

CRIMES AMENDMENT (SEXUAL OFFENCES) BILL 2008

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Bill introduced, and read a first time and ordered to be printed on motion by the Hon. John Hatzistergos.

Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, Minister for Justice, and Minister for Industrial Relations) [11.10 a.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Crimes Amendment (Sexual Offences) Bill 2008. This bill arises out of the recommendations of the New South Wales Sentencing Council and amends the Crimes Act 1900 and the Crimes (Sentencing Procedure) Act 1999. The bill is an important part of the Government's ongoing legal reforms in the area of sexual assault and child pornography. In September 2007 I requested that the Sentencing Council conduct a review of the penalties currently attaching to sexual offences. The terms of reference included, amongst other things, an examination of whether there are any anomalies or gaps in the current framework of sexual assault offences and penalties, and if so how they might be addressed, and advice on whether or not "good character" as a mitigating factor has an impact on sentences and sentence length, and if so whether there needs to be a legislative response to the operation of this factor.

Part 1 of the Sentencing Council report was handed down in August 2008 and part 2, which examines alternative sentencing regimes in overseas jurisdictions and possible responses to address repeat offending committed by serious sex offenders, will be released at a later date. I would like to take this opportunity to thank the Sentencing Council, and particularly Justice Wood, for the amount of hard work that has gone into this report and the recommendations that have been made. In its report the council made a total of 39 recommendations in relation to sexual penalties and offences. The bill implements the majority of those recommendations. The remaining recommendations have been referred to two high-level working groups: one to examine issues in relation to child pornography offences, and the other to consider a wider review of sexual offences in the Crimes Act 1900.

The amendments in this bill build on the previous legislative amendments made by this Government to improve the operation of sexual assault laws. Last year the Government introduced legislation to criminalise the abhorrent behaviour of adults who groom and procure children for the purpose of engaging in unlawful sexual activity. The introduction of new technologies has sadly provided a vehicle for increased predatory sexual behaviour towards children. Adult offenders utilise the Internet to form online relationships with a child as a first step towards sexual abuse. Paedophiles do this through a process called "grooming", which is undertaken with a view to "procuring" the child to meet with an adult and engage in unlawful sexual activity. The New South Wales legislation has a wider application than the similar Commonwealth legislation, to ensure that all grooming and procuring activities are criminalised, not just those that are confined to the Internet.

In its examination of gaps and anomalies in the current framework of sexual offences the Sentencing Council identified an additional offence in the United Kingdom legislation in relation to grooming and procuring that does not appear in New South Wales legislation. This Government is committed to having the strongest possible legislative protection available to

protect children from sexual exploitation and abuse, which is why we did not hesitate in implementing the council's recommendations in relation to the new grooming provisions. The new offence covers behaviour whereby an adult has "groomed" a child, either over the Internet or through other means, and then travels to meet the child with the intention of procuring the child for an unlawful sexual activity. The maximum penalty for this new offence is imprisonment for 15 years if the child was under 14 years of age, and 12 years if the child was between 14 and 16 years of age.

The bill also provides for an aggravated offence of having sexual intercourse with a child under the age of 10 years. Factors of aggravation for this offence include: inflicting actual bodily harm on the child; threatening the child with a weapon; committing the offence in company; committing the offence against a child with a serious physical or intellectual disability; taking advantage of the child being under the influence of drugs or alcohol to commit the offence; or kidnapping or otherwise depriving the child of their liberty either before or after committing the offence. In recognition of the heinousness of committing such an aggravated offence against a child under the age of 10, the maximum penalty is imprisonment for life.

