

THIRD SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 5043 GIBRALTAR Thursday 30th March 2023

B. 06/23

BILL

FOR

AN ACT to amend the Crimes Act 2011 and the Communications Act 2006.

ENACTED by the Legislature of Gibraltar.

Title.

1. This Act may be cited as the Crimes and Communications (Online Safety) Act 2023.

Commencement.

2. This Act comes into operation on the day of publication.

Offences of sending or showing flashing images electronically.

3. After section 96 of the Crimes Act 2011 insert –

“Offences of sending or showing flashing images electronically.

96A.(1) A person (A) commits an offence if-

- (a) A sends a communication by electronic means which consists of or includes flashing images (see subsection (13));
- (b) either condition 1 or condition 2 is met; and
- (c) A has no reasonable excuse for sending the communication.

(2) Condition 1 is that-

- (a) at the time the communication is sent, it is reasonably foreseeable that an individual with epilepsy would be among the individuals who would view it; and
- (b) A sends the communication with the intention that such an individual will suffer harm as a result of viewing the flashing images.

- (3) Condition 2 is that, when sending the communication-
- (a) A believes that an individual (B)-
 - (i) whom A knows to be an individual with epilepsy; or
 - (ii) whom A suspects to be an individual with epilepsy;will, or might, view it, and
 - (b) A intends that B will suffer harm as a result of viewing the flashing images.
- (4) In subsections (2)(a) and (3)(a), references to viewing the communication are to be read as including references to viewing a subsequent communication forwarding or sharing the content of the communication.
- (5) The exemptions contained in section 96B apply to an offence under subsection (1).
- (6) For the purposes of subsection (1), a provider of an internet service by means of which a communication is send is not to be regarded as a person who sends a communication.
- (7) In the application of subsection (1) to a communication consisting of or including a hyperlink to other content, references to the communication are to be read as including references to content accessed directly via the hyperlink.
- (8) A person (A) commits an offence if –
- (a) A shows an individual (B) flashing images by means of an electronic communications device;
 - (b) when showing the images –
 - (i) A knows that B is an individual with epilepsy; or
 - (ii) A suspects that B is an individual with epilepsy;
 - (c) when showing the images, A intends that B will suffer harm as a result of viewing them; and
 - (d) A has no reasonable excuse for showing the images.
- (9) An offence under subsection (1) or (8) cannot be committed by a healthcare professional acting in that capacity.
- (10) A person who commits an offence under subsection (1) or (8) is liable –

- (a) on summary conviction to imprisonment for a term not exceeding 12 months' imprisonment or a fine or both;
 - (b) on conviction on indictment to imprisonment for a term not exceeding five years or a fine or both.
- (11) It does not matter for the purpose of this section whether flashing images may be viewed at once (for example, a GIF that plays automatically) or only after some action is performed (for example, pressing play).
- (12) In this section-
- (a) references to sending a communication include references to causing a communication to be sent;
 - (b) references to showing flashing images include references to causing flashing images to be shown.

(13) In this section –

“electronic communications device” means equipment or a device that is capable of transmitting images by electronic means;

“flashing images” means images which carry a risk that an individual with photosensitive epilepsy who viewed them would suffer a seizure as a result;

“harm” means –

- (a) a seizure; or
- (b) alarm or distress;

“individual with epilepsy” includes, but is not limited to, an individual with photosensitive epilepsy;

“send” includes transmit and publish (and related expressions are to be read accordingly).

Exemptions from offence under section 96A.

96B.(1) A recognised news publisher cannot commit an offence under section 96A.

- (2) An offence under section 96A cannot be committed by the holder of a licence under the Broadcasting Act 2012 in connection with anything done under the authority of the licence.

- (3) An offence under section 96A cannot be committed in connection with the showing of a film made for cinema to members of the public.
- (4) “Recognised news publisher” has the meaning given in section 96C.

Recognised news publisher.

96C.(1) “Recognised news publisher” means any of the following entities –

- (a) the Gibraltar Broadcasting Corporation;
 - (b) the holder of a licence under the Broadcasting Act 2012 who publishes news-related material in connection with the broadcasting activities authorised under the licence; and
 - (c) any other entity which –
 - (i) meets all of the conditions in subsection (2), and
 - (ii) is not an excluded entity (see subsection (3)).
- (2) The conditions referred to in subsection (1)(c)(i) are that the entity –
- (a) has as its principal purpose the publication of news-related material, and such material –
 - (i) is created by different persons; and
 - (ii) is subject to editorial control;
 - (b) publishes such material in the course of a business (whether or not with a view to profit);
 - (c) is subject to a standards code;
 - (d) has policies and procedures for resolving complaints;
 - (e) has a registered office or other business address in Gibraltar;
 - (f) is the person with legal responsibility for material published by it in Gibraltar; and
 - (g) publishes –
 - (i) the entity’s name and the address mentioned in paragraph (e); and

- (ii) the name and address of any person who controls the entity (including, where such person is an entity, the person’s registered or principal office).

