

EMPLOYERS BE AWARE: NEW ONTARIO LAW WILL INCREASE REPORTING OBLIGATIONS REGARDING CHILD PORNOGRAPHY

*By Barry W. Kwasniewski**

A. INTRODUCTION

The *Child Pornography Reporting Act*, 2008, S.O. 2008, c. 21 (the “Act”), which received Royal Assent on December 10, 2008, amends Ontario’s *Child and Family Services Act* to add several provisions related to the reporting of child pornography. The amendments will come into force when the Act is proclaimed, which has not yet occurred. The Ministry of Children and Youth Services is currently undertaking implementation activities to prepare for proclamation. The Ministry anticipates that the Act will be proclaimed within the next year. Charities and Not-for-Profits need to be aware of these amendments, as they will impact on their reporting obligations with respect to employees and others.

B. “CHILD PORNOGRAPHY” DEFINED

The Act will add a definition of “child pornography” to the *Child and Family Services Act*. Under this definition, “child pornography” means:

- (a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,
 - (i) that shows a child engaged in, or depicted as engaged in, explicit sexual activity, or
 - (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ of a child or the anal region of a child,

* Barry W. Kwasniewski, B.B.A., LL.B., practices employment law with Carters’ Ottawa office, and would like to thank Heather Reardon, Student-at-Law, for her assistance in preparing this bulletin.

- (b) any written material or visual representation that advocates or counsels sexual activity with a child that would be an offence under the *Criminal Code* (Canada),
- (c) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a child that would be an offence under the *Criminal Code* (Canada), or
- (d) any audio recording that has as its dominant characteristic, the description, presentation or representation, for a sexual purpose, of sexual activity with a child that would be an offence under the *Criminal Code* (Canada); (“pornographie juvénile”).

C. REPORTING OBLIGATIONS

Section 72 of the *Child and Family Services Act* imposes a duty on any person who suspects on reasonable grounds that a child is or may be in need of protection to report this suspicion and the information upon which it is based to a Children’s Aid Society. The definition of “child in need of protection” will be amended to include a child who has been sexually exploited by child pornography.

The amendments introduced in the Act will also add an additional reporting obligation to the *Child and Family Services Act*. The duty to report under section 72 will be expanded to include a provision mandating that child pornography be reported. The amendments will require any person who reasonably believes that a representation or material is, or might be, child pornography to promptly report this information to the organization, agency or person designated by regulation. Any person who fails to report such information will be guilty of an offence. In addition, a director, officer or employee of a corporation who authorizes, permits or concurs in a failure to report by an employee of the corporation will also be guilty of an offence. Those convicted of an offence could face a fine of not more than \$50,000 and/or imprisonment for not more than two years. Given the potential for fines and/or imprisonment, this is obviously a serious matter.

The *Child Pornography Reporting Act* also contains several provisions which will protect those who report child pornography. For instance, the Act contains provisions protecting the identity of an informant and prohibiting retaliation against an informant. The Act will make it an offence to dismiss, suspend, demote, discipline, harass, interfere with or otherwise disadvantage an informant.

D. CONCLUSION

Charity and not-for-profit organizations that deal with children should take note of these new reporting obligations. Once the amendments to the *Child and Family Services Act* come into force, employers will be required to report any material that is or might be child pornography, including material found on employee computers. However, the Act specifically states that the reporting obligation does not require or authorize a person to seek out child pornography. Organizations should consider implementing policies to ensure that their employees and volunteers comply with the requirements of the *Child and Family Services Act* as part of the organization's risk management strategy. Organizations that have child protection policies in place will be required to update their policies to comply with the new child pornography reporting requirements.