

**THIRD SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 3,725 of 16th July, 2009

B. 23/09

**CRIMES (INDECENT PHOTOGRAPHS WITH CHILDREN) ACT
2009**

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SCHEDULE

**THIRD SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 3,725 of 16th July, 2009

B. 23/09

BILL

FOR

AN ACT to prohibit the taking possession and distribution of indecent images or pseudo-images of children, the abuse of children by causing, controlling or arranging for their participation in pornography, and for related purposes.

ENACTED by the Legislature of Gibraltar.

Title and commencement.

1. This Act may be cited as the Crimes (Indecent Photographs with Children) Act 2009 and comes into operation on the day of publication.

Indecent photographs of children

Simple possession of indecent photograph of a child.

2.(1) Subject to section 4, it is an offence for a person to have any indecent photograph or pseudo-photograph of a child in his possession or to procure or to attempt to procure any indecent photograph or pseudo-photograph for himself.

(2) If a person is charged with an offence under subsection (1), it is a defence for him to prove that—

- (a) he had a legitimate reason for having the photograph or pseudo-photograph in his possession;
- (b) 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) 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 who commits an offence under this section is liable—

- (a) on summary conviction to imprisonment for 6 months or the statutory maximum fine, or both;
- (b) on conviction on indictment to imprisonment for 5 years.

Taking and publishing indecent photographs of children.

3.(1) Subject to section 4, it is an offence for a person—

- (a) to produce, take or permit to be taken, or to make, any indecent photograph or pseudo-photograph of a child or to offer to produce, take or permit to be taken, or to make, any indecent photograph or pseudo-photograph of a child;
- (b) to distribute or show such indecent photographs or pseudo-photographs;
- (c) 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 procure or to attempt to procure such photograph or pseudo-photograph for those purposes;
- (d) 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; or
- (e) copies or moves any indecent photograph or pseudo-photograph to any storage medium other than that in which it is held or to a different location in the storage medium in which it was held.

(2) For the purpose of subsection (1)(b), a person is to be regarded as distributing an indecent photograph or pseudo-photograph if he parts with possession of it to, or exposes or offers it for acquisition by, another person.

(3) If a person is charged with an offence under subsection (1)(b), (c) or (e), it is a defence for him to prove that—

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

(4) A person who commits an offence under this section is liable—

- (a) on summary conviction to imprisonment for 12 months or the statutory maximum fine, or both;
- (b) on conviction on indictment to imprisonment for 10 years.

Marriage or similar relationship.

4.(1) This section applies if, in proceedings for an offence under section 2(1) for possession of an indecent photograph or pseudo-photograph of a child, the defendant proves that the photograph was of the child aged 16 or over, and that at the time when he obtained it the child and the defendant—

- (a) were married; or
- (b) lived together as partners in an enduring family relationship.

(2) This section also applies if, in proceedings for an offence under section 3(1)(a), (b), (c) or (e) the defendant proves that the photograph or pseudo-photograph was of the child aged 16 or over, and that at the time of the offence charged the child and the defendant—

- (a) were married; or
- (b) lived together as partners in an enduring family relationship.

(3) This section applies whether the photograph shows the child alone or with the defendant, but not if it shows any other person.

(4) In the case of an offence under section 3(1)(a) or (e), if sufficient evidence is adduced to raise an issue as to whether the child consented to the photograph being taken, made, copied or moved, or as to whether the defendant reasonably believed that the child so consented, the defendant is not guilty of the offence unless it is proved that the child did not so consent and that the defendant did not reasonably believe that the child so consented.

(5) In the case of an offence under section 3(1)(b), the defendant is not guilty of the offence unless it is proved that the distributing or showing was to a person other than the child.

(6) In the case of an offence under section 3(1)(c), if sufficient evidence is adduced to raise an issue both as to whether—

- (a) the child consented to the photograph being in the defendant's possession, or as to whether the defendant reasonably believed that the child so consented; and
- (b) the defendant had the photograph in his possession with a view to its being distributed or shown to anyone other than the child,

the defendant is not guilty of the offence unless it is proved either—

- (i) that the child did not so consent and that the defendant did not reasonably believe that the child so consented; or
- (ii) that the defendant had the photograph in his possession with a view to its being distributed or shown to a person other than the child.

Exception for criminal proceedings, investigations etc.

5.(1) In proceedings for an offence under section 3(1)(a) or (e), the defendant is not guilty of the offence if he proves that it was necessary for him to make, use, copy or move the photograph or pseudo-photograph for the purposes of the prevention, detection or investigation of crime, or for the purposes of criminal proceedings, in any part of the world.

