

Criminal Code (Child Pornography and Abuse) Amendment Bill 2004

Explanatory Notes

General Outline

Short Title

The short title of the Bill is the *Criminal Code (Child Pornography and Abuse) Amendment Bill 2004*.

Policy Objectives of the Legislation

The policy objective of the Bill is to respond to the growing incidence of child pornography by inserting specific offences (with appropriate penalties) into the Criminal Code.

Reasons for the Bill

Offences relating to the production, sale and possession of child pornography (generally described as child abuse material) are contained in the *Classification of Computer Games and Images Act 1995*, the *Classification of Films Act 1991* and the *Classification of Publications Act 1991*. These Acts (the “Classification Acts”) are part of a Commonwealth/State/Territory scheme for the classification of publications, films and computer games and for the enforcement of those classifications.

The Commonwealth *Classification (Publications, Films and Computer Games) Act 1995* (the Commonwealth Act) provides for the classification of publications, films and computer games for the Australian Capital Territory. These classifications are in turn adopted by the various States under their State legislation. Although the Classification Acts also allow a State officer to classify computer games (upon his or own her initiative or upon representation about the computer game) and publications (upon his or her own initiative or upon complaint about the publication); almost all classifications are dealt with under the Commonwealth Act. The State

officer's classification role is unique to Queensland. The practice of the State officer under the Classification Acts is to only consider material submitted by the police to determine whether or not it is child abuse material (RC) under the Classification Acts, not to perform a general classification function.

Other child pornography related offences are contained in the Commonwealth and Queensland Criminal Codes.

The recent national crackdown on an internet child pornography ring resulting in hundreds of arrests across Australia raised the profile of current Queensland and interstate child pornography offences and penalties.

The offences under existing Queensland legislation cover most forms of child pornography and child abuse material, including films, photographs, and computer images. Objects are not included, except in section 228 of the Code, which only applies to an object publicly exhibited.

However, legislation designed to classify material to determine who can access it, if at all, does not recognise the nature of the conduct involved. The Classification Acts are largely directed at material produced for a commercial purpose and for public distribution. Child pornography is produced for a very different audience.

The material that is restricted is also limited by the nature of the legislation regulating it—films, publications or computer games. However, the definitions within the Acts are wide enough to catch considerably more than items submitted for classification, for example an image on a computer may be classified as a “computer game”. Describing an image of a child in the act of being abused as a “computer game” is clearly inappropriate.

Some of the existing child pornography offences are not expressed in terms of “child abuse”—for example, people who sell or distribute pornographic computer images can only be charged with selling or distributing “objectionable computer games”. Likewise the offences of procuring minors for games or films refer only to “objectionable” games or films.

A number of jurisdictions (the Northern Territory, South Australia and New South Wales) have recently amended or are amending their legislation in this area.

The recent national crackdown also means that it is likely that there will be some ongoing discussion at various national forums regarding the adequacy of the existing offences and investigative powers. This means

that the Queensland provisions (both current and those provided in this Bill) may require further legislative amendment in due course.

Achieving the objective

Given the serious criminal and exploitative nature of this activity, it is more appropriate for there to be specific offences (with appropriate penalties) in the Criminal Code dealing with involving a child in, and making, distributing and possessing what is called “child exploitation” material under the Bill.

The insertion of these new offences will not derogate from the liability of an offender for the more substantive offence relating to the activity in appropriate cases. For example, a person who takes indecent photographs of 10 year old children as part of a photo shoot for a child pornography magazine will not only be involving a child in the making of child pornography under the new offences (maximum penalty of 10 years), but will also be committing an offence under existing section 210(1)(f) of the Criminal Code (taking an indecent photograph of a child under the age of 16 years). The latter offence carries a maximum penalty of 20 years. The new offences are intended to complement not replace existing offences. Where it can be established that a more serious offence involving abuse of a child has occurred, that offence should be charged.