To ensure consistency with other sexual offences under the Crimes Act, this last factor of aggravation, that is kidnapping, has also been added as an aggravating feature of an offence under section 66C, sexual intercourse with a child between the age of 10 and 16, and also as an aggravating factor under section 61J, aggravated sexual assault. Furthermore, an additional aggravating factor has been added to the current sexual assault provisions in section 61J of the Crimes Act: that the offender broke into the victim's house and sexually assaulted the victim in their own home. The offender need not have broken into the premises with the sole intention of committing the sexual offence; they may have broken in with the intention of committing any serious indictable offence and then committed the sexual offence once inside the premises. Being sexually assaulted by an intruder in one's own home is particularly frightening and serious, and has a significant impact on the victims. All members of the community have a right to feel safe in their own home, and the maximum penalty of 20 years imprisonment reflects the seriousness of such a violation.

The bill also makes some important changes to child pornography laws. This Government introduced the current child pornography laws in 2005. Since that time, changing technologies have unfortunately made the production and dissemination of child pornography ever easier. The prevalence of child pornography offences is indicated by the increased number of such offences being prosecuted in the local and district courts, particularly recently as a result of Operation Centurion, in which more than one million child exploitation images were seized by police and more than 70 people across Australia were arrested on charges of child pornography. This bill increases the penalties for possession of child pornography in recognition of the abhorrence of the offence and the harm inflicted on the children involved, and the need to deter others from engaging in these activities.

The Sentencing Council noted in its report that the differing penalties for child pornography possession between New South Wales State law, currently five years, and Commonwealth law, 10 years, causes problems in the Local Court, where an offender may be charged with offences under both Acts in relation to the same kinds of material. The historical reason for the difference in these maximum penalties is that the Commonwealth offence required that the material had to be produced or possessed for use "through a carriage service". The New South Wales offences are currently split into possession, which carries a five-year penalty, and production or dissemination, which carries a 10-year penalty. The bill increases the maximum penalty for possession of child pornographic material to 10 years. These substantial penalties send a strong message to the courts that child pornography should not be tolerated. This penalty reflects the seriousness of this crime. Any person who knowingly possesses images of a child being sexually abused is perpetuating such abuse and also providing a continuing market for such material. The Government is of the view that the criminality involved in that behaviour is the same as if the offender had produced the material themselves.

This bill further creates a circumstance of aggravation for the offence of act of indecency with or

towards a child, or inciting a child to an act of indecency, when the offender knows that the act is being filmed for the purposes of producing child pornography. This ensures that anyone who commits an indecent act against a child for the purposes of filming that act will face the same penalties as a person producing, disseminating or possessing child pornographic material. The available technologies currently utilised in the production of pornography allow for images to be manipulated, juxtaposed or pixillated. One of the reasons offenders do this is to make it more difficult to identify the children and the perpetrators, and therefore more difficult to apprehend the perpetrators and rescue the victims. This allows the abuse to continue. Images can also be manipulated to make innocent photographs of children appear in a pornographic context, or to make a person in a sexual context appear to be a child. Some may argue that such images do not include a real victim and therefore should not be captured by this legislation. However, the Government makes no apologies for ensuring that all child pornographic images, whether real or pseudo, are covered by this legislation.

These tough child pornography laws not only serve to protect children from abuse but also act as a denunciation and a general deterrent. Furthermore, it is important to reduce the amount of abhorrent material available to anyone with access to a computer. The community expects the Government to do everything within its power to prevent the proliferation of these images, and that is what this bill serves to do. The bill also introduces new voyeurism offences. The new offences provide for a maximum penalty of two years imprisonment for observing or filming, for the purposes of obtaining sexual arousal or gratification, a person who is engaged in a private act. A "private act" includes a situation in which a person is undressing—for example, in a changing room—or using a toilet, showering or bathing, or during a sexual act, and in circumstances when he or she would reasonably have expected to be afforded privacy. The aggravated version of the offence provides a maximum five-year penalty when the person being observed or filmed is under the age 16, or if the offender altered the fabric of the building in order to observe the person. This covers situations in which an offender may have constructed a peephole in order to observe someone in a changing room or a toilet.

