

THE CHILD PORNOGRAPHY (PREVENTION) ACT
(Act/3 of 2009)

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JAMAICA

No. 13 -2009

I assent,

[L.S.]

(Sgd) P. L. Allen
Governor-General

October 21, 2009

AN ACT to Prohibit the production, distribution, importation, exportation or possession of child pornography, and the use of children for child pornography, and to provide for connected matters.

[*October 21, 2009*]

BE IT ENACTED by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and House of Representatives of Jamaica, and by the authority of the same, as follows:—

1. This Act may be cited as the Child Pornography (Prevention) Short title Act, 2009.

Interpreta-
tion.

2.—(1) In this Act—

“child” means a male or female person under the age of eighteen years;

“child pornography” means—

(a) any visual representation that—

- (i) shows a person who is, or is depicted as being, a child and is engaged in, or is depicted as being engaged in, sexual activity;
- (ii) depicts, for a sexual purpose, the genitals, breast, pubic area or anal region of a child; or
- (iii) depicts a child being subjected to torture, cruelty or physical abuse in a sexual context;

(b) any audio recording or written material that has as its dominant characteristic the description, presentation, or representation, for a sexual purpose, of sexual activity with a child; or

(c) any visual representation, audio recording, or written material, that advocates or counsels sexual activity with a child;

“sexual activity” means actual or simulated—

(a) sexual intercourse;

(b) activity other than sexual intercourse, whether involving persons of the same or opposite sex—

- (i) involving the penetration of the anus, vagina or mouth with any part of a person’s body, or the anus or vagina with anything else; and
- (ii) which a reasonable person would consider sexual;

- (c) touching of a sexual organ, or the anal region, of a person with any part of the body, or with or through anything else, in a manner which a reasonable person would consider sexual;
- (d) bestiality;
- (e) masturbation; or
- (f) sadistic or masochistic abuse;

“visual representation” includes—

- (a) any image, whether made or produced by electronic, mechanical or any other means;
- (b) undeveloped film;
- (c) videotape; and
- (d) data stored in electronic form capable of conversion into a visual image.

(2) For the avoidance of doubt, in paragraph (a) of the definition of “child pornography” in subsection (1), the reference to a person shall be construed as including a reference to an image resembling a person, which has been generated or modified electronically or otherwise, and any evidence that some of the principal characteristics shown may be those of an adult shall be disregarded, if the predominant impression conveyed is that the image shown is that of a child.

3.—(1) A person who knowingly causes or incites the involvement of a child in the production of child pornography, in Jamaica or elsewhere, commits an offence.

Using or involving a child in the production of child pornography.

(2) A person who, having the custody, charge or care of a child, allows the child to be used in the production of child pornography, in Jamaica or elsewhere, commits an offence.

(3) A person who commits an offence under this section is liable, on conviction on indictment before a Circuit Court, to a fine or to imprisonment for a term not exceeding fifteen years, or to both such fine and imprisonment.

Producing,
distributing,
etc., child
pornography.

4.—(1) A person commits an offence who knowingly—

- (a) produces child pornography;
- (b) distributes, imports or exports child pornography;
- (c) distributes any advertisement likely to be understood as conveying that the advertiser or any other person produces, distributes, imports, or exports, any child pornography; or
- (d) possesses any child pornography for the purpose of distributing, importing, or exporting, it.

(2) In this Act, distributing child pornography includes selling it or publishing it in any form, and parting with possession of child pornography by exposing or offering it for acquisition by another person.

(3) A person who commits an offence under—

- (a) subsection (1)(a) is liable, on conviction on indictment before a Circuit Court, to a fine or to imprisonment for a term not exceeding twenty years, or to both such fine and imprisonment;
- (b) subsection (1)(b), (c) or (d) is liable, on conviction on indictment before a Circuit Court, to a fine or to imprisonment for a term not exceeding fifteen years, or to both such fine and imprisonment.

Possessing or
accessing
child
pornography.

5.—(1) Subject to subsection (4), a person who knowingly possesses child pornography, in circumstances other than those specified in section 4(1)(d), commits an offence under this section.

