

Agreement in Principle

Mr BARRY COLLIER (Miranda—Parliamentary Secretary) [11.36 a.m.]: I move:

That this bill be now agreed to in principle.

The Government is pleased to introduce the Crimes Amendment (Child Pornography and Abuse Material) Bill 2010. The bill amends the Crimes Act 1900 and Criminal Procedure Act 1986 to make changes to the law as it relates to child pornography, and to extend to witnesses in sexual offence proceedings who allege that the accused person has committed a sexual offence against them the same protections as those offered to complainants in the proceedings. I will deal firstly with the changes to the law relating to child pornography. In late 2008 the Government established the Child Pornography Working Party. The working party was asked to consider a number of issues that had arisen in the prosecution of child pornography offences and, in particular, how to remove the artistic purposes defence from the child pornography offences in the Crimes Act 1900 without infringing on the rights of journalists and artists to depict valid situations involving children.

The recommendation to remove the artistic purposes defence was first made by the New South Wales Sentencing Council in its landmark report examining anomalies and gaps in the sexual offence framework and their respective penalties titled "Penalties relating to Sexual Assault Offences in New South Wales" released in October 2008. Members will recall that the Government implemented the majority of the Sentencing Council's recommendations in the Crimes Amendment (Sexual Offences) Act 2008. It was also in this report that the Sentencing Council recommended that the Government establish a high-level working party to examine issues surrounding the prosecution of child pornography offences.

The Child Pornography Working Party was chaired by Judge Peter Berman, SC, and comprised practitioners experienced in the prosecution of child pornography from the NSW Police Force, the New South Wales Office of the Director of Public Prosecutions, the Australian Federal Police, the Commonwealth Director of Public Prosecutions, Legal Aid New South Wales, the Public Defender's Office as well as representatives from the Department of Justice and Attorney General and the law enforcement policy branch of the Department of Premier and Cabinet. The report of this working party was released on 10 January this year and made important recommendations in this area of the law.

I thank the members of the working party—particularly the chair of the working party, Judge Peter Berman, SC—for the amount of time that has gone into this report and for the important recommendations that the working party has made. In its report, the working party examined the history behind the New South Wales child pornography provisions, the approach taken by the Commonwealth Government and other State and Territory governments, as well as the approaches taken internationally to the defence of artistic merit. The working party was of the view—and I quote from page 21 of the report—that:

the inclusion of the defence of artistic merit amongst the child pornography offences may, somewhat unhelpfully, lead to the impression that material that would otherwise constitute child pornography is acceptable if the material was produced, used, or intended to be used whilst acting for a genuine artistic purpose.

Quite rightly, the Child Pornography Working Party was of the view that this should not be the case. Thus the working party opined:

material that is otherwise offensive because of the way in which it depicts children should not be protected because its creator claims an overriding artistic purpose for it.

Further, the working party noted:

[Artists] found to legitimately exercise artistic purpose should not have their work legally defined in the same way as the horrific images that pervade the internet of child sexual abuse. To do otherwise is to undermine the gravamen of the exploitation and abuse of children that does occur in the creation, possession and dissemination of child pornography, both in Australia and overseas.

In order to address the complex issues involved in addressing these matters, the working party recommended that the New South Wales definition of "child pornography", the factors that determine whether material is offensive and the defences that are available be amended to reflect the existing Commonwealth legislation. The working party noted that the Commonwealth model ensures the court specifically considers considerations of artistic merit when determining whether or not reasonable persons would regard particular material as being, in all the circumstances, offensive. The model also applies to all three limbs of the current definition of "child pornography" and allows the admission of expert evidence to determine whether the material has any merit in the field. Adopting the Commonwealth model also has the benefit of harmonising the law in New South Wales with the Commonwealth. The working party noted:

this is particularly important as offenders who obtain their child pornography via the internet are simultaneously

committing offences against State law, such as possession of child pornography, and Commonwealth law, such as obtaining child pornography material for use through a carriage service. It is also the case that offenders caught downloading child pornography will often, upon execution of a search warrant, be found in possession of an extensive existing collection of child pornography resulting in Commonwealth and State charges for the different bundles of pornography. Difficulties will be encountered by police officers and practitioners if the tests as to what constitutes child pornography vary according to whether the State charge is being considered or whether the Commonwealth charge is being considered. There is also the potential for a jury which is hearing a trial involving both charges to be confused by having to apply two different tests to the two charges.