The bill further creates a new offence of filming a person's private parts, which criminalises the filming of a person's private parts in circumstances when he or she can reasonably expect not to be filmed. This captures such behaviours known as upskirting, which involves filming up a person's skirt for the purposes of obtaining sexual arousal or gratification. However, it will also cover situations in which a person's private parts are filmed when the person is engaged in a usually private act, but not necessarily in a private place, such as a public urinal. This surreptitious filming of people without their consent has become prevalent with the emergence of new technologies that allow anyone with a mobile phone to film another person without that person's consent, in inappropriate circumstances. It is important to send a clear message that such behaviour is not acceptable and will be taken very seriously by the courts.

The bill also makes important changes to the Crimes (Sentencing Procedure) Act 1999 to ensure that when sentencing an offender for a child sexual offence the court is not to take into account the offender's prior good character or lack of previous convictions if that factor was of assistance to the offender in the commission of the offence. The simple fact of a person's clean record and good character may assist an offender to gain the trust of the child, or the child's parents, in order to commit a sexual offence against the child. Any offender who has misused his or her perceived trustworthiness and honesty in this way cannot use his or her good character and clean record as a mitigating factor in sentencing. Furthermore, the fact that an offender will be a registered sex offender cannot be used as a mitigating factor in sentencing. The scheme for registering persons under the Child Protection (Offenders Registration) Act 2000, or orders under the Crimes (Serious Offenders) Act 2006, is in place to protect children and others from known sex offenders. The Government makes no apologies for such offenders being denied employment or accommodation in areas where they would have contact with children. That this may make the lives of such offenders more difficult is a consequence of the nature of their offence, and should not be considered as a mitigating factor in sentencing.

Further amendments in the bill include: increasing the age from under 10 years to under 16 years for the maximum 10-year penalty for an aggravated indecent assault against a child;

increasing the maximum penalty for the aggravated offence of causing a person to enter or remain in sexual servitude; increasing the maximum penalty to 14 years imprisonment for the offence of receiving money or material benefit from prostitution when the child is under the age of 14; creating a specific offence of inciting a person to commit a sexual offence; clarifying that the table of standard non-parole periods in the Crimes (Sentencing Procedures) Act 1999 does not apply to offenders who are under the age of 18 at the date of the offence; and including the offence of persistent sexual abuse of a child under section 66EA of the Crimes Act 1900 in the scheme under the Pre-Trial Diversion of Offenders Act 1985.

I turn now to the detail of the bill. Schedule 1 amends the Crimes Act 1900. Item [1] of schedule 1 inserts an additional two circumstances of aggravation for the offence of aggravated sexual assault in section 61J of the Crimes Act 1900. These additional factors are breaking and entering into someone's home and committing a sexual assault, and kidnapping. The maximum penalty for an offence under these provisions is 20 years imprisonment. Items [3] and [4] of schedule 1 amend the offence of aggravated indecent assault with the effect that the maximum penalty for any indecent assault committed on a child under the age of 16 years is now 10 years imprisonment. There is now no longer any difference in penalty between an indecent assault committed against a child under the age of 10 years and an indecent assault committed against a child between the ages of 10 and 16. Item [5] of schedule 1 creates a new subsection (2A) in the section 61O offence of aggravated act of indecency. The new Act provides for a maximum penalty of 10 years imprisonment for acts of indecency committed with or towards a person under the age of 16 years for the purposes of the production of child pornography. The offence also makes it an offence for a person to incite a person under the age of 16 to an act of indecency with or towards that person or another person.

Item [8] of schedule 1 amends the alternative verdict provisions in section 61Q of the Crimes Act 1900, allowing a jury to find that a person charged with an offence of aggravated act of indecency for the purposes of child pornography under new section 61O (2A) of the Crimes Act 1900, and who is not satisfied on the evidence that the accused is guilty of this offence but is satisfied on the evidence that he or she is guilty of an offence with either a different circumstance of aggravation provided for by section 61O subsection (2), or the general offence of act of indecency under section 61N, is guilty of these later offences. The accused will then be punished according to the maximum penalties available for these later offences, not the penalty for the offence under section 61O (2A).

