

立法會
Legislative Council

LC Paper No. LS 119/02-03

**Note to the Bills Committee on
Prevention of Child Pornography Bill**

At the Bills Committee meeting on 30 April 2003, members requested the Legal Adviser to draft three sets of CSAs to reflect the following scenarios—

Model 1

In the case of "passive possession", the defendant's knowledge of the exact nature of the thing in possession is to be proved by the prosecution. After the Bills Committee meeting, upon further clarification with the members, the concept of "passive possession by a person" refers mainly to a person who has not asked for any child pornography but has received it involuntarily with a computer.

One way to achieve the objective is to create an exception of "passive possession" to an offence under clause 3(3). The drawback of the proposal is that it does not catch a person who, though has involuntarily received child pornography with a computer, decides to keep it on his computer after sight of it. We now propose to create a distinct offence for a person who knowingly has in his possession any child pornography, being any electronic data received with a computer, regardless of it being received at his request or not. If the person has not asked for the child pornography, he will not have knowledge of it. Hence, he does not commit an offence. If the person, though he has not asked for the child pornography, decides to keep it after sight, he will commit an offence because by then he has knowledge of it. There is also a new clause 4(1A) creating a defence for a person who has taken reasonable steps to destroy the child pornography after sight. But the scope of the proposed new clause 3(3A) will be wider than the members' request because it also encompasses those persons who have knowingly asked for the child pornography.

Model 2

Clause 3(3) is retained. But the objective standard in clause 4 relating to defence to a charge under clause 3(3) is to be removed as far as practicable.

Model 3

The element of "knowingly" is to be added to clause 3(3).

2. We are now pleased to enclose three sets of draft CSAs, marked-up on the relevant clause of the Bill and the Administration's CSAs, to reflect the above models for members' consideration.

Encl

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Legislative Council Secretariat
21 May 2003

LS/B/13/01-02

1st Draft : 3.5.03
2nd Draft : 14.5.03
3rd Draft : 15.5.03
4th Draft : 27.5.03

Model 1

PREVENTION OF CHILD PORNOGRAPHY BILL

2. Interpretation

(1) ...

"computer" (電腦) means any device for storing, processing or retrieving information;

...

3. Offences relating to child pornography

...

(3) Any person who has in his possession any child pornography, other than being any electronic data received with a computer, (unless he is the only person pornographically depicted in the child pornography) commits an offence and is liable -

- (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 5 years; or
- (b) on summary conviction to a fine of \$500,000 and to imprisonment for 2 years.

(3A) Any person who knowingly has in his possession any child pornography, being any electronic data received with a computer, (unless he is the only person pornographically depicted in the child pornography) commits an offence and is liable—

- (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 5 years; or
- (b) on summary conviction to a fine of \$500,000 and to imprisonment for 2 years.

...

4. Defences [as revised by the Administration's proposed CSA]

(1) It is a defence to a charge under section 3(3) for the defendant to establish that -

- (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 such steps as were 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 such steps as were reasonable and practicable in the circumstances of the case to destroy it.

(1A) It is a defence to a charge under section 3(3A) for the defendant to establish that he had not asked for any child pornography and, within a reasonable time after it came into his possession, he took all such steps as were reasonable and practicable in the circumstances of the case to destroy it.

(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.

(3) It is a defence to a charge under section 3 (other than section 3(3) and (3A)) for the defendant to establish that -

- (a) he took all such steps as were reasonable and practicable in the circumstances of the case to ascertain the age of the person pornographically depicted in the child pornography when originally depicted;
- (b) in so far as the defendant was able to influence in any way how the person was depicted, he took all such steps as were 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 originally depicted and that the person was not depicted as a child.

(4) It is a defence to a charge under section 3 for the defendant to establish that the thing that is alleged to constitute child pornography is, or was at the time the offence is alleged to have been committed, classified as a Class I or a Class II article under the Control of Obscene and Indecent Articles Ordinance (Cap. 390).

(5) It is a defence to a charge under section 3 (other than section 3(3A)) 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.

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

- (a) the depiction that is alleged to constitute child pornography has artistic merit;
- (b) the defendant committed the act that is the subject of the charge for a genuine educational, scientific or medical purpose;
- (c) the act that is the subject of the charge otherwise served the public good and did not extend beyond what served the public good; or
- (d) if the defendant is charged with having in his possession child pornography, the possession –
 - (i) was for a genuine educational, scientific or medical purpose; or
 - (ii) otherwise served the public good and did not extend beyond what served the public good.