The Bill defines child exploitation material as material that, in a way likely to cause offence to a reasonable adult, describes or depicts someone who is, or apparently is, a child under 16 years—

- (i) in a sexual context, including for example, engaging in a sexual activity; or
- (ii) in an offensive or demeaning context; or
- (iii) being subjected to abuse, cruelty or torture.

“Material” is defined to include data from which text, images or sound can be generated.

The Bill goes on to provide for the following offences:

- involving a child (i.e. a person under the age of 18 years) in the making of child exploitation material (maximum penalty 10 years)
- making child exploitation material (maximum penalty 10 years)
- distributing (which includes communicating, exhibiting, sending and supplying) child exploitation material (maximum penalty 10 years)

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- knowingly in possession of child exploitation material (maximum penalty five years).

The Bill acknowledges the role of the Commonwealth Classification Board in classifying material (and refusing classification of child pornography material—RC) by providing a defence to any of the offences for the defendant to prove that the material was classified (other than RC) whether before or after the alleged offence was committed. If the material is a film, computer game or publication that has not been previously classified, a defendant relying on the classification defence will have to bear the costs (which could be up to \$1500 for a single disc containing a number of images) of applying to the Commonwealth Classification Board for classification.

The Bill provides an evidentiary aid for the purpose of this defence. This evidentiary aid is a certificate under section 87 of the Commonwealth Act or a certificate issued by the State officer to cover those very rare cases where the State officer may have classified the publication or computer image.

The Bill also provides for other defences including that the conduct the subject of the offence was for a genuine artistic, educational, legal, medical, scientific or public benefit purpose. An example of public benefit purpose includes a current affairs television report showing a child being tortured.

A defendant wishing to access the material for any of the defences will have to make an application to the court under the sensitive evidence provisions of the Criminal Code. This obligation already exists on defendants who wish to access material in prosecutions under section 210 of the Criminal Code (taking an indecent image of a child under the age of 16) or prosecutions for child abuse material under the existing provisions of the Classification Acts.

The Classification Acts offences will remain operational under the Bill. This is being done to allow consideration of the overlap between the two regimes (and what further legislative change may be necessary as a result of that consideration). It is also being done to allow for maximum flexibility to accommodate any developments that may arise at a national level in this area.

Administrative Costs

Nil.

Fundamental Legislation Principles

Onus of proof reversal

The Bill allows the defendant to establish that the material was classified (other than RC) either before or after the offence was allegedly committed, rather than oblige the prosecution in every case to establish that the material was not classified, or was not capable of being classified (other than RC) prior to charging or prior to trial. This is in effect a reversal of the onus of proof.

The vast majority of material seized by police is computer images, sometimes numbering in the thousands, and of that material, the vast majority will never be capable of being classified. Requiring the prosecution to prove in every case that the material was either not classified or not capable of being classified will be extremely costly (potentially in the millions) and time consuming. Therefore, it is a better balance in those rare cases to allow a defendant who genuinely believes that the material has already been classified, or is capable of being classified (other than RC) to seek to prove this.

Forfeiture

The Classification Acts give the court a discretion to order forfeiture of the offending film, computer game or publication and anything used in connection with the offence when a person has been convicted of an offence under those Acts.

The Bill continues this regime but also gives the court a discretion to order the forfeiture of the offending material where a conviction has not occurred. This discretion could be exercised for example where there has been an unsuccessful prosecution for an offence of possession because the prosecution has not been able to establish that the defendant was knowingly in possession of the material, but the fact that the material is child exploitation material is not in dispute.

CONSULTATION

The Bill has been developed in consultation with the Departments of Premier and Cabinet, Fair Trading, Tourism and Wine Industry

Development and the Queensland Police Service. The Director of Public Prosecutions has also been consulted regarding the Bill.

Notes on Provisions

Part 1 Preliminary

Short Title

Clause 1 provides that the short title is the *Criminal Code (Child Pornography and Abuse) Amendment Act 2004*.

Commencement

Clause 2 provides for the commencement of the Act.

Part 2 Criminal Code amended

Clause 3 provides that this part amends the Criminal Code.

