

Prevention of Child Pornography Bill **Overseas legislation on "possession of child pornography"**

In the 2nd Bills Committee meeting on 3 May 2002, Members requested information on overseas legislation relating to the possession of child pornography. The offence of "possession of child pornography" (including possession for publication), in essence, consists of 9 elements –

- (a) the offence provision generally (in particular the offending act, e.g. possession, receipt);
- (b) materials covered (e.g. visual depiction or written materials);
- (c) nature of depiction (e.g. indecent, explicit sexual conduct);
- (d) penalty;
- (e) express mental element;
- (f) age of person depicted;
- (g) apparent age (whether the offence covers a person who appears to be below the age limit, apart from a person who is actually below that age);
- (h) computer-generated (whether the offence covers a depiction otherwise than of an actual person)
- (i) defences (e.g. mistake of age, artistic merit, public good).

This paper analyses these elements (except items (g) and (h), which are dealt with in a separate paper¹) in the relevant offence provisions in the **United Kingdom, Canada, United States and New South Wales, Australia.**

2. For ease of reference, Annex 1 sets out for each of the four jurisdictions 9 elements of the offence of possession.

3. Extracts of the relevant sections of the overseas legislation are at the Annexes 2A to 2D –

- (a) United Kingdom (Annex 2A)
- (b) Canada (Annex 2B)
- (c) United States (Annex 2C)
- (d) New South Wales, Australia (Annex 2D)

¹ The separate paper is entitled "The judgment relating to child pornography by the Supreme Court of the United States on 16 April 2002 and its implications on the Prevention of Child Pornography Bill".

ANALYSIS OF OVERSEAS LEGISLATION

(A) Offence provisions and penalties

4. All four jurisdictions considered in this paper differentiate the offence of simple possession from the offence of possession for the purpose of publication. The latter offence being expressed in different ways as follows -

- (a) have in his possession indecent photographs or pseudo-photographs, with a view to their being distributed or shown by himself or others (**United Kingdom**);
- (b) possess for the purpose of publication, or possess for the purpose of distribution or sale, child pornography (**Canada**);
- (c) possesses with the intent to sell child pornography (**United States**);
- (d) have in possession or custody, or under control, child pornography for the purpose of distribution, dissemination, circulation, delivery, exhibition, lending for gain, exchange, barter, sale, offer for sale, letting on hire or offer to let on hire (**New South Wales**))

5. As far as **penalties** are concerned, the same penalty applies to both offences in the case of the **United States**. In the case of the **United Kingdom, Canada** and **New South Wales, Australia**, the penalty for simple possession is lower than that for possession for the purpose of publication. Please refer to the table of penalty levels of overseas legislation at [Annex 3](#).

6. Under Clause 3(3) of the Prevention of Child Pornography Bill (the Bill), any person who 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.

7. The maximum custodial penalty level of 5 years for mere possession is the same as that of US, UK and Canada. We do not consider it necessary to create a separate offence of possession for publication despite the existence of such an offence in some other overseas countries.

8. On the one hand, publishing child pornography is already prohibited under Clause 3(2) of the Bill with a maximum penalty of 8 years' imprisonment. If there is evidence that a person publishes child pornography, he is caught under Clause 3(2). On the other hand, if he possesses the child pornography, he is

caught under Clause 3(3). It is, however, rather difficult to prove his intention of publication if he only possesses the child pornography and little evidence of publication is available. For instance, presumptions may have to be provided for regarding "for the purpose of publication", such as a presumption based on the number of copies of a particular piece of child pornography, but these presumptions can be rather arbitrary. Nevertheless, the court will take into account the purpose of publication as an aggravating factor in meting out sentences for possession offences.

(B) Materials covered

9. All four jurisdictions regulate visual depictions, though different expressions may be used -

- (a) photograph or pseudo-photograph (**United Kingdom**);
- (b) a photographic, film, video or other visual representation (**Canada**);
- (c) any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture (**United States**);
- (d) a film, publication or computer game (**New South Wales, Australia**)

10. The Canadian legislation clearly covers written materials. The reference to "written material" in s.163.1 of the Criminal Code of **Canada** was expressly upheld in the Supreme Court of **Canada's** decision of *R v Sharpe*, with minor exceptions². In line with *Sharpe*, a person was convicted of the offence of possession of child pornography, where the impugned material included a story that consisted of some 36 pages of single spaced typing and depicted sexual activity with a child in excruciating and horrifying detail.³

11. The **New South Wales** regime seems to cover written material as well. Although no case on child pornography in the form of written materials can be found, the relevant Classification (Publications, Films and Computer Games) Act 1995 clearly covers written materials. A university student journal containing an article entitled "The Art of Shoplifting" was refused classification (or, in other words, classified as RC).⁴

12. Under the Bill, "child pornography" means –

² Please refer to the paper mentioned in footnote 1.

³ *Her Majesty the Queen v. W. (R.)*, No.: 5013/00, Ontario Superior Court of Justice, 2001 Ont. Sup. C.J. LEXIS 1542

⁴ *Michael Brown, Melita Berndt, Ben Ross, Valentina Srpčanska v the Members of the Classification Review Board of the Office of Film and Literature Classification* [1997] 474 FCA (6 June 1997)

- (a) *a photograph, film, computer-generated image or other visual depiction that is a pornographic depiction of a person who is or appears to be a child, whether it is made or generated by electronic or any other means, whether or not it is a depiction of a real person and whether or not it has been modified; or*
- (b) *anything that incorporates a photograph, film, image or depiction referred to in paragraph (a),*

and includes data stored in a form that is capable of conversion into a photograph, film, image or depiction referred to in paragraph (a) and anything containing such data.

13. The Bill aims to catch visual depiction of child pornography but not those in written or audio form. In crafting the Bill, we have been mindful of the need to strike a proper balance between protection of children and safeguarding the right to freedom of expression. Visual depiction of child pornography is considered more heinous and harmful to children than written or audio forms in terms of sexual exploitation. Furthermore, any prohibition of written or audio child pornography is likely to entail tremendous enforcement difficulties. Despite some calls from non-governmental organizations to prohibit audio child pornography in Hong Kong, we consider it not necessary or appropriate at this stage. Please refer to our response to the submission by the Hong Kong Christian Service on this issue. With regard to overseas legislation, written materials of child pornography are banned under the Canadian Criminal Code and seemingly in New South Wales of Australia but not in legislation of US, UK. Moreover, audio child pornography is not prohibited by law in these four countries.

(C) Nature of depiction

14. The definition of the nature of depictions prohibited varies considerably among the four jurisdictions.

15. In the **United Kingdom**, the Protection of Children Act 1978 and the Criminal Justice Act 1988 simply refer to "indecent" without further elaboration. The meaning of "indecent" was considered in *R v GRAHAM-KERR* [1988] 1 WLR 1098, 153 JP 171, 88 Cr App Rep 302. The Court of Appeal said of the issue of "indecent" as follows -

"On the question of whether the photograph was or was not indecent, the jury had to apply the test as stated by the judge, or as stated in *Reg v Stamford*, by applying the *recognised standards of propriety*. In other words the question of whether or not the photograph was indecent or not is a matter for the appraisal of the jury applying those standards."

United Kingdom expands the concept of child pornography, in that it is sufficient if the image is indecent and a child is depicted in the image. It is not essential that the child himself is indecently depicted.

16. For **New South Wales**, a depiction is prohibited if it describes or depicts, in a way that is *likely to cause offence to a reasonable adult*, a person (whether or not engaged in sexual activity) who is a child under 16 or who looks like a child under 16, and is classified as "RC" (refused classification) on that basis. The classification is to be made by the Classification Board under the Classification (Publications, Films and Computer Games) Act 1995 of the Australian Commonwealth. The matters to be taken into account in making a decision on the classification of a publication, a film or a computer game include general standards of *morality, decency and propriety*, the *literary, artistic or educational merit and general character* of the publication, film or computer game and its intended targets of publication.

17. Under the Criminal Code of **Canada**, s.163.1 a visual depiction is child pornography if-

- (i) it shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in *explicit sexual activity*, or
- (ii) its *dominant characteristic is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person* under the age of eighteen years.

In addition, child pornography also includes any written material or visual representation that *advocates or counsels* sexual activity with a person under the age of eighteen years that would be an offence under Criminal Code.

18. Under the Criminal Code of the **United States**, Sec. 2256(8), child pornography means a visual depiction of sexually explicit conduct, where –

- (a) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
- (b) such visual depiction *is, or appears to be*, of a minor engaging in *sexually explicit conduct*⁵;
- (c) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

⁵ This section was recently struck down by the Supreme Court of United States. Please refer to the paper mentioned in footnote 1.

- (d) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

Under sec. 2256(2) of that Code, "**sexually explicit conduct**" means actual or simulated –

- (a) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
- (b) bestiality;
- (c) masturbation;
- (d) sadistic or masochistic abuse; or
- (e) lascivious exhibition of the genitals or pubic area of any person;

19. Under the Bill, “pornographic depiction” means –

- (a) *a visual depiction that depicts a person who is or appears to be engaged in explicit sexual conduct; (or)*
- (b) *a visual depiction that depicts, in a sexual manner or context, the genitals or anal region of a person or the breast of a female person,*

but, for the avoidance of doubt, a depiction for a genuine family purpose does not, merely because it depicts any part of the body referred to in paragraph (b), fall within that paragraph.

20. Pornography-related matters are by no means easy to define. We have tried to make the definition of pornographic depiction as clear and precise as possible so that members of the public may understand what the Bill aims to proscribe. In crafting the definition, we have made reference to relevant legislation of overseas countries in the light of local social and cultural dimensions.

21. Firstly, we have not used the term “indecent” as this may be open to many subjective interpretations and is therefore unclear to the general public. Nevertheless, sexual element is an essential criterion used in determining whether or not a depiction is pornographic. For instance, purely depicting the genital areas but not in a sexual manner or context is not pornographic. We also understand that some families may like to keep a few nude photos of babies or kids in a family album. To put things beyond doubt, we propose to state in the definition that such kinds of family photos of nude children will not be caught in so far as they do not

depict explicit sexual conduct or portray the genital areas in a sexual manner or context. Again, the sexual element is a crucial factor.

22. While the Bill does not define “explicit sexual conduct”, this term can be understood with reference to the definition of “sexually explicit conduct” in US legislation as described in paragraph 18 above. Some may question why a depiction of the breast of a female child in a sexual manner or context is not specifically prohibited in other countries but is proposed to be banned in Hong Kong. This is to reflect the more conservative attitude towards the exposure of female breast as a sex symbol in the Hong Kong context.⁶

(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*⁷, 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.

⁶ In Canada, photos depicting pubescent girls with their breasts exposed were found to be child pornography, see **R. v. Nedelec** 2001 W.C.B.J. LEXIS 5267, *2; 2001 W.C.B.J. 691590; 51 W.C.B. (2d) 524. Exposed female breasts are sexual organs for the purposes of s.163.1, see R. v. V.P.S. , [2001] B.C.J. No. 930, Bauman J. Further, **Colorado** legislation on child pornography also specifically covers "**female breast**". Colo. Rev. Stat. , Section 18-6-403(2)(e) defines "explicit sexual conduct" as including "erotic nudity", which in turn is defined to mean "the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human female breast, or the undeveloped or developing breast area of the human female child, for the purpose of **real** or simulated overt sexual gratification or stimulation of one or more of the persons involved."

⁷ 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

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 photographs⁸. 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 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*⁹ 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.

