasonable and practicable in the circumstances of the case”. The phrase “circumstances of the case” will cover such fact as the person depicted appearing to be like 25 or above. It may then be reasonable not to take any step to ascertain the age. But those who involve themselves in dealing with depictions of young persons should be forewarned that they should in general take steps to ascertain the age, especially if they do so in the course of business.

16. Under the Canadian legislation quoted in paragraph 4, the accused has no defence if he is charged with “making, printing, publishing or possessing for the purpose of publication” and he did not take all reasonable steps to ascertain the child’s age. The proposed clause 4(6) is not an unreasonable or unusual burden. Child pornography is a global problem that attracts international attention.

Hong Kong, as a member of the international community and as a society, has to enact a law that is effective in pursuing the compelling interest to protect children and to join in the concerted efforts in combating child pornography.

17. In addition, the Administration has noted Members' concerns that people accused of possessing child pornography may be less able to take steps to ascertain the age of the person pornographically depicted. In response to this concern, we have already proposed to provide a separate defence under clause 4(5) for persons accused of possessing child pornography on belief on reasonable grounds that the depicted person was not a child and not depicted as such (please refer to paragraph 9 above). Since we have now suggested the deletion of clause 4(5)(a) proposed for the last meeting, and given that the proposed clause 4(5)(b) is no different from clause 4(6)(c), subject to Members' views, we suggest exclusion of clause 3(3) from the application of clause 4(6).

### **Revised draft Committee Stage Amendments (CSAs)**

18. Taking into account our responses above to Members' comments at the last Bills Committee meeting held on 17 January 2003, we propose some further amendments to the draft CSAs previously circulated to Members at Appendix I. The proposed amendments are presented in revision mode at Appendix III.

19. The main purposes of the revised draft CSAs are summarized as follows:

- (a) Clauses 4(3)(a), 4(3)(b), 4(6)(a) and 4(96)(b) – to replace “taking all reasonable and practicable steps” by “taking all such steps as may be reasonable and practicable in the circumstances of the case” to reflect the fact that only steps that are reasonable and practicable in all the circumstances of the case will be taken into account.
- (b) Clause 4(5)(a) – to delete the previous proposed requirement



of the defendant having to establish that he possessed the child pornography for his reasonable personal use.

- (c) Clause 4(6) – to exclude clause 3(3) from the application of clause 4(6).

20. Members are invited to comment on the revised draft CSAs attached at Appendix III.

**To explain whether the proposed defences in clause 4 would have the effect of making the offences in clause 3 strict liability offences**

21. Strict liability in statutory offences normally results from the court's refusal to read into a statutory provision which does not use words like "intentionally" or "knowingly" or "recklessly" in relation to an element of the *actus reus* of a particular offence, a requirement that *mens rea* (i.e. criminal intent) in relation to it must be proved by the prosecution.

22. Lord Edmund- Davies said in *Whitehouse v Gay News* [1979] AC 617 at 656 that .." an offence is regarded- and properly regarded- as one of strict liability if no mens rea need be proved as to a single element in the actus reus."

23. The policy intent is clear. The Administration does not intend that a person who does not know and has no reason to suspect something to be child pornography to be guilty under the new law. If any prosecutor were to argue that a person can be convicted of an offence of possession of child pornography regardless of his knowledge or suspicion, we do not think the court will accept that.

24. In *Gammon (Hong Kong) Ltd v A.G. of Hong Kong* [1985] AC 1, [1984] 2 All ER 503, PC, [1985] 2 HKC 661, Lord Scarman sets out five propositions when deciding whether an offence is one which carries strict liability. His Lordship said ( at p.668): -

- (1) there was a presumption of law that mens rea is required before a person could be held guilty of a criminal offence;
- (2) the presumption is particularly strong where the offence is 'truly criminal' in character;

- (3) the presumption applies to all statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute;
- (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern; public safety and health are such issues;
- (5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."