Clause 4 amends section 1 of the Criminal Code – Definitions to include the new definitions inserted by this Act.

Clause 5 inserts new section 207A which inserts definitions for Chapter 22 of the Criminal Code - Offences against morality.

“**Child exploitation material**” is defined as material that, in a way likely to cause offence to a reasonable adult, describes or depicts someone who is, or apparently is, a child under 16 years—

- (i) in a sexual context, including for example, engaging in a sexual activity; or
- (ii) in an offensive or demeaning context; or
- (iii) being subjected to abuse, cruelty or torture.

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This definition is broad enough to catch any material at all – images, sound recordings, objects and written descriptions. It also includes data from which text, images or sounds can be generated (see the definition of “material”).

It is not necessary to prove that a child depicted in the material was in fact less than 16 years of age at the time the image or material was created. It is also not necessary for the material to depict a real person.

The definition also includes an objective test—that the material is likely to cause offence to a reasonable adult. This will ensure that innocent family photos, such as a naked toddler in the bath, are not caught within the definition of child exploitation material.

“Classification officer” means:

- the computer games classification officer under the *Classification of Computer Games and Images Act 1995*; or
- the films classification officer under the *Classification of Films Act 1991*; or
- the publications classification officer under the *Classification of Publications Act 1991*.

“Classified” means:

- for a computer game—cross refers to the *Classification of Computer Games and Images Act 1995* which provides for classification by the computer games classification officer upon his/ her own initiative or representation or classification under the Commonwealth Act. As noted previously nearly all classifications are done under the Commonwealth Act.
- for a film—cross refers to the *Classification of Films Act 1991* which provides for classification under the Commonwealth Act.
- for a publication—cross refers to the *Classification of Publications Act 1991* which provides for classification by the publications classification officer upon his/ her own initiative or complaint or classification under the Commonwealth Act. As noted previously nearly all classifications are done under the Commonwealth Act.

“Computer game” is defined by reference to the *Classification of Computer Games and Images Act 1995*.

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Under that Act, computer game means:

- (a) a computer program and associated data, capable of generating a display on a computer monitor, television screen, liquid crystal display or similar medium; or
- (b) a computer generated image; or
- (c) an interactive film;

but does not include—

- (d) a bulletin board; or
- (e) an exempt computer game; or
- (f) a film that is not an interactive film.

“Film” is defined by reference to the *Classification of Films Act 1991*.

Under that Act, film includes—

- (a) a cinematograph film, slide, video tape and video disc; and
- (b) any other form of recording from which a visual image can be produced together with its sound track;

but does not include—

- (c) a computer game; or
- (d) a computer program; or
- (e) an advertisement for a computer game, film or publication; or
- (f) an exempt film.

“Material” includes anything that contains data from which text, images or sound can be generated.

“Publication” is defined by reference to the *Classification of Publications Act 1991*. Under that Act, publication means a book, paper, magazine or other written or pictorial matter.

“Someone” in the context of a description or depiction, includes the body parts of someone, including for example, someone’s breast or genitalia.

Clause 6 inserts new sections 228A to 228H into Chapter 22 of the Criminal Code “Offences against morality”.

New section 228A Involving child in making child exploitation material: provides for the offence of involving a child in making child exploitation material.

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In this section, involving a child in the making of child exploitation material includes:

- (a) in any way concerns a child in the making of child exploitation material; and
- (b) attempts to involve a child in the making of child exploitation material.

As noted previously, the insertion of these new offences will not derogate from the liability of an offender for the more substantive offence relating to the activity in appropriate cases. For example, a person who takes indecent photographs of 10 year old children as part of a photo shoot for a child pornography magazine will not only be involving a child in the making of child pornography under the new offences (maximum penalty of 10 years), but will also be committing an offence under existing section 210(1)(f) of the Criminal Code (taking an indecent photograph of a child under the age of 16 years). The latter offence carries a maximum penalty of 20 years imprisonment. The new offences are intended to complement not replace existing offences. Where it can be established that a more serious offence involving abuse of a child has occurred, that is the offence that should be charged.