(3) An “excluded entity” is an entity –

- (a) which is a proscribed organisation under the Terrorism Act 2018 (see section 7 of that Act); or
- (b) the purpose of which is to support a proscribed organisation under that Act.

(4) For the purposes of subsection (2) -

- (a) news-related material is “subject to editorial control” if there is a person (whether or not the publisher of the material) who has editorial or equivalent responsibility for the material, including responsibility for how it is presented and the decision to publish it;

(b) “control”-

- (i) in relation to a body corporate, shall be construed in accordance with sub-paragraph (iii), and

- (ii) in relation to any body other than a body corporate, means the power of a person to secure, by whatever means and whether directly or indirectly, that the affairs of the first-mentioned body are conducted in accordance with the wishes of that person;

(iii) in relation to this section, a person controls a body corporate if—

(A) he holds, or is beneficially entitled to, more than 50 per cent. of the equity share capital in the body, or possesses more than 50 per cent. of the voting power in it; or

(B) although he does not have such an interest in the body, it is reasonable, having regard to all the circumstances, to expect that he would (if he chose to) be able in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that affairs of the body are conducted in accordance with his wishes; or

(C) he holds, or is beneficially entitled to, 50 per cent. of the equity share capital in that body, or possesses 50 per cent. of the voting power in it, and an arrangement exists between him and any other participant in the body as to the manner in which any voting power in the body possessed by either of them is to be exercised, or as to the omission by either of them to exercise such voting power.

(5) In this section-

“news-related material” means material consisting of –

- (a) news or information about current affairs;
- (b) opinion about matters relating to the news or current affairs; or
- (c) gossip about celebrities, other public figures or other persons in the news;

“publish” means publish by any means (including by broadcasting), and references to a publisher and publication are to be construed accordingly;

“standards code” means –

- (a) a code of standards that regulates the conduct of publishers, that is published by an independent regulator; or
- (b) a code of standards that regulates the conduct of the entity in question, that is published by the entity itself.

Liability of corporate officers.

96D.(1) If an offence under section 96A is committed by a body corporate and it is proved that the offence –

- (a) has been committed with the consent or connivance of an officer of the body corporate; or
- (b) is attributable to any neglect on the part of an officer of the body corporate,

the officer (as well as the body corporate) commits the offence and is liable to be proceeded against and punished accordingly.

(2) “Officer”, in relation to a body corporate, means –

- (a) a director, manager, associate, secretary or other similar officer, or;
- (b) a person purporting to act in such capacity.

Extra-territorial application and jurisdiction.

96E.(1) Section 96A applies to an act done outside Gibraltar, but only if the act is done by a person within subsection (2).

(2) A person is within this subsection if the person is –

- (a) an individual who is habitually resident in Gibraltar; or
- (b) a body incorporated or constituted under the law of Gibraltar.”.

Cyberflashing.

4.(1) After section 292 of the Crimes Act 2011 insert-

“Sending etc. photograph or film of genitals.

292A.(1) A person (A) who intentionally sends or gives a photograph or film of any person’s genitals to another person (B) commits an offence if-

- (a) A intends that B will see the genitals and be caused alarm, distress or humiliation; or
- (b) A sends or gives such a photograph or film for the purpose of obtaining sexual gratification and is reckless as to whether B will be caused alarm, distress or humiliation.

(2) References to sending or giving such a photograph or film to another person include, in particular –

- (a) sending it to another person by any means, electronically or otherwise;
- (b) showing it to another person; and
- (c) placing it for a particular person to find.

(3) “Photograph” includes the negative as well as the positive version.

(4) “Film” means a moving image.

(5) References to a photograph or film also include-

- (a) an image, whether made by computer graphics or in any other way, which appears to be a photograph or film;
- (b) a copy of a photograph, film or image within paragraph (a); and
- (c) data stored by any means which is capable of conversion into a photograph, film or image within paragraph (a).

(6) A person who commits an offence under this section is liable-

- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine (or both);

- (b) on conviction on indictment, to imprisonment for a term not exceeding two years.”.

