



New South Wales

Crimes Amendment (Child Pornography) Bill 2004

Explanatory note

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

Overview of Bill

The object of this Bill is to amend the *Crimes Act 1900* in relation to child pornography offences.

The Bill:

- (a) increases the maximum penalty for the production or dissemination of child pornography to imprisonment for 10 years, and
- (b) makes the possession of child pornography an indictable offence and increases the maximum penalty for the offence to imprisonment for 5 years, and
- (c) increases the maximum penalty for using a child for pornographic purposes to imprisonment for 14 years (in the case of a child under 14 years) and for 10 years (in any other case), and
- (d) revises the definition of *child pornography* for the purposes of offences relating to the production, dissemination or possession of child pornography so as to remove the requirement that the material be classified as refused classification (RC), and

- (e) extends the offences relating to child pornography and use of children for pornographic purposes to cases of torture, cruelty or physical abuse (whether or not in a sexual context).

The Bill also removes any doubt as to the timing of the classification of material in connection with existing offences relating to child pornography.

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.

Clause 3 is a formal provision that gives effect to the amendments to the *Crimes Act 1900* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the Acts set out in Schedule 2.

Schedule 1 Amendment of Crimes Act 1900

Child pornography—Transfer of provisions

Existing offences relating to the production, dissemination or possession of child pornography are currently located in Part 16 (containing summary offences and other miscellaneous enactments). These offences are transferred by the Bill to Division 15 of Part 3 (containing indictable child prostitution and pornography offences).

Schedule 1 [5] omits section 578B, the existing offence relating to possession of child pornography. **Schedule 1 [8]** omits such parts of section 578C that relate to publishing child pornography. These provisions are re-enacted by **Schedule 1 [4]** as proposed section 91H.

Schedule 1 [1], [2], [6], [7], [9] and [10] make consequential amendments.

Child pornography—Definition of child pornography

Proposed section 91H (1) redefines *child pornography* as 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).

The proposed definition does not include a requirement that the material be classified RC, under the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth, or be material that would, if classified, be classified RC. However, classification (other than RC) will be a defence to any prosecution.

Child pornography—Increase in maximum penalty

Proposed section 91H (2) provides that a person who produces or disseminates child pornography is guilty of an offence. The maximum penalty of imprisonment for 10 years provided for the proposed offence is greater than the maximum penalty currently provided for an offence under section 578C (2A) (\$110,000 or imprisonment for 5 years (or both), or in the case of a corporation—\$220,000).

Proposed section 91H (3) provides that a person who has child pornography in his or her possession is guilty of an offence. The maximum penalty of imprisonment for 5 years provided for the proposed offence is greater than the maximum penalty currently provided for an offence under section 578B (\$11,000 or imprisonment for 2 years (or both)).

Child pornography—Defences

Proposed section 91H (4) provides for certain defences to charges for the offences of production, dissemination or possession of child pornography.

It is a defence to any such charge:

- (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.

Proposed section 91H (5) provides for it to be a defence to a charge for an offence of possession of child pornography 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.

Children not to be used for pornographic purposes

Section 91G prohibits the use of children for pornographic purposes. **Schedule 1 [3]** repeals and re-enacts section 91G to provide for an offence in respect of a child who

is under the age of 14 years (proposed section 91G (1)), and an offence in respect of a child who is of or above the age of 14 years (proposed section 91G (2)).

The maximum penalty of imprisonment for 14 years provided for an offence under proposed section 91G (1) is greater than the maximum penalty currently provided for an offence under existing section 91G (1) where the child is under the age of 14 years (imprisonment for 7 years).

The maximum penalty of imprisonment for 10 years provided for an offence under proposed section 91G (2) is greater than the maximum penalty currently provided for an offence under existing section 91G (1) where the child is not under the age of 14 years (imprisonment for 5 years).

In line with the new definition of child pornography to be used in relation to the production, dissemination or possession of child pornography, and, in particular, in line with the inclusion of material regarding torture, cruelty or physical abuse (whether or not in a sexual context), the proposed section also provides that 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.

Classification of films, publications or computer games

Schedule 1 [11] inserts a proposed Part in the Eleventh Schedule to provide that, to avoid doubt, existing section 578B (4) (b) (relating to classification of material in connection with a prosecution) 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.