Importantly, as the Child Pornography Working Party stated:

by requiring that the literary, artistic or educational merit of the material is determined prior to the work being defined as child pornography, it ensures that works with genuine artistic merit are not confused with child pornography. It also ensures that a defence is not available for the creators of material without any artistic merit, but produced under the guise of an artistic purpose.

Another significant change recommended by the working party was to replace the term "child pornography" with the term "child abuse material". The Government supports this change in terminology. Child pornography is a form of child abuse and the community and the Government will not tolerate predators who engage in this type of behaviour. The working party also examined the issues faced in prosecutions involving large quantities of child pornography images.

In fact, the New South Wales Police Force informed the working party that it was a common occurrence for tens of thousands of images and movie files to be located on computer hard drives during the execution of search warrants involving child pornography. I am sure all members will agree that this is a most concerning development, which raises significant issues for the Parliament. It is vital that in large child pornography seizures the police are able to limit the exposure of their officers to images of child pornography. It is also important that Director of Public Prosecution solicitors, legal practitioners, judges, jury members, judge's associates and other court staff are not unnecessarily inundated with volumes upon volumes of disturbing and sickening images.

To address this issue the working party recommended that a legislative rebuttable presumption as to the quantity and gravity of child pornography material be created for offences under section 91H of the Crimes Act 1900, the application of which will be dependent upon the accused and/or his or her representatives having access to the images. The bill implements this recommendation by amending the Criminal Procedure Act 1986 to provide for the use of random sample evidence. Finally, the bill also extends certain protections which are afforded to complainants in sexual offence proceedings, under the Criminal Procedure Act 1986, to witnesses in the proceedings who also allege that the accused person has committed a sexual offence against him or her.

These protections include, firstly, providing for a closed court; secondly, providing for non-publication orders; thirdly, imposing restrictions on cross-examination regarding sexual experience; fourthly, providing that the complainant is not to be examined or cross-examined by the accused person; fifthly, providing for the giving of evidence by alternative arrangements, such as the use of closed-circuit television and screens; and, sixthly, providing for the entitlement to have a support person present whilst giving evidence.

I turn now to the detail of the bill. Schedule 1 amends the Crimes Act 1900. Items [6] to [9] replace provisions of the Crimes Act 1900 relating to child pornography. The changes will make the New South Wales provisions generally consistent with the approach to child pornography taken in the Commonwealth Criminal Code Act 1995. Currently "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 engaged in sexual activity or in a sexual context or as the victim of torture, cruelty or physical abuse, whether or not in a sexual context.

The new provisions, which are modelled on the Commonwealth provisions, specifically 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: first, a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse; second; 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; third, 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, fourth, 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. 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. It is noted

that the inclusion of journalistic merit is a point of departure from the provisions in the Commonwealth code. Journalistic merit will capture genuine reporting and works of photo journalism that are a record or report of a matter of public interest, and will cover the type of material that formerly was covered by the public benefit defence under the old provisions.

The new provisions contain the following defences, which are similar to the defences available under Commonwealth law: 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; a defence that the defendant was a law enforcement officer acting in the course of his or her duties; and 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 material that has been classified, other than as refused classification, under Commonwealth classification law is also retained. Items [1] to [4] and [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 pornography 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 new provisions, and 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. Item [5] is a consequential amendment.

Schedule 2 amends the Criminal Procedure Act 1986. Item [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 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 a reasonable opportunity to view all of the material concerned. Item [10] includes a transitional provision that extends the new arrangements to proceedings that have already been commenced. The Department of Justice and Attorney General will conduct a review of the use of random sample evidence and these provisions two years after the commencement.

The review will examine whether there have been any technological developments that impact on the need for these provisions, and whether the provisions have facilitated the prosecution of matters involving large amounts of material and reduced the exposure of participants to these prosecutions. 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 also not permitted to personally examine or cross-examine the complainant.

Item [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 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 will not be publicly disclosed. Such an order will invoke provisions of the Crimes Act 1900 which make it an offence to publish any matter that identifies the complainant in sexual offence proceedings. Items [4] and [5] are consequential amendments which ensure that the definition of "sexual offence witness" is consistent with the definition of "complainant". Item [10] includes a transitional provision that extends the new arrangements to proceedings that have already commenced.

Items [1], [2], [7] and [8] make amendments that are consequential on the amendments relating to child abuse material set out in schedule 1. Item [9] enables savings and transitional regulations to be made as a consequence of the amendments. 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". The bill is another example of the Government's continuing efforts to strengthen the laws surrounding child pornography, child abuse and child sexual assault. I commend the bill to the House.