

Prevention of Child Pornography Bill

Administration's Response to Issues Raised at the Meeting on 2 April 2003

Drafting of Clause 2(2)(b)

At the 12th Bills Committee meeting held on 2 April 2003, Members requested the Administration to consider deleting the term “show” in Clause 2(2)(b) and add a new Sub-clause 2(2)(c) along the line of “display or show child pornography to another person.”

2. Having considered the suggestion and drafting concerns, the Administration propose to revise Clause 2(2) as follows, with changes indicated in italics -

“(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;
- (b) shows *the child pornography in any manner whatsoever to another person (including but not limited to showing, playing or projecting the child pornography to or for another person using any machinery or apparatus or publicly displaying the child pornography)*.

(2) 就本條例而言，如任何人不論是否爲了得到任何形式的報酬而 –

- (a) 將兒童色情物品分發、轉傳、出售、出租、交給或出借予另一人；
- (b) 以任何方式將兒童色情物品示人(包括但不限於使用任何機器或器具將兒童色情物品向另一人或爲另一人放映、播放或投影或公開展示兒童色情物品)，

該人即屬發布兒童色情物品。”

Overseas experience on enforcement difficulties that might arise if “Knowing” is added to the offence provision

3. Before finalising this paper, we have the benefit of having access to a copy of the written advice tendered by the Legal Adviser to the Bills Committee on 17 April 2003. We generally agree with the advice given therein and note that the Legal Adviser has expressed support of the Administration’s relevant analyses provided to the Bills Committee earlier.

4. In particular, we would highlight that our proposed possession offence clause already seeks to strike a fair balance between having an offence provision that is enforceable and protecting the innocent. The statutory defence clauses that we have been discussing with the Bills Committee specifically seek to address the latter.

5. As may be seen from the survey of legislation of UK, Canada, Australia and US (LC paper no. CB(2) 2377/01-02(01)), all of these countries (other than the US) are silent on the mental element. Nevertheless, although “knowingly” is not included in the legislation, yet the mental element is one of the essential elements to be proved by the prosecution (for details please refer to paragraphs 23 to 28 of the paper entitled “Overseas legislation on “possession of child pornography” extracted at Annex A). Also, the defences proposed in the blue bill (including those on lack of knowledge and mistake as to age) are the most comprehensive, compared with those four jurisdictions.

6. Not only so, in view of Members' concerns over the risk that the innocent may be caught, several amendments have been proposed for further protection of the defendant. They include -

- (a) replacing references to "appears to be" by "depicted as being", a phrase that has been considered by the Supreme Court of Canada in *R v Sharpe* and construed as importing an objective standard in assessing the apparent age of the person depicted;
- (b) in relation to unsolicited child pornography, the defendant has a defence if he has taken reasonable steps to prevent himself from

coming into possession of the child pornography (in addition to the defence of "reasonable steps to destroy the child pornography" already provided for in the blue bill);

- (c) for an offence of possession of child pornography, he has a defence if he believes on reasonable grounds that the person depicted is not a child and is not depicted as a child; he needs not to take reasonable steps to ascertain the age of the person depicted;
- (d) replacing references to "endeavoured" or "taking all reasonable steps" in the blue bill by "*taking all such steps as were reasonable and practicable in the circumstances of the case*" to ensure the particular circumstances of the defendant and of the case generally will be relevant in assessing whether what he did in destroying or avoiding possession of the child pornography or ascertaining the age of the person depicted are reasonable;
- (e) to expressly state that the burden on a defendant charged with possession in raising a defence under Clauses 4(1), (2) or (5) is merely to adduce evidence to raise an issue and it is for the prosecution to prove the contrary beyond reasonable doubt.

7. Under the Prevention of Child Pornography Bill, the prosecution is responsible for providing sufficient evidence on at least the following three elements in connection with the possession offence before any actual charge may be considered –

- (a) that the defendant possessed something in the sense that it was within his custody or control; (*Bellerby v Carle* [1983] 2 AC 101)
- (b) that the defendant knew that he possessed something; (*R v McNamara*(1988) 87 Cr App R 246)
- (c) that the something possessed by the defendant was child pornography.