29. The issue of express mental element in the Bill will be dealt with in a separate paper.

(E) Age

30. The age limit is 16 in the case of the **United Kingdom** and **New South Wales**, Australia. It is 18 for the **United States** and **Canada**. The difference in age limit is matched with the difference in the nature of depictions prohibited. For the former 2 jurisdictions, the definition is broader, by reference to "indecency" in the **United Kingdom** and by reference to likelihood of causing offence to a reasonable adult in New South Wales.

⁸ *Atkins v DPP*; *Goodland v DPP* (Queen's Bench Division)

⁹ 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)

31. Under the Bill, child means a person under the age of 16 and child pornography means, among other things, a visual depiction that is a pornographic depiction of a person who is or appears to be a child. Hence, on the one hand, the Bill prohibits the making, producing, publishing, possessing and advertising of child pornography (depicting persons who is or appears to be under 16). This is generally in line with the age of consent at 16 in Hong Kong. On the other hand, the protection of persons from being used, procured or offered for making pornography or pornographic performances is extended to persons under the age of 18. Procurement is a kind of more direct exploitation and the age limit should therefore be slightly higher.

(F) Apparent age, virtual image

32. Please see separate paper mentioned in footnote 1.

(G) Defence

33. Defences of the four jurisdictions fall within 6 categories.

33.1 *"Redeeming value"*

(a) The **UK** provides "legitimate reason" as follows -

- for the offence of **possession** - that the defendant "had a legitimate reason for having the photograph or pseudo-photograph in his possession" (s.160(2)(a) Protection of Children Act).
- for the offence of **possession with a view to distribution or showing**— that the defendant "had a legitimate reason for distributing or showing the photographs or pseudo-photographs or (as the case may be) having them in his possession" (S.1(4), PCA 1978)

(b) **Canada's** Criminal Code provides -

in s163.1(6), "Where the accused is charged with an offence under subsection (2), (3) or (4) [**possess for the purpose of publication, or possess for the purpose of distribution or sale, or possess**], the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has *artistic merit or an educational, scientific or medical purpose.*" and
in s.163.3(3): No person shall be convicted of an offence under [s.163.1(2), (3) & (4) [**possess for the purpose of**

publication, or possess for the purpose of distribution or sale, or possess]] if the *public good* was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the *public good*. - Section 163(3) applies with respect to an offence under section 163.1(2), (3) or (4) (see s.163.1(7))

The **Canadian** defence has the advantage of being more specific.

33.2 “Unaware of pornographic nature”

- (a) The **UK** provides a defence that the defendant "he had not himself seen the photograph or pseudo-photograph and did *not know*, nor had any cause to suspect, it to be indecent". (See, for the offence of **possession**, s. 160(2)(b), Criminal Justice Act; for the offence of **possession with a view to distribution or showing**, s.1(4), PCA 1978)
- (b) Similarly, **New South Wales** provide for a defence for the offence of **possession (s.578B(5)(a), Crimes Act 1900)** –
 - "(a) that the defendant did *not know*, or could not reasonably be expected to have known, that the film, publication or computer game concerned is or contains pornographic material involving a child under 16;"

33.3 “Mistake as to age”

Canada's Criminal Code provides, in s163.1(5),

"It is **not a defence** to a charge under subsection (2) [**possess for the purpose of publication**] in respect of a visual representation that the accused *believed* that a person shown in the representation that is alleged to constitute child pornography *was or was depicted as being eighteen years of age or more* unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years."

33.4 “Mature actor”

- (a) **New South Wales** provide for a defence for the offence of **possession (s.578B(5) (b), Crimes Act 1900)** –
 - " (b) that the person depicted in the material was *of or above the*

age of 16 at the time when the film, computer game or publication was made, taken, produced or published."

- (b) **US Criminal Code** provides in s.2252A(c): It shall be an affirmative defence to a charge of violating paragraphs (2) [**receives**] .. or (4) [**possesses with the intent to sell**] of subsection (a) that –
- (1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;
 - (2) each such person *was an adult* at the time the material was produced; and
 - (3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

33.5 “*Pornography not kept*”

- (a) The **UK** provides a defence for the defendant to show " the photograph or pseudo-photograph was sent to him without any prior request made by him or on his behalf and that he did *not keep* it for an unreasonable time. " (s.160(2)(c) Protection of Children Act).
- (b) **US Criminal Code** provides in 2252A(d). - It shall be an affirmative defence to a charge of violating subsection (a)(5) [**possesses**] that the defendant –
- (1) possessed less than three images of child pornography; and
 - (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof –
 - (A) took reasonable steps to *destroy* each such image; or
 - (B) *reported* the matter to a law enforcement agency and afforded that agency access to each such image.

33.6 “*Classification*”

New South Wales provides, for the offence of **possession**, (s.578B(3)(c)) that it is not an offence if a person has in his or her possession any film, publication or computer game that is *classified* other than as RC.

34. The Bill aims to catch people who pose or may pose danger to children by sexually exploiting them. It does not intend to interfere with the lives and rights of ordinary people. Innocent people who unwittingly come across child pornography are certainly not our targets. In view of the need to balance

protection of children against safeguarding freedom of speech and privacy rights, comprehensive defence provisions are stipulated in Clause 4.

35. Clause 4(1) provides defences of artistic merit, genuine educational, scientific or medical purpose and public good, which is similar to paragraph 33.1(b) above. We consider that these defences are better than “legitimate reason” used by UK legislation because they are more specific and clearer. Clause 4(2) provides a defence for those innocent people who has no knowledge of the child pornography concerned. This is similar to the defence in UK and New South Wales legislation explained in paragraph 33.2(a) and (b) above.

36. Clause 4(3) provides a defence for people charged for possessing child pornography if he had not asked for it and destroy it within a reasonable time. This is similar to paragraph 33.5(a) and (b) above. Clause 4(4) provides a defence for child pornography that has been classified as Class I or Class II by the Obscene Articles Tribunal under the *Control of Obscene and Indecent Articles Ordinance, Cap. 390*. This is similar to paragraph 33.6 above. Clause 4(5) provides a defence for mistake as to age, which is similar to 33.3 above.

37. However, no defence is provided under the Bill for using a youthful-looking person who is actually above the age of 16 to be pornographically depicted as appearing to be a child under the age of 16 in the depiction. Broadly speaking, the Bill does not only aim at protecting persons being exploited during the production of child pornography but also children who are otherwise exposed to the risk of harm through the distribution and use of child pornography by other persons.

Security Bureau
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[a:overseas legislation.doc]

ELEMENTS OF POSSESSION OFFENCE: UK, CANADA, USA, NEW SOUTH WALES, AUSTRALIA

United Kingdom

s. 160 of the Criminal Justice Act 1988 & the Protection of Children Act 1978¹⁰

Offence of simple possession

It is an offence for a person to have an indecent photograph or pseudo photograph of a child in his *possession*, punishable by a maximum **penalty** of 5 years' imprisonment¹¹

Offence of possession for the purpose of publication

It is an offence for a person to have in his *possession* indecent photographs or pseudo-photographs, *with a view to their being distributed or shown by himself or others*, punishable by a maximum **penalty** of 10 years¹²

Materials covered: photograph or pseudo-photograph¹³

Nature of depiction:

"**indecent**" is not defined but

"photographs (including those comprised in a film) shall, if they show children and are indecent, be treated for all purposes of this Act as **indecent photographs of children** and so as respects pseudo-photographs". (see s.7(3), PCA 1978)

Express mental element: Nil

¹⁰ Sections 1(3), 2(3), 3 and 7 of the Protection of Children Act 1978, Ch. 37 apply to an offence under s.160 of the Criminal Justice Act 1988 by virtue of section 160(4) of the 1988 Act.

¹¹ The offence of possessing an indecent photograph or pseudo-photograph of a child, under section 160(1) of the 1988 Act, was originally summary only, and the maximum penalty was 6 months' imprisonment. Section 41(3) of the Criminal Justice and Court Services Act 2000 has made the offence triable either way, with a maximum penalty of 10 years. This applies to offences committed on or after 11 January 2001.

¹² s.1(1)(c) of the Protection of Children Act 1978 & Section 41(3) of the Criminal Justice and Court Services Act 2000.

¹³ Sections 7(2), (4) and (5) of the Protection of Children Act 1978 relates to photograph -

(2) References to an indecent photograph include an indecent film, a copy of an indecent photograph or film, and an indecent photograph comprised in a film.

(4) References to a photograph include--

(a) the negative as well as the positive version; and

(b) data stored on a computer disc or by other electronic means which is capable of conversion into a photograph.

(5) "Film" includes any form of video-recording."

Age 16 (see s.7(6), PCA 1978, definition of "Child")

Apparent age

In proceedings under this Act relating to indecent photographs of children, a person is to be taken as having been a child at any material time if it appears from the evidence as a whole that he was then under the age of 16. (s.2(3), PCA 1978)

Virtual image

"Pseudo-photograph" means an image, whether made by *computer-graphics* or otherwise howsoever, which appears to be a photograph. (s.7(7), PCA 1978))

If the *impression* conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph shall be treated for all purposes of this Act as showing a child and so shall a pseudo-photograph where the predominant impression conveyed is that the person shown is a child notwithstanding that some of the physical characteristics shown are those of an adult. (s.7(8), PCA 1978)

References to an indecent pseudo-photograph include –

- (a) a copy of an indecent pseudo-photograph; and
- (b) data stored on a computer disc or by other electronic means which is capable of conversion into a pseudo-photograph. (s.7(9), PCA 1978)

Defences

S. 160(2), CJA 1988 provides for defences for the offence of **possession** –

- (a) that the defendant had a **legitimate reason** for having the photograph or pseudo-photograph in his possession; or
- (b) that he had not himself seen the photograph or pseudo-photograph and did **not know**, nor had any cause to suspect, it to be indecent; or
- (c) that the photograph or pseudo-photograph was sent to him without any prior request made by him or on his behalf and that he did **not keep** it for an unreasonable time.

S.1(4), PCA 1978 provides for defences for the offence of **possession with a view to distribution or showing**–

- (a) that the defendant had a **legitimate reason** for distributing or showing the photographs or pseudo-photographs or (as the case may be) having them in his possession; or
- (b) that he had not himself seen the photographs or pseudo-photographs and did **not know**, nor had any cause to suspect, them to be indecent.

