

CORONERS AND JUSTICE ACT 2009

EXPLANATORY NOTES

THE ACT

Commentary on Sections

Part 2 - Criminal offences

Chapter 2: Images of children

Section 62: Possession of prohibited images of children

363. *Subsection (1)* creates a new offence in England and Wales and Northern Ireland of possession of a prohibited image of a child.
364. *Subsections (2) to (8)* set out the definition of a “prohibited image of a child”. Under subsection (2), in order to be a prohibited image, an image must be pornographic, fall within subsection (6) and be grossly offensive, disgusting or otherwise of an obscene character. The definition of “pornographic” is set out in subsection (3). An image must be of such a nature that it must reasonably be assumed to have been produced solely or mainly for the purpose of sexual arousal. Whether this threshold has been met will be an issue for a jury to determine. Subsection (4) makes it clear that where (as found in a person’s possession) an individual image forms part of a series of images, the question of whether it is pornographic must be determined by reference both to the image itself and the context in which it appears in the series of images.
365. Subsection (5) expands on subsection (4). It provides that, where an image is integral to a narrative (for example a mainstream or documentary film) which when it is taken as a whole could not reasonably be assumed to be pornographic, the image itself may not be pornographic, even though if considered in isolation the contrary conclusion might have been reached.
366. Subsection (6) and (7) provide that a prohibited image for the purposes of the offence is one which focuses solely or principally on a child’s genitals or anal region or portrays any of a list of acts set out in subsection (7).
367. Subsection (8) provides that for the purposes of subsection (7) penetration is a continuing act from entry to withdrawal.
368. *Subsection (9)* requires proceedings to be instituted by or with the consent of the Director of Public Prosecutions.

Section 63: Exclusion of classified film, etc

369. This section provides an exclusion from the scope of the offence under section 62 for excluded images.
370. An “excluded image” is defined in *subsection (2)* as an image which forms part of a series of images contained in a recording of the whole or part of a classified work. A “recording” is defined in *subsection (7)* as any disc, tape or other device capable of

storing data electronically and from which images may be produced. This therefore includes images held on a computer. A classified work is a video work in respect of which a classification certificate has been issued by an authority designated under section 4 of the Video Recordings Act 1984.

371. The effect of the exclusion is that a person who has a video recording of a film which has been classified by the British Board of Film Classification (BBFC), and which contains images that, despite their context, might amount to a “prohibited image of a child” for the purposes of the section 62 offence, will not be liable for prosecution for the offence.
372. However, the effect of *subsection (3)* is that the exclusion from the scope of the offence does not apply in respect of images contained within extracts from classified films which must reasonably be assumed to have been extracted solely or principally for the purpose of sexual arousal. Essentially the exemption for an image forming part of a classified work is lost where the image is extracted from that work for pornographic purposes. Subsection (7) defines “extract” to include a single image.
373. *Subsection (4)* provides that when an extracted image is one of a series of images, in establishing whether or not it is of such a nature that it must reasonably be assumed to have been extracted for the purpose of sexual arousal, regard is to be had to the image itself and to the context in which it appears in the series of images. This is the same test as set out in subsection (4) of section 62. Subsection (5) of section 62 also applies in determining this question.
374. The effect of *subsection (5)* is that, in determining whether a recording is a recording of a whole or part of a classified work, alterations due to technical reasons (such as a failure in the recording system), due to inadvertence (such as setting the wrong time for a recording) or due to the inclusion of extraneous material (such as advertisements), are to be disregarded.
375. *Subsection (6)* makes it clear that nothing in section 63 affects any duty of a designated authority to take into account the offence in section 62 when considering whether to issue a classification certificate in respect of a video work.
376. *Subsection (7)* sets out the definitions used in this section. *Subsection (8)* states that section 22(3) of the Video Recordings Act 1984 applies. The effect of section 22(3) is that, where an alteration is made to a video work in respect of which a classification certificate has been issued, the classification certificate does not apply to the altered work.

Section 64: Defences

377. This section sets out a series of defences to the section 62 offence of possession of prohibited images of children. These defences are set out in *subsection (1)*. They are the same as those for the offence of possession of indecent images of children under section 160(2) of the Criminal Justice Act 1988 and Article 15(2) of the Criminal Justice (Evidence etc) (Northern Ireland) Order 1988. They are:
- that the person had a legitimate reason for being in possession of the image (this will cover those who can demonstrate that their legitimate business means that they have a reason for possessing the image);
 - that the person had not seen the image and did not know, or have reasonable cause to suspect, that the images held were prohibited images of children (this will cover those who are in possession of offending images but are unaware of the nature of the images); and
 - that the person had not asked for the image – it having been sent without request – and that he or she had not kept it for an unreasonable period of time (this will cover those who are sent unsolicited material and who act quickly to delete it or otherwise get rid of it).

378. *Subsection (2)* provides that “prohibited image” in this section has the same meaning as in section 62.