(2) In Schedule 3 (sexual offences for the purposes of Part 13), after paragraph 34 insert-

“34A. An offence under section 292A (sending etc. photograph or film of genitals) if

- (a) where the offender was under 18, the offender is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months;
- (b) in any other case-
 - (i) the victim was under 18; or
 - (ii) the offender, in respect of the offence or finding, is or has been-
 - (A) sentenced to a term of imprisonment;
 - (B) detained in a hospital; or
 - (C) made the subject of a community service order of at least 120 hours.”.

Extreme Pornography.

5.(1) After Part 20 of the Crimes Act 2011 insert-

“PART 20A EXTREME PORNOGRAPHY

Possession of extreme pornographic images.

499A.(1) It is an offence for a person to be in possession of an extreme pornographic image.

(2) An “extreme pornographic image” is an image which is both—

- (a) pornographic; and
 - (b) an extreme image.
- (3) An image is “pornographic” if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal.

(4) Where (as found in the person's possession) an image forms part of a series of images, the question whether the image is of such a nature as is mentioned in subsection (3) is to be determined by reference to—

- (a) the image itself; and
- (b) (if the series of images is such as to be capable of providing a context for the image) the context in which it occurs in the series of images.

(5) So, for example, where—

- (a) an image forms an integral part of a narrative constituted by a series of images; and
- (b) having regard to those images as a whole, they are not of such a nature that they must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal,

the image may, by virtue of being part of that narrative, be found not to be pornographic, even though it might have been found to be pornographic if taken by itself.

(6) In relation to possession of an image, an “extreme image” is an image which—

- (a) falls within subsection (7) or (8); and
- (b) is grossly offensive, disgusting or otherwise of an obscene character.

(7) An image falls within this subsection if it portrays, in an explicit and realistic way, any of the following—

- (a) an act which threatens a person's life;
- (b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals;
- (c) an act which involves sexual interference with a human corpse; or
- (d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive);

and a reasonable person looking at the image would think that any such person or animal was real.

(8) An image falls within this subsection if it portrays, in an explicit and realistic way, either of the following—

- (a) an act which involves the non-consensual penetration of a person's vagina, anus or mouth by another with the other person's penis; or
- (b) an act which involves the non-consensual sexual penetration of a person's vagina or anus by another with a part of the other person's body or anything else,

and a reasonable person looking at the image would think that the persons were real.

(9) For the purposes of subsection (8)—

- (a) penetration is a continuing act from entry to withdrawal;
- (b) “vagina” includes vulva.

(10) In this section “image” means—

- (a) a moving or still image (produced by any means); or
- (b) data (stored by any means) which is capable of conversion into an image within paragraph (a).

(11) In this section references to a part of the body include references to a part surgically constructed (in particular through gender reassignment surgery).

(12) Proceedings for an offence under this section may not be instituted except by or with the consent of the Director of Public Prosecutions.

Exclusion of classified films etc.

499B.(1) Section 499A does not apply to excluded images.

- (2) An “excluded image” is an image which forms part of a series of images contained in a recording of the whole or part of a classified work.
- (3) But such an image is not an “excluded image” if—
 - (a) it is contained in a recording of an extract from a classified work; and
 - (b) it is of such a nature that it must reasonably be assumed to have been extracted (whether with or without other images) solely or principally for the purpose of sexual arousal.
- (4) Where an extracted image is one of a series of images contained in the recording, the question whether the image is of such a nature as is mentioned in subsection (3)(b) is to be determined by reference to—

- (a) the image itself; and
- (b) (if the series of images is such as to be capable of providing a context for the image) the context in which it occurs in the series of images;

and section 499A(5) applies in connection with determining that question as it applies in connection with determining whether an image is pornographic.

- (5) In determining for the purposes of this section whether a recording is a recording of the whole or part of a classified work, any alteration attributable to—
- (a) a defect caused for technical reasons or by inadvertence on the part of any person; or
 - (b) the inclusion in the recording of any extraneous material (such as advertisements),

is to be disregarded.

