NSW Legislative Council Hansard

Crimes Amendment (Child Pornography) Bill

Extract from NSW Legislative Council Hansard and Papers Thursday 9 December 2004.

Second Reading

The Hon. JOHN HATZISTERGOS (Minister for Justice, and Minister Assisting the Premier on Citizenship) [6.51 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Government is pleased to introduce the Crimes Amendment (Child Pornography) Bill 2004. Child pornography involves material that describes or depicts the sexual or physical abuse of children. It is abhorrent because its production usually involves the abuse and exploitation of children, and because in the hands of paedophiles it can be used in ways that put children at risk. Child pornography can reinforce a paedophile's perception that paedophilia is normal, and it can be shown to children as part of a process of what is called grooming for future abuse. All members of this House would be aware that police across the nation have been involved in Operation Auxin, targeting Internet child pornography. This operation has resulted in large numbers of arrests in recent months and highlighted the serious nature of child pornography offences.

The main purpose of the bill is to increase the maximum penalties for child pornography offences. It is important that courts give effect to the principles of general deterrence and denunciation in cases involving child pornography by imposing substantial sentences, and the bill gives them the capacity to do so. Those who possess child pornography, though they may not directly harm any child, provide a market for those who produce and distribute this material. If the courts can provide effective deterrence to people who possess child pornography, this market may be eliminated, and the impetus to produce child pornography, and to abuse children in its production, will be reduced. These principles have been recognised and articulated in the Canadian courts in the case of *R v Stroempl*, where the Court of Appeal in Ontario made the following comments:

> The evil of child pornography lies not only in the fact that actual children are often used in its production, but also in the use to which it is put. ….

It is used to "reinforce cognitive distortions" (by rationalising paedophilia as a normal sexual preference); to fuel their sexual fantasies (for example, through masturbation); and to "groom" children, by showing it to them in order to promote discussion of sexual matters and thereby persuade them that such activity is normal.

The possession of child pornography is a very important contributing element in the general problem of child pornography.

…The trial judge was right in his observation that if the courts, through the imposition of appropriate sanctions, stifle the activities of prospective purchasers and collectors of child pornography, this may go some distance to smother the market for child pornography altogether. In turn, this would substantially reduce the motivation to produce child pornography in the first place.

By increasing the maximum penalties for these offences, the Government is sending a clear message to the courts that child pornography should not be tolerated. The bill also expands the definition of child pornography to encompass violence and torture against children. The bill makes the possession of child pornography an indictable offence with no statute of limitations; removes the need for classifying material suspected of being child pornography; and clarifies that prosecutions which commenced before material was classified are still valid by making a retrospective amendment.

I will now outline the principal provisions of the bill. A new section 91H is inserted into the Crimes Act by item [4] of schedule 1. The new offences contained in that section, entitled production, dissemination or possession of child pornography, were previously covered by sections 578B and 578C. The maximum penalties are substantially increased: possession of child pornography will carry five years instead of two years, and production or dissemination of child pornography will carry 10 years instead of five years. Child pornography is defined as material that depicts or describes, in a manner that would in all the circumstances cause offence to reasonable persons, a person under, or apparently under, the age of 16 years: (a) engaged in sexual activity, or (b) in a sexual context, or (c) as the victim of torture, cruelty or physical abuse, whether or not in a sexual context. The definition of "material" to be inserted by item [2] of schedule 1 is a broad one that will cover objects, photographs, films, printed matter, and images on computer screens.

The definition of child pornography is new. The current definition relies on material being classified as "RC", or "refused classification", under the Commonwealth Classification (Publications, Films and Computer Games) Act 1995 on the basis of its offensive description or depiction of a person who is or looks to be under 16. The new definition will remove the classification requirement. The requirement to classify material has been unnecessarily onerous in many cases where it is clear that the material is child pornography. The new definition will allow courts to make their own determination as to whether material is or is not child pornography. It is similar to the definitions already used in a number of other States and

Territories.

A depiction or description of a child in a sexual context is a broad category that would cover, for example, situations where a child is depicted in an indecent pose or watching another person engaged in sexual activity. The requirement that the material must, in all the circumstances, be offensive to reasonable persons ensures that innocent family photographs of naked children, for example, will not be captured. The inclusion of material in which a child is a victim of torture, cruelty or physical abuse ensures that abuse which is not purely sexual, but is still offensive, is covered.