Item [9] of schedule 1 divides the offence in the current section 66A of the Crimes Act, that of sexual intercourse with a child under the age of 10, into a general offence and an aggravated form of the offence. This general offence is now contained in new subsection 66A (1) and retains the maximum penalty of 25 years. The aggravated offence is now contained in a new subsection 66A (2), and provides for a maximum penalty of life imprisonment when the offence of sexual intercourse with a child under the age of 10 is committed in circumstances of aggravation. Subsection (4) of section 66A clarifies that a person sentenced to imprisonment for life for an offence under subsection (2) is to serve that sentence for the term of his or her natural life. Subsection (5) makes it clear that nothing in this section affects the operation of section 21 of the Crimes (Sentencing Procedures) Act 1999, which authorises the passing of a lesser sentence than imprisonment for life, and subsection (6) states that nothing in section 66A affects the prerogative of mercy. Subsection (7) deals with alternative verdicts in the case where a person has been charged with another offence against the Crimes Act 1900 but is found guilty by way of the alternative provisions of section 61Q. This subsection clarifies that in these situations the maximum penalty that may be imposed on the person found guilty under this section is the penalty for the offence with which the person was originally charged.

Item [11] of schedule 1 inserts an additional aggravating circumstance of kidnapping for the offence under section 66C of the Crimes Act 1900 of sexual intercourse with a child between the ages of 10 and 16. Item [12] of schedule 1 amends the alternative verdict provisions contained in section 66E of the Crimes Act 1900 as a result of the new aggravated form of the offence of sexual intercourse with a child under the age of 10 years under section 66A of the Crimes Act 1900. Item [14] of schedule 1 creates a new offence of "meeting child following grooming" under

section 66EB of the Crimes Act 1900. New subsection (2B) of section 66EB clarifies that, for the purposes of the new offence in proposed subsection (2A), "grooming behaviour" means that the adult has engaged in conduct that exposed the child to indecent material. The maximum penalty for this offence will be 15 years imprisonment if the child is under the age of 14 years and imprisonment for 12 years in any other case. Item [18] of schedule 1 increases the penalty for the offence of causing sexual servitude where circumstances of aggravation are present from 19 years imprisonment to 20 years imprisonment. The circumstances of aggravation are when the victim is under the age of 18 years or has a cognitive impairment.

Item [19] of schedule 1 creates a new division 10B, which deals with persons who incite others to commit sexual offences. Subsection (1) of new section 80G specifies that a person charged with inciting the commission of a sexual offence under division 10A or division 15A of the Crimes Act will be liable to the same penalty as for the offence they incited. Subsection (2) states that to be found guilty the person must intend that the offence be committed. Subsection (5) details the offences that are excluded from the operation of this division. Subsection (5) (a) clarifies that it is not an offence to incite the commission of an offence under section 61N, act of indecency, or section 61O, aggravated act of indecency, as these sections contain incitement provisions. The exclusion of these sections from the incitement offence makes it clear that this provision does not extend criminal liability to inciting an act of incitement.

The incitement provisions do not apply to the operation of offences of attempting to commit a sexual offence under sections 61P, 66B, 66D, 66F (4), 73 (4), 78B and 80 or the offence of procuring or grooming a child under 16 years for unlawful sexual activity under section 66EB of the Crimes Act 1900. These are preparatory crimes committed in the preparation of actual sexual abuse. Item [20] of schedule 1 removes the word "pornography" from the heading of division 15. This means the division will now be called "Child prostitution" and only contains child prostitution offences. In addition, item [21] removes the definition of "material" from this division as it now applies to division 15A "Child pornography".