Section 65: Meaning of “image” and “child”

379. This section defines “image” and “child” for the purposes of sections 62, 63 and 64. These definitions are applied to these sections by *subsection (1)*.
380. *Subsection (2)* sets out the definition of an image. It states that for the purposes of this offence, “an image” includes still images such as photographs, or moving images such as those in a film. The term “image” also incorporates any type of data, including that stored electronically (as on a computer disk), which is capable of conversion into an image. This covers material available on computers, mobile phones or any other electronic device.
381. *Subsection (3)* provides that “image” does not include an indecent photograph or indecent pseudo-photograph of a child, as these are subject to other controls. *Subsection (4)* defines “indecent photograph” and “indecent pseudo-photograph” in accordance with the Protection of Children Act 1978 and for Northern Ireland, the Protection of Children (Northern Ireland) Order 1978. “Indecent photograph” includes an indecent film, a copy of a photograph or film, a negative and electronic data capable of conversion into a photograph. It also includes a tracing or other image derived from the whole or part of a photograph or pseudo-photograph and electronic data capable of conversion into such an image. A pseudo-photograph is an image, whether made by computer-graphics or otherwise, which appears to be a photograph and includes a copy of a pseudo-photograph and electronic data capable of conversion into a pseudo-photograph.
382. *Subsection (5)* defines a child to be a person under 18 years of age.
383. *Subsection (6)* requires that a person in an image is to be treated as a child if the impression conveyed by the image is that the person shown is a child, or the predominant impression conveyed is that the person shown is a child despite the fact that some of the physical characteristics shown are not of a child.
384. *Subsection (7)* provides that references to an image of a person include references to an imaginary person, and *subsection (8)* makes it clear that references to an image of a child include references to an imaginary child.

Section 66: Penalties

385. The penalties that will apply to persons found guilty of an offence under section 62 are set out in this section.
386. In England and Wales and Northern Ireland on conviction on indictment the maximum sentence is imprisonment for three years.
387. The maximum sentence on summary conviction of the offence in England and Wales is six months’ imprisonment. On the commencement of section 154(1) of the 2003 Act, the maximum sentence on summary conviction in England and Wales will rise to 12 months (see paragraph 12(1) of Schedule 22 to the Act). The maximum custodial penalty on summary conviction in Northern Ireland is six months.

Section 67: Entry, search, seizure and forfeiture

388. *Subsection (1)* applies the entry, search, seizure and forfeiture powers of the Protection of Children Act 1978 to prohibited images of children. *Subsection (2)* applies the equivalent Northern Ireland legislation.
389. *Subsection (3)* applies these powers to prohibited images to which section 62 applies.

390. Paragraph 12(2) of Schedule 22 to the Act provides that these powers of forfeiture have effect regardless of when the images were lawfully seized.

Section 68 and Schedule 13: Special rules relating to providers of information society services

391. [Section 68](#) and Schedule 13 ensure that the provisions outlined above which make it an offence to possess prohibited images of children are consistent with the UK's obligations under the E-Commerce Directive.
392. Under Schedule 13 providers of information society services who are established in England, Wales or Northern Ireland are covered by the new offence even when they are operating in other European Economic Area states. Paragraphs 3 to 5 of the Schedule provide exemptions for internet service providers from the offence of possession of prohibited images of children in limited circumstances, such as where they are acting as mere conduits for such material or are storing it as caches or hosts.

Section 69: Indecent pseudo-photographs of children: marriage etc

393. *Subsection (1)* amends section 1A of the Protection of Children Act 1978 to extend the "marriage and other relationships" defence to offences under that Act so that it applies in relation to "pseudo-photographs". The defence already applies to an offence under section 1(1)(a) of the Protection of Children Act 1978 of taking or making an indecent photograph of a child and to an offence under section 1(1)(b) or (c) of that Act relating to possession and distribution of an indecent photograph of a child.
394. *Subsection (2)* amends section 160A of the Criminal Justice Act 1988 to extend the "marriage and other relationships" defence to offences under that Act to "pseudo-photographs". The defence already applies to an offence under section 160 of the Criminal Justice Act 1988 relating to possessing an indecent photograph of a child.
395. *Subsection (3)* amends Article 15A of the [Criminal Justice \(Evidence etc.\) \(Northern Ireland\) Order 1988 \(SI 1988/1847 \(NI.17\)\)](#) to extend the "marriage and other relationships" defence to offences under that Order to "pseudo-photographs". The defence already applies to an offence under Article 15 of the [Criminal Justice \(Evidence etc.\) \(Northern Ireland\) Order 1988 \(SI 1988/1847 \(NI 17\)\)](#) relating to possession of an indecent photograph of a child.
396. *Subsection (4)* amends Article 3B of the [Protection of Children \(Northern Ireland\) Order 1978 \(SI 1978/1047 \(NI 17\)\)](#) to extend to the "marriage and other relationships" defence to offences under that Order to "pseudo-photographs". The defence already applies to an offence under Article 3(1)(a) of the [Protection of Children \(Northern Ireland\) Order 1978 \(SI 1978/1047 \(NI 17\)\)](#) of taking or making an indecent photograph of a child and to Article 3(1)(b) or (c) of that Order relating to possession and distribution of an indecent photograph of a child.