{please see paragraphs 4 to 8 of the earlier paper on "knowingly" of October 2002 attached at [Annex B](#)}

8. The prosecution has the burden to prove these elements beyond reasonable doubt. Therefore, if a certain thing is found in a flat shared by person A and person B but it cannot be proved beyond all reasonable doubt which person has custody or control over the thing, neither person A nor person B will be convicted. Likewise, if the jury has a reasonable doubt that something is slipped into the defendant's bag without his knowledge, he must be acquitted. On these 3 elements, there is no onus of proof on the defendant to adduce evidence to support his innocence. These are well-established principles under common law. On the other hand, case law does not support the need for the prosecution to prove that the defendant knew the exact nature of the thing he has in his possession. The difficulties that the prosecution will have were the position otherwise were acknowledged by the House of Lords in various passages in R v. Lambert's judgement. {please see **paragraph 11** of the earlier paper on "**knowingly**" of October 2002 attached at Annex B}

9. If the word "knowingly" is added to the offence provision, the prosecution will be required to prove at the outset that the defendant is, knowingly, in possession of child pornography. There will be great difficulty in establishing even a prima facie case. While the police may have found something that is child pornography in a defendant's bag, there is very often no direct evidence as to the defendant's actual knowledge of the exact nature of that thing being child pornography, let alone proof of that knowledge beyond reasonable doubt.

10. For instance, if VCDs or DVDs that depict children pornographically are found in a suspect's bag, the nature of their content cannot be ascertained unless the VCDs or DVDs are played. If the prosecution needs to prove that a defendant has actual knowledge that those VCDs or DVDs he is alleged to possess are child pornography, there must at the outset be positive evidence of the defendant's actual knowledge that the VCDs or DVDs contain child pornography. Inferences may be drawn if the VCDs or DVDs have labels on their face that expressly state that they are child pornography. However, there may well be no label, or the label is concealed, or the label is completely innocuous (such as a serial number or a general term like "Golden teens") or merely state that it is pornography but not specifically child pornography. Even if labels are present and inferences may be drawn, there may be more than one plausible inferences and the defendant will always be given the benefit of doubt. It will be rare that the defendant is actually caught playing the VCDs or DVDs and watching the images or that he admits he is

knowingly in possession of child pornography.

11. In short, the offence provision on possession of child pornography is hardly enforceable if the word "knowingly" is added, bearing in mind the defendant's right to silence, the burden on the prosecution to prove every element of the offence beyond all reasonable doubt and the fact that the defendant is the only person who can tell whether he knows of the nature of things in his possession.

12. Lord Hope of Craighead in the *Lambert* case 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. 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).

13. The absence of the word "knowingly" does make it easier for the prosecution to establish a prima facie case. But that does not lead directly to a prosecution and conviction. Rather, this facilitates the collection of evidence by requiring the suspect to explain his knowledge or lack of knowledge as to his possession of the child pornography. If the suspect chooses to remain silent when it is clear that he is knowingly in control and custody of a thing that is found to be child pornography, he is entitled to remain silent and does so at his own risk. However, if he asserts his lack of knowledge, the Police may assess whether his explanation raises a reasonable doubt as to his guilt. In deciding whether prosecution should be initiated, the prosecutor will assess whether there is a reasonable prospect of conviction, taking into account the suspect's explanation and any other evidence that casts doubt on the suspect's guilt. If the case does proceed to court, he must be acquitted if the jury has a reasonable doubt whether he knew or had reasonable cause to suspect it to be child pornography or was mistaken as to the age of the person depicted.

Proposed Clause 4(2) – Defence of mistake as to age (possession cases)

14. As annexed to the paper entitled "Administration's Response to Issues Raised at the Meeting on 18 February 2003" (LC Paper no. CB(2) 1522/02-03(02)), the proposed Clause 4(2) was drafted as follows –

“(2) It is a defence to a charge under section 3(3) for the defendant to establish that he believed on reasonable grounds that the person pornographically depicted in the child pornography was not a child when originally depicted and that the person was not depicted as a child.”

15. A Member proposed to revise the above Sub-clause by replacing “*believed on reasonable grounds* that the person pornographically depicted in the child pornography was not a child” in clause 4(2) with “*had no reason to believe* that the person pornographically depicted in the child pornography was a child”.