Item [22] of schedule 1 increases the maximum penalty for an act of child prostitution involving a child under the age of 14 years to 14 years imprisonment under section 91E of the Crimes Act 1900—the offence of obtaining benefit from child prostitution. Item [23] of schedule 1 specifies that for the offence of obtaining benefit from child prostitution, contrary to section 91E (3) the age of the child must be specified in the charge, otherwise the penalty of 14 years does not apply and the appropriate penalty will be 10 years. Item [24] of schedule 1 clarifies that a child in the context of the child pornography offences is a person under the age of 16 years. It also clarifies that the term "material" in these sections includes any film, printed matter, electronic data or any other thing, including any computer image or other depiction.

Item [25] replaces the current definition of "child pornography" in section 91H to clarify that child pornography includes material that appears to depict or describe offensive material, and includes a person who is or appears to be a child. As I have previously outlined in this speech, this ensures that all forms of child pornography are included in this definition, even images that have been digitally altered to either make someone appear to be under 16 years or make a child appear to be in a pornographic context. Item [26] provides a definition of the term "produce" in relation to child pornography and ensures that all forms of production of child pornography are captured by the definition, including both real images of children being abused and also pseudo, manipulated or computer-generated images.

Item [30] goes further and ensures that all images, including pseudo images, are covered by this section, not just for the purposes of those who produce child pornography as covered by the item [26] amendments but also for those who possess or disseminate such material. This section puts beyond doubt that the definition of child pornography in section 91H includes images of a child that have been altered or manipulated or an image that appears to be a child. Items [27], [28] and [29] relate to the increase in the maximum penalty for possession of child pornography to 10 years imprisonment, and consequential amendments to the section as a result of this increase.

Item [31] of schedule 1 creates a new division 15B in the Crimes Act 1900 of voyeurism and related offences. The first section of this new division is the definition section under proposed section 91I. The new offence of voyeurism is contained in proposed section 91J and makes it an offence for any person who, for the purposes of obtaining sexual arousal or sexual gratification, observes another person who is engaged in a private act knowing that the person being observed does not consent to being observed. The maximum penalty for this offence is 100 penalty units or imprisonment for two years, or both. Proposed subsection (2) states that this offence is a summary offence.

Proposed subsection (3) states that the aggravated form of the offence of voyeurism is five years imprisonment. Proposed subsection (4) details the aggravating circumstances in this situation as follows: the person observed was a child or the offender constructed or adapted the fabric of any building for the purpose of facilitating the commission of the offence. Proposed subsection (5) is an alternative verdict provision and proposed subsection (6) deals with the law of attempt and specifies that a person who attempts to commit either a general or aggravated form of the offence is liable to the penalty provided for the actual offence.

New section 91K creates the offence of filming a person engaged in a private act. The general form of this offence replaces the offence of filming for indecent purposes, which was previously dealt with in section 21G of the Summary Offences Act 1988. This has been transferred from the Summary Offences Act in order for the offence to include factors of aggravation. The maximum penalty for this offence is 100 penalty units or imprisonment for two years, or both. Proposed subsection (2) states that this offence is a summary offence. Proposed subsection (3) states that the aggravated form of the offence of filming a person engaged in a private act is five years imprisonment. The aggravating factors are the same as those for the new voyeurism offence in section 91J. Proposed subsections (5) and (6) mirror the alternative verdict and attempt provisions in the voyeurism offences under section 91J.

New section 91L creates the offence of filming a person's private parts. Proposed subsection (1) is the general form of the offence and creates an offence of filming a person's private parts for sexual gratification. This covers behaviour known as upskirting. The maximum penalty for this general form of the offence is 100 penalty units or imprisonment for two years, or both. Proposed subsection (2) states that this offence is a summary offence. Proposed subsection (3) states that the aggravated form of the offence is five years imprisonment with the same aggravating factors as those for the offences of voyeurism and filming a person engaged in a private act. Proposed subsections (5) and (6) are equivalent in alternative verdict and attempt provisions provided for in sections 91K and 91L. Proposed subsection (7) states that the person cannot be convicted of both an offence against this section and an offence under section 91K in respect of conduct occurring on the same occasion.

