



New South Wales

Crimes Amendment (Child Pornography and Abuse Material) Bill 2010

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are as follows:

- (a) to amend the *Crimes Act 1900* to change the law as it relates to child pornography (which will now be referred to as child abuse material) so that:
 - (i) the defence relating to material produced for child protection, scientific, medical, legal, artistic or other public benefit purposes will no longer be available, and
 - (ii) the law is generally more consistent with Commonwealth offences relating to child pornography,
- (b) to amend the *Criminal Procedure Act 1986* to provide for the use of random sample evidence in proceedings for a child abuse material offence,
- (c) to amend the *Criminal Procedure Act 1986* to extend to a witness in sexual offence proceedings the same protections as those afforded to a complainant in the proceedings, in cases where it is alleged that the accused person has committed a sexual offence against the witness that is not the subject of the proceedings concerned,

- (d) to make consequential and related amendments to the above Acts and other legislation.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act.

Schedule 1 Amendment of Crimes Act 1900 No 40

Schedule 1 [6] and [9] replace provisions of the *Crimes Act 1900* relating to child pornography. The new provisions are generally consistent with the approach to child pornography taken in the *Criminal Code Act 1995* of the Commonwealth.

At present, **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:

- (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).

It is an offence to produce, disseminate or possess child pornography.

The new provisions expressly 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:

- (a) a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse, or
- (b) 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), or
- (c) 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
- (d) 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.

The new provisions contain the following defences, which are similar to the defences available under Commonwealth law:

- (a) 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),
- (b) a defence that the defendant was a law enforcement officer acting in the course of his or her duties,
- (c) 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 the material that has been classified (other than as refused classification) under Commonwealth classification law is also retained.

Schedule 1 [1]–[4], [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 pornographic 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 a new provision which 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. **Schedule 1 [5]** is a consequential amendment.

Schedule 2 Amendment of Criminal Procedure Act 1986 No 209

Use of random sample evidence

Schedule 2 [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 an opportunity to view all of the material concerned.

Schedule 2 [10] includes a transitional provision that extends the new arrangements to proceedings that have already been commenced.

Extension of protections afforded to complainants in sexual offence cases

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 not permitted to personally examine or cross-examine the complainant.

Schedule 2 [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 that 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 not be publicly disclosed. Such an order will invoke provisions of the *Crimes Act 1900* which make it an offence to publish any matter which identifies the complainant in sexual offence proceedings.

Schedule 2 [4] and [5] are consequential amendments, which ensure that the definition of *sexual offence witness* is consistent with the definition of *complainant*.

Schedule 2 [10] includes a transitional provision that extends the new arrangements to proceedings that have already been commenced.

Other amendments

Schedule 2 [1], [2], [7] and [8] make amendments that are consequential on the amendments relating to child abuse material set out in Schedule 1.

Schedule 2 [9] enables savings and transitional regulations to be made as a consequence of the amendments.

Schedule 3 Amendment of other legislation

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*.

First print



New South Wales

Crimes Amendment (Child Pornography and Abuse Material) Bill 2010

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New South Wales

Crimes Amendment (Child Pornography and Abuse Material) Bill 2010

No. , 2010

A Bill for

An Act to amend the *Crimes Act 1900* and other legislation to make further provision with respect to the possession, production and dissemination of child pornography and abuse material.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Crimes Amendment (Child Pornography and Abuse Material) Act 2010</i> .	3 4
2 Commencement	5
(1) This Act commences on a day or days to be appointed by proclamation, except as provided by subsection (2).	6 7
(2) Schedule 2 [4]–[6] and [10] commence on the date of assent.	8