- (6) In this section—

“classified work” means (subject to subsection (7)) a video work in respect of which a classification certificate has been issued by the British Board of Film Classification (whether before or after the commencement of this section);

“classification certificate” means a certificate –

(a) issued in respect of a video work in pursuance of arrangements made by the British Board of Film Classification in accordance with their obligations under the United Kingdom Video Recordings Act 1984, and which satisfies the requirements of paragraph (b) below;

(b) the requirements are that the certificate must contain the title assigned to the video work in accordance with the provisions of the United Kingdom’s Video Recordings Act 1984 and –

(i) a statement that the video work concerned is suitable for general viewing and unrestricted supply (with or without any advice as to the desirability of parental guidance with regard to the viewing of the work by young children or as to the particular suitability of the work for viewing by children or young children); or

(ii) a statement that the video work concerned is suitable for viewing only by persons who have attained the age (not being more than eighteen years) specified in the certificate and that no

video recording containing that work is to be supplied to any person who has not attained the age so specified; or

(iii) the statement mentioned in subparagraph (ii) above together with a statement that no video recording containing that work is to be supplied other than in a licensed sex shop;

(c) For the purposes of this Act, a video work is not a video work in respect of which a classification certificate has been issued if every classification certificate issued in respect of the video work has been revoked.

“video work” means any series of visual images (with or without sound)—

(a) produced electronically by the use of information contained on any disc, magnetic tape or any other device capable of storing data electronically; and

(b) shown as a moving picture;

“extract” includes an extract consisting of a single image;

“image” and “pornographic” have the same meanings as in section 499A;

“recording” means any disc, tape or other device capable of storing data electronically and from which images may be produced (by any means).

(7) Where any alteration is made to a video work in respect of which a classification certificate has been issued, the classification certificate is not to be treated for the purposes of this Act as issued in respect of the altered work.

Defences: general.

499C. (1) Where a person is charged with an offence under section 499A, it is a defence for the person to prove any of the matters mentioned in subsection (2).

(2) The matters are—

(a) that the person had a legitimate reason for being in possession of the image concerned;

(b) that the person had not seen the image concerned and did not know, nor had any cause to suspect, it to be an extreme pornographic image;

(c) that the person—

- (i) was sent the image concerned without any prior request having been made by or on behalf of the person; and
 - (ii) did not keep it for an unreasonable time.
- (3) In this section “extreme pornographic image” and “image” have the same meanings as in section 499A.

Defence: participation in consensual acts.

499D.(1) Subsection (2) applies where —

- (a) a person (“D”) is charged with an offence under section 499A; and
 - (b) the offence relates to an image that portrays an act or acts within subsection (7)(a) to (c) or (8) of that section (but does not portray an act within subsection (7)(d) of that section).
- (2) It is a defence for D to prove—
- (a) that D directly participated in the act or any of the acts portrayed; and
 - (b) that the act or acts did not involve the infliction of any non-consensual harm on any person; and
 - (c) if the image portrays an act within section 499A(7)(c), that what is portrayed as a human corpse was not in fact a corpse; and
 - (d) if the image portrays an act within section 499A(8), that what is portrayed as non-consensual penetration was in fact consensual.
- (3) For the purposes of this section harm inflicted on a person is “non-consensual” harm if-
- (a) the harm is of such a nature that the person cannot, in law, consent to it being inflicted on himself or herself; or
 - (b) where the person can, in law, consent to it being so inflicted, the person does not in fact consent to it being so inflicted.

Penalties etc. for possession of extreme pornographic images.

499E.(1) This section has effect where a person is guilty of an offence under section 499A.

- (2) If the offence relates to an image that portrays any relevant act (with or without other acts), the offender is liable—

- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 3 years or a fine or both.
- (3) If the offence relates to an image that does not portray any relevant act, the offender is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine or both.
- (4) In this section “relevant act” means an act within section 499A(7)(a) or (b) or (8)(a) or (b).

Special rules relating to providers of information society services.

499F. Schedule 4A makes special provision in connection with the operation of section 499A in relation to persons providing information society services within the meaning of that Schedule.”.

- (2) In Schedule 3, after paragraph 36 insert –

“36A. An offence under section 499A of the Crimes Act 2011 (possession of extreme pornographic images) if the offender –

- (a) was 18 or over; and
- (b) is sentenced in respect of the offence to imprisonment for a term of at least 2 years.”.

- (3) After Schedule 4 insert-

“Schedule 4A

Exceptions for mere conduits

1.(1) A service provider is not capable of being guilty of an offence under section 499A in respect of anything done in the course of providing so much of an information society service as consists in-

- (a) the provision of access to a communication network; or
- (b) the transmission in a communication network of information provided by a recipient of the service,

if the condition in sub-paragraph (2) is satisfied.

(2) The condition is that the service provider does not-

- (a) initiate the transmission;
- (b) select the recipient of the transmission; or
- (c) select or modify the information contained in the transmission.