Canada**Criminal Code, R.S.C. 1985, c. C-46, s. 163.1 & s.163.3(3)****Offence of simple possession**

s.163.1(4) makes it an offence to possess child pornography, punishable by imprisonment for a term not exceeding 5 years (**Penalty**)

Offence of possession for publication

s.163.1(2) & (3) makes it an offence to possess for the purpose of publication, or possess for the purpose of distribution or sale, child pornography, punishable by imprisonment for a term not exceeding 10 years (**Penalty**)

"**child pornography**" means –

- (a) a photographic, film, video or other *visual representation*, whether or not it was made by electronic or mechanical means (**materials covered**),
 - (i) that shows a person who *is or is depicted as being* under the age of *eighteen years* and is engaged in or is depicted as engaged in *explicit sexual activity* (**nature of depiction**), or
 - (ii) the *dominant characteristic* of which is the depiction, *for a sexual purpose, of a sexual organ or the anal region* of a person under the age of *eighteen years* (**nature of depiction**); or
- (b) any *written material or visual representation* (**materials covered**) that *advocates or counsels* sexual activity with a person under the age of eighteen years that would be an offence under this Act (**nature of depiction**)

Express mental element: Nil

Age: 18 (see definition of "child pornography" above)

Apparent age, virtual image : who is *or is depicted as being* under the age of eighteen years (see definition of "child pornography" above)

Defence

s.163.1(5) It is not a defence to a charge under subsection (2) [possession for publication] in respect of a visual representation that the accused **believed** that a person shown in the representation that is alleged to constitute child pornography

was or was depicted as being eighteen years of age or more unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.

s.163.1(6) Where the accused is charged with an offence under subsection (2), (3) or (4),[possess for the purpose of publication, or possess for the purpose of distribution or sale, or possess] the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has **artistic merit or an educational, scientific or medical purpose**.

s.163.3(3) No person shall be convicted of an offence under [s.163.1(2), (3) or (4): possess for the purpose of publication, or possess for the purpose of distribution or sale, or possess] if the **public good** was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good. - Section 163.3(3) applies with respect to an offence under section 163.1(2), (3) or (4) (see s.163.1(7))

United States

Criminal Code, Title 18 – Crimes and Criminal Procedure, Part I – Crimes, Chapter 110 – Sexual Exploitation and Other Abuse of Children, Sec. 2252A & 2256

Offence

A person commits an offence if he –

(s.2252A(a)(2)) knowingly receives child pornography.

(s.2252A(a)(4)) knowingly possesses with the intent to sell child pornography.

(s.2252A(a)(5)) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography

S.2256(8) says, "**child pornography**" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means (**materials covered**), of sexually explicit conduct, where –

- (a) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
- (b) such visual depiction is, or *appears to be*, of a minor engaging in sexually explicit conduct;
- (c) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
- (d) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct; and

S.2256(5) says, "visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image; (**materials covered**)

Nature of depiction:

Sec. 2256(2) says, "**sexually explicit conduct**" means actual or simulated –

- (a) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

- (b) bestiality;
- (c) masturbation;
- (d) sadistic or masochistic abuse; or
- (e) lascivious exhibition of the genitals or pubic area of any person;

Penalty: fined or imprisoned for not more than 15 years, or both, but, a 2nd or subsequent conviction, fined and imprisoned for not less than 5 years nor more than 30 years.

Express mental element: knowingly

Age: 18 (see s.2256(1) definition of "minor")

Apparent age, virtual image

Sec. 2256(9) says, "identifiable minor" –

- (A) means a person -
 - (i) (I) who was a minor at the time the visual depiction was created, adapted, or modified; or
 - (II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and
 - (ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and
- (B) shall not be construed to require proof of the actual identity of the identifiable minor."

Defence:

s.2252A(c) says, "It shall be an affirmative defence to a charge of violating paragraphs .. (2) [receives] .. or (4) [possesses with the intent to sell] of subsection (a) that –

- (a) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;
- (b) each such person was an adult at the time the material was produced; and
- (c) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct."

2252A(d) says, "It shall be an affirmative defence to a charge of violating subsection (a)(5) [possesses] that the defendant –

- (a) possessed less than three images of child pornography; and

- (b) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof –
 - (A) took reasonable steps to destroy each such image; or
 - (B) reported the matter to a law enforcement agency and afforded that agency access to each such image."

New South Wales, Australia

Crimes Act 1900, ss.578B & 578C

Offence of simple possession

A person who has in his or her possession any child pornography is guilty of an offence (s.578B(2)), punishable by 100 penalty units or imprisonment for 2 years (or both) (**penalty**) - confined to summary conviction - s.578B(4)(c))

Offence of possession for the purpose of publication

A person who publishes an indecent article that is child pornography is guilty of an offence (s.578C(2A)), punishable by in the case of an individual 1,000 penalty units or imprisonment for 5 years (or both); or in the case of a corporation 2,000 penalty units. (**penalty**) - confined to summary conviction - s.578C(5))

The reference to "publish" includes have in *possession* or custody, or under control, for the purpose of distribution, dissemination, circulation, delivery, exhibition, lending for gain, exchange, barter, sale, offer for sale, letting on hire or offer to let on hire (s.578C(1)(b))

Materials covered: a film, publication or computer game (578B(2) "child pornography")

Nature of depiction: that is classified RC, or that would, if classified, be classified RC, on the basis that it describes or depicts, in a way that is *likely to cause offence to a reasonable adult*, a person (whether or not engaged in sexual activity) who is a child under 16 or who *looks like* a child under 16. (578B(2) "child pornography")

RC stands for "refused classification" by the Classification Board under the Classification (Publications, Films and Computer Games) Act 1995 of the Australian Commonwealth¹⁴ Under that Act, matters to be considered in classification¹⁵ are 11. (**Betty : please verify the meaning of 11**) The matters to be taken into account in making a decision on the classification of a publication, a film or a computer game include:

¹⁴ Classification (Publications, Films and Computer Games) Act 1995, Schedule, a publication, film or computer game may be classified as RC (refused classification) on among others, the basis that it "describe or depict in a way that is likely to cause offence to a reasonable adult, a minor who is, or who appears to be, under 16 (whether the minor is engaged in sexual activity or not)".

¹⁵ Section 11 of the National Classification Code set out in the Schedule to the Classification (Publications, Films and Computer Games) Act 1995

- (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
- (b) the *literary, artistic or educational merit* (if any) of the publication, film or computer game; and
- (c) the general character of the publication, film or computer game, including whether it is of a *medical, legal or scientific character*; and
- (d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

Express mental element: Nil

Age: 16 (578B(2) "child pornography")

Apparent age, virtual image : is a child under 16 or who *looks like* a child under 16 (578B(2) "child pornography")

Defence applicable to offence of **simple possession only:** (s.578B(5)) –

- (a) that the defendant did *not know*, or could not reasonably be expected to have known, that the film, publication or computer game concerned is or contains pornographic material involving a child under 16, or
- (b) that the person depicted in the material was *of or above the age of 16* at the time when the film, computer game or publication was made, taken, produced or published.

Not an offence (applicable to offence of **simple possession only**)

if a person has in his or her possession any film, publication or computer game that is *classified* other than as RC. (s.578B(3)(c))

Defence for an Offence of **possession for the purpose of publication:** Nil

[a:overseas legislation-annex.doc]

4 Punishments

- (1) Offences under this Act shall be punishable either on conviction on indictment or on summary conviction.
- (2) A person convicted on indictment shall be liable—
 - (a) for an offence under section 1 or section 2 of this Act, to imprisonment for a term not exceeding five years; and
 - (b) for an offence under section 3 of this Act, to imprisonment for a term not exceeding two years.
- (3) A person convicted summarily of any offence under this Act shall be liable—
 - (a) to imprisonment for a term not exceeding six months; or
 - (b) to a fine not exceeding the prescribed sum for the purposes of [section 32 of the Magistrates' Courts Act 1980] (punishment on summary conviction of offences triable either way: £1,000 or other sum substituted by order under that Act),

or to both.

NOTES

The words in square brackets in sub-s (3)(b) were substituted by the Magistrates' Courts Act 1980, s 154(1), Sch 7, para 170.
 Shall be punishable, etc. For the procedure for determining the mode of trial of offences triable either on indictment or summarily, see the Magistrates' Courts Act 1980, s 17 et seq, Vol 27, title Magistrates.
 Conviction on indictment. All proceedings on indictment are to be brought before the Crown Court; see the Supreme Court Act 1981, s 46(1), Vol 11, title Courts and Legal Services.
 Summary conviction. Summary jurisdiction and procedure are mainly governed by the Magistrates' Courts Act 1980, Vol 27, title Magistrates, and by rules made under s 144 of that Act.
 Imprisonment. Under the Powers of Criminal Courts Act 1973, s 30(1) ante, on conviction on indictment a fine (on which no statutory limit is placed) may be imposed in lieu of or in addition to, imprisonment.
 Magistrates' Courts Act 1980, s 37. See Vol 27, title Magistrates. By s 32(2) of the 1980 Act the prescribed sum is £5,000 but a different sum may be substituted by order under s 143 of that Act.

5 Supplementary

- (1) For purposes of sections 1 and 2 above "deception" has the same meaning as in section 15 of the Theft Act 1968, that is to say, it means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person; and section 18 of that Act (liability of company officers for offences by the company) shall apply in relation to sections 1 and 2 above as it applies in relation to section 15 of that Act.
- (2) Sections 30(1) (husband and wife), 31(1) (effect on civil proceedings) and 34 (interpretation) of the Theft Act 1968, so far as they are applicable in relation to this Act, shall apply as they apply in relation to that Act.
- (3)-(5) . . .

NOTES

Sub-s (3) was repealed by the Extradition Act 1989, s 37, Sch 2.
 Sub-s (4) amends the Visiting Forces Act 1952, Schedule, para 3, Vol 3, title Armed Forces (Pt 4).
 Sub-s (5) repeals the Theft Act 1968, s 16(2)(a).
 Theft Act 1968. See this title ante.

6 Enactment of same provisions for Northern Ireland

An Order in Council under paragraph 1(1)(b) of Schedule 1 to the Northern Ireland Act 1974 (legislation for Northern Ireland in the interim period) which contains a statement that it operates only so as to make for Northern Ireland provision corresponding to this Act—

- (a) shall not be subject to paragraph 1(4) and (5) of that Schedule (affirmative resolution of both Houses of Parliament); but
- (b) shall be subject to annulment by resolution of either House.

NOTES

Order in Council . . . which contains a statement, etc. The power to make Orders in Council is exercisable by statutory instrument; see the Statutory Instruments Act 1946, s 1(1), Vol 41, title Statutes.
 Subject to annulment. For provisions as to annulment of statutory instruments in pursuance of a resolution of either House of Parliament, see the Statutory Instruments Act 1946, ss 5(1), 7(1), Vol 41, title Statutes.
 Northern Ireland Act 1974, Sch 1, para 1. See Vol 31, title Northern Ireland (Pt 2).

7 Short title, commencement and extent

- (1) This Act may be cited as the Theft Act 1978.
- (2) This Act shall come into force at the expiration of three months beginning with the date on which it is passed.
- (3) This Act except section 5(3), shall not extend to Scotland; and except for that subsection, and subject also to section 6, it shall not extend to Northern Ireland.

NOTE

Three months beginning, etc. "Month" means a calendar month; see the Interpretation Act 1978, s 5, Sch 1, Vol 41, title Statutes. In calculating this period, the date (ie 20 July 1978) on which the Act was passed (ie received the Royal Assent) is reckoned; see *Hare v Cocher* [1962] 2 QB 641, [1962] 2 All ER 762, and *Thou v Ind Coops (West Midlands) Ltd* [1967] 2 QB 899 at 909, [1967] 2 All ER 900, CA. Accordingly, this Act came into force on 20 October 1978.

UK

PROTECTION OF CHILDREN ACT 1978
(1978 c 37)

ARRANGEMENT OF SECTIONS	
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An Act to prevent the exploitation of children by making indecent photographs of them; and to penalise the distribution, showing and advertisement of such indecent photographs

Northern Ireland. With minor exceptions the Act does not apply; see s 9(2) post. As to the making of similar provision for Northern Ireland, see s 8 post, and see the order noted to that section.