Schedule 1	Amendment of Crimes Act 1900 No 40	1
[1]	Section 61O Aggravated act of indecency	2
	Omit “pornography” from section 61O (2A) (b) and (4) (a) wherever occurring.	3
	Insert instead “abuse material”.	4
		5
[2]	Section 61Q Alternative verdicts	6
	Omit “pornography” from the heading to section 61Q (6).	7
	Insert instead “abuse material”.	8
[3]	Part 3, Division 15A, heading	9
	Omit the heading. Insert instead:	10
	Division 15A Child abuse material	11
[4]	Section 91FA Definitions	12
	Insert in alphabetical order:	13
	<i>child abuse material</i> —see section 91FB.	14
	<i>data</i> includes:	15
	(a) information in any form, or	16
	(b) any program (or part of a program).	17
[5]	Section 91FA, definition of “material”	18
	Omit “electronic”.	19
[6]	Section 91FB	20
	Insert after section 91FA:	21
	91FB Child abuse material—meaning	22
	(1) In this Division:	23
	<i>child abuse material</i> means material that depicts or describes, in a way that reasonable persons would regard as being, in all the circumstances, offensive:	24
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	(a) a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse, or	27
		28
	(b) 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), or	29
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(c)	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	1 2 3
(d)	the private parts of a person who is, appears to be or is implied to be, a child.	4 5
(2)	The matters to be taken into account in deciding whether reasonable persons would regard particular material as being, in all the circumstances, offensive, include:	6 7 8
(a)	the standards of morality, decency and propriety generally accepted by reasonable adults, and	9 10
(b)	the literary, artistic or educational merit (if any) of the material, and	11 12
(c)	the journalistic merit (if any) of the material, being the merit of the material as a record or report of a matter of public interest, and	13 14 15
(d)	the general character of the material (including whether it is of a medical, legal or scientific character).	16 17
(3)	Material that depicts a person or the private parts of a person includes material that depicts a representation of a person or the private parts of a person (including material that has been altered or manipulated to make a person appear to be a child or to otherwise create a depiction referred to in subsection (1)).	18 19 20 21 22
(4)	The <i>private parts</i> of a person are:	23
(a)	a person’s genital area or anal area, or	24
(b)	the breasts of a female person.	25
[7]	Section 91G Children not to be used for production of child abuse material	26 27
	Omit “for pornographic purposes” from section 91G (1) (a) and (2) (a) wherever occurring.	28 29
	Insert instead “for the production of child abuse material”.	30
[8]	Section 91G (3)	31
	Omit the subsection.	32

[9] Sections 91H and 91HA	1
Omit section 91H. Insert instead:	2
91H Production, dissemination or possession of child abuse material	3
(1) In this section:	4
<i>disseminate</i> child abuse material, includes:	5
(a) send, supply, exhibit, transmit or communicate it to another person, or	6
(b) make it available for access by another person, or	8
(c) enter into any agreement or arrangement to do so.	9
<i>possess</i> child abuse material includes, in relation to material in the form of data, being in possession or control of data (within the meaning of section 308F (2)).	10
<i>produce</i> child abuse material includes:	13
(a) film, photograph, print or otherwise make child abuse material, or	14
(b) alter or manipulate any image for the purpose of making child abuse material, or	16
(c) enter into any agreement or arrangement to do so.	18
(2) A person who produces, disseminates or possesses child abuse material is guilty of an offence.	19
Maximum penalty: imprisonment for 10 years.	21
91HA Defences	22
(1) Innocent production, dissemination or possession	23
It is a defence in proceedings for an offence against section 91H 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 abuse material.	24
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(2) It is a defence in proceedings for an offence against section 91H not involving the production or dissemination of child abuse material that the material concerned came into the defendant's possession unsolicited and the defendant, as soon as he or she became aware of its nature, took reasonable steps to get rid of it.	28
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(3) Public benefit	1
It is a defence in proceedings for an offence against section 91H that the conduct engaged in by the defendant:	2 3
(a) was of public benefit, and	4
(b) did not extend beyond what was of public benefit.	5
(4) Conduct is of public benefit if, and only if, the conduct is necessary for or of assistance in:	6 7
(a) enforcing or administering a law of the State, or of another State, a Territory or the Commonwealth, or	8 9
(b) monitoring compliance with, or investigating a contravention of, a law of the State, or of another State, a Territory or the Commonwealth, or	10 11 12
(c) the administration of justice.	13
(5) The question of whether a person's conduct is of public benefit is a question of fact and the person's motives for engaging in the conduct are irrelevant.	14 15 16
(6) Law enforcement officers	17
It is a defence in proceedings for an offence against section 91H that:	18 19
(a) the defendant was, at the time of the offence, a law enforcement officer acting in the course of his or her duties, and	20 21 22
(b) the conduct of the defendant was reasonable in the circumstances for the purpose of performing that duty.	23 24
(7) Classified material	25
It is a defence in proceedings for an offence against section 91H that the material concerned was classified (whether before or after the commission of the alleged offence) under the <i>Classification (Publications, Films and Computer Games) Act 1995</i> of the Commonwealth, other than as refused classification (RC).	26 27 28 29 30 31

