THIRTY-EIGHTH PARLIAMENT

REPORT 41

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

CHILD EXPLOITATION MATERIAL AND CLASSIFICATION LEGISLATION AMENDMENT BILL 2009 (REPORT 2)

Presented by Hon Adele Farina MLC (Chairman)

October 2009

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

"**8. Uniform Legislation and Statutes Review Committee**

8.1 A *Uniform Legislation and Statutes Review Committee* is established.

8.2 The Committee consists of 4 Members.

8.3 The functions of the Committee are -

(a) to consider and report on Bills referred under SO 230A;

(b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;

(c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;

(d) to review the form and content of the statute book;

(e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and

(f) to consider and report on any matter referred by the House or under SO 125A.

8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting."

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)

Hon Nigel Hallett MLC (Deputy Chairman)

Hon Liz Behjat MLC

Hon Helen Bullock MLC

Staff as at the time of this inquiry:

Suzanne Veletta, Advisory Officer (General)

Cassandra Stephenson, Committee Clerk

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222
unileg@parliament.wa.gov.au
Website: http://www.parliament.wa.gov.au

ISBN 978-1-921634-12-3

Government Response

This Report is subject to Standing Order 337:

> *After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.*

The four-month period commences on the date of tabling.

CONTENTS

EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

CHILD EXPLOITATION MATERIAL AND CLASSIFICATION LEGISLATION AMENDMENT BILL 2009

EXECUTIVE SUMMARY

1 This report informs of matters arising out of the Uniform Legislation and Statutes Review Committee's consideration of the Child Exploitation Material and Classification Legislation Amendment Bill 2009 during the Committee's two inquiries into the Bill.

FINDINGS AND RECOMMENDATIONS

2 Findings and Recommendations are grouped as they appear in the text at the page number indicated:

Page 16

Finding 1: The Committee finds that terms in the definition of "child exploitation material" in the Child Exploitation Material and Classification Legislation Amendment Bill 2009 do not require further prescription. In particular, the phrase "likely to offend a reasonable person" and the terms "offensive" and "demeaning" do not require further prescription.

Page 17

Finding 2: The Committee finds the expansive definition of "material" in the Child Exploitation Material and Classification Legislation Amendment Bill 2009 is a positive development in the law. "Material", as defined, covers modern forms of communication and is broad enough to cover offences that may be committed in the future using new technology and forms of communication.

Page 19

Recommendation 1: The Committee recommends that "concerned" be deleted and "involved" be inserted in proposed sections 217(1)(a) and 217(1)(b). This may be achieved in the following manner:

Page 4, line 4 — after "invites a child to be" delete "in any way concerned" and insert

in any way involved

Page 4, line 6 — after "causes a child to be" delete "in any way concerned" and insert

in any way involved

Page 21

Recommendation 2: The Committee recommends that the Minister review the offence penalties in section 321 of *The Criminal Code* to ensure consistency and parity in penalties.

Page 29

Recommendation 3: The Committee recommends that proposed section 218 be amended by inserting after "produces" ", or is in any way involved in or facilitates the production of,". This may be achieved in the following manner:

Page 4, line 16 — delete "A person who produces child exploitation material" and insert

A person who produces, or is in any way involved in or facilitates the production of, child exploitation material

Page 33

Recommendation 4: The Committee recommends that the Minister considers whether the Child Exploitation Material and Classification Legislation Amendment Bill 2009 should be further amended to include an aggravated possession of child exploitation material offence.

Page 35

Recommendation 5: The Committee recommends that proposed section 221A(1)(b) be amended to limit the defence to cases where an accused did not know the content of the material.

One option may be to delete "that the material to which the charge relates describes, depicts or represents a person or part of a person in a way likely to offend a reasonable person" and insert "that the material to which the charge relates was child exploitation material". This may be achieved in the following manner:

Page 5, line 22 — after "the accused person did not know, and could not reasonably be expected to have known," delete "that the material to which the charge relates describes, depicts or represents a person or part of a person in a way likely to offend a reasonable person; or" and insert

that the material to which the charge relates was child exploitation material; or

Page 43

Finding 3: The Committee finds that child protection officers do not require the same protection afforded to "law enforcement agencies" in proposed section 221A(3)(a).

Page 45

Recommendation 6: The Committee recommends that proposed section 221A be amended to clearly reflect the Government's intention in relation to whether section 24 of *The Criminal Code* applies to the proposed offences.

If the Government intended that an honest and reasonable, but mistaken, belief as to the age of a child should be a defence, then this should be clearly stated in proposed section 221A(1).

If the Government intended that an honest and reasonable, but mistaken, belief as to the age of a child should be excluded as a defence, then this should be clearly stated in proposed section 221A.

Page 57

Recommendation 7: The Committee recommends that a comma be inserted after the term "educational" in clause 24(2)(b). This may be achieved in the following manner:

Page 15, Line 20 — delete the word "educational" and insert

educational,

Finding 4: The Committee finds that the Child Exploitation Material and Classification Legislation Amendment Bill 2009 is substantially consistent with its supporting documentation.

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

CHILD EXPLOITATION MATERIAL AND CLASSIFICATION LEGISLATION AMENDMENT BILL 2009

1 INTRODUCTION

1.1 This is the second Uniform Legislation and Statutes Review Committee (**Committee**) report dealing with the Child Exploitation Material and Classification Legislation Amendment Bill 2009 (**Bill)**.

1.2 This report informs of pertinent matters arising out of the Committee's consideration of the Bill during the Committee's two inquiries into the Bill.

1.3 The intent of the Bill is to protect children and the community from the evils of child exploitation material by improving and strengthening legislation in this area.[1]

1.4 The Committee considered the legal and practical implications of the Bill, and if the Bill is consistent with the relevant Intergovernmental Agreement.

1.5 The challenge for the Government and this Committee is to ensure that robust legislation exists to protect children and deal with those who exploit children.