(7) A defendant charged with an offence under section 3(3) or (3A) is to be taken to have established any fact that needs to be established for the purpose of a defence under subsection (1), (1A), (2) 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.

(8) Unless subsection (7) applies, a defendant is to establish any fact that needs to be established for the purpose of a defence under this section on the balance of probabilities.

Model 2

PREVENTION OF CHILD PORNOGRAPHY BILL

4. Defences [as revised by the Administration's proposed CSA]

(1) It is a defence to a charge under section 3(3) for the defendant to establish that -

- (a) he had not asked for any child pornography and he ~~could not have prevented had endeavoured to prevent/believed that he had taken all steps to prevent~~ himself from coming into possession of the child pornography ~~by taking all such steps as were 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 such steps as were reasonable and practicable in the circumstances of the case~~ ~~endeavoured/believed that he had taken all steps~~ to destroy it.

(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.

(3) It is a defence to a charge under section 3 (other than section 3(3)) for the defendant to establish that -

- (a) he took all such steps as were reasonable and practicable in the circumstances of the case to ascertain the age of the person pornographically depicted in the child pornography when originally depicted;

- (b) in so far as the defendant was able to influence in any way how the person was depicted, he took all such steps as were 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 originally depicted and that the person was not depicted as a child.

(4) It is a defence to a charge under section 3 for the defendant to establish that the thing that is alleged to constitute child pornography is, or was at the time the offence is alleged to have been committed, classified as a Class I or a Class II article under the Control of Obscene and Indecent Articles Ordinance (Cap. 390).

(5) It is a defence to a charge under section 3 (other than section 3(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.

(5A) It is a defence to a charge under section 3(3) for the defendant to establish that he had not himself seen the child pornography and did not know, nor did he suspect, it to be child pornography.

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

- (a) the depiction that is alleged to constitute child pornography has artistic merit;
- (b) the defendant committed the act that is the subject of the charge for a genuine educational, scientific or medical purpose;
- (c) the act that is the subject of the charge otherwise served the public good and did not extend beyond what served the public good; or
- (d) if the defendant is charged with having in his possession child pornography, the possession –
 - (i) was for a genuine educational, scientific or medical purpose; or

(ii) otherwise served the public good and did not extend beyond what served the public good.

(7) 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 (1), (2) or ~~(5)(5A)~~ 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.

(8) Unless subsection (7) applies, a defendant is to establish any fact that needs to be established for the purpose of a defence under this section on the balance of probabilities.

1st Draft : 3.5.03

2nd Draft : 15.5.03

Model 3

PREVENTION OF CHILD PORNOGRAPHY BILL

3. Offences relating to child pornography

...

(3) Any person who knowingly has in his possession any child pornography (unless he is the only person pornographically depicted in the child pornography) commits an offence and is liable -

- (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 5 years; or
- (b) on summary conviction to a fine of \$500,000 and to imprisonment for 2 years.

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4. Defences [as revised by the Administration's proposed CSA]

(1) It is a defence to a charge under section 3(3) for the defendant to establish that -

- (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 such steps as were 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 such steps as were reasonable and practicable in the circumstances of the case to destroy it.
- (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.~~

(3) It is a defence to a charge under section 3 (other than section 3(3)) for the defendant to establish that -

- (a) he took all such steps as were reasonable and practicable in the circumstances of the case to ascertain the age of the person pornographically depicted in the child pornography when originally depicted;
- (b) in so far as the defendant was able to influence in any way how the person was depicted, he took all such steps as were 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 originally depicted and that the person was not depicted as a child.

(4) It is a defence to a charge under section 3 for the defendant to establish that the thing that is alleged to constitute child pornography is, or was at the time the

offence is alleged to have been committed, classified as a Class I or a Class II article under the Control of Obscene and Indecent Articles Ordinance (Cap. 390).

(5) It is a defence to a charge under section 3 (other than section 3(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.

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

- (a) the depiction that is alleged to constitute child pornography has artistic merit;
- (b) the defendant committed the act that is the subject of the charge for a genuine educational, scientific or medical purpose;
- (c) the act that is the subject of the charge otherwise served the public good and did not extend beyond what served the public good; or
- (d) if the defendant is charged with having in his possession child pornography, the possession –
 - (i) was for a genuine educational, scientific or medical purpose; or
 - (ii) otherwise served the public good and did not extend beyond what served the public good.

(7) 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 (1), (2) 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.

(8) Unless subsection (7) applies, a defendant is to establish any fact that needs to be established for the purpose of a defence under this section on the balance of probabilities.