1 Indecent photographs of children

- (1) It is an offence for a person—
- to take, or permit to be taken [or to make], any indecent photograph [or pseudo-photograph] of a child . . . ; or
 - to distribute or show such indecent photographs [or pseudo-photographs]; or
 - to have in his possession such indecent photographs [or pseudo-photographs], with a view to their being distributed or shown by himself or others; or
 - to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs [or pseudo-photographs], or intends to do so.
- (2) For purposes of this Act, a person is to be regarded as distributing an indecent photograph [or pseudo-photograph] if he parts with possession of it, or exposes or offers it for acquisition by, another person.
- (3) Proceedings for an offence under this Act shall not be instituted except by or with the consent of the Director of Public Prosecutions.
- (4) Where a person is charged with an offence under subsection (1)(b) or (c), it shall be a defence for him to prove—
- that he had a legitimate reason for distributing or showing the photographs [or pseudo-photographs] or (as the case may be) having them in his possession; or
 - that he had not himself seen the photographs [or pseudo-photographs] and did not know, nor had any cause to suspect, them to be indecent.
- (5) References in the Children and Young Persons Act 1933 (except in sections 15 and 99) to the offences mentioned in Schedule 1 to that Act shall include an offence under subsection (1)(a) above.
- (6), (7) . . .

NOTES

The words in square brackets in sub-s (1), (2), (4) were inserted, and the words omitted from sub-s (1)(a) were repealed, by the Criminal Justice and Public Order Act 1994, ss 84(1), (2), 168(3), Sch 11.

Sub-s (6) was repealed by the Extradition Act 1989, s 37, Sch 2.

Sub-s (7) amends the Visiting Forces Act 1952, Schedule, para 1, Vol 3, title Armed Forces (Pt 4).
General Note. This section makes it an offence to take, distribute, show, or possess with a view to their being distributed or shown, indecent photographs or pseudo-photographs of children under the age of sixteen or to publish any advertisement to the effect that the advertiser distributes or shows such photographs. Mere possession of such photographs is made an offence by the Criminal Justice Act 1988, s 160 post.

Sub-s (1): It is an offence. For punishments, see s 6 post.

By the Criminal Justice Act 1991, s 31 post, an offence under this Act, or a conspiracy, attempt or incitement to commit an offence under this Act, is a "sexual offence" for the purposes of Pt I of that Act post (restrictions on imposing custodial sentences, lengths of custodial sentences and procedural requirements). Such an offence is also a "sexual offence" for the purpose of—

- the Children and Young Persons Act 1969, s 12D, Vol 6, title Children (duty of court to state in certain cases that requirement in supervision order is in place of custodial sentence); see sub-s (1A) thereof;
- s 23 of the 1969 Act, Vol 6, title Children (remands and committals to local authority accommodation); see sub-s (12) thereof;
- the Powers of Criminal Courts Act 1973, s 3(3), Sch 1A, para 4 ante (requirements in probation orders for sexual offenders); see sub-para (2) thereof;
- the Magistrates' Courts Act 1980, s 38 (committal for sentence on summary trial of offence triable either way), Vol 27, title Magistrates; see sub-s (3) thereof;

(v) the Police and Criminal Evidence Act 1984, s 38 post (detention at a police station); see sub-s (6A) thereof.

As to the application of the Criminal Justice Act 1991, Pt II (early release of prisoners), to sexual offenders, see s 44 of that Act, Vol 34, title Prisons.

An offence under this section is always a serious arrestable offence; see the Police and Criminal Evidence Act 1984, ss 24(2), 116(2)(b), Sch 5, Pt II post.

Person. Unless the contrary intention appears this includes a body of persons corporate or unincorporate; see the Interpretation Act 1978, s 5, Sch 1, Vol 41, title Statutes.

Indecent photograph or pseudo-photograph. As to the meaning of "indecent photograph or pseudo-photograph", see s 7(2), (3), (7)–(9) post, and as to the meaning of "photograph" and "indecent" itself but see *R v Stronach* [1965] 2 QB 327, [1965] 1 All ER 1035, CCA.

It is thought that indecency is to be determined solely by considering the photograph and that the surrounding circumstances are relevant only in mitigation; see *Kosmos Publications Ltd v DPP* [1975] Crim LR 345. Moreover it would appear from *R v Stamford* [1972] 2 QB 391, [1972] 2 All ER 427, CA (applying *R v Calder and Boyan Ltd* [1969] 1 QB 151, [1968] 3 All ER 644, and *R v Anderson* [1972] 1 QB 364, [1971] 3 All ER 1152), that evidence is not admissible on the issue whether or not the photograph is indecent; that issue is a matter entirely for the jury or, on summary trial, the magistrates to decide without hearing the views of witnesses as to the effect on them of the photograph recognised standards of propriety, which may vary from age to age, it is exclusively within the province of the jury or magistrates to determine and safeguard the current standards, accordingly it is not open to the accused or the prosecution to call evidence to assist in ascertaining what are the current standards (*R v Stamford* above). See also *R v Graham-Kee* [1988] 1 WLR 1098, (1989) 153 JP 171, CA.

Distribute. Note sub-s (2) above.
 Show. Cf *Stoker v DPP* [1963] 1 QB 926, [1963] 1 All ER 697 where it was stated that, for the purposes of the Obscene Publications Act 1959, s 1(3) ante, the showing must be to some member of the public.

This Act. Any reference to this Act in sub-s (3) above and in ss 2(3), 3, 7 post includes a reference to the Criminal Justice Act 1988, s 140, see s 160(4) of that Act post.

Consent of the Director of Public Prosecutions. Provision for the appointment of the Director of Public Prosecutions is made by the Prosecution of Offences Act 1985, s 2 post. See also, in been given, and s 26, as to evidence of such consent.

The Service is headed by the Director of Public Prosecutions and also includes Crown Prosecutors who enjoy all the powers of the Director as to the institution and conduct of proceedings, but they exercise those powers under his direction; see s 1(1), (6) of that Act.

Evidence. As to the use of video recordings of children's evidence, and restrictions on subsequent cross-examination, see the Criminal Justice Act 1988, ss 32A, 34A, Vol 17, title Evidence; and as to para 1, 8 to, that Act (proceedings before Service courts), Vol 3, title Armed Forces. See also s 2(3) post.

Committal proceedings. As to evidence of children in committal proceedings for an offence under this Act, see the Magistrates' Courts Act 1980, s 103, Vol 27, title Magistrates.

The Criminal Justice Act 1991, s 53, Sch 6 post, provides for committal proceedings in magistrates' courts to be bypassed where a person has been charged with an offence under this Act and a child witness is alleged to have been the victim of the offence or to have witnessed its commission, and delay might harm his welfare.

Further provisions. As to the entry and searching of premises in connection with the existence of indecent photographs or pseudo-photographs of children, see s 4 post, as to the seizure and forfeiture of indecent photographs and pseudo-photographs of children, see s 5 post.
 Children and Young Persons Act 1933. See Vol 6, title Children.

2 Evidence

- (1), (2) . . .

(3) In proceedings under this Act [relating to indecent photographs of children] a person is to be taken as having been a child at any material time if it appears from the evidence as a whole that he was then under the age of 16.

NOTES

Sub-s (1) was repealed by the Police and Criminal Evidence Act 1984, s 119(2), Sch 7, Pt V.
 Sub-s (2) was repealed by the Magistrates' Courts Act 1980, s 103, Sch 6, Pt V.

The words in square brackets in sub-s (3) were inserted by the Criminal Justice and Public Order Act 1994, s 168(2), Sch 10, para 37(1), (2).

This Act. See the note to s 1 ante.

Indecent photographs. See the note "Indecent photograph or pseudo-photograph" to s 1 ante. **Child.** See s 7(6), (8) post.

Under the age of 16. A person attains a particular age expressed in years at the commencement of the relevant anniversary of the date of his birth; see the Family Law Reform Act 1969, s 9, Vol 6, title Children.

3 Offences by corporations

(1) Where a body corporate is guilty of an offence under this Act and it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of, any director, manager, secretary or other officer of the body, or any person who was purporting to act in any such capacity he, as well as the body corporate, shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

NOTE

Offence under this Act. See s 1(1) ante. See also the note "This Act" to s 1 ante.

4 Entry, search and seizure

(1) The following applies where a justice of the peace is satisfied by information on oath, laid by or on behalf of the Director of Public Prosecutions or by a constable, that there is reasonable ground for suspecting that, in any premises in the petty sessions area for which he acts, there [is an indecent photograph [or pseudo-photograph] of a child].

(2) The justice may issue a warrant under his hand authorising any constable to enter (if need be by force) and search the premises . . . and to seize and remove any articles which he believes (with reasonable cause) to be or include indecent photographs [or pseudo-photographs] of children . . .

(3) Articles seized under the authority of the warrant, and not returned to the occupier of the premises, shall be brought before a justice of the peace acting for the same petty sessions area as the justice who issued the warrant.

(4) This section and section 5 below apply in relation to any stall or vehicle, as they apply in relation to premises, with the necessary modifications of references to premises and the substitution of references to use for references to occupation.

NOTES

The words in the first (outer) pair of square brackets in sub-s (1) were substituted, and the words omitted in the second place from sub-s (2) were repealed, by the Criminal Justice Act 1988, s 170, Sch 15, paras 60, 61, Sch 16.

The words in the second (inner) pair of square brackets in sub-s (1) and the words in square brackets in sub-s (2) were inserted, and the words omitted in the first place from sub-s (2) were repealed, by the Criminal Justice and Public Order Act 1994, s 168, Sch 9, para 23(a), Sch 10, para 37(1), (3), Sch 11.

Justice of the peace. A justice of the peace may be either a lay justice or a stipendiary magistrate. Matters as appointment, removal and organisation, will be found in the Justices of the Peace Act 1979, Vol 27, title Magistrates, and the office and jurisdiction of justices are considered generally in 29 Halsbury's Laws (4th edn) paras 201 et seq.

Oath. This includes affirmation and declaration; see the Interpretation Act 1978, s 5, Sch 1, Vol 41, title Statutes. As to oaths, affirmations and declarations, see the Oaths Act 1978, Vol 17, title Evidence, and the other relevant enactments noted to s 1 of that Act.

Director of Public Prosecutions. Cf the note "Consent of the Director of Public Prosecutions" to s 1 ante.

Constable. This means any person holding the office of constable (as to which, see 36 Halsbury's Laws (4th edn) paras 201 et seq), not a member of a police force holding the rank of constable. As to the attestation of constables, see the Police Act 1996, s 29, Sch 4, Vol 33, title Police, and as to their jurisdiction, see s 30 of that Act.

Indecent photograph or pseudo-photograph. See the note to s 1 ante.

Child. See s 7(6), (8) post.

The justice may issue a warrant. This section must be read subject to certain provisions of the Police and Criminal Evidence Act 1984, Pt II post, which relates to powers of entry, search and seizure generally. See, in particular, s 9 of, and Sch 1 to, the 1984 Act (access to certain kind of material defined in ss 10-14); ss 15, 16 thereof (applications for, and issue and execution of, search warrants); and ss 19-22 thereof (seizure and retention of property) post.

Forfeiture. As to the forfeiture of articles seized under this section, see s 5 post.

5 Forfeiture

(1) The justice before whom any articles are brought in pursuance of section 4 above may issue a summons to the occupier of the premises to appear on a day specified in the summons before a magistrates' court for that petty sessions area to show cause why they should not be forfeited.

(2) If the court is satisfied that the articles are in fact indecent photographs [or pseudo-photographs] of children, . . . the court shall order them to be forfeited; but if the person summoned does not appear, the court shall not make an order unless service of the summons is proved.

(3) In addition to the persons summoned, any other person being the owner of the articles brought before the court, or the persons who made them, or any other person through whose hands they had passed before being seized, shall be entitled to appear before the court on the day specified in the summons to show cause why they should not be forfeited.