2 REFERRAL

2.1 On 6 May 2009, the Bill was automatically referred to the Committee after its Second Reading pursuant to Standing Order 230A. The Committee was required to report to the Legislative Council on its inquiry into the Bill not later than 3 June 2009 (**the first inquiry**).[2]

2.2 On 21 May 2009, the Committee reported on the Bill in *Report 36: Child Exploitation Material and Classification Legislation Amendment Bill 2009*[3] (**Report 36**) as required. Report 36 included seven recommendations seeking clarification from Hon Christian Porter MLA, Attorney General.

---

1 Hon Simon O'Brien MLC, Minister Representing the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 6 May 2009, p3396.

2 Legislative Council Standing Order 230A provides, inter alia, that the Committee shall present a final report not later than 30 days after the day a bill is referred under Standing Order 230A, or such other period as may be ordered by the House.

3 Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 36, *Child Exploitation Material and Classification Legislation Amendment Bill 2009*, 21 May 2009.

2.3 On 18 August 2009, the Bill was again referred to the Committee for its further consideration (**the inquiry**).[4] The Committee was initially required to report on the inquiry not later than 17 September 2009. This deadline was extended to 22 October 2009.[5]

3 INQUIRY PROCEDURE

3.1 In May 2009, during the first inquiry, the Committee requested and received written evidence from the Attorney General and the Department of the Attorney General (**the Department**).

3.2 In June 2009, the Attorney General provided a Government Response to the recommendations in Report 36 (**Government Response**).[6] A copy of the Government Response to Report 36 is attached at Appendix 1.[7]

3.3 On 22 August 2009, the Committee advertised the inquiry in *The West Australian.*

3.4 The Committee also wrote to stakeholders inviting them to make a submission. A list of the stakeholders is attached at Appendix 2.

3.5 The Committee received seven submissions. A list of submissions received is attached at Appendix 3.

3.6 On 9 September 2009, the Committee conducted a public hearing with the following witnesses from the Department:

- Mr Frank Morisey, Senior Policy Officer; and
- Mr James Thomson, Legal Officer.

3.7 On 9 September 2009, the Committee also conducted a public hearing with the following witness:

- Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police.

3.8 On 16 September 2009, the Committee conducted a public hearing with the following witnesses from the Office of the Director of Public Prosecutions (**Office of the DPP**):[8]

---

4 Hon Simon O'Brien MLC, Minister Representing the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 18 August 2009, p6003.

5 Hon Adele Farina MLC, Legislative Council, *Parliamentary Debates (Hansard),* 16 September 2009, p7072.

6 The Government Response to Report 36 was provided under cover of a letter from Hon Christian Porter MLA, Attorney General, dated 16 June 2009.

7 The Government Response to Report 36 at Appendix 1 notes the Committee's Report 36 recommendations.

- Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions (**the DPP**);
- Mr Lindsay Fox, State Prosecutor; and
- Ms Nuala Keating, Legal Policy Officer.

3.9 Witnesses also provided answers to questions on notice after the hearings.

3.10 The Committee thanks each witness for the assistance they provided during the course of both inquiries.

4 UNIFORM LEGISLATION

4.1 National legislative schemes implementing uniform legislation take a variety of forms. Nine different structures, each with a varying degree of emphasis on national consistency or uniformity of laws and adaptability, have been identified. The structures are summarised in Appendix 4. The Bill resembles Structure 1 "Complementary Commonwealth-State or Co-operative Legislation".

4.2 When scrutinising uniform legislation, the Committee considers various "*fundamental legislative scrutiny principles*". Although not formally adopted by the Legislative Council as part of the Committee's terms of reference, the Committee applies the principles as a convenient framework.[9] These principles are set out in Appendix 5.

5 BACKGROUND TO THE BILL

5.1 The Bill is a response to the development of nationally consistent child pornography laws by the Standing Committee of Attorneys General (**SCAG**).

5.2 In 2004, a nationwide police operation call Operation Auxin highlighted the cross border nature of child pornography offences and was an impetus for expediting reform of child pornography legislation throughout Australia. This resulted in the Model Criminal Code Officers Committee (**MCCOC**) report on Nationally Consistent Child Pornography Law dated December 2004 (**MCCOC Report**).

---

8 A copy of the transcripts of the hearings, papers tabled by witnesses during hearings and answers to questions on notice provided after hearings are available from Committee staff.

9 Further background on fundamental legislative principles can be found in a report by the predecessor Committee, the Standing Committee on Uniform Legislation and General Purposes. Refer to Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 23, *The Work of the Committee During the Second Session of the Thirty-Sixth Parliament - 13 August 2002 to 16 November 2004, November 2004,* pp4-9.

5.3 There is a need to update Western Australian laws to reflect advances in information technology, media and communication methods, and make these laws as consistent as possible with other States.[10]

5.4 An increasing number of these offences are committed using electronic technology, including the internet and phone services. Detective Inspector Seivwright informed the Committee:

> [People] *go onto websites and they download images and perhaps even pay for those images. There is also a significant amount of what we call peer-to-peer exchange of child exploitation material images going on. Basically what that involves is there are file-sharing websites and file-sharing programs that you may be aware of, things like LimeWire and GigaTribe and internet relay chat or IRC.*[11] *...*
>
> [We] *have in Western Australia and in Australia, and internationally, organised groups of paedophiles who exchange CEM*[12] *on a regular basis. Also, it is not internet-based, so it is a lot harder to detect. ... When you do not have to pay for the CEM, and it is not internet-based, that is where the paedophiles—who apart from their offending are often quite intelligent in computers and tech-savvy people—are getting their images from. They may have a contact list of 50 people, and they will get all the images from person number one and add them to their library, and then from person number two, and then they would exchange with that person as well. So a lot of child abuse images are being exchanged on line, every day, and this is quite a significant problem now in our community ... The emergence of technology crime is quite amazing.*[13]
>
> *We are following in the path of the US. We are a much smaller community and will not get there as fast, but we will get there. Within*

---

10 Hon Simon O'Brien MLC, Minister Representing the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 6 May 2009, pp3396-3399. Legislation in 2003 and 2006 amended and created relevant offence provisions including electronic communication offences. Since then, all jurisdictions except Western Australia have amended their child pornography/child exploitation material offences to make them as consistent as possible.

11 Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, *Transcript of Evidence*, 9 September 2009, p13. IRC, Internet Relay Chat, is a form of real-time internet text messaging (chat) or synchronous conferencing, which allows one on one communication as well as chat and data transfers.