25. Per curiam, Lord Scarman (at p. 670B-C) said that " whether a particular provision of the statute created an offence of full mens rea or of strict liability must depend upon the true meaning of the words of the particular provision construed with reference to its subject matter and to the question of whether strict liability in relation to any or all of the essential ingredients would promote the objects of the provision. "

26. It is no easy task to persuade the court that mens rea is immaterial. The presumption is strong. The court may be more inclined to find strict liability in offences that are regulatory in nature (e.g. food safety). Child pornography offences are not within that category.

27. Take the possession offence as an example, "knowledge" is material to the guilt or innocence of the defendant. To prove a prima facie case, apart from proving the other elements of the offence, the prosecution must prove beyond reasonable doubt that the defendant knew that he possessed "something" as an ingredient of the offence of possession. And this is not the end of the matter. The defendant may raise the question of lack of knowledge as a defence, by adducing evidence. This does not mean the offence becomes a strict liability offence. Instead, it merely relieves the prosecution of an initial burden to prove knowledge. To put an initial burden on the prosecution to prove the defendant's knowledge of the precise nature of the thing possessed would cause serious difficulties in prosecuting the offence, thus undermining the efficacy of the legislation. In the House of Lords decision in *R v Lambert* [2001] 3 WLR 206 Lord Hope of Craighead described similar difficulties in the context of possession of dangerous

drugs cases that “the systems of control and prosecution might well be in jeopardy if there were to be an initial onus on the prosecution to establish that the accused knew these things [i.e. that what he possessed was a controlled drug]. The right to silence and the covert and unscrupulous nature of drug-related activities must be taken into account in the assessment as to whether a fair balance had been achieved” (para. 89 of the judgment; see also other parts of the judgement para. 36 – Lord Steyn; para. 69 to 71 – Lord Hope of Craighead; para. 153 – Lord Clyde; para. 190 – 191 – Lord Hutton).

28. However, it is the prosecution who bears the persuasive burden. Lord Clyde’s judgment at paragraphs 157 and 158 explains the degree of knowledge that the prosecution has to prove before an accused may be convicted -

“... It seems to me that the proper way by which that harshness should be alleviated is to recognise that the accused should have the opportunity to raise the issue of his knowledge but to leave the persuasive burden of proof throughout on the prosecution. Respect for the “golden thread” of the presumption of innocence deserves no less.

I am not persuaded that this approach gives rise to any practical problem. In some cases no issue may arise at all about the accused’s knowledge of the nature of the thing which he is alleged to possess. Section 28 [which provides for a lack of knowledge defence] then will not come into play and it would only distract a jury from the point in issue to give any direction, or certainly any detailed direction, about it. When the matter of the accused’s knowledge (including in that word for convenience the matters of suspicion and reason to suspect which are detailed in section 28) does arise, such burden as there is on the defence is discharged by the defence expressly raising knowledge as an issue. Where that occurs the judge will require to explain the substance of section 28 to the jury but will also simply remind them that the burden of proving guilt is throughout on the prosecution. If the jury are satisfied on the matter of

possession but are left with a reasonable doubt on the matter of his knowledge or suspicion of the existence of a fact which the prosecution has to prove, such as, for example, the existence of the controlled drug, then they should acquit. *If the jury are satisfied beyond reasonable doubt that the accused possessed the substance or product in question but are not satisfied beyond reasonable doubt that he knew that it was a controlled drug (or suspected or had reason to suspect that it was) then again they should acquit him.* They can only convict if they are satisfied beyond reasonable doubt that the prosecution has proved possession of the controlled drug and, if the issue is raised, that the lines of defence set out in section 28 are without foundation.”