16. With the amendments that the Administration agrees to take on board as referred to in paragraph 6 above, the Bill already contains the most comprehensive defences, compared to child pornography legislation in other jurisdictions. A person charged with possession of child pornography will not be convicted if evidence is adduced to raise an issue as follows (except where the prosecution can prove the contrary beyond all reasonable doubt)-

- (a) 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.
- (b) even if he has seen it, that
 - (i) he had not asked for any child pornography and took steps to prevent himself from coming into possession of child pornography.
 - (ii) he had not asked for any child pornography and took steps to destroy it within a reasonable time .
- (c) even if he has seen it and kept it, that he believed on reasonable grounds that the person pornographically depicted in the child pornography was not a child when originally depicted and that the person was not depicted as a child.

There are also defences of Class I or II status under COIAO and genuine educational, scientific or medical purpose or public good.

17. The Administration is of the view that the proper balance has been struck.

We are not talking about people carrying on normal commercial activities, and the harm is not mere economic loss. The defendant has in his possession something that is pornographic depiction of children and it can be proved beyond reasonable doubt to be such. It is fair that he is acquitted only if he had formed a positive belief that it was not child pornography when he decided to keep it. Only this can adequately address the compelling interest of protecting children from being exploited sexually for the purpose of child pornography, and from the humiliation and the psychological damage arising from such exploitation.

To consider confining the element of “knowingly” to possession but not whether an article or movie was child pornography

18. A Member suggested confining the element of “knowingly” to possession only but not whether he knows the nature of the thing (being child pornography) that he is possessing. This suggestion is similar to our earlier explanation in the paper entitled “Knowingly” of how the mental element is addressed. By way of case law, the above approach is already implicit in the present formulation of the proposed possession offence. We note that the Legal Adviser to the Bills Committee has also advised on this point which he has labeled as “the two-pronged approach to possession”. He agrees with the Administration’s analysis which has the support of judicial authorities.

Security Bureau
April 2003

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Prevention of Child Pornography Bill

Extracts of Overseas legislation on "possession of child pornography"

(D) Express mental element

23. The **United States** is the only jurisdiction that includes in its offence provisions an express mental element. Offence provisions of the **United Kingdom, Canada and New South Wales, Australia** are all silent on the mental element.

24. In the **United States**, defendants frequently challenged their convictions on the ground that there is insufficient evidence of "knowledge". In the case of *Layne*¹, the accused did not dispute that he was in possession, in his storage unit, of 40 magazines that depicted minors engaged in explicit sexual conduct. He argued that he did not *knowingly* possess the magazines. There was in fact strong evidence of knowledge. The accused's wife testified that he had the only key to the storage unit. The accused also admitted to an officer that he had child pornography at the storage facility. The accused had child pornography in his house when he was arrested. On appeal, the court affirmed the conviction.

25. Although legislation in the **United Kingdom and Canada** do not include an express mental element, courts have consistently required proof of "knowledge" to support a conviction. The knowledge can be inferred from circumstantial evidence.

26. In the **United Kingdom**, an accused who was unaware of the existence of the cache in his computer which contained unsaved indecent photographs, was held not guilty of possessing the photographs². In *R v Matrix* [1997] Crim LR 901, CA, an assistant was in charge of a sex shop that specialised in the sale or rental of explicit sexual video cassettes said to cater as advertised for "different sexual orientations". He was convicted of possession of indecent photograph of children with a view to it being distributed or shown by himself or others. He admitted that he

¹ USA v John David Layne, No. 93-2807, US Court of Appeals for the Fifth Circuit, 43 F.3d 127; 1995 U.S. App. LEXIS 408

² Atkins v DPP; Goodland v DPP (Queen's Bench Division)

knew the impugned video was physically present in the stock but claimed ignorance of its quality, namely that it depicted children engaged in sexual acts. There seemed to be no specific evidence of the defendant's knowledge of the indecent nature of the video. The Court of Appeal upheld the conviction, as the jury was entitled to infer his knowledge. The Court of Appeal also referred to the fact that the appellant in this case did not avail himself of the defence under s.1(4) of the Protection of Children Act 1978 and did not give evidence. It is a defence under s.1(4) to prove that that he had not seen the photographs in question, and did not know or have cause to suspect that they were indecent.