12 CEM means child exploitation material.

13 Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, *Transcript of Evidence*, 9 September 2009, p13.

the next five or six years we will be in that space as well, because there will be so much material out there that we need to investigate.[14]

5.5 Technology gives perpetrators the capacity to store hundreds of thousands, or millions, of images. At present, the largest commonly available thumb drive (a 64 gigabyte thumb drive which costs $219) can contain 374,000 pictures. The largest commonly available hard drive (a two terabyte hard drive which costs $489) can contain about 12,600,000 typical internet images.[15] Detective Inspector Seivwright believes that the storage capacities are likely to grow exponentially, and there will be a likely growth in these crimes.

6 SUPPORTING DOCUMENTATION

6.1 In May 2009, the Department provided the following material in support of Part 2 of the Bill ("Child exploitation material offences"):

- SCAG Out of Session Paper dated November 2004.
- MCCOC Report dated December 2004.
- Letter from the Attorney General to the Secretary of the SCAG dated January 2005.
- SCAG Out of Session Paper dated March 2005.
- Council of Australian Governments (**COAG**) Communique dated June 2005.
- Excerpt of a COAG Agenda Paper dated June 2005.

6.2 The Department also provided, in relation to parts 3 and 4 of the Bill:

- a copy of an intergovernmental agreement relating to the National Cooperative Classification Scheme signed 28 November 1995 (**NCCS Intergovernmental Agreement**); and
- SCAG (Censorship) Summary of Meeting dated April 2007.

6.3 Department officers also provided additional information in support of the Bill at, and after, their hearing on 9 September 2009.

---

14 Ibid, p11.

15 Document tabled by Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, during hearing on 9 September 2009.

Supporting documentation for Part 2 of the Bill

MCCOC Report

6.4 A copy of the MCCOC Report's 20 recommendations is attached at Appendix 6.

6.5 The MCCOC Report recognised that:

> *the legislative provisions dealing with child pornography have to operate within the context of each jurisdiction's general criminal law, including, in the case of the Code States, how issues of fault are generally dealt with. This means that absolute uniformity will be difficult to achieve. However it is still possible to strive towards as much consistency as possible. The report focuses on achieving greater consistency.*[16]

6.6 The Explanatory Memorandum to the Bill notes that as a result of the consultative work between SCAG and the Australasian Police Ministers' Council "*in December 2004, a subcommittee of SCAG produced the Model Criminal Code Officers Committee Report. This Bill will implement recommendations of this report*".[17]

6.7 However, as the Committee noted in Recommendation 1 of Report 36,[18] the Bill does not implement many of the MCCOC Report's 20 recommendations. The Committee inquired into each MCCOC Report recommendation not implemented in the Bill. This evidence is reported at paragraphs 14.3 to 14.6 of this report.

Supporting documentation for Parts 3 and 4 of the Bill

The NCCS Intergovernmental Agreement

6.8 The NCCS Intergovernmental Agreement signed on 28 November 1995 is the principal item of supporting documentation for Parts 3 and 4 of the Bill.

6.9 Recital A of the Agreement indicates that Western Australia and Tasmania did not participate in the cooperative scheme with respect to publications. At Recommendation 3 of Report 36, the Committee asked the Minister to explain why publications were excluded from the National Cooperative Classification Scheme (**NCCS**) in 1995 and if this continues to be the case.[19]

---

16 MCCOC Report, p3.

17 Explanatory Memorandum to the Child Exploitation Material and Classification Legislation Amendment Bill 2009, p2.

18 Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 36, *Child Exploitation Material and Classification Legislation Amendment Bill 2009,* 21 May 2009, p5.

19 Ibid, p6.

6.10 The Government Response advised that in 1995 the Minister maintained Western Australia's classification regime but on 1 July 2003 Western Australia became a full member of the NCCS as a result of the 2003 amendments to the *Classification (Publications, Film and Computer Games) Enforcement Act 1996* (**Enforcement Act**). Therefore, Western Australia no longer classifies publications.[20] With the commencement of the Bill, Western Australia will continue to be an effective participant in the NCCS.

SCAG (Censorship) Summary of Meeting dated April 2007

6.11 The SCAG (Censorship) Summary of Meeting dated April 2007 supports Part 4 of the Bill.

6.12 The Commonwealth developed amendments whereby unclassified films and computer games can be advertised before classification. The impetus for reform was industry concern that the advertising framework for unclassified material was cumbersome and outdated.

7 OVERVIEW OF THE BILL

7.1 The Bill has 35 clauses in four Parts.

Part 2

7.2 Part 2 of the Bill inserts "*Chapter XXIV - Child exploitation material*" into *The Criminal Code*, which includes four child exploitation material offences.

7.3 The Bill provides that what is currently known as "*child pornography*" will be known as "*child exploitation material*". "*Child exploitation material*" is more broadly defined than the current "*child pornography*", and the proposed offences are more expansive than the offences presently in the Enforcement Act.

7.4 To reflect the seriousness of these offences, the Bill inserts the new child exploitation material offences into *The Criminal Code*.[21] The Bill deletes the child pornography offences in the Enforcement Act. A copy of the deleted offences is attached at Appendix 7.

7.5 The Bill proposes higher maximum penalties for offences. For example, the current section 60(3) Enforcement Act offence of displaying, distributing or demonstrating child pornography carries a maximum penalty of 5 years imprisonment, while the proposed section 219 *The Criminal Code* offence of distributing child exploitation material will carry a maximum penalty of 10 years imprisonment, and the current section 60(4) Enforcement Act offence of possessing child pornography carries a

[20] Government Response to Report 36, p5: see Appendix 1 of this report.

[21] These crimes will be tried on indictment in the District Court.

maximum penalty of 5 years imprisonment, while the proposed section 220 possession offence of possessing child exploitation material will carry maximum penalty of 7 years imprisonment.

7.6 It is important to note that other State and Commonwealth offences[22] may also cover the same conduct that falls within the scope of proposed offences. In these cases prosecution agencies may choose to not charge under the new offence, but charge under an existing State or Commonwealth offence provision (particularly if prosecution agencies form the view that the prosecution of an offence under an existing offence provision is more likely to succeed).[23]

7.7 The majority of this report deals with issues arising out of the Committee's inquiry into Part 2 of the Bill and, in particular, the new offences, and defences and exclusions provided in the Bill.