(2) No proceedings for an offence under section 2 or 3 may be commenced except by, or with the consent of, the Attorney-General.

Entry, search and seizure.

6.(1) The following subsections apply if a magistrate is satisfied by information on oath, laid by or on behalf of the Attorney-General or by a police officer, that there is reasonable ground for suspecting that, in any premises, there is an indecent photograph or pseudo-photograph of a child.

(2) The magistrate may issue a warrant under his hand authorising any police officer 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, must be disposed of in accordance with the Schedule to this Act.

(4) In this section and the Schedule, “premises” includes—

- (a) any vehicle, vessel, aircraft or hovercraft;
- (b) any stall, tent or moveable structure (including an offshore installation);
- (c) any other place whatever, whether or not occupied as land.

(5) References in this section and in the Schedule to premises must, where the context so requires, be modified so that a reference to occupation shall be construed as a reference to the use of such premises.

Indecent photographs: Interpretation.

7.(1) The following subsections apply for the interpretation of sections 2 to 6 and the Schedule.

(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), if they show–

- (a) a child engaging in sexually explicit or sexually suggestive conduct;
- (b) a person appearing to be a child engaged in sexually explicit or sexually suggestive conduct;
- (c) realistic images representing a child engaged in sexually explicit or sexually suggestive conduct; or
- (d) children and are indecent,

they are to be treated for all purposes of this Act as indecent photographs of children and similarly in respect of pseudo-photographs.

(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.

(6) “Child”, subject to subsection (8), means a person under the age of 18, and 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 18.

(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 is to be treated for all purposes of this Act as showing a child and a pseudo-photograph is to be similarly treated if 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) 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.

(10) “Storage medium” includes any medium that allows for storage of any photograph or pseudo-photograph.

Abuse of children through pornography

Causing or inciting child pornography.

8.(1) A person (A) commits an offence if—

- (a) he intentionally causes or incites another person (B) to be involved in pornography, in any part of the world; and
- (b) either—
 - (i) B is under 18, and A does not reasonably believe that B is 18 or over; or
 - (ii) B is under 16.

(2) A person who commits an offence under this section is liable—

- (a) on summary conviction to imprisonment for 12 months or the statutory maximum fine or both;
- (b) on conviction on indictment to imprisonment for 14 years.

Controlling a child involved in pornography.

9.(1) A person (A) commits an offence if—

- (a) he intentionally controls any of the activities of another person (B) relating to B’s involvement in pornography in any part of the world, and
- (b) either—

- (i) B is under 18, and A does not reasonably believe that B is 18 or over, or
- (ii) B is under 16.

(2) A person who commits an offence under this section is liable—

- (a) on summary conviction to imprisonment for 12 months or the statutory maximum fine, or both;
- (b) on conviction on indictment to imprisonment for 14 years.

Arranging or facilitating child pornography.

10.(1) A person (A) commits an offence if—

- (a) he intentionally arranges or facilitates the involvement in pornography in any part of the world of another person (B); and
- (b) either—
 - (i) B is under 18, and A does not reasonably believe that B is 18 or over; or
 - (ii) B is under 16.

(2) A person who commits an offence under this section is liable—

- (a) on summary conviction to imprisonment for 12 months or the statutory maximum fine, or both;
- (b) on conviction on indictment to imprisonment for 14 years.

Sections 8 to 10: interpretation.

11. For the purposes of sections 8 to 10, a person is involved in pornography if an indecent image of that person is made, produced, recorded or stored; and “pornography” and similar expressions are to be interpreted accordingly.

SCHEDULE

Sections 6, 7

**FORFEITURE OF INDECENT PHOTOGRAPHS AND PSEUDO-
PHOTOGRAPHS OF CHILDREN**

Application of Schedule.

1.(1) This Schedule applies if–

- (a) property which has been lawfully seized in Gibraltar is in the custody of a police officer;
- (b) apart from this Schedule, there is no legitimate reason for the officer to retain custody of the property;
- (c) the officer is satisfied that there are reasonable grounds for believing that the property is or is likely to be forfeitable property; and
- (d) apart from this Schedule, the officer is not aware of any person who has a legitimate reason for possessing the property or any readily separable part of it.

(2) The term “forfeitable property” means–

- (a) any indecent photograph or pseudo-photograph of a child;
- (b) any property which it is not reasonably practicable to separate from any property within sub-paragraph (a).