27. In the **Canadian** cases of *R. v. Weir*³ the defence argues subjective knowledge must be proven beyond all reasonable doubt for there to be possession of child pornography (being files in Weir's computer) and, without catching Mr. Weir looking at the images, that knowledge is not proven. The court held that the knowledge can be inferred from evidence that the other residents at Mr. Weir's home knew nothing about the data on the computer, that Mr. Weir had exclusive use of the files and therefore control of them, and that Mr. Weir exchanged with another messages with the pornographic images of children.

28. In the **Australian** cases found, knowledge was not an issue.

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³ 1998 W.C.B.J. 663559; 37W.C.B. (2d) 302 (Alberta Queen's Bench); 156 C.C.C. (3d) 188; 2001 (Alberta Court of Appeal) (July 4, 2001)

Prevention of Child Pornography Bill

“Knowingly”

Some members of the Bills Committee suggested the Administration to include an express mental element in the offence of possession of child pornography under clause 3(3) of the Bill.¹ Legislators' worry is that people may possess child porn in the form of SPAM mail, unsolicited films or possibly publications circulated in public but may not know that they contain child porn.

Proposed possession offence

2. The offence of “possession of child pornography” is set out in Clause 3(3) which reads :

“Any person who has in his possession any child pornography (unless he is the only person depicted in the child pornography) commits an offence ...”

3. The Bill at present does not provide for an express mental element but contains defence provisions in Clause 4(2) and (5) as follows² :

“(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.

(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;

¹ In the previous paper "Overseas legislation on possession of child pornography", the section on "express mental element " mentions that United States is the only jurisdiction that includes in its offence provisions an express mental element. Offence provisions of the United Kingdom, Canada and New South Wales, Australia are all silent on the mental element. The paper also briefly discusses some court cases in these jurisdictions in which knowledge was in dispute.

² The Administration intends to submit separately draft amendments to Clause 4(5) for more logical presentation.

- (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."

Ingredients of the proposed offence

4. To establish that an offence under Clause 3(3) has been committed by the defendant, the prosecution must prove three essential ingredients of the offence beyond reasonable doubt. These ingredients are:

- (1) that the defendant possessed something in the sense that it was within his custody or control; (physical element of possession - see paragraph 6 below)
- (2) that the defendant knew that he possessed something; (mental element of possession - see paragraphs 7 to 8 below)
- (3) that the something possessed by the defendant was child pornography.

5. The intent of the proposed legislative scheme is such that the prosecution is required to prove the facts from which, in appropriate cases, the inference could be drawn that the accused was in possession of the thing, which upon examination, was shown to be child pornography. It leaves it to the accused to raise the question of lack of knowledge as a defence.

Physical element of "possession"

6. In order to be in physical possession of the child pornography in question, it must be proved that the defendant had some *degree of custody or control* over it. In *Bellerby v Carle* [1983] 2 AC 101, the House of Lords in the UK considered the meaning of possession within the context of the Weights and Measures Act 1963. Lord Brandon, whilst not finding it necessary to lay down an exhaustive definition of the expression 'has in his possession', stated that :

“ A person cannot ‘ have in his possession’ weighing and measuring equipment...unless he has some degree of control over it.”

Mental element of “possession”

7. The mental element of possession is illustrated in possession of drugs cases. Lord Lane CJ of the UK Court of Appeal in *R v McNamara* (1988) 87 Cr App R 246 at p. 252 identified the elements of the offence which the prosecution must prove. At page 252 of the judgment he said:

“The prosecution must prove that the accused had a bag [or some sort of container] with something in it in his possession or control; and that the something in the bag was a controlled drug. It is not necessary for the prosecution to prove that the accused knew that the thing was a controlled drug, let alone a particular controlled drug. The defendant may then seek to establish one of the defences provided...in the Act.”

8. *McNamara* was applied by the recent House of Lords decision in *R v Lambert* [2001] 3 WLR 206, a case which concerned a charge of possession of a controlled drug with intent to supply, contrary to section 5(3) of the Misuse of Drugs Act 1971, section 28 of the Act provided a lack of knowledge defence. The Law Lords stated in their reasons for judgment³ that for the purposes of sections 5 and 28 of the 1971 Act, where the prosecution proved that the accused had a container with something in it in his possession and control and that the thing in it was a controlled drug, it was not necessary for the prosecution to prove that the accused knew that the thing was a controlled drug.