7.8 Part 2 also contains consequential amendments to the Enforcement Act, the *Community Protection (Offender Reporting) Act 2004*, *Prostitution Act 2000* and *Working with Children (Criminal Record Checking) Act 2004.*

Part 3

7.9 Part 3 of the Bill implements amendments consequential to the *Classification (Publications, Film and Computer Games) Amendment Act 2007* (Cth) and amendments to the Enforcement Act. These are required by the above Commonwealth Act and because Western Australia is a member of the NCCS. Under the NCCS, publications, films and computer games are classified by the Classification Operations Branch in the Commonwealth Attorney General's Department and all States and Territories then adopt those classification decisions. The enforcement of these

---

22 In particular, *The Criminal Code*, Chapter XXXI, contains a number of sexual offences (including indecent dealing offences) and section 204B provides that it is an offence to use electronic communication to procure, or expose to indecent matter, children under 16 years of age. Part 10.6 of *The Criminal Code* (Cth) contains a number of internet and telecommunications offences including the section 474.26 offence of using a carriage service to procure persons under 16 years of age. Detective Inspector Darren Seivwright advised that Federal and State police officers work closely together to determine the most appropriate charge. Answers to Questions on Notice from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 6 October 2009, p13, advised that "*the State DPP prosecutes when relevant material is found in some physical form in the possession of the offender, for instance on a computer hard-drive, on a disk or in the memory of a mobile telephone. The Commonwealth DPP generally prosecutes where data is transmitted over the internet. However, the WA DPP will prosecute where the conduct of the offender comes within the provisions of s.204B of the Code, commonly known as the cyber-predator offences, notwithstanding that it involves the use of the internet*".

23 Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, *Transcript of Evidence*, 9 September 2009, p7 noted that indecent dealing charges might be preferred over the proposed offences in the case of a person videotaping boys urinating and/or naked because "*it is easier to prove*". See also paragraph 8.27 of this report.

decisions is a matter for each State and Territory under its complementary enforcement legislation.[24]

7.10 Part 3 amendments to the Enforcement Act include amendments relating to the screening of films, the sale of a classified film, the classification decision and exceptions from classification.

Part 4

7.11 Part 4 of the Bill implements consequential amendments to the Enforcement Act relating to advertising, required by the *Classification (Publications, Film and Computer Games) Amendment Act 2007* (Cth) because Western Australia is a member of the NCCS. This Part includes amendments regarding the classification and advertising of films and computer games.

8 PROPOSED CHILD EXPLOITATION MATERIAL OFFENCES

8.1 Part 2, clause 4 of the Bill inserts "*Chapter XXIV - Child exploitation material*", consisting of proposed sections 216 to 221B, into *The Criminal Code*. The inserted Chapter XXIV includes a definition section and four child exploitation material offences, namely the offences of involving a child in child exploitation material, producing child exploitation material, distributing child exploitation material and possessing child exploitation material.

8.2 As clause 4 of the Bill inserts a number of sections into *The Criminal Code*, this report refers to the relevant proposed section number, not the clause number.

Child exploitation material

A new expansive term

8.3 The proposed offences relate to "*child exploitation material*", which is more expansive than the present term "*child pornography*".[25]

8.4 Section 3 of the Enforcement Act currently defines "*child pornography*" to mean:

> *an article that describes or depicts, in a manner that is likely to cause offence to a reasonable adult, a person who is, or who looks like, a child under 16 years of age (whether the person is engaged in sexual activity or not).*

---

[24] Hon Simon O'Brien MLC, Minister Representing the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 6 May 2009, p3399.

[25] This was accepted by all witnesses, for example, see Submission No. 7 from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 11 September 2009, p2.

8.5 Clause 4 of the Bill inserts proposed section 216 into *The Criminal Code*. Proposed section 216 defines "*child exploitation material*" to mean:

> *material that, in a way likely to offend a reasonable person, describes, depicts or represents a person, or part of a person, who is, or appears to be, a child —*
>
> *(a) engaging in sexual activity; or*
>
> *(b) in a sexual, offensive or demeaning context; or*
>
> *(c) being subjected to abuse, cruelty or torture (whether or not in a sexual context)*

8.6 The Committee heard different views on the merits of omitting the term "*pornography*" in the offence provisions of the Bill (and in the title of the Bill).

8.7 While the Committee appreciates that such choice of language is a matter of policy, and the Committee will not express a view on this issue, evidence explaining the reasons for this new terminology is noted in this report.

8.8 Hon Nick Goiran MLC raised the issue of the title of the Bill and the perceived effects of this change in language:[26]

> *I would like to point out the possible negative consequence of the removal of the word "pornography" from the title of the bill. There has been a push by the pornography industry to alter the perception of pornography by adopting non violent erotica terms. It has been suggested to me that by removing the term pornography from the title we are lowering the standard for material the possession and distribution of which constitutes an offence. …* [there may] *be merit in specifically outlining pornography as included in the scope of child exploitation material.*

8.9 Concerns were raised that "*child exploitation material*" desensitises the community from the ugliness of what we are dealing with and "*child pornography*" is preferable because it is better understood in the community.

