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NOVEMBER 2-4, 2016
MONTEGO BAY, JAMAICA



**DISCLOSURE AND THE HANDLING OF EXHIBITS
IN CHILD PORNOGRAPHY CASES.**

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INTRODUCTION

VIDEO SHOCK

- High school students' sex tape goes viral
- Parents' social media nightmare

STORY BY CAMILLE CLARKE & RACHAEL ESPINET — PAGE A3

CWC finalises Flow merger Page A5

OFF TO COURT

Dion Cross, 22, is taken to the San Fernando Magistrates Court, yesterday. She was charged with wounding her ten-year-old sister with intent to do her grievous bodily harm. See Page A5. PHOTO: RISH BAGGOTATIE

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Four killed in road accidents — Page A6

Wednesday's estimated jackpot \$2.3 MILLION
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Guardian Trinidad and Tobago
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PLAY WINE: 10,30 am: 35 (Big Snaka) 1 pm: 16 (Jametta) 6,30 pm: 26 (Fowl) PICK 2: 10,30 am: 4, 31 1 pm: 29, 33 6,30 pm: 2, 25 PICK 4: 10,30 am: 1, 7, 1, 9 1 pm: 6, 5, 5, 2 6,30 pm: 8, 2, 7, 7 CASH POT: 1, 3, 9, 14, 22 M: 4

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With the advent of technology, child pornography has moved from dark alleys, back rooms and persons in trench coats to being easily and readily accessible into homes and offices of what would appear to be normal people of good upstanding character.

The headline as illustrated in the Trinidad Guardian is no longer a rarity in Jamaica and is disturbingly far more commonplace than we would like to imagine.

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On October 21, 2009 the Parliament of Jamaica brought into effect 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-or as it is known by its short title Child Pornography (Prevention) Act [CPPA].

The Government of Jamaica in enacting the legislation did so for the following reasons:-

- [1] To curb child pornography, which is seen as an evil in all democratic societies.**
- [2] Child pornography strikes at the dignity of children.**
- [3] It is harmful to children who are used in its production;**

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DISCLOSURE



There are two competing policy considerations that must be balanced and which prosecutors should keep in mind. These are that:-

- [I] Defence counsel has a duty to defend their clients properly; and**

- [II] Law enforcement agencies have a duty to ensure that they do not unnecessarily create more indecent images of children or compromise sensitive confidential material.**

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GUIDELINES FOR DICLOSURE

The following proposals are being suggested. Based on a template as provided by the Crown Prosecution Service- Indecent Photographs of Children. CPS Guidelines; and the Court in *Regina v LR* [2010] EWCA CRIM 924; [2011] 1 WLR 359 and adapted mutatis mutandis for the Jamaican context.

- [1] That the offending images are not in any way and under any circumstances to be handed over to the accused person or his counsel – unless the prosecutor has been ordered to do so by a Court.**
- [2] Where the accused person is on bail, the accused person and his counsel are to make the necessary arrangements with the prosecution for the viewing.**
- [3] Where the accused person is in custody the accused person and his counsel are to make arrangements with the prosecution for a viewing of the images.**

- [4] That when defence counsel and the accused person arrive for the viewing that they are not to be allowed to take into the viewing room any computer, cellular telephone, flash drive or any device capable of making a copy of the offending images.**

- [5] Defence counsel and the accused person are to be afforded the privacy required for them to view the images and permit instructions and advice to be given freely and unfettered and enable the defendant to have private and confidential discussions with his legal advisers, unsupervised and unobserved by police officers or representatives of the DPP.**

- [6] If counsel and the accused person are not amenable to viewing the material at the offices of the prosecutor then whenever possible, such access should take place either on police premises, or at the court or some designated secure location agreed upon by the defendant and the prosecution.**
- [7] That where counsel and the accused person prove difficult and non – compliant with the procedures enumerated in [1] –[3] then the issues of disclosure are to be referred to the Court to be made subject to case management orders by the court owing to the sensitivity of the material.**

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COURT ORDERS



- [1] Where a judge orders service of the audio or visual representations on defence counsel they are to be provided with the material for a very limited and strictly defined purpose. Possession and use outside these limited purposes is unlawful, and would put them in peril of prosecution. No further hard copies or digital copies beyond those necessarily required for the purpose of the conference (or indeed a trial) should be made. All the material must be returned to the custody of the prosecution when the relevant trial has concluded.**