(3) For the purposes of sub-paragraph (1)-

- (a) the provision of access to a communication network, and
- (b) the transmission of information in a communication network,

includes the automatic, intermediate and transient storage of the information transmitted so far as the storage is solely for the purpose of carrying out the transmission in the network.

(4) Sub-paragraph (3) does not apply if the information is stored for longer than is reasonably necessary for the transmission.

Exception for caching

4.(1) This paragraph applies where an information society service consists in the transmission in a communication network of information provided by a recipient of the service.

(2) The service provider is not capable of being guilty of an offence under section 499A in respect of the automatic, intermediate and temporary storage of information so provided, if—

- (a) the storage of the information is solely for the purpose of making more efficient the onward transmission of the information to other recipients of the service at their request; and
- (b) the condition in sub-paragraph (3) is satisfied.

(3) The condition is that the service provider—

- (a) does not modify the information;

- (b) complies with any conditions attached to having access to the information; and
 - (c) (where sub-paragraph (4) applies) expeditiously removes the information or disables access to it.
- (4) This sub-paragraph applies if the service provider obtains actual knowledge that—
- (a) the information at the initial source of the transmission has been removed from the network;
 - (b) access to it has been disabled; or
 - (c) a court or administrative authority has ordered the removal from the network of, or the disablement of access to, the information.

Exception for hosting

- 5.(1) A service provider is not capable of being guilty of an offence under section 499A in respect of anything done in the course of providing so much of an information society service as consists in the storage of information provided by a recipient of the service, if—
- (a) the service provider had no actual knowledge when the information was provided that it contained offending material; or
 - (b) on obtaining actual knowledge that the information contained offending material, the service provider expeditiously removed the information or disabled access to it.
- (2) “Offending material” means material the possession of which constitutes an offence under section 499A.
- (3) Sub-paragraph (1) does not apply if the recipient of the service is acting under the authority or control of the service provider.

Interpretation

- 6.(1) This paragraph applies for the purposes of this Schedule.
- (2) “Information society services” has the meaning in Part 1 of the Electronic Commerce Act 2001.
- (3) “Recipient”, in relation to a service, means any person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible.

- (4) “Service provider” has the meaning in Part I of the Electronic Commerce Act 2001.”.

Amendment of the Communications Act 2006.

6. After section 19 of the Communications Act 2006 insert -

“Duty to promote media literacy.

19A. (1) It shall be the duty of the Authority to take such steps, and to enter into such arrangements, as appear to them calculated—

- (a) to bring about, or to encourage others to bring about, a better public understanding of the nature and characteristics of material published by means of the electronic media, and in particular a better understanding of the risk of harm presented by content on electronic media;
- (b) to bring about, or to encourage others to bring about, a better public awareness and understanding of the processes by which such material is selected, or made available, for publication by such means;
- (c) to bring about, or to encourage others to bring about, the development of a better public awareness of the available systems by which access to material published by means of the electronic media is or can be regulated;
- (d) to bring about, or to encourage others to bring about, the development of a better public awareness of the available systems by which persons to whom such material is made available may control what is received and of the uses to which such systems may be put; and
- (e) to encourage the development and use of technologies and systems for regulating access to such material, and for facilitating control over what material is received, that are both effective and easy to use.

(2) In this section, references to the publication of anything by means of the electronic media are references to its being—

- (a) broadcast so as to be available for reception by members of the public or of a section of the public; or
- (b) distributed by means of an electronic communications network to members of the public or of a section of the public.”.

EXPLANATORY MEMORANDUM

The Bill makes amendments to the Crimes Act 2011 and the Communications Act 2006.

The Bill makes the intentional sending of flashing images to a person with epilepsy with the intention to cause that person to have a seizure an offence.

The Bill creates a new offence in relation to the sending of photographs of genitals, commonly known as “cyberflashing”.

The Bill introduces a new Part 20A to the Crimes Act 2011 on extreme pornography. Section 499A to 499D make it an offence to possess pornographic images that depict acts which threaten a person’s life, acts which result in or are likely to result in serious injury to a person’s anus, breasts or genitals, bestiality or necrophilia, they also provide for the exclusion of classified films and sets out defences and the penalties for the offence. Section 499F and a new Schedule 4A are intended to ensure that the operation of the extreme pornography offence is consistent with retained EU law commitments.

The Bill imposes on the Gibraltar Regulatory Authority a duty to promote media literacy, in particular as to the risk of harm presented by content on electronic media (this adds to the existing power of the GRA to promote media literacy found in the Broadcasting Act 2012).

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