(3) For the purposes of this paragraph–

- (a) a part of any property is a “readily separable part” of the property if, in all the circumstances, it is reasonably practicable for it to be separated from the remainder of that property; and
- (b) it is reasonably practicable for a part of any property to be separated from the remainder if it is reasonably practicable to

separate it without prejudicing the remainder of the property or another part of it.

(4) The circumstances mentioned in paragraph (3)(a) include the time and costs involved in separating the property.

Possession pending forfeiture.

2.(1) The property must be retained in the custody of a police officer until it is returned or otherwise disposed of in accordance with this Schedule.

(2) The provisions of the Police Act 2006 relating to property seized in the investigation of an offence do not apply to property held under this Schedule.

The relevant officer.

3. “The relevant officer”, in relation to any property, is the police officer who for the time being has custody of the property.

Notice of intended forfeiture.

4.(1) The relevant officer must give notice of the intended forfeiture of the property (“notice of intended forfeiture”) to—

- (a) every person whom he believes to have been the owner of the property, or one of its owners, at the time of the seizure of the property;
- (b) if the property was seized from premises, every person whom he believes to have been an occupier of the premises at that time; and
- (c) if the property was seized as a result of a search of any person - that person.

(2) The notice of intended forfeiture must set out—

- (a) a description of the property; and
- (b) how a person may give a notice of claim under this Schedule and the period within which such a notice must be given.

(3) Subject to paragraph (4), the notice of intended forfeiture may be given to a person only by–

- (a) delivering it to him personally;
- (b) addressing it to him and leaving it for him at the appropriate address; or
- (c) addressing it to him and sending it to him at that address by post.

(4) A notice given in accordance with paragraph (1)(b) may, if it is not practicable to give the notice in accordance with paragraph (3), be given by–

- (a) addressing it to “the occupier” of those premises, without naming him; and
- (b) leaving it for him at those premises or sending it to him at those premises by post.

(5) Property may be treated or condemned as forfeited under this Schedule only if–

- (a) the requirements of this paragraph have been complied with in the case of the property; or
- (b) it was not reasonably practicable for them to be complied with.

(6) In this paragraph “the appropriate address”, in relation to a person, means–

- (a) in the case of a corporate body, its registered or principal office in Gibraltar;
- (b) in the case of a firm, the principal office of the partnership;
- (c) in the case of an unincorporated body or association, the principal office of the body or association;

- (d) in any other case, his usual or last known place of residence in Gibraltar or his last known place of business in Gibraltar.

(7) In the case of–

- (a) a company registered outside Gibraltar;
- (b) a firm carrying on business outside Gibraltar; or
- (c) an unincorporated body or association with offices outside Gibraltar,

the references in this paragraph to its principal office include references to its principal office within Gibraltar (if any).

Notice of claim.

5.(1) A person claiming that he has a legitimate reason for possessing the property or a part of it may give notice of his claim to a police officer at any police station.

(2) Oral notice is not sufficient for this purpose.

Time and form of notice.

6.(1) A notice of claim may not be given more than one month after–

- (a) the date of the giving of the notice of intended forfeiture; or
- (b) if no such notice has been given, the date on which the property began to be retained under this Schedule (see paragraph 2).

(2) A notice of claim must specify–

- (a) the name and address of the claimant;
- (b) a description of the property, or part of it, in respect of which the claim is made;

- (c) in the case of a claimant who is outside Gibraltar, the name and address of a solicitor in Gibraltar who is authorised to accept service, and to act, on behalf of the claimant.

(3) Service upon a solicitor so specified is to be taken to be service on the claimant for the purposes of any proceedings by virtue of this Schedule.

(4) In a case in which notice of intended forfeiture was given to different persons on different days, the reference in this paragraph to the day on which that notice was given is a reference in relation–

- (a) to a person to whom notice of intended forfeiture was given, to the day on which that notice was given to that person; and
- (b) to any other person, to the day on which notice of intended forfeiture was given to the last person to be given such a notice.

Automatic forfeiture if no claim is made.

7.(1) If the property is unclaimed it is treated as forfeited.

(2) The property is “unclaimed” if, by the end of the period for the giving of a notice of claim–

- (a) no such notice has been given in relation to it or any part of it; or
- (b) the requirements of paragraphs 5 and 6 have not been complied with in relation to the only notice or notices of claim that have been given.

(3) Paragraph (1) applies in relation to a readily separable part of the property as it applies in relation to the property, and for this purpose paragraph (2) applies as if references to the property were to the part.