Section 91M creates the offence provisions for the offence of installing a device to facilitate observing or filming, which was previously dealt with in section 21H of the Summary Offences Act 1988. This offence is transferred from that Act along with the offence of filming a person engaged in a private act because it is a statutory alternative to offences under proposed sections 91J, 91K and 91L—the offences of voyeurism, filming a person engaged in a private act, and filming a person's private parts respectively. All of these offences are now appropriately grouped together in the same legislation.

Schedule 2 amends other important pieces of criminal legislation. Item [1] of schedule 2.1 includes the proposed sections 91J, 91K and 91L of the Crimes Act—the offences of voyeurism, filming a person engaged in a private act, and filming a person's private parts—in the definition of class 2 offences under the Child Protection (Offenders Registration) Act 2000 where the person who was being observed or filmed was then a child. Class 2 offences are registrable offences for the purposes of the Child Protection (Offenders Registration) Act 2000. Item [2] of schedule 2.1 places the general version of these offences under sections 91J, 91K and 91L in section 3A (2) (c) (iii) of the Child Protection (Offenders Registration) Act 2000, meaning that because someone has been convicted of a single instance of one of these offences does not mean they are necessarily a registrable person under the Act. Schedule 2.2 clarifies that the

table of standard non-parole periods does not apply in respect of offences committed by children.

Part 2.3 in schedule 2 inserts offences under sections 91J, 91K, 91L or 91M of the Crimes Act 1900 committed against, with, or in the presence of a child as included in the definition of reportable conduct in section 33 (1) of the Commission for Children and Young People Act 1998. Item [1] of schedule 2.4 ensures that a sex offender's good prior character or lack of previous convictions are not to be taken into account as mitigating factors in sentencing if the court is satisfied that the fact concerned was of assistance to the offender in the commission of the sex offence against the child.

Item [2] of schedule 2.4 clarifies the offences that are classified as child sexual offences for the purposes of the Crimes (Sentencing Procedure) Act 1999. These include the new offences of voyeurism, filming a person engaged in a private act, and filming a person's private parts, when such offences were conducted against a person under the age of 16. Item [3] of schedule 2.4 ensures that any mandatory requirements for supervision of sex offenders are to be disregarded in the sentencing of the child sex offender.

Item [4] of schedule 2.4 makes amendments to section 54D (2) of the Crimes (Sentencing Procedure) Act 1999 to clarify that the table of standard non-parole periods does not apply to the sentencing of an offender in respect of an offence, if the offender was under the age of 18 years at the time the offence was committed. Item [5] of schedule 2.4 clarifies that the specified standard non-parole period of 15 years imprisonment in part 4, division 1A applies to both the general offence of sexual intercourse with a child under 10 years of age, contrary to section 66A (1) of the Crimes Act 1900, and to the aggravated version of the offence under section 66A (2).

Item [6] of schedule 2.4 inserts section 66A (2), which relates to aggravated sexual intercourse with a child under 10 years, into the schedule of existing life sentences in the Crimes (Sentencing Procedure) Act 1999. Item [1] of schedule 2.5 inserts the offences against sections 91J, 91K and 91L of the Crimes Act 1900, the offences of voyeurism, filming a person engaged in a private act, and filming a person's private parts in relation to the observing or filming of a child, into the definition of an offence of a sexual nature in the Crimes (Serious Sex Offenders) Act 2006. The amendment in schedule 2.9 includes the offence of persistent child sex abuse against section 66EA of the Crimes Act 1900 among the child sexual assault offences to which the Pre-Trial Diversion of Offenders Act 1985 applies.

The Government is committed to the reform of all aspects of the investigation and prosecution of sexual assault, child sexual assault and child pornography. These amendments continue the Government's ongoing commitment to ensuring that New South Wales has the strongest possible sexual assault laws and that our children and our community are adequately protected from sexual predators. I commend the bill to the House.