8.10 The MCCOC Report recommended the offence term "*child pornography material*".[27]

8.11 The Department explained why the term "*child exploitation material*" is used in the Bill:

---

26 Submission No. 3 from Hon Nick Goiran MLC, 7 September 2009, p3.

27 MCCOC Report, Recommendation 1: see Appendix 6 of this report.

> *There was a body of thought in there that the current definition was not broad enough and it should be expanded to include other forms of punishment or exploitation inflicted upon children—not just sexual. As you would note, the current reference pertains only to sexual exploitation. We have expanded that to include torture and cruelty to children, because children can also be exploited in such ways. The definitions that are used in the other jurisdictions vary …* [28]

> *There was some concern about whether that* [MCCOC] *definition was enough to encapsulate what they wanted to do to further protect children. At one stage, we were going to retain the definition of "child pornography". But then, upon reflection, it was decided that the definition should be expanded to use the term "child exploitation material". That was done quite deliberately so that it would give an expanded definition. If I can just cite the commonwealth Criminal Code, it refers to "child abuse material" and "child pornography material". The commonwealth has two definitions. Some jurisdictions still retain the phrase "child pornography". Others use "child exploitation material". The Northern Territory uses "child abuse material". We have adopted the Queensland model, which is "child exploitation material" …*[29]

> *The commonwealth has two separate definitions, we want only one definition.*[30]

8.12 The Department advised that the Parliamentary Counsel's Office supported the term "*child exploitation material*":

> *in discussions with parliamentary counsel, they also suggested we go towards the child exploitation material to indicate that it is a wider application of the material that we are dealing with.*[31]

8.13 The Western Australia Police supports the use of the term "*child exploitation material*" and the broad scope of this term in the Bill. Detective Inspector Seivwright, who was the instigator[32] of the Bill in early 2008, is of the firm view that the term "*child exploitation material*" is appropriate. Detective Inspector Seivwright explained his support for the change in terminology:

---

28 Mr Frank Morisey, Senior Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 9 September 2009, p4.

29 Ibid.

30 Ibid, p6.

31 Ibid.

32 Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, *Transcript of Evidence*, 9 September 2009, p2.

> *The term "child exploitation material" has been adopted nationally.*[33] *Child protection Australia-wide is dealt with in a policing sense by having representatives from each jurisdiction and New Zealand as part of ANZPAA, the Australian New Zealand Police Advisory Agency Child Protection Committee. They meet at least twice yearly, and there they come to particular resolutions about how to deal with child protection in each of their particular jurisdictions. … Pornography, in the sense that most people understand the word, involves sexual activity generally between consenting adults, and with those adults understanding that they are being recorded either in still images or in film and that those images or that film may in turn end up becoming public. On the other hand, every piece of child exploitation material, every image and every video is a contact sex offence being committed against the child. Therefore, we are wanting to move away, and the ANZPAA CPC has resolved to move away, from the term "pornography" and use the term "child exploitation material". That, in a nutshell, is how we arrived at that terminology. We are satisfied that it encompasses the necessaries for a policing purpose. …*
>
> *I think the first thing we need to do in that* [public] *educative process is to remove the term "pornography". Once the bill, if it goes through in its current form, becomes the Child Exploitation Material and Classification Legislation Amendment Act, on every occasion we prosecute an offender for committing offences against the act, we can say we have charged them with possession of child exploitation material … For me, this is the start of the educative process for the public.*[34]

8.14 The DPP opined:

> *In summary, the definition of "child pornography" in the Enforcement Act is probably capable of encompassing material described in the definition of "child exploitation material" in the Bill, but the latter is better defined and makes it clear that sexual context is unnecessary. While the definition of "child pornography" specified that the person depicted need not be engaged in sexual activity, the use of the word "pornography" tends to connote a sexual context. The definition of "child exploitation material" avoids any potential argument about whether material showing abuse of cruelty, for*

---

33 "*Child exploitation material*" is used in *The Criminal Code* (Qld) and *The Criminal Code* (Tasmania).

34 Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, *Transcript of Evidence*, 9 September 2009, pp1-2.

instance, comes within the broad requirement that the material must be offensive to a reasonable person.[35]

8.15 The Committee notes that amending the title of the Bill to include the word "*pornography*" may not have an effect on the substantive law.[36]

8.16 However, Detective Inspector Seivwright is definite in his firm view that a change in the title of the legislation to include the word "*pornography*" would "*sit uncomfortably*" with him for the reasons expressed above.[37]

Prescription of terms

8.17 The Committee recommended, at Recommendation 4 in Report 36, that the Minister explain the absence of prescription in the phrase "*likely to offend a reasonable person*" and the terms "*offensive"* and "*demeaning"* in the definition of "*child exploitation material*".[38] The Committee raised preliminary concerns about the lack of prescription and whether such terms would make prosecuting offences more difficult.

8.18 The Attorney General confirmed that it was a deliberate policy decision to leave to the courts the task of determining the meaning of these terms.[39]

8.19 Detective Inspector Seivwright and the DPP agreed that these terms do not require further definition.[40]

8.20 The Law Society of Western Australia, however, submitted in relation to the terms "*demeaning*" and "*abuse*":

---

35 Answers to Questions on Notice from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 6 October 2009, p4.

36 See Mr James Thomson, Legal Officer, Department of the Attorney General, *Transcript of Evidence*, 9 September 2009, p5.

37 Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, *Transcript of Evidence*, 9 September 2009, p2.

38 Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 36, *Child Exploitation Material and Classification Legislation Amendment Bill 2009*, 21 May 2009, p8.

39 Government Response to Report 36, p4: see Appendix 1 of this report. See also, Submission No. 4 from Hon Alison Xamon MLC, 7 September 2009, p2, requesting further inquiry into the use of these terms and their implications.

40 Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, *Transcript of Evidence*, 9 September 2009, p2; Submission No. 7 from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 11 September 2009, p3: "*I am inclined to agree with the Government's Response at pages 4 to 5 regarding the Committee's recommendation*". See also, Submission No. 3 from Hon Nick Goiran MLC, 7 September 2009, p2, which added: "*I believe that this has been done intentionally in order to leave scope for future developments of different forms of material. In today's society technology advances at such a rapid rate that the future of any kind of material is limitless*".

> *It may be appropriate that the terms "demeaning" or "abuse" as referred to in s.216 be more specifically defined to include acts of degradation or humiliation to such extent as to offend the sensibilities of a reasonable person.*[41]

8.21 The Committee was particularly interested in the phrase "*likely to offend a reasonable person*" in the definition of "*child exploitation material*". Again, the DPP and Detective Inspector Seivwright opposed further prescribing this phrase.

