

2004

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CRIMES LEGISLATION AMENDMENT BILL 2004

EXPLANATORY STATEMENT

Circulated by authority of the
Attorney General
Jon Stanhope MLA

This explanatory statement relates to the Bill as introduced into the Legislative Assembly.

Overview of Bill

This Bill amends the *Crimes Act 1900* (Crimes Act) and the *Prostitution Act 1992* (Prostitution Act). The amendments are to put beyond doubt the Australian Capital Territory's compliance with the International Labour Organisation Convention No 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention) and the United Nation's Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Optional Protocol). A child for the purposes of these treaties is a person under 18 years of age.

The Convention and the Optional Protocol oblige State parties to criminalise serious violations of children's rights. The amendments will insert new offences in the Crimes Act to ensure adequate punishment for those who use or otherwise involve children in the production of child pornography and the giving of pornographic performance and also for those who trade in and possess child pornography. The amendments will also insert a revised offence in the Prostitution Act to ensure adequate punishment for those who cause, permit, offer or procure children for prostitution.

The amendments do not change the age of consent for sexual intercourse (16 years of age) but if a person, whether under the age of 16 or otherwise, is engaged for these offences in an activity of a sexual nature without consent the persons involved may also face prosecution under Part 3 and 5 for sexual assault, act of indecency, sexual servitude etc.

Outline of provisions

Clause 1 Name of Act

This clause sets out the name of the proposed Act as the *Crimes Legislation Amendment Act 2004*.

Clause 2 Commencement

This clause provides that the Act (other than section 7) will commence the day after its notification on the Legislation Register. The commencement of section 7 is delayed to coincide with the commencement of another Act's provision.

Clause 3 Legislation amended – pt 2

This clause states that this part amends the *Crimes Act 1900*.

Clause 4 Section 7A, note 1, new dot points

Inserts in section 7A, note 1, new dot points noting that other legislation applies in relation to offences against this Act, namely the *Criminal Code 2002*.

Clause 5 Sections 64 and 65

This clause will replace the existing offences in sections 64 and 65 of the Crimes Act, with three new sections directed at those who use or otherwise involve children in the production of child pornography and the giving of pornographic performance and also for those who trade in and possess child pornography.

A child for these provisions is defined in the *Legislation Act 2001* as a person under the age of 18 years of age (dictionary).

Section 64 - using child for production of child pornography etc

This section creates two offences according to the age of the child. Subsection (1) makes it an offence for a person to use, offer or procure a child under the age of 12 years to be used for the production of child pornography or for a pornographic performance. Absolute liability applies to subsection (1)(b), the age of the child. This does not render the whole offence an absolute liability offence. The effect of applying absolute liability to this element of the offence is that it is not necessary to prove that the defendant had any awareness (or any other fault element) about the age of the child involved and it is not relevant that he or she may have made a mistake about the age of the child. This is appropriate because of the age of the child and is consistent with the approach in the Chapter 5, Sexual Offences, report of the Model Criminal Code Officers' Committee. The maximum penalty for this offence is 1500 penalty units and 15 years imprisonment or both.

Subsection (3) makes it an offence for a person to use, offer or procure a child between 12 and 18 years of age to be used for the production of child pornography or for a pornographic performance. Strict liability applies to subsection (3)(b), the age of the child. Again, this does not render the whole offence a strict liability offence. The effect of applying strict liability is that it is not necessary to prove that the defendant had any awareness (or any other fault element) about the age of the child but the defence of mistake of fact applies (section 36, *Criminal Code 2002*). Mistake of fact is open to the defendant only if the person considered whether or not facts existed and was under a mistaken but reasonable belief about the facts. Application of strict liability is also consistent with the approach in Chapter 5. The maximum penalty is 1200 penalty units and 12 years imprisonment or both.

Child pornography is defined broadly as any representation of a child's sexual parts; a child engaged in an activity of a sexual nature or another person engaged in an activity of a sexual nature in the presence of a child. The representation may be by any means – film, photograph, computer game, internet etc. This will ensure that the definition will keep up with changing technology. The representation, though, must have been substantially for the sexual arousal or sexual gratification of someone other than the child. This test will ensure, for example, that a photo taken by a parent or an artist is not caught unless it is done substantially for sexual purposes.

A pornographic performance is included in this section to cover cases where a child is used to give a performance of a sexual nature, such as a striptease.

Section 64A - trading in child pornography

The section creates an offence for a person to produce, publish, offer or sell child pornography. It applies to persons who may not have used a child to create child pornography but who are involved in its production, publication, offering or sale. Other legislation prevents the classification of commercial material depicting a child but this offence is necessary to cover those who intentionally trade in child pornography.

Section 65 - possessing child pornography

This offence updates the offence of possession currently in the *Crimes Act*. Subsection (1) provides that a person commits an offence if the person intentionally possesses pornography and the pornography is child pornography. Both elements of the offence must be proven. Absolute liability applies to the second element of the offence (that is, the pornography is child pornography), however a defendant may avoid liability if he or she

can prove, on the balance of probabilities, that he or she had no reasonable grounds for suspecting that the pornography was child pornography. This defence is consistent with subsection 65(3) currently in the Crimes Act.

Clause 6 Legislation amended – pt 3

This clause states that this part amends the *Prostitution Act 1992*.

Clause 7 New section 4A

Inserts a new section 4A noting that other legislation applies in relation to offences against this Act, namely the *Criminal Code 2002*.

**Clause 8 Participation of children
Section 20**

This clause substitutes current section 20. It strengthens the present offence by adding offering or procuring a child for the purpose of providing commercial sexual services, eg. the act of prostitution. A child for the Act is presently defined as being under 18.

Subsection (1) makes it an offence for a person to cause, permit, offer or procure a child under the age of 12 years to provide commercial sexual services. Absolute liability applies to subsection (1)(b), the age of the child. Again, this does not render the whole offence an absolute liability offence. The effect of applying absolute liability to this element of the offence is that it is not necessary to prove that the defendant had any awareness (or any other fault element) about the age of the child involved and it is not relevant that he or she may have made a mistake about the age of the child. The maximum penalty for this offence is 1500 penalty units and 15 years imprisonment or both.

Subsection (3) makes it an offence for a person to cause, permit, offer or procure a child between 12 and 18 years of age to provide commercial sexual services. Strict liability applies to subsection (3)(b), the age of the child. Again, this does not render the whole offence a strict liability offence. The effect of applying strict liability is that it is not necessary to prove that the defendant had any awareness (or any other fault element) about the age of the child but the defence of mistake of fact applies (section 36, *Criminal Code 2002*). Mistake of fact is open to the defendant only if the person considered whether or not facts existed and was under a mistaken but reasonable belief about the facts. The maximum penalty is 1200 penalty units and 12 years imprisonment or both.

Clause 9 Dictionary, definition of *commercial sexual services*

This clause substitutes the current definition of commercial sexual services so that it complies with the definition in the Optional Protocol. Under the new definition, commercial sexual services will include sexual services provided for any consideration and not merely for monetary or material reward.