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- (8) **Approved research** 1
- It is a defence in proceedings for an offence against section 91G 2
or 91H that the conduct engaged in by the defendant: 3
- (a) was necessary for or of assistance in conducting scientific, 4
medical or educational research that has been approved by 5
the Attorney General in writing for the purposes of this 6
section, and 7
- (b) did not contravene any conditions of that approval. 8

Schedule 2	Amendment of Criminal Procedure Act	1
	1986 No 209	2
[1]	Section 91 Witness may be directed to attend	3
	Omit “pornographic purposes” from paragraph (c) of the definition of <i>complainant</i> in section 91 (9).	4
	Insert instead “the production of child abuse material”.	5
[2]	Section 281B Sensitive evidence—meaning	6
	Insert “or child abuse material (within the meaning of Division 15A of Part 3 of the <i>Crimes Act 1900</i>)” after “child pornography” in section 281B (2) (c).	7
[3]	Chapter 6, Part 4A	8
	Insert after Part 4:	9
	Part 4A Use of random sample evidence	10
289A	Definitions	11
	In this Part:	12
	<i>authorised analyst</i> means any person, or person of a class, authorised by the Attorney General or the Director of Public Prosecutions to exercise the functions of an authorised analyst under this Part.	13
	<i>child abuse material</i> and <i>material</i> have the same meanings as they have in Division 15A of Part 3 of the <i>Crimes Act 1900</i> .	14
	<i>child abuse material offence</i> means an offence under Division 15A of Part 3 of the <i>Crimes Act 1900</i> .	15
289B	Use of random sample evidence in child abuse material cases	16
(1)	An authorised analyst may, in connection with any proceedings for a child abuse material offence, conduct an examination of a random sample of the child abuse material or alleged child abuse material that is the subject of the proceedings concerned.	17
(2)	In proceedings for the child abuse material offence concerned, evidence adduced by the prosecutor of any 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.	18