8.22 The requirement for material to be likely to offend a reasonable person, without further prescription of this term, is included in similar definitions in other jurisdictions.[42]

8.23 The DPP advised:

> *What is necessary to consider from a policy perspective is that the requirement that the material is "likely to offend a reasonable person" allows for the possibility that changing social mores will affect the value judgements that are made by juries over time in relation to material that nevertheless falls within the specific criteria in paragraphs (a) to (c). …*
>
> *the concept of what is offensive to a reasonable person has been dealt with in the context of what is indecent or what is obscene. There is a large body of law that is concerned about those terms. Generally, it simply involves the application of community standards in the judge of what fits that discretion.*[43]

8.24 Regarding this phrase, the Commissioner for Children and Young People added:

> *It is not possible to articulate "offensive" with sufficient generality for it to apply widely enough to capture future circumstances and technologies unforeseen and unforeseeable to the legislature, on the one hand, but to be not so wide that it captures materials that in context would not be considered offensive to the reasonable person.*[44]

---

41 Submission No. 6 from Mr Dudley Stow, President, Law Society of Western Australia, 8 September 2009, p1.

42 For example, section 207A of *The Criminal Code* (Qld) and section 1A of *The Criminal Code* (Tasmania). However, section 473.4 of *The Criminal Code* (Cth) provides a non exhaustive list of matters to be taken into account when deciding if a reasonable person would regard particular material as being, in all the circumstances, offensive.

43 Submission No. 7 from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 11 September 2009, p3.

44 Submission No. 1 from Ms Michelle Scott, Commissioner for Children and Young People, 25 August 2009, p4.

8.25 In Report 36, the Committee referred to the South Australian decision in *Phillips v SA Police* (1994) 75 A Crim R 480, which involved the secret videotaping of men and boys urinating in public toilets and undressing in public areas.[45]

8.26 Detective Inspector Seivwright was of the view that the expanded definition of "*child exploitation material*" could cover this conduct but in these circumstances another offence might be charged.[46]

8.27 The DPP considered that the "*material in Phillips v SA Police could, in my opinion, be caught by the definition of "child exploitation material" in the Bill insofar as the material depicted boys urinating and/or naked. It would be a matter of whether the tribunal of fact considered that the material depicted the children in a demeaning context (which I consider to be the most relevant criterion here) in a way likely to offend a reasonable adult"*.[47] However, the DPP advised that in these circumstances the Office of the DPP would more likely proceed under a charge or charges of indecently recording a child under section 320(6) of *The Criminal Code* (child under 13 years - maximum penalty of 10 years imprisonment) or section 321(6) of *The Criminal Code* (child over 13, but under 16 years - maximum penalty of 7 years imprisonment).[48]

8.28 As noted in Report 36, South Australian legislation provides a more prescriptive approach to the definition of "*child pornography*".[49] The Government Response advised that:[50]

> *Other States were concerned about three things under the South Australian approach. First, it could be difficult to establish the elements of child exploitation offences. Second, conventional cases would be more difficult to prosecute. Third, the South Australian approach would be likely to have unintended consequences.*

8.29 The DPP advised that further prescription is likely to hinder prosecutions:

---

45 Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 36, *Child Exploitation Material and Classification Legislation Amendment Bill 2009*, 21 May 2009, p7.

46 Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, *Transcript of Evidence*, 9 September 2009, p7.

47 Answers to Questions on Notice from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 6 October 2009, p5.

48 Ibid.

49 Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 36, *Child Exploitation Material and Classification Legislation Amendment Bill 2009*, 21 May 2009, p7.

50 Government Response to Report 36, p5: see Appendix 1 of this report.

> *In summary, a lack of prescription is likely to assist rather than hinder prosecutions, because it reduces the prospect of technical arguments based on a prescriptive definition. Adding words to define a term that is in common usage may lead to a need to define the additional words. Words not defined will be given their natural meaning. This already occurs in relation to words that involve value judgments in others sections of the Code. For instance, in defining "circumstances of aggravation" in context of sexual offences in Chapter 31 of the Code, s319, at paragraph (a)(iv) refers to "an act which is likely seriously and substantially to "degrade" or "humiliate"... The words "seriously", "substantially", "degrade" and "humiliate" are not defined; juries are instructed to give the words their natural meaning, and in assessing whether an act falls within the description they are required to have regard to their combined experience and understanding of human affairs.*
>
> *The South Australian provision is arguably more difficult; it requires proof of the intended effect of the material.*[51]

8.30 On reviewing evidence on this matter, the Committee is of the view that no benefit would be gained from the further prescription of terms contained in the definition of "*child exploitation material*".

Finding 1: The Committee finds that terms in the definition of "child exploitation material" in the Child Exploitation Material and Classification Legislation Amendment Bill 2009 do not require further prescription. In particular, the phrase "likely to offend a reasonable person" and the terms "offensive" and "demeaning" do not require further prescription.

Material

8.31 It is important to note that proposed section 216 also provides a broad definition of "*material*", which is defined to *include*:

> *(a) any object, picture, film, written or printed matter, data or other thing; and*
>
> *(b) any thing from which text, pictures, sound or data can be produced or reproduced, with or without the aid of anything else.*

[51] Answers to Questions on Notice from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 6 October 2009, p2.

8.32 The DPP and Detective Inspector Seivwright support this expansive definition, which more appropriately reflects modern forms of electronic data, including phone activity.[52]

8.33 The DPP considered this definition a "*positive development*" and advised that under the current law "*the definition of "article" has led to significant problems for the prosecution when trying to apply that definition to modern forms of electronic data*".[53]

8.34 Further, Detective Inspector Seivwright advised the Committee that he is "*very confident*"[54] that the way the Bill is currently drafted would cover possible offences created in the future with changes to media and communication. In his view the Bill "*is fairly robust and will be good certainly for at least the next five or six years*" but added the understandable caveat "[we] *are talking technology remember*".[55] The DPP agreed that the terminology in the Bill was broad enough to cover offences that may be committed in the future using new means of media and communication and noted in this regard that the definition of the word "*material*" includes "*other thing*" and "*any thing*".[56]

Finding 2: The Committee finds the expansive definition of "material" in the Child Exploitation Material and Classification Legislation Amendment Bill 2009 is a positive development in the law. "Material", as defined, covers modern forms of communication and is broad enough to cover offences that may be committed in the future using new technology and forms of communication.