Schedule 2 Amendment of other Acts

Schedule 2.4 [2] amends the *Criminal Procedure Act 1986* to provide that the new child pornography offences (proposed section 91H (2) and (3)) are indictable offences that are to be dealt with summarily unless the prosecutor or the accused elects otherwise.

Schedule 2.3 [2] makes an amendment to section 58 of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* to make it clear that the evidentiary provision in that section extends to a certificate (whether given

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before or after the commencement of the amendment) that states a matter at the time the certificate is given, or at any other earlier specified time, or in respect of any specified period before the certificate is given. **Schedule 2.3 [1]** makes an amendment that applies that section to offences under the *Crimes Act 1900*.

The remaining amendments in Schedule 2 are consequential on the repeal of section 578B and its re-enactment as proposed section 91H.

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No. , 2004

A Bill for

An Act to amend the *Crimes Act 1900* in connection with offences relating to child pornography and use of children for pornographic purposes.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Crimes Amendment (Child Pornography) Act 2004</i> .	3
2 Commencement	4
(1) This Act commences on a day or days to be appointed by proclamation, except as provided by subsection (2).	5 6
(2) Schedule 1 [11] and Schedule 2.3 [1] and [2] commence on the date of assent to this Act.	7 8
3 Amendment of Crimes Act 1900 No 40	9
The <i>Crimes Act 1900</i> is amended as set out in Schedule 1.	10
4 Amendment of other Acts	11
The Acts specified in Schedule 2 are amended as set out in that Schedule.	12 13

Schedule 1	Amendment of Crimes Act 1900	1
	(Section 3)	2
[1] Section 91C Definitions		3
	Omit “For the purposes of sections 91C–91G”.	4
	Insert instead “For the purposes of this Division”.	5
[2] Section 91C		6
	Insert in alphabetical order:	7
	<i>material</i> includes any film, printed matter, electronic data or any other thing of any kind (including any computer image or other depiction).	8 9 10
[3] Section 91G		11
	Omit the section. Insert instead:	12
91G Children not to be used for pornographic purposes		13
(1) Any person who:		14
(a) uses a child who is under the age of 14 years for pornographic purposes, or		15 16
(b) causes or procures a child of that age to be so used, or		17
(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,		18 19
is guilty of an offence.		20
Maximum penalty: imprisonment for 14 years.		21
(2) Any person who:		22
(a) uses a child who is of or above the age of 14 years for pornographic purposes, or		23 24
(b) causes or procures a child of that age to be so used, or		25
(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,		26 27
is guilty of an offence.		28
Maximum penalty: imprisonment for 10 years.		29
(3) For the purposes of this section, a child is used by a person for pornographic purposes if:		30 31
(a) the child is engaged in sexual activity, or		32
(b) the child is placed in a sexual context, or		33

(c)	the child is subjected to torture, cruelty or physical abuse (whether or not in a sexual context),	1
	for the purposes of the production of pornographic material by that person.	2
(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.	3
		4
(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.	5
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		11
		12
		13
[4]	Section 91H	14
	Insert after section 91G:	15
91H	Production, dissemination or possession of child pornography	16
(1)	Definitions	17
	In this section:	18
	<i>child pornography</i> 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:	19
		20
		21
		22
(a)	engaged in sexual activity, or	23
(b)	in a sexual context, or	24
(c)	as the victim of torture, cruelty or physical abuse (whether or not in a sexual context).	25
		26
	<i>disseminate</i> child pornography, includes:	27
(a)	send, supply, exhibit, transmit or communicate it to another person, or	28
		29
(b)	make it available for access by another person, or	30
(c)	enter into any agreement or arrangement to do so.	31
(2)	Production or dissemination of child pornography	32
	A person who produces or disseminates child pornography is guilty of an offence.	33
		34
	Maximum penalty: imprisonment for 10 years.	35