29. Applying Lord Clyde’s judgment cited above to the context of child pornography, the respective burden of proof of the prosecution and the defendant in respect of “knowledge” in the context of child pornography is as follows -

- (a) There are cases where no issue may arise at all about the accused’s knowledge of the nature of the thing which he is alleged to possess. It would distract a jury from the point in issue to give any direction, or certainly any detailed direction, about it. There is no initial burden on the prosecution to prove the accused’s knowledge that the impugned material he possessed was child pornography.
- (b) On the other hand, the defence may adduce evidence sufficient to raise the issue of knowledge (e.g. in clause 4(2) of the Bill). Where that occurs, the judge will require to explain the substance of clause 4(2) to the jury but will also simply remind them that the burden of proving guilt is throughout on the prosecution. If the jury are satisfied beyond reasonable doubt that the accused possessed the impugned material in question but are not satisfied beyond reasonable doubt that he knew that it was child pornography (or suspected or had reason to suspect that it was) then they should acquit him. They can only convict if they are

satisfied beyond reasonable doubt that the prosecution has proved possession of the child pornography and, if the issue is raised, that the lines of defence set out in clause 4(2) are without foundation.

30. In short, the prosecution does have the persuasive burden regarding mens rea. The defendant cannot be convicted if there is reasonable doubt that he knew of the nature of the thing he is alleged to possess being child pornography (or suspected or had reason to suspect that it was child pornography). Clause 3 offences are not strict liability offences.

**Proposed clause 4(8)(b) - prosecution to disprove beyond reasonable doubt**

31. The Administration has been requested to reconsider the need for the proposed clause 4(8)(b) in the light of clause 4(8)(a).

32. It can be seen that draft clause 4(8) reflects the House of Lords' guidance in R v Lambert as to how the issue of the defendant's knowledge should be resolved in a trial, namely –

- (a) no initial burden on this point for the prosecution;
- (b) evidential burden on the defendant to raise an issue as to his lack of knowledge (or suspicion);
- (c) burden on the prosecution to disprove the defendant's assertion beyond reasonable doubt.

33. Omission of clause 4(8)(b) would mean incomplete guidance to the court. It may even mislead some to think that it is the end of the matter if the defendant raises an issue. It is also helpful to emphasize that the prosecution is to disprove the defendant's assertion beyond reasonable doubt.

34. Extracts of the following UK legislation with a similar approach are attached at Appendix IV -

- (a) sections 9 and 17 of the Tobacco Advertising and Promotion Act 2002 (2002 C. 34) provides for a lighter burden of proof for the defendant with respect to some, but not all, defences.
- (b) sections 47 and 49 the Anti-terrorism, Crime and Security Act 2001 (2001 C. 24)

**To consider the suggestion of providing a defence of reasonable excuse for the possession of child pornography**

35. At the Bills Committee meeting held on 9 January 2003, a Member suggested that the Administration should consider providing a defence of reasonable excuse for the possession of child pornography. In the Prevention of Child Pornography Bill, which was previously introduced into the Legislative Council in 1999 (but lapsed on 30 June 2000), a defence clause was available to the effect that “Where a person is charged with an offence under the Bill, there shall be a defence for him if it is established by evidence that he had a legitimate cause for doing the act.” The above defence clause was criticised for being vague. The Administration has therefore proposed the more specific defence clauses in the revised Bill being considered by the Bills Committee. We have already provided specific defences that deal with any reasonable excuse a defendant could possibly have for possession of child pornography. In particular, clause 4(1) provides for defences for handling child pornography for a genuine educational, scientific or medical purpose, or it served the public good. In fact, during the revised Bill’s drafting, the Administration already took into account the defence clauses in the child pornography legislations of other jurisdictions. We do not recall the inclusion of a defence of reasonable excuse for the possession of child pornography in those legislations. Therefore we do not propose its inclusion in the defence clauses which are being examined by the Bills Committee.

**Security Bureau  
February 2003**

PREVENTION OF CHILD PORNOGRAPHY BILL

**COMMITTEE STAGE**

Amendments to be moved by the Secretary for Security

<u>Clause</u>	<u>Amendment Proposed</u>
2(1)	<p>(a) In the definition of "child pornography", in paragraph (a), by deleting "appears to be" and substituting "is depicted as being".</p> <p>(b) In the definition of "pornographic depiction", in paragraph (a), by deleting "depicts a person who is or appears to be engaged in explicit sexual conduct;" and substituting "of a person who is engaged in or is depicted as being engaged in explicit sexual conduct; or".</p>
4	<p>By deleting subclause (3) and substituting -</p> <p>"(3) It is a defence to a charge under section 3(3) for the defendant to establish that -</p> <p>(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 for this purpose; or</p> <p>(b) he had not asked for any child pornography and, within</p>

a reasonable time after it came into his possession, he took all reasonable and practicable steps to destroy it."