(4) Where any of the articles are ordered to be forfeited under subsection (2), any person who appears, or was entitled to appear, to show cause against the making of the order may appeal to the Crown Court.

(5) If as respects any articles brought before it the court does not order forfeiture, the court may if it thinks fit order the person on whose information the warrant for their seizure was issued to pay such costs as the court thinks reasonable to any person who has appeared before it to show cause why the photographs [or pseudo-photographs] should not be forfeited; and costs ordered to be paid under this subsection shall be recoverable as a civil debt.

(6) Where indecent photographs [or pseudo-photographs] of children are seized under section 4 above, and a person is convicted under section 1(1) [or section 160 of the Criminal Justice Act 1988] of offences in respect of those photographs [or pseudo-photographs], the court shall order them to be forfeited.

(7) An order made under subsection (2) or (6) above (including an order made on appeal) shall not take effect until the expiration of the ordinary time within which an appeal may be instituted or, where such an appeal is duly instituted, until the appeal is finally decided or abandoned; and for this purpose—

(a) an application for a case to be stated or for leave to appeal shall be treated as the institution of an appeal; and

(b) where a decision on appeal is subject to a further appeal, the appeal is not finally decided until the expiration of the ordinary time within which a further appeal may be instituted or, where a further appeal is duly instituted, until the further appeal is finally decided.

NOTES

The words in square brackets in sub-s (2), (5) and the words in the first and third pairs of square brackets in sub-s (6) were inserted by the Criminal Justice and Public Order Act 1994, s 168(2), Sch 10, para 37(1), (4).

The words omitted from sub-s (2) were repealed, and the words in the second pair of square brackets in sub-s (6) were inserted, by the Criminal Justice Act 1988, s 170, Sch 15, paras 60, 62, Sch 16.

Sub-s (1): Justice. See the note "Justice of the peace" to s 4 ante.

Magistrates' court. For meaning, see, by virtue of the Interpretation Act 1978, s 5, Sch 1, Vol 41, title Statutes, the Magistrates' Courts Act 1980, s 148, Vol 27, title Magistrates.

Sub-s (2): Court is satisfied, etc. The justices should look at the articles themselves; the omission of showing cause why the articles should not be forfeited is on the person summoned; see *Thomson v Chain Libraries Ltd* [1954] 2 All ER 616, [1954] 1 WLR 999.

Indecent photographs or pseudo-photographs; person. See the corresponding notes to s 1 ante.

Children. See s 7(6), (8) post.

Sub-s (4): Appeal to the Crown Court. Sub-s (4) above does not create an exclusive code of appeal. An informant may, therefore, appeal by case stated against refusal of forfeiture, he being a party to the proceedings within the Magistrates' Courts Act 1980, s 111, Vol 27, title Magistrates; see *Burke v Cooper* [1962] 2 All ER 14, [1962] 1 WLR 700.

For the establishment, jurisdiction and powers of the Crown Court, see the Supreme Court Act 1981, ss 8, 45-47, Vol 11, title Courts and Legal Services. The procedure in appeals from magistrates' courts to the Crown Court is governed by s 48 of that Act, in the same title.

Saving. Nothing in the Local Government (Miscellaneous Provisions) Act 1982, Sch 3 (control of sex establishments), Vol 45, title Theatres and Other Places of Entertainment, is to be taken into account in any way in proceedings under this section; see Sch 3, para 1(b)(ii) to the 1982 Act.

Criminal Justice Act 1988, s 160. See this title post.

6 Punishments

(1) Offences under this Act shall be punishable either on conviction on indictment or on summary conviction.

(2) A person convicted on indictment of any offence under this Act shall be liable to imprisonment for a term of not more than three years, or to a fine or to both.

(3) A person convicted summarily of any offence under this Act shall be liable—

- to imprisonment for a term not exceeding six months; or
- to a fine not exceeding the prescribed sum for the purposes of [section 32 of the Magistrates' Courts Act 1980] (punishment on summary conviction of offences triable either way: £1,000 or other sum substituted by order under that Act), or to both.

NOTES

The words in square brackets in sub-s (3)(b) were substituted by the Magistrates' Courts Act 1980, s 154(1), Sch 7, para 171.

Offences under this Act. See s 1(1) ante.

Shall be punishable either, etc. For the procedure for determining the mode of trial of offences triable either on indictment or summarily, see the Magistrates' Courts Act 1980, ss 17 et seq, Vol 27, title Magistrates.

Conviction on indictment. All proceedings on indictment are to be brought before the Crown Court; see the Supreme Court Act 1981, s 46(1), Vol 11, title Courts and Legal Services.

Summary conviction. Summary jurisdiction and procedure are mainly governed by the Magistrates' Courts Act 1980, Vol 27, title Magistrates, and by rules made under s 144 of that Act.

Person. See the note to s 1 ante.

Fine. There is no specific limit to the amount of the fine which may be imposed on conviction on indictment, but it has for long been the law that the fine should be within the offender's capacity to pay (see, in particular, *R v Churchill (No 2)* [1967] 1 QB 190, [1966] 2 All ER 215, CCA; read on other grounds sub nom *Churchill v Wilson* [1967] 2 AC 224, [1967] 1 All ER 497, HL and *R v Garner* [1986] 1 All ER 78, [1986] 1 WLR 73, CA; and see also the Bill of Rights (1688), s 1, Vol 10, title Constitutional Law (Pt 1)), and it is now provided by the Criminal Justice Act 1991, s 18(3) post, that in fixing the amount of a fine a court shall take into account, inter alia, the financial circumstances of the offender so far as they are known, or appear, to the court. For further provisions as to the fixing

of fines, see s 18 of the 1991 Act post, and as to when a fine may be imposed in addition to imprisonment, see *R v Garner* above.

Magistrates' Courts Act 1980, s 32. See Vol 27, title Magistrates. By s 32(9) of the 1980 Act the prescribed sum is £5,000 but a different sum may be substituted by order under s 143 of that Act.

7 Interpretation

(1) The following subsections apply for the interpretation of this Act.

(2) References to an indecent photograph include an indecent film, a copy of an indecent photograph or film, and an indecent photograph comprised in a film.

(3) Photographs (including those comprised in a film) shall, if they show children and are indecent, be treated for all purposes of this Act as indecent photographs of children [and so as respects pseudo-photographs].

(4) References to a photograph include—

- the negative as well as the positive version; and
- data stored on a computer disc or by other electronic means which is capable of conversion into a photograph.

(5) "Film" includes any form of video-recording.

(6) "Child", subject to subsection (8), means a person under the age of 16.

(7) "Pseudo-photograph" means an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph.

(8) If the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph shall be treated for all purposes of this Act as showing a child and so shall a pseudo-photograph where the predominant impression conveyed is that the person shown is a child notwithstanding that some of the physical characteristics shown are those of an adult.

(9) References to an indecent pseudo-photograph include—

- a copy of an indecent pseudo-photograph; and
- data stored on a computer disc or by other electronic means which is capable of conversion into a pseudo-photograph.

NOTES

The words in square brackets in sub-s (3) and the whole of sub-ss (6) (9) were added, and sub-s (4) was substituted, by the Criminal Justice and Public Order Act 1994, s 84(1), (3).

General Note. Sub-ss (6), (8) above make new provision for the definition of "child" in this Act, as, owing to the unusual format of pseudo-photographs, the definition previously contained in Sch 11) of this Act (repealed by the Criminal Justice and Public Order Act 1994, s 84(1), (2), 168(3), s 1(1)(a) of this Act) was no longer adequate. Sub-s (6) above repeats the original definition and provides that it is subject to sub-s (8) above, which provides that if the impression conveyed appears to be that of a child, the pseudo-photograph is to be treated as portraying a child notwithstanding that some of the physical characteristics shown are those of an adult. This provision is necessary because technology allows the superimposition of an actual photograph of a child's face onto an actual pornographic photograph of an adult and, by electronic manipulation, the resulting image can be made to appear to be a child's face (see 741, 742, 15 February 1994).

Sub-s (1): This Act. See the note to s 1 ante.

Sub-s (2): Indecent photograph; indecent film. Cf the note "Indecent photograph or pseudo-photograph" to s 1 ante.

Sub-s (6): Under the age of 16. See the note to s 2 ante.

In proceedings under this Act relating to indecent photographs of children, a person is to be taken as having been a child at any material time if it appears from the evidence as a whole that he was then under the age of 16; see s 2(3) ante.

Sub-s (7): Made by computer graphics or otherwise howsoever. This would include an image sourced, for example, from a bulletin board within or outside the United Kingdom (HC Official Report, SC B (Criminal Justice and Public Order Bill) col 733, 15 February 1994).

8 Similar provision for Northern Ireland

An Order in Council under paragraph 1(1)(b) of Schedule 1 to the Northern Ireland Act 1974 (legislation for Northern Ireland in the interim period) which contains a statement that it operates only so as to make for Northern Ireland provision corresponding to this Act—

- (a) shall not be subject to paragraph 1(4) and (5) of that Schedule (affirmative resolution of both Houses of Parliament); but
- (b) shall be subject to annulment by a resolution of either House.

NOTES

Order in Council . . . which contains a statement, etc. The power to make an Order in Council is exercisable by statutory instrument; see the Statutory Instruments Act 1946, s 1(1), Vol 41, title Statutes.

Subject to annulment. For provisions as to annulment of statutory instruments in pursuance of a resolution of either House of Parliament, see the Statutory Instruments Act 1946, ss 5(1), 7(1), Vol 41, title Statutes.

Northern Ireland Act 1974, Sch 1, para 1(1)(b), (4), (5). See Vol 31, title Northern Ireland (Pt 2).

9 Short title, extent and commencement

- (1) This Act may be cited as the Protection of Children Act 1978.
- (2) This Act except section 1(6) shall not extend to Scotland and except for that subsection, and subject also to section 8 shall not extend to Northern Ireland.
- (3) Section 8 of this Act shall come into force forthwith, but otherwise this Act shall come into force at the expiration of one month beginning with the date it is passed.

NOTE

One month beginning, etc. "Month" means a calendar month; see the Interpretation Act 1978, s 5, Sch 1, Vol 41, title Statutes. In calculating this period, the date (ie 20 July 1978) on which the Act was passed (ie received the Royal Assent) is reckoned; see *Hare v Cocher* [1962] 2 QB 841, [1962] 2 All ER 763, and *Trou v Ltd Coops (West Midlands) Ltd* [1967] 2 QB 899 at 909, [1967] 2 All ER 900, CA. Accordingly, this Act, except s 8 thereof, came into force on 20 August 1978.

INDECENT DISPLAYS (CONTROL) ACT 1981

(1981 c 42)

An Act to make fresh provision with respect to the public display of indecent matter, and for purposes connected therewith.

Northern Ireland. This Act does not apply; see s 5(3) post.

[27 July 1981]

1 Indecent displays

- (1) If any indecent matter is publicly displayed the person making the display and any person causing or permitting the display to be made shall be guilty of an offence.
- (2) Any matter which is displayed in or so as to be visible from any public place shall, for the purposes of this section, be deemed to be publicly displayed.
- (3) In subsection (2) above, "public place", in relation to the display of any matter, means any place to which the public have or are permitted to have access (whether on payment or otherwise) while that matter is displayed except—
 - (a) a place to which the public are permitted to have access only on payment which is or includes payment for that display; or
 - (b) a shop or any part of a shop to which the public can only gain access by passing beyond an adequate warning notice;

but the exclusions contained in paragraphs (a) and (b) above shall only apply where persons under the age of 18 years are not permitted to enter while the display in question is continuing.