(4) In this paragraph “readily separable part” has the meaning given by paragraph 1.

Decision whether to take court proceedings to condemn property as forfeited.

8.(1) If a notice of claim in respect of the property, or a part of it, is duly given in accordance with paragraphs 5 and 6, the relevant officer must decide whether to take proceedings to ask the court to condemn the property or a part of it as forfeited.

(2) The decision whether to take such proceedings must be made as soon as reasonably practicable after the giving of the notice of claim.

Return of property if no forfeiture proceedings.

9. (1) This paragraph applies if, in a case in which a notice of claim has been given, the relevant officer decides not to take proceedings—

- (a) for condemnation of the property; or
- (b) for condemnation of a part of the property.

(2) The relevant officer must return the property or part to the person who appears to him to have a legitimate reason for possessing the property or, if there is more than one such person, to one of those persons.

(3) Any property required to be returned in accordance with sub-paragraph (2) must be returned as soon as reasonably practicable after the decision not to take proceedings for condemnation.

Forfeiture proceedings.

10.(1) This paragraph applies if, in a case in which a notice of claim has been given, the relevant officer decides to take proceedings for condemnation of the property or a part of it (“the relevant property”).

(2) Subject to sub-paragraphs (5) and (7), the court must condemn the relevant property if it is satisfied that—

- (a) the relevant property is forfeitable property; and
- (b) no-one who has given a notice of claim has a legitimate reason for possessing the relevant property.

(3) If the court is not satisfied that the relevant property is forfeitable property, the court must order its return to the person who appears to the court to have a legitimate reason for possessing it or, if there is more than one such person, to one of those persons.

(4) If the court is satisfied that—

- (a) the relevant property is forfeitable property; and
- (b) a person who has given a notice of claim has a legitimate reason for possessing the relevant property, or that more than one such person has such a reason,

the court must order the return of the relevant property to that person or, as the case may be, to one of those persons.

(5) If the court is satisfied that any part of the relevant property is a separable part, sub-paragraphs (2) to (4) apply separately in relation to each separable part of the relevant property as if references to the relevant property were references to the separable part.

(6) For this purpose a part of any property is a “separable part” of the property if—

- (a) it can be separated from the remainder of that property; and
- (b) if a person has a legitimate reason for possessing the remainder of that property or any part of it, the separation will not prejudice the remainder or part.

(7) If the court is satisfied that—

- (a) a person who has given a notice of claim has a legitimate reason for possessing part of the relevant property; and
- (b) although the part is not a separable part within the meaning given by sub-paragraph (6), it can be separated from the remainder of the relevant property,

the court may order the return of that part to that person.

(8) Sub-paragraph (7) does not apply to any property required to be returned to a person under sub-paragraph (4).

Supplementary orders.

11.(1) If the court condemns property under sub-paragraph 10(2), the court—

- (a) may order the relevant officer to take such steps in relation to the property or any part of it as it thinks appropriate; and
- (b) if it orders a step to be taken - may make that order conditional on specified costs relating to the taking of that step being paid by a specified person within a specified period.

(2) A court order under sub-paragraph 10(3), (4), (5) or (7) requiring the return of a part of the relevant property to a person may be made conditional on specified costs relating to the separation of the part from the remainder of the relevant property being paid by that person within a specified period.

(3) If the court makes an order under sub-paragraph 10(7) for the return of a part of the relevant property, the court—

- (a) may order the relevant officer to take such steps as it thinks appropriate in relation to any property which will be prejudiced by the separation of that part; and
- (b) if it orders a step to be taken, may make that order conditional on specified costs relating to the taking of that step being paid by a specified person within a specified period.

(4) For the purposes of this paragraph, “specified” means specified in, or determined in accordance with, the court order.

Magistrates’ Court.

12. Proceedings by virtue of this Schedule are civil proceedings and may be instituted in the Magistrates’ Court.

Appeals.

13.(1) Either party may appeal against the decision of the Magistrates' Court to the Supreme Court.

(2) This paragraph does not affect any right to require the statement of a case for the opinion of the Supreme Court.

(3) If an appeal has been made (whether by case stated or otherwise) against the decision of the Magistrates' Court in proceedings by virtue of this Schedule in relation to property, the property is to be left in the custody of a police officer pending the final determination of the matter.

Effect of forfeiture.

14. If property is treated or condemned as forfeited under this Schedule the forfeiture is to be treated as having taken effect as from the time of the seizure.

Disposal of property which is not returned.

