



New South Wales

Crimes Amendment (Child Pornography) Act 2004 No 95

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New South Wales

Crimes Amendment (Child Pornography) Act 2004 No 95

Act No 95, 2004

An Act to amend the *Crimes Act 1900* in connection with offences relating to child pornography and use of children for pornographic purposes. [Assented to 15 December 2004]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Crimes Amendment (Child Pornography) Act 2004*.

2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation, except as provided by subsection (2).
- (2) Schedule 1 [11] and Schedule 2.3 [1] and [2] commence on the date of assent to this Act.

3 Amendment of Crimes Act 1900 No 40

The *Crimes Act 1900* is amended as set out in Schedule 1.

4 Amendment of other Acts

The Acts specified in Schedule 2 are amended as set out in that Schedule.

Schedule 1 Amendment of Crimes Act 1900

(Section 3)

[1] Section 91C Definitions

Omit “For the purposes of sections 91C–91G”.

Insert instead “For the purposes of this Division”.

[2] Section 91C

Insert in alphabetical order:

material includes any film, printed matter, electronic data or any other thing of any kind (including any computer image or other depiction).

[3] Section 91G

Omit the section. Insert instead:

91G Children not to be used for pornographic purposes

- (1) Any person who:
 - (a) uses a child who is under the age of 14 years for pornographic purposes, or
 - (b) causes or procures a child of that age to be so used, or
 - (c) having the care of a child of that age, consents to the child being so used or allows the child to be so used,is guilty of an offence.
Maximum penalty: imprisonment for 14 years.
- (2) Any person who:
 - (a) uses a child who is of or above the age of 14 years for pornographic purposes, or
 - (b) causes or procures a child of that age to be so used, or
 - (c) having the care of a child of that age, consents to the child being so used or allows the child to be so used,is guilty of an offence.
Maximum penalty: imprisonment for 10 years.
- (3) For the purposes of this section, a child is used by a person for pornographic purposes if:
 - (a) the child is engaged in sexual activity, or
 - (b) the child is placed in a sexual context, or

- (c) the child is subjected to torture, cruelty or physical abuse (whether or not in a sexual context),
for the purposes of the production of pornographic material by that person.
- (4) For the purposes of this section, a person may have the care of a child without necessarily being entitled by law to have the custody of the child.
- (5) Where on the trial of a person for an offence under subsection (1) the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under subsection (2), it may find the accused not guilty of the offence charged but guilty of the latter offence, and the accused is liable to punishment accordingly.

[4] Section 91H

Insert after section 91G:

91H Production, dissemination or possession of child pornography

(1) **Definitions**

In this section:

child pornography means material that depicts or describes, in a manner that would in all the circumstances cause offence to reasonable persons, a person under (or apparently under) the age of 16 years:

- (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).

disseminate child pornography, includes:

- (a) send, supply, exhibit, transmit or communicate it to another person, or
- (b) make it available for access by another person, or
- (c) enter into any agreement or arrangement to do so.

(2) **Production or dissemination of child pornography**

A person who produces or disseminates child pornography is guilty of an offence.

Maximum penalty: imprisonment for 10 years.

(3) **Possession of child pornography**

A person who has child pornography in his or her possession is guilty of an offence.

Maximum penalty: imprisonment for 5 years.

(4) **Defences**

It is a defence to any charge for an offence under subsection (2) or (3):

- (a) that the defendant did not know, and could not reasonably be expected to have known, that he or she produced, disseminated or possessed (as the case requires) child pornography, or
- (b) that the material concerned was classified (whether before or after the commission of the alleged offence) under the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth, other than as refused classification (RC), or
- (c) that, having regard to the circumstances in which the material concerned was produced, used or intended to be used, the defendant was acting for a genuine child protection, scientific, medical, legal, artistic or other public benefit purpose and the defendant's conduct was reasonable for that purpose, or
- (d) that the defendant was a law enforcement officer acting in the course of his or her official duties, or
- (e) that the defendant was acting in the course of his or her official duties in connection with the classification of the material concerned under the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth.