- (4) Nothing in this section applies in relation to any matter—
 - (a) included by any person in a television broadcasting service or other television programme service (within the meaning of the Broadcasting Act 1990);
 - (b) included in the display of an art gallery or museum and visible only from within the gallery or museum; or
 - (c) displayed by or with the authority of, and visible only from within a building occupied by, the Crown or any local authority; or
 - (d) included in a performance of a play (within the meaning of the Theatres Act 1968); or
 - (e) included in a film exhibition as defined in the Cinemas Act 1985—
 - (i) given in a place which as regards that exhibition is required to be licensed under section 1 of that Act or by virtue only of section 5, 7 or 8 of that Act is not required to be so licensed; or
 - (ii) which is an exhibition to which section 6 of that Act applies given by an exempted organisation as defined by subsection (6) of that section).

(5) In this section "matter" includes anything capable of being displayed, except that it does not include an actual human body or any part thereof; and in determining for the purpose of this section whether any displayed matter is indecent—

- (a) there shall be disregarded any part of that matter which is not exposed to view; and
 - (b) account may be taken of the effect of juxtaposing one thing with another.
- (6) A warning notice shall not be adequate for the purposes of this section unless it complies with the following requirements—
- (a) The warning notice must contain the following words, and no others—

"WARNING

Persons passing beyond this notice will find material on display which they may consider indecent. No admittance to persons under 18 years of age."
 - (b) The word "WARNING" must appear as a heading.
 - (c) No pictures or other matter shall appear on the notice.
 - (d) The notice must be so situated that no one could reasonably gain access to the shop or part of the shop in question without being aware of the notice and it must be easily legible by any person gaining such access.

NOTES

Sub-s (4)(a) was substituted by the Broadcasting Act 1990, s 203(1), Sch 20, para 30.

Sub-s (4)(c) was substituted by the Cinemas Act 1985, s 24(1), Sch 2, para 13.

Sub-s (1): Indecent matter. As to the meaning of "matter", see sub-s (5) above.

"Indecent" is not defined in the Act but see *R v Stanley* [1965] 2 QB 327, [1965] 1 All ER 1035, CA.

It is thought that indecency is to be determined solely by considering the matter alleged to be indecent and that the surrounding circumstances are relevant only in mitigation; see *Kinima Publications* [1972] 2 All ER 427, CA (quoting *R v Calder and Boyars* [1969] 1 QB 151, [1968] 1 All ER 644, and *R v Anderson* [1972] 1 QB 304, [1971] 3 All ER 1152), that evidence is not admissible on the ordinary trial, for the magistrates to decide. Furthermore, although the issue is to be decided on a

- (3) In reckoning for the purposes of subsection (2) above any period of 24 hours, no account shall be taken of Christmas Day, Good Friday or any Sunday.
- (4) The offences that fall within this subsection are—
- an offence against section 5(2) of the Misuse of Drugs Act 1971 (possession of controlled drugs); and
 - a drug trafficking offence.
- (5) In this section and section 152 below "drug trafficking offence" means a drug trafficking offence as defined by [section 1(3) of the Drug Trafficking Act 1994] other than an offence under section 50] of that Act (assisting another to retain the benefit of drug trafficking).

NOTES

The words in square brackets in sub-s (5) were substituted by the Drug Trafficking Act 1994, s 65(1), Sch 1, para 22.

Commencement. Sub-s (5) above was brought into force on 3 April 1989 by the Criminal Justice Act 1988 (Commencement No 7) Order 1989, SI 1989/264, made under s 171(1) post. Up to 1 March 1997 no order had been made bringing the remainder of this section into force.

Justice of the peace. See the note to s 102 ante.

Petty sessions area. This expression is not defined for the purposes of this section, but of the Justice of the Peace Act 1979, s 4, Vol 27, title Magistrates.

Misuse of Drugs Act 1971, s 5(2). See Vol 28, title Medicine and Pharmacy (Pt 2).

Drug Trafficking Act 1994, ss 1(3), 50. See this title ante.

152–157 (For s 152, see Vol 27, title Magistrates; s 153 inserts the Bail Act 1976, Sch 1, Pt 1, para 9A ante; s 154 inserts Sch 1, Pt 1A to that Act ante; s 155 inserts the Magistrates' Courts Act 1980, s 128A, Vol 27, title Magistrates, and the Bail Act 1976, Sch 1, Pt 1, para 9B ante; s 156 amends the Supreme Court Act 1981, s 48(2)(a), Vol 11, title Courts and Legal Services; s 157 substitutes the Criminal Appeal Act 1968, s 20 ante.)

Reports of criminal proceedings

158 (Amends the Sexual Offences (Amendment) Act 1976, ss 4, 7(2) ante, and repeals s 6 of that Act.)

159 Crown Court proceedings—orders restricting or preventing reports or restricting public access

- (1) A person aggrieved may appeal to the Court of Appeal, if that court grants leave, against—
- an order under section 4 or 11 of the Contempt of Court Act 1981 made in relation to a trial on indictment;
 - an order made by the Crown Court under section 58(7) or (8) of the Criminal Procedure and Investigations Act 1996 in a case where the Court has convicted a person on a trial on indictment;
 - any order restricting the access of the public to the whole or any part of a trial on indictment or to any proceedings ancillary to such a trial; and
 - any order restricting the publication of any report of the whole or any part of a trial on indictment or any such ancillary proceedings;

and the decision of the Court of Appeal shall be final.

(2) Subject to Rules of Court, the jurisdiction of the Court of Appeal under this section shall be exercised by the criminal division of the Court, and references to the Court of Appeal in this section shall be construed as references to that division.

(3) On an application for leave to appeal under this section a judge shall have power to give such directions as appear to him to be appropriate and, without prejudice to the generality of this subsection, power—

- to order the production in court of any transcript or note of proceedings or other document;
- to give directions as to persons who are to be parties to the appeal or who may be parties to it if they wish and as to service of documents on any person;

and the Court of Appeal shall have the same powers as the single judge.

(4) Subject to Rules of Court made by virtue of subsection (6) below, any party to an appeal under this section may give evidence before the Court of Appeal orally or in writing.

(5) On the hearing of an appeal under this section the Court of Appeal shall have power—

- to stay any proceedings in any other court until after the appeal is disposed of;
- to confirm, reverse or vary the order complained of; and
- to make such order as to costs as it thinks fit.

(6) Without prejudice to the generality of section 84 of the Supreme Court Act 1981, Rules of Court may make in relation to trials satisfying specified conditions special provision as to the practice and procedure to be followed in relation to hearings in camera and appeals from orders for such hearings and may in particular, but without prejudice to the generality of this subsection, provide that subsection (4) above shall not have effect.

(7) In the application of this section to Northern Ireland—

- subsection (2) shall be omitted; and
- the reference in subsection (6) to section 84 of the Supreme Court Act 1981 shall be construed as a reference to sections 52 and 55 of the Judicature (Northern Ireland) Act 1978.

NOTES

Sub-s (1)(a) was inserted by the Criminal Procedure and Investigations Act 1996, s 61(6), in relation to offences committed on or after 1 April 1997.

Sub-s (1): Court of Appeal. See the note to s 35 ante.

Leave. The power to grant leave may be exercised by a single judge in the same manner as it may be exercised by the Court of Appeal; see the Criminal Appeal Act 1968, s 31(2B) ante (and of the Criminal Appeal (Northern Ireland) Act 1980, s 45(3A), Vol 31, Northern Ireland (Pt 2)).

Sub-s (4): Writing. See the note "Written" to s 71 ante.

Contempt of Court Act 1981, ss 4, 11. See Vol 11, title Contempt of Court.

Criminal Procedure and Investigations Act 1996, s 58(7), (8). See this title post.

Supreme Court Act 1981, s 84. See Vol 11, title Courts and Legal Services.

Judicature (Northern Ireland) Act 1978, ss 52, 55. See Vol 31, title Northern Ireland (Pt 2).

Rules of court. For the meaning of "rules of court", see the Interpretation Act 1978, s 5, Sch 1, Vol 41, title Statutes.

For rules of court made by virtue of sub-s (6) above, see the Criminal Appeal Rules 1968, SI 1968/1262, rr 16A, 16B, as inserted by SI 1989/1102, and the Crown Court Rules 1982, SI 1982/1109, r 24A, as inserted by SI 1989/1103.

Up to 1 March 1997 no rules of court had been made by virtue of sub-s (2) above.

Possession of indecent photograph of child

160 Summary offence of possession of indecent photograph of child

- It is an offence for a person to have any indecent photograph (or pseudo-photograph) of a child . . . in his possession.
- Where a person is charged with an offence under subsection (1) above, it shall be a defence for him to prove—

HK

- (n) that he had a legitimate reason for having the photograph [or pseudo-photograph] in his possession; or
 (b) that he had not himself seen the photograph [or pseudo-photograph] and did not know, nor had any cause to suspect, it to be indecent; or
 (c) that the photograph [or pseudo-photograph] was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time.

(3) A person shall be liable on summary conviction of an offence under this section to [imprisonment for a term not exceeding six months or] a fine not exceeding level 5 on the standard scale, or both].

(4) Sections 1(3), 2(3), 3 and 7 of the Protection of Children Act 1978 shall have effect as if any reference in them to that Act included a reference to this section.

(5) . . .

NOTES

The words in square brackets in sub-s (1), (2)(a), (b), (c) and in both pairs of square brackets in sub-s (3) were inserted, and the words omitted from sub-s (1) and the whole of sub-s (5) were repealed, by the Criminal Justice and Public Order Act 1994, ss 84(4)(a), (b), 86(1), 168(3), Sch 11.

Sub-s (1): Person. See the note to s 74 ante. As to offences by corporations, see the Protection of Children Act 1978, s 3 ante, as applied by sub-s (4) above.

Indecent photograph, pseudo-photograph. See the note to the Protection of Children Act 1978, s 1 ante (the provisions of ss 2(3) and 7 of that Act there cited are applied by sub-s (4) above).

Sub-s (3): Summary conviction. See the note to s 93A ante.

Standard scale. See the note to s 39 ante.

Protection of Children Act 1978, ss 1(3), 2(3), 3, 7. See this title ante.

161–167 (§ 161 applies to Scotland only; s 162 inserts the Video Recordings Act 1984, s 16A, Vol 45, title Theatres and Other Places of Entertainment; s 163 adds the Theft Act 1968, s 28(7) ante; s 164(1), (2) insert the Justices of the Peace Act 1979, ss 24A, 24B, Vol 27, title Magistrates; ss 164(3), 165 repealed by the Police and Magistrates' Court Act 1994, s 93, Sch 9, Pt II; s 166 amends the Prosecution of Offences Act 1985, ss 14, 19 ante (with effect from 1 October 1986), and the Criminal Justice Act 1987, Sch 1, para 8 ante; for s 167, see Vol 34, title Prisons.)

PART XII

GENERAL AND SUPPLEMENTARY

168 (See Vol 17, title Evidence.)

169 Financial provision

There shall be paid out of money provided by Parliament—

- (a) any expenses incurred under this Act by a Minister of the Crown; and
 (b) any increase attributable to the provisions of this Act in the sums payable out of such money under any other Act.

170 Minor and consequential amendments and repeals

(1) The enactments mentioned in Schedule 15 to this Act shall have effect with the amendments there specified (being minor amendments and amendments consequential on the foregoing provisions of this Act).