(2) Subject to subsection (4), a person who knowingly accesses any child pornography commits an offence under this section.

(3) For the purposes of subsection (2), a person accesses child pornography if that person causes child pornography to be viewed by, or otherwise read, heard or transmitted to, that person.

(4) No person shall be liable for an offence under this section if that person shows that—

- (a) he had not seen, read or listened to the child pornography concerned and had no reasonable cause to suspect that he was in possession of it or had accessed it;
- (b) upon having reason to suspect that he had come into possession of, or accessed, child pornography, he promptly—
 - (i) took reasonable steps to avoid, remove or destroy the child pornography; or
 - (ii) reported the matter to—
 - (A) the Children’s Registry in accordance with the provisions of the Child Care and Protection Act; and
 - (B) a member of the Jamaica Constabulary Force,and allowed access to the child pornography for the purposes of the enforcement of this Act or any other law; or
- (c) he possessed the child pornography concerned for the purposes of *bona fide* educational, scientific, legal or medical research.

(5) A person who commits an offence under subsection (1) or (2) shall be liable upon conviction on indictment before a Circuit Court to a fine or to imprisonment for a term not exceeding eight years, or to both such fine and imprisonment.

6.—(1) Subject to subsection (2), where a body corporate commits an offence under this Act, every director, manager, secretary of the body corporate, or other similar officer concerned with the management of the body corporate, is liable on conviction on indictment before a Circuit Court to a fine or to imprisonment for a term not exceeding twenty years, or to both such fine and imprisonment.

Offences by
bodies
corporate.

(2) A director, manager, secretary or other similar officer concerned with the management of a body corporate shall not be liable, by

virtue of subsection (1), for an offence under this Act unless the court is satisfied that—

- (a) the offence was committed with his connivance; or
- (b) he had not exercised all due diligence to prevent the commission of the offence, having regard to the nature of functions in that capacity and to all the circumstances.

(3) A body corporate which commits an offence under this Act is liable, on conviction on indictment before a Circuit Court, to a fine.

Offences
where profit
is derived

7. A person who receives a financial or other benefit knowing that it results from an offence under section 3 or 4, commits an offence and is liable on conviction on indictment before a Circuit Court to a fine or to imprisonment for a term not exceeding twenty years, or to both such fine and imprisonment.

Entry, search
and seizure.

8.—(1) Where a Justice of the Peace is satisfied by information on oath, and such further information as he may in the circumstances require, that there are reasonable grounds for suspecting that evidence of or relating to an offence under this Act is to be found on any premises specified in the information, he may issue a warrant in accordance with subsection (2).

(2) A warrant issued under this section may authorize a constable named therein, with such assistance as is reasonably necessary and by the use of reasonable force to—

- (a) enter upon the premises specified in the warrant;
- (b) search the premises for evidence of, or relating to, an offence under this Act; and
- (c) seize property found in the course of the search that the constable believes, on reasonable grounds, to be evidence of, or relating to, an offence under this Act.

(3) A warrant issued under this section shall include—

- (a) a statement of the purpose for which the warrant is issued, and a description of the offence;
- (b) a description of the kind of property to be seized;

- (c) a reference to the time, not being later than fourteen days, upon the expiration of which the warrant ceases to have effect; and
- (d) a statement as to whether entry is authorized to be made at any time of the day or night, or during the hours of the day or night specified therein.

(4) For the purposes of this section “an offence under this Act” refers to an offence which has been, is being, or is about to be committed.

9.—(1) Subject to subsections (2) and (3), the court before which a person is convicted of an offence under this Act may, upon the application of the Director of Public Prosecutions, make an order for the forfeiture of any thing used in the commission of the offence. Forfeiture.

(2) Where the court is satisfied that any thing used in the commission of an offence under this Act is child pornography, the court shall—

- (a) whether or not any person is convicted of the offence; and
- (b) instead of making an order under subsection (1),

order that the thing concerned be destroyed or otherwise disposed of in such manner as the court may determine.

(3) Before making an order under subsection (1) or (2), the court shall give any person claiming to be the owner of the thing concerned, the opportunity to show cause why the order should not be made.