New section 228B Making child exploitation material: provides for the offence of making child exploitation material.

In this section, make child exploitation material includes—

- (a) produce child exploitation material; and
- (b) attempt to make child exploitation material.

New section 228C Distributing child exploitation material: provides for the offence of distributing child exploitation material.

In this section, distribute child exploitation material includes—

- (a) communicate, exhibit, send, supply or transmit child exploitation material to someone, whether to a particular person or not; and
- (b) make child exploitation material available for access by someone, whether by a particular person or not; and
- (c) enter into an agreement or arrangement to do something in paragraph (a) or (b); and
- (d) attempt to distribute child exploitation material.

New section 228D Possessing child exploitation material: provides for the offence of knowingly possessing child exploitation material.

New section 228E Defences for ss 228A – 228D: provides for the defences for the new offences.

Subsection (1) provides that subsections (2), (3) and (5) prescribe defences available to a person charged with an offence against sections 228A, 228B, 228C or 228D.

Under subsection (2), it is a defence for a person to prove that—

- (a) the person engaged in the conduct for a genuine artistic, educational, legal, medical, scientific or public benefit purpose; and
- (b) the person’s conduct was, in the circumstances, reasonable for that purpose.

An example of something made for a “public benefit” is a current affairs television article showing children being tortured during a civil war.

Subsection (3) provides a defence for a person to prove that, at the time of the offence—

- (a) a classification exemption had been given to an entity for the material that is alleged to be child exploitation material; and
- (b) the person engaged in the conduct that is alleged to constitute the offence—
 - (i) for a purpose for which the exemption was given; and
 - (ii) in a way that is consistent with the exemption, including any conditions imposed on the exemption.

This defence refers to specific exemptions that may be given under section 59 of the *Classification of Computer Games and Images Act 1995* or section 37 of the *Classification of Publications Act 1991* for material that is clearly child exploitation material, but where the material is of a medical, educational or scientific character, or which is intended to be used for a medical, educational or scientific purpose. The defence will only arise if the use of the material is consistent with the exemption.

For example, a medical school may be given an exemption under section 59 of the *Classification of Computer Games and Images Act 1995* to allow the medical school to possess images of tortured children, and to show the images to its medical students. The exemption is subject to a condition that the medical students are not allowed to forward the images to anyone,

including to themselves at another computer. If a student sends a copy of the images to his or her home computer or to another person's computer, the defence will not apply.

Whether conduct was engaged in for a purpose mentioned in subsection (2)(a) or (3)(b)(i) is a question of fact.

Where the material alleged to be child exploitation material is a computer game, film or publication, subsection (5) provides a further defence for a person to prove that the material is classified as something other than RC (that is, "refused classification"). The defence also applies where the material is a computer game that, under the Commonwealth Act, is a film classified as R or X. Under subsection (6) the material may have been classified before, or may be classified after, the offence is alleged to have been committed.

The purpose of this defence is to ensure that a person can not be convicted of one of these serious offences in relation to material that has been approved by the classification system. A film, publication or computer game will be refused classification (and thus classified RC) if it depicts a person who is, or who looks like, a child under 16 in a way likely to cause offence to a reasonable adult.

The defence also allows the person to seek to have the item classified after being charged, if it was not classified at the time of the alleged offence.

As is noted above, the Commonwealth Act provides for the classification of publications, films and computer games for the Australian Capital Territory. These classifications are in turn adopted by the various States under their State legislation. Although the Classification Acts also allow a State officer to classify computer games (upon his or her own initiative or upon representation about the computer game) and publications (upon his or her own initiative or upon complaint about the publication); almost all classifications are dealt with under the Commonwealth Act. A defendant wishing to have unclassified material which is a film, computer game or publication classified for the purposes of his/ her defence will have to make an application to the Commonwealth Classification Board for the material to be classified.

