

立法會

Legislative Council

LC Paper No. LS97/02-03

Paper for the Bills Committee on Prevention of Child Pornography Bill

Purpose

At the Bills Committee meeting on 2 April 2003, in relation to clause 3(3) of the Bill, members requested the legal adviser to advise in writing on the following—

- (a) the effect of adopting the formulation of "knowingly having in his possession" on prosecuting a case under the provision; and
- (b) in respect of the mental element of possession, the effect of adopting a formulation requiring the defendant's knowledge of the custody or control of something, but not requiring knowledge of its exact nature ("the two-pronged approach to possession").

The effect of adopting the formulation of "knowingly having in his possession" on prosecuting a case under clause 3(3)

2. Where the word "knowingly" is included in an offence, the general principle is that the prosecution must prove knowledge on the part of the defendant of all the material circumstances of the offence. For example, on a charge of "knowingly having in his possession an explosive substance", the prosecution must prove that the defendant knew both that he had it in his possession and that it was an explosive substance: *R v Hallam* [1957]1QB569. If clause 3(3) were to be amended by adding the element of "knowingly", the prosecution would have to prove the defendant knew both that he had the child pornography in his possession and that its exact nature was child pornography in accordance with that principle. The Administration is of the view that the inclusion of "knowingly" would cause serious difficulties in prosecuting the offence, thus undermining the efficacy of the legislation. This appears to be a reasonable statement as evidence of actual knowledge would be required to secure a conviction. Such evidence has to be of such quality that the jury

is able to be satisfied beyond reasonable doubt that the defendant did actually know. Although whether a certain piece of evidence would suffice to prove knowledge should depend on the special circumstances of each case, Archbold Criminal Pleading, Evidence and Practice 2003 ("Archbold 2003") has made the general point with the support of judicial authority that "nothing short of actual knowledge will suffice the requirement of "knowingly"" (paragraph 17-49 of Archbold 2003). Having said that, it is a matter of policy for members to decide by striking a fair balance between the general interest of the community in the protection of children by creating the offence in question which should be effective in its implementation and the need to protect the fundamental rights of the individual including the need to avoid convicting a person who is not intended to be caught by the legislation.

The two-pronged approach to possession

3. It is proposed by members of the Bills Committee to study, in respect of the mental element of possession, the effect of adopting a formulation such that it would be made clear that what would be required of the defendant's knowledge is the custody or control of something, so as to avoid innocent possession (the first limb), but not the exact nature of the thing in his possession, so that it would cause serious difficulties in prosecuting a genuine offender (the second limb). On closer examination of this formulation, it appears to be in accord with the approach implicit in the present formulation of the offence in clause 3(3).

4. The Administration in its paper circulated to the Bills Committee (vide LC Paper No. CB(2)58/02-03(01) "the Administration's Paper") explains the ingredients of possession in clause 3(3). These ingredients are—

- (a) that the defendant possessed something in the sense that it was within his custody or control (physical element of possession);
- (b) that the defendant knew that he possessed something (mental element of possession); and
- (c) that the something possessed by the defendant was child pornography.

5. We agree with the Administration's analysis which has the support of judicial authorities. The physical and mental elements of possession as explained by the Administration are consistent with the first limb of the two-pronged approach to possession. In terms of not convicting the "innocent" unwittingly, there is judicial authority which held, on an offence of similar formulation, that a man does not have possession of something which has been put into his pocket or house without his

knowledge (paragraph 26-59 of Archbold 2003). None of the ingredients of possession as explained by the Administration requires the defendant to know the exact nature of the thing in his possession. This appears to be consistent with the second limb of the two-pronged approach to possession.

Conclusion

6. It follows from the above analysis that knowledge is material to the issue of guilt in clause 3(3) even without the word "knowingly". The prosecution must prove that the defendant was in possession of something with his knowledge. The prosecution must also prove that "something" is child pornography. The defendant may then seek to establish a defence under clause 4(5)* by adducing evidence sufficient to raise the issue of knowledge. Where that occurs, we agree with the Administration's observation that, "the judge will require to explain the substance of clause 4(2) [now revised to be clause 4(5)] 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) [now revised to be clause 4(5)] are without foundation."(see paragraph 17 of the Administration's Paper).

Prepared by

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17 April 2003

LS/S/13/01-02

* 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.