

Bills Committee on Prevention of Child Pornography Bill

**Proposed Statutory Defence in relation to
Age of Person Pornographically Depicted : Clause 4(5)(a) & (b)**

The Administration was queried at the first Bills Committee meeting on the logic of Clause 4(5)(a) & (b) of the Bill because a defendant who believed on reasonable grounds that a person pornographically depicted in the child pornography was not a child at the time of depiction would naturally consider it unnecessary to take further steps to ascertain the age of the person.

Clause 4

(5) *It is a defence to a charge under section 3 of for the defendant to establish that –*

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

Administration's response

2. The intent of Clause 4(5) is that a defendant must comply with sub-clauses (a), (b) and (c) to invoke the statutory defence. The arrangement of the sub-clauses does not represent a sequence of their taking place. It is not sufficient for a person to say that he has a reasonable belief that the person pornographically depicted was not a child. He must have taken reasonable steps to ascertain the age of the person. If the accused is in direct contact with the person depicted, he must take reasonable steps to ascertain the age, say, by requiring the person depicted to produce his/ her identity card. In the interest of child protection, people involved in the pornography industry should be vigilant and cannot rely on a mere belief without taking reasonable steps to

ascertain the age.

3. For Members' reference, statutory provisions in relation to the age of the relevant person defence are also found in s.15C(2) of the Smoking (Public Health) Ordinance, Cap. 371, s.20(4) of the Film Censorship Ordinance, Cap. 392, and s.22(2) of the Control of Obscene and Indecent Articles Ordinance, Cap. 390. They require the defendant to have inspected the identity card and believed on reasonable grounds that the person was not under certain age. Extracts of relevant Ordinances are at Annex.

4. On the basis of the foregoing, belief on reasonable grounds and taking all reasonable steps to ascertain the age are both relevant and necessary for establishing the defence in Clause 4(5). However, the sequence of events does not necessarily follow that order. To avoid any ambiguity, we may consider reversing the order of paragraph (a) and (b) of Clause 4(5). It would be logical for a defendant to first take steps to ascertain age, then form a belief as to the age of the person pornographically depicted.

Security Bureau
May 2002

[a:clause4(5)]

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Section of Enactment

Chapter : 371 Title : SMOKING (PUBLIC HEALTH) ORDINANCE Gazette L.N. 124 of
Section : 15C Heading : **Offences under Part IVA** Number : 1998
Version Date : 01/07/1998

(1) Any person who contravenes section 15A or 15B commits an offence and is liable on summary conviction to a fine at level 4.

(2) It shall be a defence to a charge under section 15A of selling any cigarette, cigarette tobacco, cigar or pipe tobacco to a person under the age of 18 years to prove that at the time the offence is alleged to have been committed, the person charged inspected an identity card or passport purporting to be the identity card or passport of the person under the age of 18 years and believed on reasonable grounds that such person was not under the age of 18 years. (Amended 93 of 1997 s. 21)

(Added 91 of 1994 s. 15)

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Section of Enactment

Chapter :	392	Title :	FILM CENSORSHIP ORDINANCE	Gazette Number :	
Section :	20	Heading :	Offence in relation to exhibition or publication of films classified for exhibition or publication only to persons who have attained the age of 18 years	Version Date :	30/06/1997

PART VIII

ENFORCEMENT AND MISCELLANEOUS

- (1) A person shall not exhibit a film which has the classification referred to in section 12(1)(c) to a person under the age of 18 years.
- (2) A person who contravenes subsection (1) commits an offence and is liable-
- (a) on a first or second conviction to a fine of \$50000; and (Amended 63 of 1993 s. 11)
- (b) on a third or subsequent conviction to a fine of \$100000.
- (2A) A person shall not publish a videotape or a laserdisc, to which the classification described in section 12(1)(c) applies, to a person under the age of 18 years. (Added 63 of 1993 s. 11)
- (2B) Any person who contravenes subsection (2A) commits an offence and is liable on conviction to a fine of \$200000 and imprisonment for 12 months. (Added 63 of 1993 s. 11)
- (3) It shall be a defence to a charge under subsection (2) that the person charged took all reasonable precautions during the exhibition of the film to which the charge relates to prevent the exhibition of the film to persons under the age of 18 years.
- (4) It shall be a defence to a charge under subsection (2A) to prove that at the time the offence is alleged to have been committed, the person charged inspected an identity card or passport purporting to be the identity card or passport of the person under the age of 18 years and believed on reasonable grounds that such person was not under the age of 18 years. (Added 63 of 1993 s. 11)

(Enacted 1988)

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Section of Enactment

Chapter :	390	Title :	CONTROL OF OBSCENE AND INDECENT ARTICLES ORDINANCE	Gazette Number :
Section :	22	Heading :	Prohibition on publishing an indecent article to a juvenile	Version Date : 30/06/1997

(1) Subject to subsection (2), any person who publishes any indecent article to a person who is a juvenile, whether or not he knows that it is an indecent article or that such person is a juvenile, commits an offence and is liable to a fine of \$400000 and to imprisonment for 12 months on his first conviction, and to a fine of \$800000 and to imprisonment for 12 months on a second or subsequent conviction. (Amended 73 of 1995 s. 6)

(2) It shall be a defence to a charge under this section to prove that-

- (a) the article the subject of the charge is, or was at the time that the offence is alleged to have been committed, classified as a Class I article;
- (b) at the time that the offence is alleged to have been committed, the person so charged inspected an identity card or passport purporting to be the identity card or passport of the juvenile and believed on reasonable grounds that the juvenile was not a juvenile; or
- (c) the indecent article was published in compliance with conditions relating to its publication imposed by a Tribunal under section 8(2)(c).

(Enacted 1987)

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