The bill contains five defences that are available to the reworked offence. The first defence is that the defendant did not know, and could not reasonably be expected to have known, that he or she produced, disseminated or possessed child pornography, as the case requires. This would exempt from liability a person who passes on a computer disk without knowing that a pornographic image was buried in one of its files. The requirement that a defendant establish that he or she could not reasonably be expected to have known that they produced, disseminated or possessed child pornography means that a defendant cannot escape liability simply by asserting that they did not know the material contained child pornography. It adds an objective element to the defence.

The second defence is that the material was classified under the Commonwealth legislation, other than as RC. This applies both to material that had been classified before the alleged offence, and to material classified later. If material is approved by the classification authorities, a court should not then be able to hold that it is child pornography. The third defence is available where the defendant was acting for a genuine child protection, scientific, medical, legal, artistic or other public benefit purpose, and the conduct was reasonable for that purpose. In determining whether the defence was available, regard will need to be had to the circumstances in which the material was produced, used or intended to be used. This defence would cover, for example, news or current affairs programs reporting images of children injured in a war, or medical texts, if that material has not been classified. It would also cover people who report cases of child abuse to the authorities.

The fourth and fifth defences apply to law enforcement officers and classification officers who are acting in the course of their official duties. There is an additional defence which applies only to the offence of possession of child pornography. The defence is available where the material came into the defendant's possession unsolicited and the defendant, as soon as he or she became aware of its pornographic nature, took reasonable steps to get rid of it. A prime example of where this defence would apply is where a person receives unsolicited or spam email containing child pornography, and he or she attempts to delete it as soon as they realise what it is.

The defence applies equally to unsolicited hard copy materials. Item [3] of schedule 1 redrafts the offence of using a child for pornographic purposes in section 91G of the Crimes Act. It doubles the maximum penalties. The offence will carry 10 years where the child is aged 14 or over, and it will carry 14 years where the child is under 14. The redrafted offence provides separate offences for children aged over and under 14, and it allows an alternative verdict for the lesser offence where, in a trial for an offence against a child under 14, the jury is not satisfied that the child is in fact under 14.

The definition of pornographic purposes in the new section 91G (3) reflects the categories in the definition of child pornography in proposed section 91H. Both sections expand what may be the commonly understood concept of what is pornography to include material involving physical abuse. Items [5] to [10] of schedule 1 delete the existing child pornography provisions, leaving section 578C as an offence of publishing indecent articles, and ensuring that a person cannot be charged with child pornography offences and with publishing an indecent article in respect of the same matter. Item [11] of schedule 1 contains the provision clarifying the current offence of possession of child pornography under section 578B.

The controversy of this amendment is well known, and has been substantially exaggerated. For the record, let me say that police legal services sought the advice of the Crown Advocate to clarify whether the commencement of any prosecution was in doubt because they had not yet been classified. The Crown Advocate advised that a court was unlikely to accept an argument that a person cannot be charged before classification, but recommended, however, for abundant caution that a retrospective clarifying amendment would put the matter beyond doubt. That was simply commonsense, and the Government is happy to act to put this matter beyond doubt.

The amendment clarifies that section 578B (4) (b), as in force prior to this legislation, does not prevent, and is taken never to have prevented, process being issued or served, or a person pleading guilty or a plea of guilty being accepted, or sentence being passed after a plea of guilty, without the material having been classified. This amendment will have a retrospective effect and will, therefore, apply to all offences alleged to have been committed before the new legislation commences, including those for which proceedings are now on foot. Schedule 2 makes consequential amendments to a number of other Acts by inserting references to proposed section 91H. As promised, the offence will now be an indictable offence, able to be dealt with in the District Court by a jury. The most serious cases will be dealt with in this way.

Item [2] of schedule 2.3 amends the evidentiary provision in section 58 of the Classification (Publications, Films and Computer Games) Enforcement Act 1995. It clarifies that a certificate issued under the Commonwealth classification legislation can state not only the current classification status of something, but also a classification status at any previous date. Item [1] of schedule 2.3 ensures that the section applies to offences under the Crimes Act. These amendments achieve a uniformity with other States both in terms of penalty and content of the offence. They are a warning to any person possessing or disseminating child pornography or involved in its production that their offending will be dealt with seriously by the courts. I commend the bill to the House.