- [2] Where the court directs that copies of the indecent images should be supplied to the defence counsel, prosecutors should ensure that the order contains a proviso that the material is to be released only upon the counsel signing an undertaking as to the safe custody and control of the image.**
- [3] Where the Court directs that copies are to be served on the defence because of the nature of the offence and the material it should be released to the lawyer only and where representation changes the material is to be returned forthwith to the prosecution notwithstanding the principle that the evidence being disclosed belongs to the accused person.**

- [4] *The material is not to be sent or served by way of e-mail or by any other electronic mean.***
- [5] The accused should only be permitted access to the material whilst in the company of their legal representative.**

- [6] Where the accused person insists on representing himself, the material should be made available to the accused person under controlled circumstances and a copy of the impounded material should not be given to him. In such circumstances the crown should apply to the court for counsel to be assigned for the sole purpose as custodian of the material on behalf of the defendant. The accused should, of course, only be permitted access whilst in the company of a/their legal representative.**

[7] Where the images are in the custody of the police and a copy has not yet been made available to defence counsel and the defendant's counsel or expert (for any reason) wishes to view the offending material, the prosecution should provide the defence with suitable access to the relevant material. Such access must enable the defendant to have private and confidential discussions with his legal advisers, unsupervised and unobserved by police officers or representatives of the DPP.

- [8] If the defendant's counsel or expert (for any reason) wishes to examine the defendant's computer, the prosecution should provide the defence with suitable and supervised access to the relevant material. The accused should, of course, only be permitted access whilst in the company of their legal representative.**

[9] In the event of a guilty plea and there is a dispute about the nature and gravity of the material, it should be made available for examination in circumstances of confidentiality between the defendant and his lawyers, and such access should take place either on police premises, or at the court or some designated secure location agreed upon by the defendant and the prosecution with the necessary restrictions that they are not to be allowed to take into the viewing room any computer, cellular telephone, flash drive or any device capable of making a copy of the offending images.

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HANDLING OF EXHIBITS



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As with the issue of disclosure the CPPA does not make any rules or offer any guidelines as to how exhibits are to be handled. The following are being proposed:-

- [i] Disturbing and unsettling as it is prosecutors should view the indecent images of children in order to ascertain whether there is sufficient evidence to provide a realistic prospect of conviction.**
- [ii] If and where possible arrangements should be made with the police for such images to be viewed on the police officer's laptop or other computer equipment at a mutually agreeable location.**

- [iii] A CD-ROM (or other media) containing indecent images of children should not in any circumstances be inserted into any DPP computer or laptop. As there is the potential effect of transference of the file to the DPP computer. unless there is a dedicated computer purely for that purpose. This of course is subject to resource constraints of the particular prosecutor's office.**

- [iv] It may be necessary at times –though it is undesirable - for prosecutors to take possession of indecent photographs of children. If it is deemed necessary to do so, such exhibits have to be dealt with as sensitive material, i.e. as having a protective marking of confidential, they should be kept in a safe and a log should be maintained recording dates accessed, by whom, length of time and the reason accessed.**

- [v] The sexual offences unit of the DPP should have a dedicated lap top for the viewing of these images and kept in a safe place and access to that laptop restricted. a log should be maintained recording dates accessed, by whom, length of time and the reason accessed.**

- [vi] When the case has come to an end (that is when the appeals process has been completed) the material and computer should either be destroyed (by court order) or returned to the police or filed away in a secure and restricted location in the vault of the DPP. Destruction should is the ideal and should always be the first choice.**

- [vii] Items which have “metadata capacity”:**
 - [a] must not be opened by anyone without expert training;**
 - [b] must not be tampered with before expert processing and examination;**
 - [c] must be stored as recommended by the experts;**
 - [d] must be thoroughly examined externally and labelled externally;**

- [e] must be conveyed to your cybercrimes experts as soon as is possible in the interest of preserving data;**

- [f] the chain of custody conveying these items from suspect to police custody to experts should be short.**

- [g] the risk of tampering or accidental accessing or transferring of any data must be minimized.**

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THE PURPOSE OF THIS PRESENTATION IS TO FORMULATE A PRACTICE DIRECTION WHICH WILL BE ISSUED BY THE LEARNED DIRECTOR OF PUBLIC PROSECUTIONS WITH A VIEW TO GUIDING PROSECUTORS AND POLICE OFFICERS IN THE HANDLING OF THE MATERIAL.

AND ACCORDINGLY, THE AUTHOR WELCOMES FEEDBACK AND COMMENTS ON THIS PRESENTATION AND CAN BE CONTACTED AT THE E-MAIL IN THE HEADER OF THIS DOCUMENT.

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THE END

