

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are as follows:

(a) to amend the Crimes Act 1900 to change the law as it relates to child pornography (which will now be referred to as child abuse material) so that:

(i) the defence relating to material produced for child protection, scientific, medical, legal, artistic or other public benefit purposes will no longer be available, and

(ii) the law is generally more consistent with Commonwealth offences relating to child pornography,

(b) to amend the Criminal Procedure Act 1986 to provide for the use of random sample evidence in proceedings for a child abuse material offence,

(c) to amend the Criminal Procedure Act 1986 to extend to a witness in sexual offence proceedings the same protections as those afforded to a complainant in the proceedings, in cases where it is alleged that the accused person has committed a sexual offence against the witness that is not the subject of the proceedings concerned,

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(d) to make consequential and related amendments to the above Acts and other legislation.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act.

Schedule 1 Amendment of Crimes Act 1900 No 40

Schedule 1 [6] and [9] replace provisions of the Crimes Act 1900 relating to child pornography. The new provisions are generally consistent with the approach to child pornography taken in the Criminal Code Act 1995 of the Commonwealth.

At present, child pornography is defined as material that depicts or describes (or appears to depict or describe), in a manner that would in all the circumstances cause offence to reasonable persons, a person who is (or appears to be) a child:

(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).

It is an offence to produce, disseminate or possess child pornography.

The new provisions expressly extend to a greater range of material, including material that depicts or describes the private parts of a child. The material concerned will now be referred to as child abuse material.

Child abuse material is defined as material that depicts or describes, in a way that reasonable persons would regard as being, in all the circumstances, offensive:

(a) a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse, or

(b) a person who is, appears to be or is implied to be, a child engaged in or apparently engaged in a sexual pose or sexual activity (whether or not in the presence of other persons), or

(c) a person who is, appears to be or is implied to be, a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity, or

(d) the private parts of a person who is, appears to be or is implied to be, a child.

The existing offence of producing, disseminating or possessing child pornography is retained, with updated terminology. However, it will no longer be a defence to that

offence that the material concerned was produced, used or intended to be used by the defendant acting for a genuine child protection, scientific, medical, legal, artistic or other public benefit purpose.

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Instead, the new provisions set out the factors to be taken into account in deciding whether reasonable persons would regard particular material as being, in all the circumstances, offensive. These factors include any literary, artistic, educational or journalistic merit of the material.

The new provisions contain the following defences, which are similar to the defences available under Commonwealth law:

(a) a defence that the conduct engaged in by the defendant was of public benefit (with public benefit including conduct necessary for or of assistance in enforcing or administering the law),

(b) a defence that the defendant was a law enforcement officer acting in the course of his or her duties,

(c) a defence that the conduct of the defendant was necessary for or of assistance in conducting scientific, medical or educational research approved by the Attorney General.

An existing defence relating to the state of mind of the defendant is retained, so that it will be a defence in proceedings for the offence of producing, disseminating or possessing child abuse material that the defendant did not know, and could not reasonably be expected to have known, that he or she produced, disseminated or possessed child abuse material.

An existing defence relating to the material that has been classified (other than as refused classification) under Commonwealth classification law is also retained.

Schedule 1 [1]–[4], [7] and [8] update existing provisions of the Crimes Act 1900 to reflect the new terminology. The existing offence of using a child for the production of pornographic material is changed so that it will now be an offence to use a child for the production of child abuse material. Schedule 1 [4] also inserts a new definition of data. This definition relates to a new provision which makes it clear that having possession of child abuse material includes, in the case of child abuse material in the form of computer data, having possession of a computer or data storage device holding or containing the data. Schedule 1 [5] is a consequential amendment.

Schedule 2 Amendment of Criminal Procedure Act

1986 No 209

Use of random sample evidence

Schedule 2 [3] provides for the use of random sample evidence in proceedings for a child abuse material offence.

The amendment enables an authorised analyst to conduct an examination of a random sample of the child abuse material or alleged child abuse material the subject of the proceedings. The prosecutor may adduce evidence of the findings of the authorised analyst. Evidence of the findings of the authorised analyst as to the nature and content of the random sample is admissible as evidence of the nature and content

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of the whole of the material from which the random sample was taken. Accordingly, it is open to a court to find that any type of child abuse material present in a particular proportion in the random sample of the material is present in the same proportion in all of the material.

Evidence of the findings of an authorised analyst may be given in the form of a certificate.

The provision permits regulations to be made that will provide for the circumstances or types of cases in which random sample evidence may be adduced by the prosecutor, and the procedure for taking and examining random sample evidence. Random sample evidence may be admitted under the provision only if the accused person, or his or her Australian legal practitioner, has been given an opportunity to view all of the material concerned.

Schedule 2 [10] includes a transitional provision that extends the new arrangements to proceedings that have already been commenced.

Extension of protections afforded to complainants in sexual offence cases

At present, special arrangements apply to the giving of evidence by complainants in sexual offence cases. For example, complainants may give their evidence during an in camera session of court or may give their evidence from outside the courtroom by means of closed-circuit television facilities. An accused person is not permitted to personally examine or cross-examine the complainant.

Schedule 2 [6] extends these special arrangements to sexual offence witnesses. A sexual offence witness is a witness (other than the complainant) against whom it is alleged that the accused has committed a sexual offence (not being the sexual offence that is the subject of the proceedings). The provision also allows a court to make an order directing that the identity of a sexual offence witness not be publicly disclosed. Such an order will invoke provisions of the Crimes Act 1900 which make it an offence to publish any matter which identifies the complainant in sexual offence proceedings.

Schedule 2 [4] and [5] are consequential amendments, which ensure that the definition of sexual offence witness is consistent with the definition of complainant.

Schedule 2 [10] includes a transitional provision that extends the new arrangements to proceedings that have already been commenced.

Other amendments

Schedule 2 [1], [2], [7] and [8] make amendments that are consequential on the amendments relating to child abuse material set out in Schedule 1.

Schedule 2 [9] enables savings and transitional regulations to be made as a consequence of the amendments.

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Schedule 3 Amendment of other legislation

Schedule 3 makes amendments that are consequential on the amendments relating to child abuse material set out in Schedule 1. These generally replace the expression child pornography with the expression child abuse material.