Subsection (7) provides that a certificate stating whether a film, publication or computer game is classified and its classification is evidence of that fact. Generally, this will be a certificate issued under section 87 of the Commonwealth Act. A certificate is only likely to be issued by a State

officer in those very rare cases where the State officer has previously classified a publication or computer image.

A defendant wishing to access the material for any of the defences will have to make an application to the court under the sensitive evidence provisions of the Criminal Code. This obligation already exists on defendants who wish to access material in prosecutions under section 210 of the Criminal Code (making an indecent image of a child under the age of 16) or prosecutions for child abuse material under the existing provisions of the Classification Acts.

“Certificate” and “classification exemption” are defined in subsection (8).

New section 228F Excluding non-essential persons from court when child exploitation material displayed: requires the court to exclude all non-essential persons from the court when child exploitation material is displayed.

This provision has been inserted to minimise public exposure and access to child exploitation material. It is modelled on section 21AU of the *Evidence Act 1977* and section 5 of the *Criminal Law (Sexual Offences) Act 1978*.

The court may permit a person with a proper interest to be present, provided that person’s presence would not be prejudicial to the interests of any child depicted in the material. For example, a person conducting legitimate research into child pornography might apply to be present in court while child exploitation material is on display. In determining who is entitled to be present, the court must consider the public benefit of limiting the number of people with access to child exploitation material.

New section 228G Forfeiture of child exploitation material etc: continues the forfeiture regime under the Classification Acts and gives the court a discretion to order forfeiture of the offending film, computer game or publication and anything used in connection with the offence when a person has been convicted of an offence under those Acts.

The provision also gives the court a discretion to order the forfeiture of the alleged child exploitation material when a conviction has not occurred. This discretion could be exercised for example where there has been an unsuccessful prosecution for an offence of possession because the prosecution has not been able to establish that the defendant was knowingly in possession of the material, but it is not disputed that the material is child exploitation material.

New section 228H Possession etc of child exploitation material by law enforcement officer: makes it clear that law enforcement officers are not

criminally responsible for offences against sections 228B, 228C or 228D if—

- (a) the person is, at the time of the offence, a classification officer or law enforcement officer acting in the course of the person's duties; and
- (b) the person's conduct is reasonable in the circumstances for the performance of the duties.

The effect of this provision is that a law enforcement officer may reasonably have child exploitation material in his/ her possession as part of the investigation of an offence. He/ she could however be charged with the distribution of the child exploitation material if that distribution was not reasonable in the circumstances for the performance of the duties, even if the possession of the material is excused by this provision.

This section is an excuse, not a defence. In practice this will mean that a law enforcement officer who is charged with an offence bears an evidential onus to raise the issue that his/ her conduct was reasonable in the circumstances for the performance of his/ her duties. After the issue has been raised, the prosecution must prove beyond reasonable doubt that the conduct was not reasonable in the circumstances.

Clause 7 amends section 590AF to make it clear that child exploitation material or alleged child exploitation material is sensitive evidence under the Criminal Code.

Part 3 Child Protection (Offender Reporting) Act 2004 amended

Clause 8 provides that this part amends the *Child Protection (Offender Reporting) Act 2004*.

Clause 9 adds these new offences to class 2 of the Schedule to the *Child Protection (Offender Reporting) Act 2004* - the effect being that a person convicted of such an offence will be a reportable offender (for at least eight years) under that Act.

Part 4 Commission for Children and Young People and Child Guardian Act amended

Clause 10 states that this part amends the *Commission for Children and Young People and Child Guardian Act 2000*.

Clause 11 amends section 99E (What is an excluding offence) to insert a new subsection (c) referring to these new Code offences. A person convicted of an excluding offence for which imprisonment is ordered or where a disqualification order is made by the court under section 126C must be issued with a negative notice (in effect a life time ban). A conviction for an excluding offence for which imprisonment is not ordered, and where the court has not made an order under section 126C, will result in a negative notice being issued, unless exceptional circumstances exist.

Clause 12 amends schedule 2 (Current serious offences) to include these new offences within the list of serious offences.