(5) **Defence to possession of child pornography**

It is a defence to any charge for an offence under subsection (3) that the material concerned came into the defendant's possession unsolicited and the defendant, as soon as he or she became aware of its pornographic nature, took reasonable steps to get rid of it.

[5] Section 578B Possession of child pornography

Omit the section.

[6] Section 578C Publishing indecent articles

Omit the definition of *child pornography* from section 578C (1).

[7] Section 578C (2)

Omit “(other than an indecent article that is child pornography)”.

[8] Section 578C (2A), (2B), (2C) and (5A)

Omit the subsections.

[9] Section 578C (3A)

Insert after section 578C (3):

- (3A) A person cannot be convicted of an offence against this section and section 91H in respect of the same matter.

[10] Section 578D Police may enter and search premises for indecent articles

Omit “578B or” wherever occurring.

[11] Eleventh Schedule Savings and transitional provisions

Insert at the end of the Schedule with appropriate Part and clause numbers:

Part Crimes Amendment (Child Pornography) Act 2004

Classification of films, publications or computer games

- (1) In this clause, the *amending Act* means the *Crimes Amendment (Child Pornography) Act 2004*.
- (2) To avoid doubt, section 578B (4) (b) (as in force before its repeal by the amending Act) does not prevent (and is taken never to have prevented), in respect of an alleged offence against that section:
 - (a) a court attendance notice or other process being issued, or
 - (b) a court attendance notice or other process being served, or
 - (c) a person pleading guilty or a plea of guilty being accepted, or
 - (d) sentence being passed for the offence on an offender who has pleaded guilty to the offence,without the film, publication or computer game concerned having been classified under the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth.
- (3) This clause extends to offences against section 578B in respect of which anything mentioned in subclause (2) occurred before the repeal of that section by the amending Act.

Schedule 2 Amendment of other Acts

(Section 4)

2.1 Child Protection (Offenders Registration) Act 2000 No 42

Section 3 Definitions

Insert “91H,” after “section” wherever occurring in paragraph (d) of the definition of *Class 2 offence* and paragraph (d) (ii) of the definition of *registrable person* in section 3 (1).

2.2 Child Protection (Prohibited Employment) Act 1998 No 147

Section 5 Prohibited persons

Insert “91H,” after “section” in paragraph (d) of the definition of *serious sex offence* in section 5 (3).

2.3 Classification (Publications, Films and Computer Games) Enforcement Act 1995 No 63

[1] Section 58 Evidence

Insert “or the *Crimes Act 1900*” after “this Act”.

[2] Section 58 (2)

Insert at the end of section 58:

- (2) Subsection (1) extends to a certificate (whether given before or after the commencement of this subsection) that states a matter:
 - (a) at the time the certificate is given, or at any other earlier specified time, or
 - (b) in respect of any specified period before the certificate is given.

[3] Section 61 Forfeiture of films, publications and computer games on conviction

Insert “or section 91H of the *Crimes Act 1900*” after “this Act”.

2.4 Criminal Procedure Act 1986 No 209

[1] Section 348 Offences in respect of which an intervention program may be conducted

Insert “91H (Production, dissemination or possession of child pornography),” after “section” in section 348 (2) (d).

[2] Schedule 1 Indictable offences triable summarily

Insert “, 91H” after “91B” in clause 2.

**2.5 Law Enforcement (Powers and Responsibilities) Act 2002
No 103**

Section 47 Power to apply for warrant for particular offences

Insert “91H,” after “section” in the definition of *child pornography offence* in section 47 (4).

2.6 Summary Offences Act 1988 No 25

Section 11G Loitering by convicted child sexual offenders near premises frequented by children

Insert “91H,” after “section” in paragraph (c) of the definition of *convicted child sexual offender* in section 11G (2).

[Second reading speech made in—
Legislative Assembly on 11 November 2004
Legislative Council on 9 December 2004]

BY AUTHORITY