(2) The enactments mentioned in Schedule 16 to this Act (which include

enactments already obsolete or unnecessary) are repealed to the extent specified in the third column of that Schedule but subject to the Notes at the end of the Schedule.

NOTE

Commencement. Sub-ss (1) and (2) above came into force on the passing of this Act on 29 July 1988 so far as they relate to the enactments specified in s 171(5) post, and those subsections came into force on 29 September 1988 so far as they relate to the enactments specified in s 171(6) post. As to the commencement of the remaining amendments and repeals made by Subs 15 and 16 post, see s 171(1) post and the note "Orders under this section" thereto.

171 Commencement

(1) Subject to the following provisions of this section, this Act shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint and different days may be appointed in pursuance of this subsection for different provisions or different purposes of the same provision.

(2) An order under this section may make such transitional provision as appears to the Secretary of State to be necessary or expedient in connection with any provision thereby brought into force . . .

(3), (4) . . .

(5) The following provisions shall come into force on the day this Act is passed—

section 66;

section 67;

section 103(1), so far as it relates—

(a) to the addition of two subsections at the end of section 8 of the Drug Trafficking Offences Act 1986;

(b) to the insertion of a new subsection in section 24 of that Act; and

(c) to the substitution of two new sections for section 26 of that Act;

section 129;

section 132, so far as it relates to the Local Government Finance Act 1982;

section 141;

section 142;

section 143;

section 144;

section 149;

section 166;

section 167;

section 168;

section 169;

subsection (1) of section 170, so far as relating to the following—

section 112A(1) of the Land Registration Act 1925;

the extension of references in the Children and Young Persons Act 1933 to the offences mentioned in Schedule 1 to that Act so as to include offences under Part I of the Child Abduction Act 1984;

the Visiting Forces Act 1952;

section 67(6) of the Criminal Justice Act 1967;

section 29 of the Children and Young Persons Act 1969;

section 6(1) of the Juries Act 1974;

sections 171 and 368 of and Schedule 1 to the Criminal Procedure (Scotland) Act 1975;

the Child Care Act 1980;

sections 37 and 133 of the Magistrates' Courts Act 1980;

Annex 2B

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

(a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever;

(b) publicly exhibits a disgusting object or an indecent show;

(c) offers to sell, advertises or publishes an advertisement of, or has for sale or disposal, any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage; or

(d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

Defence of public good

(3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.

Question of law and question of fact

(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

Motives irrelevant

(5) For the purposes of this section, the motives of an accused are irrelevant.

(6) [Repealed, 1993, c. 46, s. 1]

Definition of "crime comic"

(7) In this section, "crime comic" means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

(a) the commission of crimes, real or fictitious; or

(b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

Obscene publication

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

R.S., 1985, c. C-46, s. 163; 1993, c. 46, s. 1.



Definition of "child pornography"

163.1 (1) In this section, "child pornography" means

(a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or

(b) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.

Making child pornography

(2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

Distribution or sale of child pornography

(3) Every person who imports, distributes, sells or possesses for the purpose of distribution or sale any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

Possession of child pornography

(4) Every person who possesses any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

Defence

(5) It is not a defence to a charge under subsection (2) in respect of a visual representation that the accused believed that a person shown in the representation that is alleged to constitute child pornography was or was depicted as being eighteen years of age or more unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.

Defences

(6) Where the accused is charged with an offence under subsection (2), (3) or (4), the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose.

Other provisions to apply	<p>(7) Subsections 163(3) to (5) apply, with such modifications as the circumstances require, with respect to an offence under subsection (2), (3) or (4).</p> <p>1993, c. 46, s. 2.</p>
Warrant of seizure	<p>164. (1) A judge who is satisfied by information on oath that there are reasonable grounds for believing that</p> <p>(a) any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is obscene or a crime comic, within the meaning of section 163, or</p> <p>(b) any representation or written material, copies of which are kept in premises within the jurisdiction of the court, is child pornography within the meaning of section 163.1,</p> <p>may issue a warrant authorizing seizure of the copies.</p>
Summons to occupier	<p>(2) Within seven days of the issue of a warrant under subsection (1), the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.</p>
Owner and maker may appear	<p>(3) The owner and the maker of the matter seized under subsection (1), and alleged to be obscene, a crime comic or child pornography, may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the matter.</p>
Order of forfeiture	<p>(4) If the court is satisfied that the publication, representation or written material referred to in subsection (1) is obscene, a crime comic or child pornography, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.</p>
Disposal of matter	<p>(5) If the court is not satisfied that the publication, representation or written material referred to in subsection (1) is obscene, a crime comic or child pornography, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.</p>
Appeal	<p>(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings</p> <p>(a) on any ground of appeal that involves a question of law alone,</p> <p>(b) on any ground of appeal that involves a question of fact alone, or</p> <p>(c) on any ground of appeal that involves a question of mixed law and fact,</p> <p>as if it were an appeal against conviction or against a</p>

judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XXI and sections 673 to 696 apply with such modifications as the circumstances require.

Consent

(7) Where an order has been made under this section by a judge in a province with respect to one or more copies of a publication, representation or written material, no proceedings shall be instituted or continued in that province under section 163 or 163.1 with respect to those or other copies of the same publication, representation or written material without the consent of the Attorney General.

Definitions

(8) In this section,

"court" «tribunal»

"court" means

(a) in the Province of Quebec, the Court of Quebec, the municipal court of Montreal and the municipal court of Quebec,

(a.1) in the Province of Ontario, the Superior Court of Justice,

(b) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(c) in the Provinces of Prince Edward Island and Newfoundland, the Trial Division of the Supreme Court,

(c.1) [Repealed, 1992, c. 51, s. 34]

(d) in the Provinces of Nova Scotia and British Columbia, the Yukon Territory and the Northwest Territories, the Supreme Court, and

(e) in Nunavut, the Nunavut Court of Justice;

"crime comic" «histoire illustrée de crime»

"crime comic" has the same meaning as in section 163;

"judge" «juge»

"judge" means a judge of a court.

R.S., 1985, c. C-46, s. 164; R.S., 1985, c. 27 (2nd Supp.), s. 10, c. 40 (4th Supp.), s. 2; 1990, c. 16, s. 3, c. 17, s. 9; 1992, c. 1, s. 58, c. 51, s. 34; 1993, c. 46, s. 3; 1997, c. 18, s. 5; 1998, c. 30, s. 14; 1999, c. 3, s. 27.

Tied sale

165. Every one commits an offence who refuses to sell or supply to any other person copies of any publication for the reason only that the other person refuses to purchase or acquire from him copies of any other publication that the other person is apprehensive may be obscene or a crime comic.

R.S., c. C-34, s. 161.

166. [Repealed, 1994, c. 44, s. 9]

Immoral theatrical performance

167. (1) Every one commits an offence who, being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representation.

Person taking part

(2) Every one commits an offence who takes part or appears as an actor, a performer or an assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre.

R.S., c. C-34, s. 163.

Mailing obscene matter

168. (1) Every one commits an offence who makes use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous.

Exceptions

(2) Subsection (1) does not apply to a person who

(a) prints or publishes any matter for use in connection with any judicial proceedings or communicates it to persons who are concerned in the proceedings;

(b) prints or publishes a notice or report under the direction of a court; or

(c) prints or publishes any matter

(i) in a volume or part of a genuine series of law reports that does not form part of any other publication and consists solely of reports of proceedings in courts of law, or

(ii) in a publication of a technical character that is intended, in good faith, for circulation among members of the legal or medical profession.

R.S., 1985, c. C-46, s. 168; 1999, c. 5, s. 2.

Punishment

169. Every one who commits an offence under section 163, 165, 167 or 168 is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 169; 1999, c. 5, s. 3.

Parent or guardian procuring sexual activity

170. Every parent or guardian of a person under the age of eighteen years who procures that person for the purpose of engaging in any sexual activity prohibited by this Act with a person other than the parent or guardian is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, if the person procured for that purpose is under the age of fourteen years, or to imprisonment for a term not exceeding two years if the person so procured is fourteen years of age or more but under the age of eighteen years.

R.S., 1985, c. C-46, s. 170; R.S., 1985, c. 19 (3rd Supp.), s. 5.

Householder
permitting sexual
activity

171. Every owner, occupier or manager of premises or other person who has control of premises or assists in the management or control of premises who knowingly permits a person under the age of eighteen years to resort to or to be in or on the premises for the purpose of engaging in any sexual activity prohibited by this Act is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, if the person in question is under the age of fourteen years, or to imprisonment for a term not exceeding two years if the person in question is fourteen years of age or more but under the age of eighteen years.

R.S., 1985, c. C-46, s. 171; R.S., 1985, c. 19 (3rd Supp.), s. 5.

Corrupting children

172. (1) Every one who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) [Repealed, R.S., 1985, c. 19 (3rd Supp.), s. 6]

Definition of "child"

(3) For the purposes of this section, "child" means a person who is or appears to be under the age of eighteen years.

Who may institute
prosecutions

(4) No proceedings shall be commenced under subsection (1) without the consent of the Attorney General, unless they are instituted by or at the instance of a recognized society for the protection of children or by an officer of a juvenile court.

R.S., 1985, c. C-46, s. 172; R.S., 1985, c. 19 (3rd Supp.), s. 6.

Disorderly Conduct

Indecent acts

173. (1) Every one who wilfully does an indecent act

(a) in a public place in the presence of one or more persons, or

(b) in any place, with intent thereby to insult or offend any person,

is guilty of an offence punishable on summary conviction.

Exposure

(2) Every person who, in any place, for a sexual purpose, exposes his or her genital organs to a person who is under the age of fourteen years is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 173; R.S., 1985, c. 19 (3rd Supp.), s. 7.

Laws: Cases and Codes : U.S. Code : Title 18 : Section 2256

- [United States Code](#)
 - [TITLE 18 - CRIMES AND CRIMINAL PROCEDURE](#)
 - [PART I - CRIMES](#)
 - [CHAPTER 110 - SEXUAL EXPLOITATION AND OTHER ABUSE OF C](#)

U.S. Code as of: 01/05/99



Section 2256. Definitions for chapter

Related R

For the purposes of this chapter, the term -

- (1) "minor" means any person under the age of eighteen years;
- (2) "sexually explicit conduct" means actual or simulated -
 - (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
 - (B) bestiality;
 - (C) masturbation;
 - (D) sadistic or masochistic abuse; or
 - (E) lascivious exhibition of the genitals or pubic area of any person;
- (3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;
- (4) "organization" means a person other than an individual;
- (5) "visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image;
- (6) "computer" has the meaning given that term in section 1030 of this title;
- (7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;
- (8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where -
 - (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
 - (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
 - (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
 - (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct; and
- (9) "identifiable minor" -

[Criminal](#)

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- A) means a person -
- (i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or
 - (II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and
 - (ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and
- (B) shall not be construed to require proof of the actual identity of the identifiable minor.

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U.S. Code as of: 01/05/99

Section 2252A. Certain activities relating to material constituting or containing child pornography

Related R

(a) Any person who -

[Criminal](#)

(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;

[Criminal I
and Do](#)

(2) knowingly receives or distributes -

(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

[Federal W
Crime S](#)

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

[Criminal La](#)

(3) knowingly reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer;

(4) either -

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(5) either -

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped

or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, shall be punished as provided in subsection (b).