(4) Where the Director of Public Prosecutions intends to apply for an order under subsection (1), he shall give to any person who, to his knowledge, is the owner of the thing concerned, fourteen days notice of that intention.

(5) Where the Director of Public Prosecutions is unable to ascertain the owner of any thing to which this section applies, he shall publish a notice in a daily newspaper circulating in Jamaica, of his intention to apply for an order under subsection (1), not less than fourteen days prior to the application.

(6) An order under subsection (1) or (2) shall not take effect until—

- (a) the time for instituting an appeal against the conviction and order concerned has expired; or
- (b) where an appeal referred to in paragraph (a) is instituted, the appeal has been finally determined.

(7) Where, on the hearing of an application for an order under subsection (1), no person appears before the court to show cause as mentioned in subsection (3), the court shall presume that the thing concerned has been abandoned.

Defence for persons concerned in the enforcement of this Act.

10. A person carrying out duties in connection with the enforcement of this Act shall not be liable for any offence under this Act, to the extent that—

- (a) such person is acting in the course of those duties; and
- (b) the person's conduct is reasonable in the circumstances for the performance of those duties.

Protection of victims.

11.—(1) In relation to any proceedings in any court which arise out of any offence under this Act—

- (a) no report of the proceedings shall reveal the name, address, or school, or include any particulars calculated to lead to the identification of any child concerned in the proceedings, either as being the person against or in respect of whom the proceedings are taken, or as being a witness therein;
- (b) no picture of any child referred to in paragraph (a) shall be published.

(2) When any alleged child pornography is displayed for the purpose of any proceedings in any court in relation to an offence under this Act, the court shall order to be excluded from the courtroom any person who is not an essential person.

(3) For the purposes of subsection (2), the following are essential persons—

- (a) parties to the proceedings and their legal representatives;

- (b) the prosecutor;
- (c) the Children's Advocate or his representative;
- (d) a representative of the Child Development Agency;
- (e) a witness giving evidence;
- (f) a person whose presence is, in the court's opinion, necessary or desirable for the proper conduct of the proceedings; and
- (g) a person who applies to the court to be present, and whose presence, in the court's opinion would—
 - (i) serve a proper interest of that person; and
 - (ii) not be prejudicial to the interests of any child described or depicted in the child pornography concerned, whether or not that child can be identified from the child pornography.

(4) Any person who publishes any matter in contravention of this section commits an offence and is liable, upon summary conviction before a Resident Magistrate, to a fine not exceeding one million dollars or, in default of payment, to imprisonment for a term not exceeding twelve months.

12.—(1) The Minister may make regulations generally for giving Regulations. effect to the provisions of this Act.

(2) Notwithstanding the provisions of section 29 of the Interpretation Act, regulations made under this section may provide, in respect of a breach of any of the provisions of such regulations, that the offender be liable upon summary conviction before a Resident Magistrate to such fine not exceeding five hundred thousand dollars or to such term of imprisonment not exceeding one year, as may be prescribed therein.

13. Subject to affirmative resolution, the Minister may by order published in the *Gazette* increase any monetary penalty imposed by this Act. Power to amend penalties.

Amendments
to other Acts.

14. The Proceeds of Crime Act is amended in the Second Schedule thereto, by renumbering paragraph 9 as paragraph 10, and inserting the following as paragraph 9—

"Child
pornogra-
phy. 9. An offence under section 3 or 4 of the Child
Pornography (Prevention) Act."

Passed in the Senate this 24th day of July, 2009, with seven (7) amendments.

OSWALD G. HARDING, OJ, CD, QC
President.

Passed in the House of Representatives this 22nd day of September, 2009, with three (3) amendments.

DELROY CHUCK
Speaker.

On the 25th day of September, 2009 the Senate agreed to the amendments made by the House of Representatives.

OSWALD G. HARDING, OJ, CD, QC
President.

This printed impression has been carefully compared by me with the authenticated impression of the foregoing Act, and has been found by me to be a true and correct printed copy of the said Act.

Clerk to the Houses of Parliament.