Adding ‘knowingly’ to the offence provision?

9. One may ask, "If the intention is that the Prosecution needs to prove knowledge, why not expressly state *knowingly* in the offence provision for *possession of child pornography* in clause 3(3)?" The answer is that inclusion of "knowingly" would cause serious difficulties in prosecuting the offence, thus undermining the efficacy of the legislation. By adding "knowingly", the prosecution will have to prove not only knowledge of possession of the thing, that is in fact child pornography, but also knowledge of the nature of the thing possessed (that it is child pornography or, in other words, it contains (i) a pornographic depiction of (ii) a child). Lord Hope of Craighead in the *Lambert* case 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. The right to

³ See paragraphs 16, 35, 61, 126 and 187 of the judgment.

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).

10. At paragraph 125 of the judgment of the *Lambert* case, Lord Clyde illuminated *what difference the word "knowingly" makes* in the context of offences of possession:-

"But in the context of offences of possession, the matter is somewhat more delicate in so far as the substance of the knowledge involved may be of different kinds of things. Knowingly to possess something seems to my mind to require that there is knowledge of what the thing is, at least in its general nature, which one has in possession. The offence of knowingly possessing explosives implies knowledge that the things in possession are explosives: *R v Hallam* [1957] 1 QB 569. The distinction between that case and possession of drugs where the word "knowingly" does not occur was noted in *Lockyer v Gibb* [1967] 2 QB 243, where it was held that it did not have to be proved that the accused knew that what she had in her hold-all was a drug. The absence of the word "knowingly" in section 5(3) of the 1971 Act fits with the understanding that the word "possession" does not involve knowledge of the nature of the thing possessed."

Justification

11. Placing an evidential burden on the defence to prove lack of knowledge (the nature of the burden is explained in paras. 15 –17 below) is justified by the difficulties the prosecution will have if it were required to prove knowledge in the specific sense (i.e. knowledge of the exact nature of the thing possessed). This was acknowledged in various passages of the *Lambert* judgment (para. 36 - Lord Steyn; para 69 to 71 - Lord Hope of Craighead; para. 153 - Lord Clyde; para 190 -191 - Lord Hutton).

Per Lord Steyn -

“It is now necessary to consider the question of justification for the legislative interference with the presumption of innocence. I am satisfied that there is an objective justification for some interference with the burden of proof in prosecutions under section 5 of the 1971 Act. The basis for this justification is that sophisticated drug smugglers, dealers and couriers typically secrete drugs in some

container, thereby enabling the person in possession of the container to say that he was unaware of the contents. Such defences are commonplace and they pose real difficulties for the police and prosecuting authorities.

Per Lord Hope of Craighead -

“I do not think that it is surprising that Parliament made that choice in view of the difficulties which the prosecution would face if it had to prove in every case that the accused knew that the thing was a controlled drug. Taken to its logical conclusion, a requirement to prove mens rea as to the gravamen of the offence would extend to proof of knowledge that it was a controlled drug of the class alleged, as different penalties apply to each class. The legislation has clearly not gone that far, as section 28(3)(a) shows. As it is not a defence for the accused to prove that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged, it is plain that this is not something that the prosecution need establish. Proof of possession of the substance or product is sufficient. Strict liability follows, subject to the defences which are provided for by the statute.

In most cases possession of a container such as a bag or a tin will enable the inference to be drawn that the accused was in possession of its contents, and in most cases where the substance or product is out in the open such as where it is found on the accused's mantelpiece or at his bedside there will be other facts and circumstances from which that inference can be drawn. The problem arises in regard to proof that he knew that the thing in the container, on the mantelpiece or at his bedside was a controlled drug. The fact that the tablet or powder was a controlled drug may be capable of being proved only after careful examination and analysis. Inferences can be drawn if it is found in the company of other material which is used in connection with the supplying or use of controlled drugs. But if it is found on its own and its appearance is all that there is to go by, it may be very difficult for the prosecution to prove that the accused knew that it was a controlled drug.