(3) Possession of child pornography	1
A person who has child pornography in his or her possession is guilty of an offence.	2 3
Maximum penalty: imprisonment for 5 years.	4
(4) Defences	5
It is a defence to any charge for an offence under subsection (2) or (3):	6 7
(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	8 9 10 11
(b) 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), or	12 13 14 15 16
(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	17 18 19 20 21 22
(d) that the defendant was a law enforcement officer acting in the course of his or her official duties, or	23 24
(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 <i>Classification (Publications, Films and Computer Games) Act 1995</i> of the Commonwealth.	25 26 27 28 29
(5) Defence to possession of child pornography	30
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.	31 32 33 34
[5] Section 578B Possession of child pornography	35
Omit the section.	36
[6] Section 578C Publishing indecent articles	37
Omit the definition of <i>child pornography</i> from section 578C (1).	38

[7] Section 578C (2)	1
Omit “(other than an indecent article that is child pornography)”.	2
[8] Section 578C (2A), (2B), (2C) and (5A)	3
Omit the subsections.	4
[9] Section 578C (3A)	5
Insert after section 578C (3):	6
(3A) A person cannot be convicted of an offence against this section and section 91H in respect of the same matter.	7 8
[10] Section 578D Police may enter and search premises for indecent articles	9
Omit “578B or” wherever occurring.	10
[11] Eleventh Schedule Savings and transitional provisions	11
Insert at the end of the Schedule with appropriate Part and clause numbers:	12
Part Crimes Amendment (Child Pornography) Act 2004	13 14
Classification of films, publications or computer games	15
(1) In this clause, the <i>amending Act</i> means the <i>Crimes Amendment (Child Pornography) Act 2004</i> .	16 17
(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:	18 19 20
(a) a court attendance notice or other process being issued, or	21
(b) a court attendance notice or other process being served, or	22
(c) a person pleading guilty or a plea of guilty being accepted, or	23 24
(d) sentence being passed for the offence on an offender who has pleaded guilty to the offence,	25 26
without the film, publication or computer game concerned	27
having been classified under the <i>Classification (Publications, Films and Computer Games) Act 1995</i> of the Commonwealth.	28 29
(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.	30 31 32

Schedule 2	Amendment of other Acts	1
	(Section 4)	2
2.1	Child Protection (Offenders Registration) Act 2000 No 42	3
	Section 3 Definitions	4
	Insert “91H,” after “section” wherever occurring in paragraph (d) of the definition of <i>Class 2 offence</i> and paragraph (d) (ii) of the definition of <i>registrable person</i> in section 3 (1).	5 6 7
2.2	Child Protection (Prohibited Employment) Act 1998 No 147	8
	Section 5 Prohibited persons	9
	Insert “91H,” after “section” in paragraph (d) of the definition of <i>serious sex offence</i> in section 5 (3).	10 11
2.3	Classification (Publications, Films and Computer Games) Enforcement Act 1995 No 63	12 13
[1]	Section 58 Evidence	14
	Insert “or the <i>Crimes Act 1900</i> ” after “this Act”.	15
[2]	Section 58 (2)	16
	Insert at the end of section 58:	17
	(2) Subsection (1) extends to a certificate (whether given before or after the commencement of this subsection) that states a matter:	18 19
	(a) at the time the certificate is given, or at any other earlier specified time, or	20 21
	(b) in respect of any specified period before the certificate is given.	22 23
[3]	Section 61 Forfeiture of films, publications and computer games on conviction	24 25
	Insert “or section 91H of the <i>Crimes Act 1900</i> ” after “this Act”.	26
2.4	Criminal Procedure Act 1986 No 209	27
[1]	Section 348 Offences in respect of which an intervention program may be conducted	28 29
	Insert “91H (Production, dissemination or possession of child pornography),” after “section” in section 348 (2) (d).	30 31

[2] Schedule 1 Indictable offences triable summarily	1
Insert “, 91H” after “91B” in clause 2.	2
2.5 Law Enforcement (Powers and Responsibilities) Act 2002 No 103	3 4
Section 47 Power to apply for warrant for particular offences	5
Insert “91H,” after “section” in the definition of <i>child pornography offence</i> in section 47 (4).	6 7
2.6 Summary Offences Act 1988 No 25	8
Section 11G Loitering by convicted child sexual offenders near premises frequented by children	9 10
Insert “91H,” after “section” in paragraph (c) of the definition of <i>convicted child sexual offender</i> in section 11G (2).	11 12