Proposed section 217

Terms

8.35 Clause 4 of the Bill inserts proposed section 217 into *The Criminal Code*.

8.36 Proposed section 217 provides:

---

52 Detective Inspector Darren Seivwright confirmed that the legislation covers phone messages, twittering, messages on online chat rooms, online child exploitation and adults who try to procure children. Detective Inspector Darren Seivwright also noted that section 204B of *The Criminal Code* (which provides that it is an offence for a person to use electronic communication to procure a person under 16 years to engage in sexual activity or expose that person to any indecent matter) may apply in some circumstances (this offence carries a maximum penalty of 18 months imprisonment): *Transcript of Evidence*, 9 September 2009, p10.

53 Submission No. 7 from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 11 September 2009, p2.

54 Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, *Transcript of Evidence*, 9 September 2009, p11.

55 Ibid.

56 Answers to Questions on Notice from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 6 October 2009, p14.

Involving a child in child exploitation

(1) For the purposes of this section, a person involves a child in child exploitation if the person —

(a) invites a child to be in any way concerned in the production of child exploitation material; or

(b) causes a child to be in any way concerned in the production of child exploitation material; or

(c) procures a child for the purpose of the production of child exploitation material; or

(d) offers a child for the purpose of the production of child exploitation material.

(2) A person who involves a child in child exploitation is guilty of a crime and is liable to imprisonment for 10 years.

8.37 The Committee recommended, at Recommendation 4 of Report 36, that the Minister explain the absence of prescription in proposed sections 217(1)(a) and (b).[57] The Attorney General confirmed that it was a deliberate policy decision to leave to the courts the task of determining the meaning of these terms.[58]

8.38 The Committee received no evidence that the lack of prescription in the terms "*invites a child to be in a way concerned in the production of child exploitation*", "*in a way concerned in the production of child exploitation material*" and "*procures a child*" was a legal or practical concern.

8.39 The Department advised of the following reasons why these terms are not further prescribed:

> *One is that some of these terms are already known to the law and there are cases … that would provide meanings. The second … is that if we define too narrowly the terms or even define them, it allows courts and lawyers to come to decisions or results that may not have been intended. The third reason … is to allow these terms in the legislation to have some flexibility in the joints so that it allows future developments, future community standards, to become embedded and changed. For those three reasons, I think we have avoided being*

---

57 Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 36, *Child Exploitation Material and Classification Legislation Amendment Bill 2009,* 21 May 2009, p8.

58 Government Response to Report 36, p4: see Appendix 1 of this report.

> *overly prescriptive by providing a definitional provision in each section.*[59]

8.40 The DPP brought the Committee's attention to the use of the word "*concerned*", as well as "*involved*", in this section.

8.41 The *New Shorter Oxford English Dictionary* defines the word "*concerned*" to include "*involved*" and "*involved*" to include "*concerned*".[60]

8.42 The Committee supports the following views expressed by the DPP:

> *With respect, it seems to me that the use of the words "to be in any way concerned" adds nothing to the concept of being "involved", and may in fact be regarded as circular. In my view, for the sake of consistency it would be preferable to replace the words "to be in any way concerned" in s.217(1)(a) and (b) with "to be in any way involved".*[61]

> [I] *could not see the point in introducing another term that would need to be explained to the jury as part of what is meant to be involving a child in child exploitation material.*[62]

Recommendation 1: The Committee recommends that "concerned" be deleted and "involved" be inserted in proposed sections 217(1)(a) and 217(1)(b). This may be achieved in the following manner:

Page 4, line 4 — after "invites a child to be" delete "in any way concerned" and insert

in any way involved

Page 4, line 6 — after "causes a child to be" delete "in any way concerned" and insert

in any way involved

---

59 Mr James Thomson, Legal Officer, Department of the Attorney General, *Transcript of Evidence*, 9 September 2009, p7.

60 *The New Shorter Oxford English Dictionary*, 1993 Edition, pp469 and 1413.

61 Submission No. 7 from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 11 September 2009, p3.

62 Mr Bruno Fiannaca SC, DPP, *Transcript of Evidence*, 16 September 2009, p3. The jury is the tribunal of fact in contested District Court trials against adult accused.

Penalty

8.43 There is a lack of parity between the maximum penalty applying to an offence under proposed section 217 and existing penalties for similar offences in *The Criminal Code*.

8.44 A person convicted of an offence under proposed section 217 (of causing a child to be in any way concerned in the production of child exploitation material or, in other ways prescribed in 217(1), involving a child in child exploitation) faces a maximum penalty of 10 years imprisonment, even if no child exploitation material is actually produced, for example, if there are technical difficulties or an enterprise is unexpectedly thwarted.

8.45 In some cases when a proposed section 217 offence is committed, the same conduct may fall within the scope of another *The Criminal Code* charge as well. The DPP advised:

> [In] *cases where an offender's conduct constitutes an offence of a sexual nature or the actual recording of a child, it would ordinarily be preferable for the prosecution to charge that* [other] *offence. Such offences might include offences under:*
>
> - *Section 320(3) of the Code regarding procuring, inciting or encouraging a child under 13 to engage in sexual behaviour – penalty of 20 years;*
> - *Section 320(5) of the Code regarding procuring, inciting or encouraging a child under 13 to do an indent act – penalty of 10 years; and*
> - *Section 320(6) of the Code regarding indecently recording a child under 13 – penalty of 10 years.*
>
> *However, there would appear to be a discrepancy between the perceived seriousness of offences under the proposed s.217 and some of the sexual offences under s.321 of the Code involving children between the ages of 13 and 16 years. For instance the penalty for an offender who:*
>
> - *Actually indecently deals with such a child,*
> - *Procures, incites or encourages such a child to do an indecent act, or*
> - *records such a child*

is 7 years, unless the child is under the offender's care, supervision or authority.

It seems a curious outcome that someone who has invited a 14 year old child to become involved in the production of child exploitation material, but has been unsuccessfully achieving that production, would be liable to 10 years imprisonment, while the person who has actually indecently dealt with or indecently recorded such a child is liable under s.321(8) to 7 years imprisonment. There may be a need to review penalties under s321.[63]

8.46 Parity and consistency in penalties is important. It is undesirable that section 321 *The Criminal Code* offences carry a lower maximum penalty than those in proposed section 217. This disparity may encourage prosecution agencies to prefer charges under less appropriate offences because that offence carries a higher maximum penalty.[64]

8.47 The Committee does not support any decrease in the maximum penalty in proposed section 217 (or any other penalty in the Bill).