4(4) By deleting "Without prejudice to subsection (2), it" and substituting "It".

4 By deleting subclause (5) and substituting -

"(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 for the defendant to establish that -

- (a) he took all reasonable and practicable steps 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 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.

(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."

5(5) By adding -

"vehicle" ( ) does not include a military vehicle;".

11(1)(a) By adding "and" after the semicolon.

14 (a) By deleting the proposed section 138A(4) and substituting -

"(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."

(b) In the proposed section 138A(5), in the definition of "pornography", in paragraph (a), by deleting ", whether or not it is a depiction of a real person".

**Appendix II**

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**Section of Enactment**

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Chapter:	132X	Title:	FOOD BUSINESS REGULATION	Gazette Number:	L.N. 320 of 1999
Section:	<b>10</b>	Heading:	<b>Protection of food from risk of contamination</b>	Version Date:	01/01/2000

Every person engaged in any food business shall, while so engaged, take all such steps as may be reasonably necessary to protect the food from risk of contamination or deterioration, and in particular, without prejudice to the generality of the foregoing, no person shall-

- (a) so place, or cause, suffer or permit any other person so to place, any open food as to involve any risk of contamination; or
- (b) wrap up or otherwise bring any open food into direct contact with any printed newspaper or other unclean paper or wrapping material.

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Chapter:	395	Title:	SECURITIES (INSIDER DEALING) ORDINANCE	Gazette Number:	
Section:	<b>13</b>	Heading:	<b>Duty of officers of corporation</b>	Version Date:	30/06/1997

It shall be the duty of every officer of a corporation to take all such measures as may from time to time be reasonable in all the circumstances for the purpose of ensuring that proper safeguards exist to prevent the corporation from perpetrating any act which would cause it to be identified by the Tribunal as an insider dealer.

(Amended 69 of 1991 s. 2)

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**Section of Enactment**

Chapter:	494	Title:	AVIATION SECURITY ORDINANCE	Gazette Number:	
Section:	<b>47</b>	Heading:	<b>Contents of enforcement notice</b>	Version Date:	30/06/1997

(1) An enforcement notice may specify in greater detail measures which are described in general terms in those provisions of the direction to which it relates which impose general requirements, but may not impose any requirement which could not have been imposed by a direction given by the Authority under the provision under which the direction was given.

(2) An enforcement notice may be framed so as to afford the person on whom it is served a choice between different ways of complying with the specified requirements of the direction.

(3) Subject to subsection (4), an enforcement notice which relates to a direction given under section 39 must require the person to whom the direction was given not to cause or permit things to be done as mentioned in subsection (1)(a) or (b) or (2) of that section, as the case requires, until the specified measures have been taken.

(4) In serving an enforcement notice which relates to a direction under section 39(2), the authorized officer shall allow, and shall specify in the notice, such period as appears to him to be reasonably required for taking the measures specified in the notice; and the notice shall not take effect before the end of the period so specified.

(5) An enforcement notice which relates to a direction must either-

(a) require the person to whom the direction was given to take the measures specified in the notice within a period so specified which-

(i) where the measures consist of or include the construction, execution, alteration, demolition or removal of a building or other works, must not be less than 30 days after the day on which the notice is served; and

(ii) in any other case, must not be less than 7 days after the day on which the notice is served; or

(b) require him not to do things so specified, or cause or permit things to be done, until the measures so specified have been taken.

(6) Subject to section 50, an enforcement notice requiring a person not to cause or permit anything to be done shall be construed as requiring him to take all such steps as in any particular circumstances are practicable and necessary to prevent that thing from being done.

