

Prevention of Child Pornography Bill

Administration's Response to Issues Raised at the meeting on 29 May 2003

At the 14th Bills Committee meeting held on 29 May 2003, Members agreed to adopt Model 2 of ALA's draft CSAs to remove the objective standards in the relevant defence clauses, subject to Members' comments at the meeting. A copy of Model 2 is attached at **Appendix I** for ease of reference. Specifically, the Administration was also asked to consider the following suggestions :

- (a) deleting Clause 4(1)(a);
- (b) whether to use the word "endeavoured" or "believed" in Clause 4(1)(b);
- (c) deleting the expression "on reasonable grounds" from Clause 4(2);
- (d) deleting the word "himself" from Clauses 4(5) and (5A);
- (e) whether to replace the word "suspect" with "believe" in Clause 4(5A); and
- (f) reviewing the order of the defence provisions in Clause 4.

To delete Clause 4(1)(a)

2. The Administration agrees with Members' comments made at the last meeting. Clause 4(1)(a) in Model 2 should be deleted.

Whether to use the word "endeavoured" or "believed" in Clause 4(1)(b)

3. We consider that as this defence covers actions taken to destroy child pornography, it is more appropriate to use the word "endeavoured" than "believed". By using the word "endeavoured", a defendant would be able to establish the defence so long as he had made efforts to destroy the child pornography (including the scenario that he could not successfully destroy it at the end).

To delete the expression “on reasonable grounds” from Clauses 4(2)

4. We have considered Members’ views that, if there is a reasonable doubt that a defendant honestly did not suspect the thing to be child pornography, or that he honestly endeavoured to destroy it, or that he honestly believed that the thing is not child pornography, he should be acquitted even if he might have fallen short of an objective standard. Bearing in mind Members’ concerns that some may unwittingly be in possession of child pornography, especially in the form of electronic data in a computer or similar devices, we agree to delete the expression “on reasonable grounds” from the defence clause.

To delete the word “himself” from Clauses 4(5) and (5A)

5. We agree to delete the word “himself” from Clauses 4(5) and (5A) in Model 2, and proposed section 153Q(4) of the Crimes Ordinance, a defence, of similar formulation, in relation to publication etc. of an advertisement for arrangements to commit the relevant sexual offence(s).

Whether to replace the word “suspect” with “believe” in Clause 4(5A)

6. Since Members’ purpose is to remove any objective standard in a defence clause for the possession offence, it is sufficient to remove “have any reasonable cause to” as already provided in Clause 4(5A) in Model 2. This will be in line with a similar defence (Clause 4(5) in Model 2) applicable to other offences under the Bill, except that the latter will require to meet an objective test.

7. Amendments have been made to our latest draft CSAs to Clause 4 and proposed section 153Q(4) to reflect the above as at **Appendix II**.

To review the order of the defence provisions in Clause 4

8. A Member suggested at the last meeting that the various defences in Clause 4 should be re-arranged according to the offences for which they are available. In response to the suggestion, the order of the defence provisions is re-arranged as indicated in the revised draft CSAs at **Appendix II**, starting with the defences applicable to all offences, followed by defences applicable to offences other than the possession offence, and then those applicable to the possession offence only, and lastly, the burden proof provisions.

9. Below is a brief summary of the order of the defence provisions:

Clause		Subject matter	Offence(s) for which defence is available
Model 2	Revised draft CSAs		
4(6)	- (Note: Clause 4(1) in Blue Bill)	Artistic merit, educational, scientific or medical purpose, public good	All offences under Clause 3
4(4)	4(2)	Class I or II status under Control of Obscene and Indecent Articles Ordinance	All offences under Clause 3
4(5) & 4(3)	4(3)(a) & (b)	<ul style="list-style-type: none"> ● Not seen child pornography, no knowledge or reasonable cause for suspicion as to nature ● Mistake of age + steps to ascertain age 	Offences other than possession (Clause 3 except subclause 3))
4(5A), 4(1)(b) & 4(2)	4(4)(a), (b) & (c)	<ul style="list-style-type: none"> ● Not seen child pornography, no knowledge or suspicion as to nature ● Child pornography not asked for + endeavour to destroy ● Mistake of age 	Possession only (Clause 3(3))
4(7) & 4(8)	4(5) & 4(6)	Burden of proof	

Advice Sought

10. Members are invited to comment on the revised draft CSAs to Clause 4 and proposed section 153Q(4) at **Appendix II**.

Security Bureau
June 2003

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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.

PREVENTION OF CHILD PORNOGRAPHY BILL

COMMITTEE STAGE

Amendments to be moved by the Secretary for Security

<u>Clause</u>	<u>Amendment Proposed</u>
4(1)(d)(i)	By deleting "is" and substituting "was".
4	By deleting clause 4(2), (3), (4) and (5) and substituting - "(2) 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). (3) It is a defence to a charge under section 3 (other than section 3(3)) for the defendant to establish - (a) that he had not seen the child pornography and did not know, nor did he have any reasonable cause to suspect, it to be child pornography; or (b) that - (i) 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;

(ii) 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

(iii) 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(3) for the defendant to establish

-

(a) that he had not seen the
child pornography and did not
know, nor did he suspect, it

- to be child pornography;
- (b) that he had not asked for any child pornography and, within a reasonable time after it came into his possession, he endeavoured to destroy it; or
- (c) that he believed 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.

(5) Unless subsection (6) 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.

(6) 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 (4) 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."

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14 In the proposed section 153Q(4), by deleting "himself".