(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs (FOOTNOTE 1) (1), (2), (3), or (4) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but, if such person has a prior conviction under this chapter, chapter 109A, or chapter 117, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

(FOOTNOTE 1) So in original. Probably should be "paragraph".

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 5 years, or both, but, if such person has a prior conviction under this chapter, chapter 109A, or chapter 117, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

(c) It shall be an affirmative defense to a charge of violating paragraphs (FOOTNOTE 1) (1), (2), (3), or (4) of subsection (a) that -

(1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;

(2) each such person was an adult at the time the material was produced; and

(3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

(d) Affirmative Defense. - It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant -

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof -

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

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CRIMES ACT 1900 - SECT 578B

578B Possession of child pornography

(1) In this section:

child pornography means a film, publication or computer game classified RC, or an unclassified film, publication or computer game that would, if classified, be classified RC, on the basis that it describes or depicts, in a way that is likely to cause offence to a reasonable adult, a person (whether or not engaged in sexual activity) who is a child under 16 or who looks like a child under 16.

Classification Board means the Classification Board established under the Commonwealth Act.

classified means classified under the Commonwealth Act.

Commonwealth Act means the Classification (Publications, Films and Computer Games) Act 1995 of the Commonwealth.

computer game, film and publication each have the same meanings, respectively, as in the Commonwealth Act.

law enforcement agency has the same meaning as in section 13 of the Criminal Records Act 1991, and includes a person or body prescribed by the regulations for the purpose of this definition.

(2) A person who has in his or her possession any child pornography is guilty of an offence.

Maximum penalty: 100 penalty units or imprisonment for 2 years (or both).

(3) Nothing in this section makes it an offence:

- (a) for any member or officer of a law enforcement agency to have any child pornography in his or her possession in the exercise or performance of a power, function or duty conferred or imposed on the member or officer by or under any Act or law, or
- (b) for any person to have any child pornography in his or her possession in the exercise or performance of a power, function or duty relating to the classification of such material conferred or imposed on the person by or under any Act or law, or
- (c) for a person to have in his or her possession any film, publication or computer game that is classified other than as RC.

(4) Proceedings for an offence under this section:

- (a) are not to be commenced later than 2 years after the date of the alleged offence, and
- (b) in the case of a film, publication or computer game that is unclassified at the time of the alleged offence, are not to be commenced until the film, publication or computer game concerned has been classified, and
- (c) are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

(4A) However, subsection (4) (b) does not prevent a person being arrested for,

charged with, an alleged offence against this section before the film, publication or computer game concerned has been classified.

(5) It is a defence to a prosecution under this section to prove:

- (a) that the defendant did not know, or could not reasonably be expected to have known, that the film, publication or computer game concerned is or contains pornographic material involving a child under 16, or
- (b) that the person depicted in the material was of or above the age of 16 at the time when the film, computer game or publication was made, taken, produced or published.

(6) In any proceedings under this section, a certificate issued under [section 87](#) of the Commonwealth Act signed (or purporting to be signed) by the Director of the Classification Board (or by the Deputy Director of the Classification Board) and stating that the film, publication or computer game concerned is classified RC on the basis that it describes or depicts, in a way that is likely to cause offence to a reasonable adult, a person (whether or not engaged in sexual activity) who is a child under 16 or who looks like a child under 16 is prima facie evidence of the matter stated in the certificate.

(7) A court that convicts a person of an offence under this section may order that any child pornography in respect of which the offence was committed is to be destroyed or otherwise disposed of as the court thinks fit.

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CRIMES ACT 1900 - SECT 578C

578C Publishing child pornography and indecent articles

(1) In this section:
article includes any thing:

- (a) that contains or embodies matter to be read or looked at, or
- (b) that is to be looked at, or
- (c) that is a record, or
- (d) that can be used, either alone or as one of a set, for the production or manufacture of any thing referred to in paragraphs (a), (b) or (c), but it does not include:
 - (e) any film that is classified (other than as RC or X) under the Commonwealth Act, or
 - (f) any publication that is classified Unrestricted, Category 1 restricted or Category 2 restricted under the Commonwealth Act, or
 - (g) any computer game that is classified (other than as RC) under the Commonwealth Act, or
 - (h) any film, publication or computer game that is the subject of an exemption under Division 3 of Part 6 of the Classification (Publications, Films and Computer Games) Enforcement Act 1995.

child pornography has the same meaning as it has in section 578B.
Commonwealth Act means the Classification (Publications, Films and Computer Games) Act 1995 of the Commonwealth.
computer game, film and publication each have the same meanings, respectively, as in the Commonwealth Act.
publish includes:

- (a) distribute, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell, offer for sale, let on hire or offer to let on hire, or
 - (b) have in possession or custody, or under control, for the purpose of doing an act referred to in paragraph (a), or
 - (c) print, photograph or make in any other manner (whether of the same or of a different kind or nature) for the purpose of doing such an act.
- record means a gramophone record or a wire or tape, or a film, and any other thing of the same or of a different kind or nature, on which is recorded a sound or picture and from which, with the aid of a suitable apparatus, the sound or picture can be produced (whether or not it is in a distorted or altered form).

(2) A person who publishes an indecent article (other than an indecent article that is child pornography) is guilty of an offence.

Maximum penalty: in the case of an individual 100 penalty units or imprisonment for 12 months (or both), and in the case of a corporation 200

penalty units.

(2A) A person who publishes an indecent article that is child pornography is guilty of an offence.

Maximum penalty: in the case of an individual 1,000 penalty units or imprisonment for 5 years (or both), or in the case of a corporation 2,000 penalty units.

(2B) A court that convicts a person of an offence under subsection (2A) may order forfeiture to the Crown of any computer used to publish the child pornography.

(2C) On the making of an order under subsection (2B) the computer becomes the property of the Crown.

(3) Nothing in this section makes it an offence for:

- (a) a person to publish an indecent article for the purposes of an application for classification under the Commonwealth Act,
- (b) for any member or officer of a law enforcement agency (within the meaning of the Criminal Records Act 1991) to publish an indecent article in the exercise or performance of a power, function or duty conferred or imposed on the member or officer by or under any Act or law.

(4) For the purposes of this section, an article may be indecent even though part of it is not indecent.

(5) Proceedings for an offence under subsection (2) are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

(5A) Proceedings for an offence under subsection (2A) are not to be commenced later than 2 years after the date of the alleged offence.

(6) In any proceedings for an offence under this section in which indecency is in issue, the opinion of an expert as to whether or not an article has any merit in the field of literature, art, medicine or science (and if so, the nature and extent of that merit) is admissible as evidence.

(7) If a corporation contravenes, whether by act or omission, another provision of this section, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the provision if the person knowingly authorised or permitted the contravention.

(8) A person may be proceeded against and convicted under a provision pursuant to subsection (7) whether or not the corporation has been proceeded against or been convicted under that provision.

(9) Nothing in subsection (7) or (8) affects any liability imposed on a corporation for an offence committed by the corporation under a provision of this section.

**Comparison of Penalty Level
in the Proposed Prevention of Child Pornography Bill
with Overseas Legislation**

Offence	Hong Kong (proposed)		Australia NSW Crimes Act 1900 No.40		Canada Criminal Code		UK Protection of Children Act 1978		US U.S. Code, Title 18. Part 1, Chap. 10, s.2252A,	
	Max. Fine (HK\$)	Max. Imprisonment	Max. Fine	Max. Imprisonment	Max. Fine	Max. Imprisonment	Max. Fine	Max. Imprisonment	Max. Fine	Max. Imprisonment
* Printing, making, producing, or importing	\$2,000,000	8 years (also punishable on summary conviction)	1,000 penalty units for individual and 2,000 penalty units for corporate [^]	5 years	Fine not specified	10 years (also punishable on summary conviction)	Max. level not specified	10 years [^] (also punishable on summary conviction)	Max. level not specified	15 years (5 to 30 years for 2 nd offence)
Publishing	\$2,000,000	8 years (also punishable on summary conviction)	1,000 penalty units for individual and 2,000 penalty units for corporate [^]	5 years	Fine not specified	10 years (also punishable on summary conviction)	Max. level not specified	10 years [^] (also punishable on summary conviction)	Max. level not specified	15 years (5 to 30 years for 2 nd offence)

<u>Offence</u>	<u>Hong Kong (proposed)</u>		<u>Australia</u> NSW Crimes Act 1900 No.40		<u>Canada</u> Criminal Code		<u>UK</u> Protection of Children Act 1978		<u>US</u> U.S. Code, Title 18. Part 1, Chap. 10, s.2252A,	
	<u>Max. Fine</u> <u>(HK\$)</u>	<u>Max.</u> <u>Imprisonment</u>	<u>Max.</u> <u>Fine</u>	<u>Max.</u> <u>Imprisonment</u>	<u>Max.</u> <u>Fine</u>	<u>Max.</u> <u>Imprisonment</u>	<u>Max.</u> <u>Fine</u>	<u>Max.</u> <u>Imprisonment</u>	<u>Max.</u> <u>Fine</u>	<u>Max.</u> <u>Imprisonment</u>
Possession (including possession for publication + mere possession)	\$1,000,000	5 years (also punishable on summary conviction)	<u>Possess for publication</u>		<u>Possess for publication</u>		<u>Possess for publication</u>		<u>Possess for publication</u>	
			1,000 penalty units for individual and 2,000 penalty units for corporate [^]	5 years	Fine not specified	10 years (also punishable on summary conviction)	Max. level not specified	10 years [^] (also punishable on summary conviction)	Max. level not specified	15 years (5 to 30 years for 2 nd offence)
			<u>Mere possession</u>		<u>Mere possession</u>		<u>Mere possession</u>		<u>Mere possession</u>	
			100 penalty units	2 years	Fine not specified	5 years (also punishable on summary conviction)	Max. level not specified	5 years [^]	Max. level not specified	5 years (2 to 10 years for 2 nd offence)

Offence	Hong Kong (proposed)		Australia NSW Crimes Act 1900 No.40		Canada Criminal Code		UK Protection of Children Act 1978		US U.S. Code, Title 18. Part 1, Chap. 10, s.2252A,	
	Max. Fine (HK\$)	Max. Imprisonment	Max. Fine	Max. Imprisonment	Max. Fine	Max. Imprisonment	Max. Fine	Max. Imprisonment	Max. Fine	Max. Imprisonment
Advertisement	\$2,000,000	8 years (also punishable on summary conviction)	Offence not provided for		Offence not provided for		Max. level not specified	10 years ^Δ (also punishable on summary conviction)	Max. level not specified	10 to 20 years (15 to 30 years for 2 nd offence; 30 years to life imprisonment for 3 rd offence)
Use, procurement or offer of children for making child pornography	\$3,000,000	10 years	Fine not specified	7 years (if child under the age of 14); 5 years (if child between the age of 14-18)	Fine not specified	5 years (if child under age of 14) 2 years (if child between the age of 14-18)	No specific offence for this item but covered by sexual offences against children		Max. level not specified	10 to 20 years (15 to 30 years for 2 nd offence; 30 years to life imprisonment for 3 rd offence)

These offences are provided for in the proposed Prevention of Child Pornography Bill. They, however, may appear in slightly different forms or wording in overseas legislation and comparison is drawn here for broadly similar offences in overseas legislation. Besides, they may not all appear in overseas legislation.

1 penalty unit = A\$110 : See NSW Crimes (Sentencing Procedure) Act 1999, s.17

The existing penalty levels were recently raised under section 41(3) of the Criminal Justice and Court Services Act 2000 which came into force on 11 January 2001.