(Enacted 1996)

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**Section of Enactment**



Chapter:	561	Title:	HUMAN REPRODUCTIVE TECHNOLOGY ORDINANCE	Gazette Number:
Section:	<b>39</b>	Heading:	<b>Offences</b>	Version Date:

Remarks:  
not yet in operation

(1) A person who contravenes section 13, 14, 15(1), (2), (3) or (5), 16(1) or (2) or 17(1) or (2), or any condition specified in a notice mentioned in section 27(7) or under section 29 or 32(2), or the condition specified in section 34(7), commits an offence and is liable-

- (a) on a first conviction, to a fine at level 4 and to imprisonment for 6 months;
- (b) on a subsequent conviction, to a fine at level 6 and to imprisonment for 2 years.

(2) A person who, for the purposes of the grant of a licence, knowingly or recklessly provides any information which is false or misleading in a material particular commits an offence and is liable on conviction to a fine at level 4 and to imprisonment for 6 months.

(3) A person who discloses any information in contravention of section 34 commits an offence and is liable-

- (a) on a first conviction, to a fine at level 4 and to imprisonment for 6 months;
- (b) on a subsequent conviction, to a fine at level 6 and to imprisonment for 2 years.

(4) A person who-

- (a) fails to comply with a requirement made by virtue of section 37(1)(b) or (2) (b) or 38(2)(b)(ii) or (5)(b); or
- (b) intentionally obstructs the exercise of any rights conferred by a warrant issued under section 38,

commits an offence and is liable on conviction to a fine at level 4 and to imprisonment for 6 months.

(5) A person to whom a licence applies or the licensee who gives or receives any money or other benefit, not authorized under this Ordinance, in respect of any supply of gametes or embryos, commits an offence and is liable on conviction to a fine at level 4 and to imprisonment for 6 months.

(6) It is a defence for a person ("the defendant") charged with an offence of doing a thing which,

under section 13, cannot be done except pursuant to a licence to show-

- (a) that the defendant was acting under the direction of another; and
- (b) that the defendant believed on reasonable grounds-
  - (i) that the other person was at the material time the person responsible under a licence or a person designated by virtue of section 24(3)(b) as a person to whom a licence applied; and
  - (ii) that the defendant was authorized by virtue of the licence or directions to do that thing.

(7) It is a defence for a person charged with an offence against this Ordinance to show-

- (a) that at the material time he was a person to whom a licence applied; and
- (b) that he took all such steps as were reasonable and exercised all due diligence to avoid committing the offence.

(8) Where the person responsible under a licence has committed an offence against this Ordinance, the licensee shall be guilty of the like offence unless the licensee shows that the act or omission constituting the offence took place without his knowledge or consent.

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PREVENTION OF CHILD PORNOGRAPHY BILL

**COMMITTEE STAGE**

Amendments to be moved by the Secretary for Security

<u>Clause</u>	<u>Amendment Proposed</u>
2(1)	<p>(a) In the definition of "child pornography", in paragraph (a), by deleting "appears to be" and substituting "is depicted as being".</p> <p>(b) In the definition of "pornographic depiction", in paragraph (a), by deleting "that depicts a person who is or appears to be engaged in explicit sexual conduct;" and substituting "of a person who is engaged in or is depicted as being engaged in explicit sexual conduct; or".</p>
4	<p>By deleting subclause (3) and substituting -</p> <p>"(3) It is a defence to a charge under section 3(3) for the defendant to establish that -</p> <p>(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 <del>all reasonable and practicable</del> <u>steps all such steps as may be</u></p>



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."

4(4) By deleting "Without prejudice to subsection (2), it" and substituting "It".

4 By deleting subclause (5) and substituting -

"(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.

(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."

5(5) By adding -

"vehicle" ( ) does not include a  
military vehicle;".

11(1)(a) By adding "and" after the semicolon.

14 (a) By deleting the proposed section 138A(4) and  
substituting -

"(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."

- (b) In the proposed section 138A(5), in the  
definition of "pornography", in paragraph  
(a), by deleting ", whether or not it is a  
depiction of a real person".

**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.