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- (3) Accordingly, it is open to a court to find that any type of child abuse material found by an authorised analyst to be present in a particular proportion in the random sample is present in the same proportion in the material from which the random sample was taken. 1
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- (4) A certificate of an authorised analyst, that certifies any of the following matters, is admissible in proceedings for a child abuse material offence as evidence of the matters certified: 6
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- (a) that the authorised analyst conducted an examination of a random sample of the material the subject of the proceedings, 9
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- (b) that the random sample was taken, and the examination conducted, in accordance with any requirements of the regulations, 12
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- (c) the findings of the authorised analyst as to the nature and content of the random sample. 15
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- (5) A certificate signed by a person purporting to be an authorised analyst is taken to be a certificate of an authorised analyst, in the absence of evidence to the contrary. 17
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- (6) Evidence is admissible under this section only if the court is satisfied that the accused person, or an Australian legal practitioner representing the accused person, has been given a reasonable opportunity to view all of the child abuse material or alleged child abuse material the subject of the proceedings concerned. 20
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- (7) This section does not affect the provisions of Part 2A, which restrict the access of an accused person to sensitive evidence. 26
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- (8) The regulations may make further provision for or with respect to the taking and admissibility of random sample evidence under this section, including by providing for: 28
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- (a) the circumstances or types of cases in which the prosecutor may adduce evidence of the findings of an authorised analyst under this section, and 31
32
33
- (b) the procedure for taking and examining random samples of material, and 34
35
- (c) any further requirements as to the content and service of a certificate of an authorised analyst. 36
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[4] Section 290A Definitions	1
Omit the definition of <i>complainant</i> . Insert instead:	2
<i>complainant</i> , in relation to any proceedings, means the person, or	3
any of the persons, against whom a prescribed sexual offence	4
with which the accused person stands charged is alleged to have	5
been committed.	6
[5] Section 290A (2)	7
Insert at the end of the section:	8
(2) In this Division, a reference to a person against whom a	9
prescribed sexual offence is alleged to have been committed	10
includes:	11
(a) in relation to an offence under section 80E of the <i>Crimes</i>	12
<i>Act 1900</i> , a reference to the person who is alleged to have	13
been the subject of sexual servitude, and	14
(b) in relation to an offence under section 91D, 91E or 91F of	15
the <i>Crimes Act 1900</i> , a reference to the person under the	16
age of 18 years who is alleged to have participated in an act	17
of child prostitution, and	18
(c) in relation to an offence under section 91G of the <i>Crimes</i>	19
<i>Act 1900</i> , a reference to the person under the age of	20
18 years who is alleged to have been used for the	21
production of child abuse material.	22
[6] Section 294D	23
Insert after section 294C:	24
294D Protections afforded to complainants extend to witnesses against	25
whom accused person is alleged to have committed sexual	26
offence	27
(1) In proceedings in respect of a prescribed sexual offence, this	28
Division applies to a sexual offence witness in the proceedings in	29
the same way as it applies to a complainant in the proceedings.	30
(2) A <i>sexual offence witness</i> is any witness in the proceedings	31
against whom a prescribed sexual offence is alleged to have been	32
committed by the accused person, being a prescribed sexual	33
offence that is not the subject of the proceedings concerned.	34
(3) Accordingly, a reference in this Division to a complainant	35
includes a reference to a sexual offence witness.	36

(4)	In addition, the court may make an order directing that the identity of a sexual offence witness is not to be publicly disclosed.	1 2 3
(5)	If the court makes such an order, the sexual offence witness is taken to be a complainant for the purposes of section 578A of the <i>Crimes Act 1900</i> and that section applies accordingly. Note. Section 578A of the <i>Crimes Act 1900</i> prohibits the publication of any matter which identifies the complainant in prescribed sexual offence proceedings or any matter which is likely to lead to the identification of the complainant.	4 5 6 7 8 9 10
(6)	A witness is to be treated as a sexual offence witness, even if the witness has not yet given evidence in the proceedings, if the court is satisfied that the prosecutor has given notice to the accused person that the prosecutor intends to adduce evidence that the accused person committed a prescribed sexual offence against the witness.	11 12 13 14 15 16
[7]	Section 306A Definitions Omit “pornographic purposes” from paragraph (c) of the definition of <i>complainant</i> . Insert instead “the production of child abuse material”.	17 18 19 20
[8]	Section 348 Offences in respect of which an intervention program may be conducted Omit “dissemination or possession of child pornography” from section 348 (2) (d). Insert instead “dissemination or possession of child pornography or child abuse material”.	21 22 23 24 25 26
[9]	Schedule 2 Savings, transitional and other provisions Insert at the end of clause 1 (1): <i>Crimes Amendment (Child Pornography and Abuse Material) Act 2010</i>	27 28 29 30

[10] Schedule 2	1
Insert at the end of the Schedule with appropriate Part and clause numbering:	2
Part Provisions consequent on enactment of Crimes Amendment (Child Pornography and Abuse Material) Act 2010	3 4 5
Use of random sample evidence	6
(1) Part 4A of Chapter 6, as inserted by the <i>Crimes Amendment (Child Pornography and Abuse Material) Act 2010</i> , extends to proceedings instituted or partly heard before the commencement of that Part, which were not finally disposed of before that commencement.	7 8 9 10 11
(2) Accordingly, that Part extends to offences under Division 15A of Part 3 of the <i>Crimes Act 1900</i> alleged to have been committed before the commencement of Part 4A of Chapter 6.	12 13 14
References to child abuse material	15
A reference in this Act to child abuse material includes a reference to child pornography within the meaning of section 91H of the <i>Crimes Act 1900</i> (as in force before that section was replaced by the <i>Crimes Amendment (Child Pornography and Abuse Material) Act 2010</i>).	16 17 18 19 20
Extension of protections afforded to complainants to other witnesses	21 22
(1) Section 294D, as inserted by the <i>Crimes Amendment (Child Pornography and Abuse Material) Act 2010</i> , extends to proceedings instituted or partly heard before the commencement of that section, which were not finally disposed of before that commencement.	23 24 25 26 27
(2) However, section 294D does not affect the admissibility of any evidence given in proceedings before the commencement of that section or otherwise affect the validity of anything done, or omitted to be done, before that commencement.	28 29 30 31