15.(1) If—

- (a) property is required to be returned to a person under this Schedule;
- (b) the property is (without having been returned) still in the custody of the relevant officer after the end of the period of 12 months beginning with the day on which the requirement to return it arose; and
- (c) it is not practicable to dispose of it by returning it immediately to the person to whom it is required to be returned,

the relevant officer may dispose of it in any manner he thinks fit.

(2) If property would be required to be returned to a person under this Schedule but for a failure to satisfy a condition imposed by virtue of paragraph 11(2) (return of property conditional on payment of costs within specified period), the relevant officer may dispose of the property in any manner he thinks fit.

Provisions as to proof.

16.(1) In proceedings under this Schedule, the fact, form and manner of the seizure are to be taken, without further evidence and unless the contrary is shown, to have been as set forth in the process.

(2) In proceedings, the condemnation by a court of property as forfeited under this Schedule may be proved by the production of either—

- (a) the order of condemnation; or
- (b) a certified copy of the order purporting to be signed by an officer of the court by which the order was made or granted.

Saving for owner's rights.

17. Neither the imposition of a requirement by virtue of this Schedule to return property to a person nor the return of it to a person in accordance with such a requirement affects—

- (a) the rights in relation to that property, or any part of it, of any other person; or
- (b) the right of any other person to enforce his rights against the person to whom it is returned.

Interpretation.

18. (1) In this Schedule—

“the court” is to be construed in accordance with paragraph 12;

“forfeitable property” is to be construed in accordance with paragraph 1(2); and

“the relevant officer” is to be construed in accordance with paragraph 3.

(2) For the purposes of this Schedule the circumstances in which a person (“P”) has a legitimate reason for possessing an indecent photograph of a child (“C”) include—

- (a) the photograph was of C aged 16 or over;
- (b) one or both of the following apply–
 - (i) P and C are married or are living together as partners in an enduring family relationship;
 - (ii) P and C were married or were so living together at the time P obtained the photograph;
- (c) the photograph shows C alone or with P, but does not show any other person;
- (d) C has consented to the photograph being in P's possession (and that consent has not been withdrawn); and
- (e) P owns the photograph, or is authorised (directly or indirectly) by the owner to possess it.

EXPLANATORY MEMORANDUM

This Bill provides for the prohibition of the possession and dissemination of indecent photographs and pseudo-photographs of or concerning children as well as creating offences in respect of causing, controlling or arranging for a child to participate in pornography.

Clause 2 creates the offence of simple possession of indecent photograph or pseudo photograph of a child and provides for defences. The maximum sentence on conviction on indictment is 5 years imprisonment.

Clause 3 creates offences for a wider range of circumstances which go beyond simple possession. These include the production or taking of the indecent photographs, distribution, publication and copying of these photographs. The maximum penalty on conviction on indictment is 10 years imprisonment.

Clause 4 provides a defence in circumstances where the child is married to the defendant and where the child has consented to the defendant's actions.

Clause 5 permits law enforcement agencies to perform certain actions with a view to the prevention, detection or investigation of crimes both in Gibraltar and abroad.

Clause 6 and the Schedule to the Bill provide for a regime whereby the Court may issue a search warrant and thereafter may be forfeited.

Clause 7 provides for the interpretation of the preceding clauses and in particular defines "photograph" as including a film, it also includes the negative, and in the case of digital photography includes data which is capable of being converted into a photograph. A pseudo-photograph is defined as an image which is made by computer graphics or otherwise and which appears to be a photograph. Subclause (3) sets out the circumstances whereby a photograph is to be classified as indecent for the purposes of the Act. Subclause (8) applies to images where it is not certain that the subject matter is a child. In such cases it will be treated as an image of a child where the predominant impression conveyed is that it is a child.

Clause 8 creates the offence of causing or inciting a child to become involved in pornography, whether in Gibraltar or abroad.

Clause 9 creates the offence of controlling a child's activities where those involve pornography, whether in Gibraltar or abroad.

Clause 10 creates the offence of arranging or facilitating a child's involvement in pornography, whether in Gibraltar or abroad.

The maximum penalty on conviction on indictment in respect of the offences in clauses 8 to 10 is 14 years imprisonment.

Clause 11 provides for the interpretation of involvement in pornography as regards clauses 8 to 10.

**Printed by the Gibraltar Chronicle Limited
Printing Office, 2, Library Gardens,
Government Printers for Gibraltar,
Copies may be purchased at 6, Convent Place, Price £1.10p.**