I think that there are sound reasons of policy for construing the legislation in such a way as not to put the initial burden of proving knowledge of that fact on the Crown.”

Per Lord Clyde -

“Reasons can readily be adduced to support the imposition of the burden of proof on the accused in the present context. Firstly, the question whether the accused was ignorant or had no reason to suspect that what he possessed was a controlled drug is a matter very much within his own knowledge. There are sound practical reasons for imposing the burden on him to prove his ignorance. Secondly, the proof may be relatively easy for him, as I have already noted. Thirdly, there is a serious consideration of the public interest in the discouragement of what is well recognised as a grave social evil, the unlawful distribution of controlled drugs. Fourthly, the knowledge of the defendant of the nature of what he possessed is brought in as a defence, not as an ingredient of the offence. In some cases it may never arise. It can be strongly argued that a transfer of a persuasive burden of proof onto the defendant under section 28 could be compatible with article 6(2).”

Per Lord Hutton -

“Therefore in considering whether a rebuttable presumption of knowledge created by section 28(2) and (3) is compatible with article 6(2) a number of factors (which to some extent overlap) have to be considered.

- (1) Is the presumption created by section 28(2) and (3) directed towards a clear and proper public objective? In my opinion it clearly is. The taking of controlled drugs is a great social evil which causes widespread suffering and the possession of controlled drugs with intent to supply is a grave and frequently committed offence which ensures the continuation of this social evil.
- (2) Is the creation of the presumption a reasonable measure for Parliament to take and is there a reasonable relationship of proportionality between the means employed and the aim sought to be realised? In considering this matter it is necessary, as Lord Hope of Craighead stated in *Brown v Stott*, to assess whether a fair balance has been struck between the general interest of the community and the personal rights of the individual. In my opinion the threat posed by drugs to the welfare of society is so grave and the difficulty in some cases of rebutting a defence that the defendant believed that he was

carrying something other than drugs is so great that it was reasonable for Parliament to impose a persuasive burden as to lack of knowledge on a defendant. The question whether a fair balance has been struck depends in large measure on whether the creation of an evidential burden as opposed to a persuasive burden on a defendant would be adequate to remedy the problem with which section 28(2) and (3) were intended to deal. That problem can arise in the type of case where the Crown proves that a man was carrying a container such as a bag and that the bag contained a controlled drug, or where the Crown proves that tablets, which were a controlled drug, were on a table in the bedroom of the defendant's house and the defendant raises the defence that he believed that the object in the bag was a video film or that the tablets on the bedroom table were painkillers. In such cases it will often be very difficult to prove guilt if the prosecution has to prove beyond a reasonable doubt that the defendant knew that the bag contained a controlled drug or that the tablets were a controlled drug.

It is clear from the decisions of the European Commission in *X v United Kingdom* and *AG v Malta* that the difficulty of proving knowledge on the part of the defendant is one of the factors which can justify the creation of a presumption against a defendant, where the presumption is neither irrebuttable nor unreasonable.”

12. Similar difficulties will be encountered if the prosecution is required to prove knowledge that the impugned material contains a pornographic depiction and knowledge that the depiction is of a child. Proof that a person depicted in a photograph is under 16 is possible. It is quite another matter to prove that the person in possession of the photograph knows the person depicted is under 16. Positive evidence of the accused's knowledge may be by the accused's admission of the knowledge, or if there is evidence that the accused is informed by another person of the age of the child. It is not easy to prove that the accused knows that he is in possession of something. It is even harder to prove that the accused knows of the *exact nature of the thing he possesses*.⁴

⁴ Indeed, similar difficulties in proving knowledge in possession offences are catered for by presumptions, which enable the prosecution to discharge the burden of proof regarding the element of knowledge. Examples include ss.58 & 59 of the Dutiable Commodities Ordinance (Cap. 109); ss.8 & 47 of the Dangerous Drugs

13. Incidentally, in *R v Land* [1999] QB 65, the Court of Appeal said in relation to the fear of innocent people being caught for possession of indecent photographs of children 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."