Schedule 3	Amendment of other legislation	1
3.1	Children and Young Persons (Care and Protection) Act 1998 No 157	2 3
[1]	Section 43 Removal of children and young persons without warrant	4
	Omit “pornographic purposes” from section 43 (3) (b) (i) and (ii) wherever occurring.	5 6
	Insert instead “the production of child abuse material”.	7
[2]	Section 43 (7), definition of “pornographic purposes”	8
	Omit the definition. Insert in alphabetical order:	9
	<i>child abuse material</i> has the same meaning as it has in Division 15A of Part 3 of the <i>Crimes Act 1900</i> .	10 11
3.2	Commission for Children and Young People Act 1998 No 146	12
[1]	Section 33 Definitions	13
	Insert after paragraph (a) of the definition of <i>reportable conduct</i> in section 33 (1):	14 15
	(aa1) any offence or misconduct involving child abuse material (within the meaning of Division 15A of Part 3 of the <i>Crimes Act 1900</i>), or	16 17 18
[2]	Section 33G Persons not entitled to make review applications	19
	Omit section 33G (1) (c). Insert instead:	20
	(c) an offence under section 91H (2) of the <i>Crimes Act 1900</i> , involving the production of child abuse material, or a similar offence under that Act or a law other than a law of New South Wales,	21 22 23 24
3.3	Law Enforcement (Powers and Responsibilities) Act 2002 No 103	25 26
[1]	Section 46A Searchable offences	27
	Omit section 46A (1) (a) (iv). Insert instead:	28
	(iv) a child abuse material offence,	29

[2] Section 46A (2)	1
Omit the definition of <i>child pornography offence</i> . Insert instead:	2
<i>child abuse material offence</i> means an offence under	3
section 91H or 578C of the <i>Crimes Act 1900</i> .	4
3.4 Ombudsman Act 1974 No 68	5
Section 25A Definitions	6
Insert “or an offence involving child abuse material (within the meaning of	7
Division 15A of Part 3 of the <i>Crimes Act 1900</i>)” after “child pornography	8
offence” in paragraph (a) of the definition of <i>reportable conduct</i> in	9
section 25A (1).	10
3.5 Parliamentary Electorates and Elections Act 1912 No 41	11
Section 81K Definitions	12
Insert “or an offence involving child abuse material (within the meaning of	13
Division 15A of Part 3 of the <i>Crimes Act 1900</i>)” after “child pornography	14
offence” wherever occurring in paragraphs (a) and (b) of the definition of	15
<i>child sexual offence</i> in section 81K (1).	16
3.6 Parliamentary Electorates and Elections Regulation 2008	17
[1] Schedule 1 Forms	18
Insert “or offences involving child abuse material (within the meaning of	19
Division 15A of Part 3 of the <i>Crimes Act 1900</i>)” after “child pornography	20
offences” in Form 6.	21
[2] Schedule 1, Form 6	22
Insert “or an offence involving child abuse material (within the meaning of	23
Division 15A of Part 3 of the <i>Crimes Act 1900</i>)” after “child pornography	24
offence” wherever occurring.	25

3.7 Victims Support and Rehabilitation Act 1996 No 115	1
Dictionary	2
Omit “pornographic purposes” from paragraph (e) of the definition of <i>sexual assault and domestic violence</i> .	3
Insert instead “the production of child abuse material”.	4
	5