14. Therefore, while it is very important to protect the innocent, it is equally important to ensure that the legislation can be effectively enforced. The innocent should not be burdened with criminal liability or have his reputation ruined. Equally, vulnerable children should be protected from all forms of sexual exploitation, including child pornography. The Administration believes that the formulation of the proposed possession offence with the statutory defence clauses in the Bill strikes a fair balance between the protection of an individual's right to presumption of innocence and the need to protect children from sexual exploitation. Serious prosecution difficulties will arise if "knowingly" is added to the possession offence. A law that can hardly be enforced will be ineffective in protecting children from sexual exploitation.

The nature of the burden on the accused

15. The *Lambert* case held that there is justification for shifting the evidential burden to the defendant who raises a statutory defence, even though a general burden of proof remains on the prosecution. The House of Lords decided (by a 4-1 majority)⁵ that the defence provisions should be construed as imposing on the defendant an evidential burden but not a legal or persuasive burden⁶. Their Lordships adopted this construction to ensure consistency with

Ordinance (Cap. 134); ss.2A & 10 of the Control of Chemicals Ordinance (Cap. 145); s.8 of the Wild Animals Protection Ordinance (Cap. 170); s.55 of the Crimes Ordinance (Cap. 200); ss.13 & 24 of the Firearms and Ammunition Ordinance (Cap. 238).

⁵ Contrary to the Headnotes, Lord Hutton is in dissent on this issue, not Lord Steyn. Lord Hutton held that the defence has a legal or persuasive burden, i.e. proof on a balance of probabilities. The other four Law Lords held that the defence has an evidential burden.

⁶ Quoting from para. 182 of the *Lambert* judgment, "A persuasive burden is one where the matter in question must be taken as proved against the defendant unless he satisfies the jury on the balance of probabilities to the

the presumption of innocence guaranteed by article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, as incorporated by the Human Rights Act 1998.

16. Lord Clyde's judgment at paragraphs 157 and 158 is pertinent -

"...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 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,

contrary. An evidential burden is one where the matter must be taken as proved against the defendant unless there is sufficient evidence to raise an issue on the matter but, if there is sufficient evidence, then the burden rests on the prosecution to satisfy the jury as to the matter beyond reasonable doubt."

that the lines of defence set out in section 28 are without foundation.”

17. Applying Lord Clyde's judgment cited in paragraph 16 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 (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.

18. Members further asked whether the offence of possession under clause 3(3) is a strict liability offence. A strict liability offence is an offence that does not require intention, recklessness or even negligence as to one or more elements in the actus reus. An offence of possession under Clause 3(3) of the Bill does not fit into this description and hence is not a strict liability offence. In this connection, paragraph 4(2) above identifies "that the defendant knew that he possessed something" as an ingredient of the offence of possession. Paragraph 17 above makes it clear that the defendant cannot be convicted if there is reasonable doubt as to the defendant's knowledge of the nature of the thing he is alleged to possess. Knowledge is therefore material to the issue of guilt.⁷

⁷ It should be noted that Lord Hope of Craighead in paragraph 69 of the judgment did mention strict liability but he seems to take it to mean "not to put the initial burden of proving knowledge [of the nature of the thing he possessed] on the Crown" (paragraph 71 of the judgment).

Proposed Refinement

19. The proposed provisions may be refined by stating expressly that the defendant's burden is an evidential one such that a construction of the provisions as giving rise to a legal burden is not possible. This can be achieved by replacing 'establish' in the defence provision by 'raise a reasonable doubt by adducing evidence' or a similar phrase. It should be pointed out that the Administration has always intended a lower threshold by using 'establish' instead of 'prove' in Clause 4.

Conclusion

20. The Administration takes the view that, in the light of the recent *Lambert* judgment, the statutory objective and the proposed framework of the possession offence strike a fair balance between the protection of an individual's right to presumption of innocence protected by Article 11(1) of the HKBOR and the public interest in protecting children from the harmful effects of sexual exploitation. We share the concern that a number of non-governmental organizations have expressed regarding the exploitation of children for making child pornography which causes not just physical harm but also permanent emotional and psychological damage to them. Furthermore, while it is observed child pornography we come across has been produced mainly with children outside Hong Kong, the attitudinal and other potential harm that may be caused locally should not be underestimated. The international community considers that combating child pornography is a worldwide cause. The introduction of the Bill is part of our effort to discharge this international obligation and it is essential that our legislation in this respect is effective.

Security Bureau
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