8.48 The Committee considers that similar or more serious criminal conduct should be punishable by a period of imprisonment not less than the penalty prescribed in proposed section 217 (10 years imprisonment).

Recommendation 2: The Committee recommends that the Minister review the offence penalties in section 321 of *The Criminal Code* to ensure consistency and parity in penalties.

Proposed section 218

8.49 Clause 4 of the Bill inserts proposed section 218 into *The Criminal Code*.

8.50 Proposed section 218 provides:

Production of child exploitation material

A person who produces child exploitation material is guilty of a crime and is liable to imprisonment for 10 years.

63 Submission No. 7 from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 11 September 2009, p4.

64 This is a Committee comment. The prosecution agencies did not suggest that this would occur.

8.51 This offence overlaps with provisions in current sections 320 and 321 of *The Criminal Code*, but the proposed provision has capacity to apply to a wider group of people.[65]

8.52 The word "*produces*" is not defined. The DPP raised an important issue regarding the word "*produces*" in this section.

> [The *Oxford English Dictionary*] *defines the verb "produce", in part, to mean: Bring a thing into existence, bring about, effect, cause (an action, result, etc.) … Composed, make, or bring into existence by mental of physical labour (a material object). Administer and supervise the making of (a play, film, broadcast, etc); supervise the making of (a record), esp. by determining the overall sound.*
>
> *The question is whether this would be broad enough to include all those who may be involved in the making of child exploitation material; for instance, in the case of a film or video productions:*
>
> - *the person who coordinates the making of it,*
> - *the person financing it,*
> - *the writer, if there is a script,*
> - *all those who may act as a "crew",*
> - *the person editing it or involved in other "post production" activities, and*
> - *the person printing it.*[66]

8.53 The DPP noted that section 7 of *The Criminal Code* renders procurers, aiders and enablers of offences criminally responsible but advised that, in his view, it would be preferable in the above circumstances to avoid having to rely on and explain section 7 during a prosecution:

> *Section 7 of the Code (which render procurers, aiders and enablers of offences criminally responsible) may be sufficient to cover any person who becomes a party to the production of child exploitation material in any of the categories mentioned above, but from the point of view of a prosecutor presenting a prosecution or a judge giving directions to the jury on the law, it would be preferable to avoid having to rely*

---

65 Submission No. 7 from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 11 September 2009, pp5-6.

66 Ibid, p5. See also Answers to Questions on Notice from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 6 October 2009, pp2-3 for further on this issue.

> *on and explain the provisions of s.7 by having a definition of "produces" that includes all steps in the production process. The definition would not need to descend into specific categories, but would need to be sufficiently descriptive of the sort of conduct that would constitute producing as to cover all those who may have a role in making child exploitation material.*[67]

8.54 In New South Wales, section 91H of the *Crimes Act 1900* defines "*produce child pornography*" to include*:*

> *(a) film, photograph, print or otherwise make child pornography, or*
>
> *(b) alter or manipulate any image for the purpose of making child pornography, or*
>
> *(c) enter into any agreement or arrangement to do so.*

8.55 The DPP noted that another issue, only partly addressed by the New South Wales provision, is that proposed section 218 requires a final product to be produced:[68]

> *having regard to the dictionary definition of "produce", the proposed offence under s218 requires child exploitation material to have been actually brought into existence. It is difficult to see why all those involved in the process should not be regarded as criminally liable in the event that there is the no final "product", for instance because the recording did not work due to equipment failure. Such persons would have been involved in the exploitation of children, and it is precisely such conduct that the legislature is concerned to prevent and to punish when it occurs, irrespective of the competence of the offenders to achieve their goals.*

8.56 While a failed attempt could be charged as an attempt to commit a section 218 offence (under section 552 of *The Criminal Code*), the maximum penalty for an attempt offence is *half* the section 218 maximum penalty.

8.57 The Committee considers that charging an attempt charge is contrary to the policy behind the proposed legislation, which is to punish people who exploit children. In the Committee's view, the penalty for an attempt charge does reflect the seriousness of this conduct.

---

[67] Submission No. 7 from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 11 September 2009, p5. See also, Answers to Questions on Notice from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 6 October 2009, pp2-3 for further on this issue.

8.58 The above concerns about proposed section 218 could be addressed by rewording section 218 *or* defining "*produces*" in a manner that clearly provides that any activity in the production process is included in this term, whether child exploitation material was actually produced or not.

8.59 Section 130A of *The Criminal Code* (Tasmania) is an example of how a production offence can be phrased to include all involved in producing child exploitation material. Section 130A provides:

> ***Production of child exploitation material***
>
> *A person who —*
>
> *(a) produces, or does any thing to facilitate the production of, child exploitation material; and*
>
> *(b) knows, or ought to have known, that the material is or will be child exploitation material –*
>
> *is guilty of a crime.*

8.60 At hearing, this issue and the preferred way of amending the Bill to address the identified deficiencies was discussed with the DPP.[69]

8.61 After the hearing, the DPP advised the Committee:

> *While it is arguable that, having regard to the definition in the Oxford English Dictionary …* [that] *the word "produces" is capable of encompassing conduct in the production process irrespective of whether a finished product is achieved, it is desirable to eliminate any scope for argument by the introduction of a definition of "produces" or by formulating the offence in a way that makes it clear that a finished product is not necessary for the offence to have been committed. In Submission 1 and at the hearing I referred to s.130A of the Criminal Code 1924 (Tas) as an example of an offence creating provision that appeared to cover conduct in the production process, irrespective of whether a finished product resulted. Under that section a person is guilty of a crime if he "does any thing to facilitate the production of" child exploitation material.*

---

[68] Submission No. 7 from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 11 September 2009, p6.

[69] Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, *Transcript of Evidence*, 16 September 2009, pp3-6. The jury is the tribunal of fact in contested District Court trials against adult accused.

The Committee asked that we consider whether using the words "involved in" in a definition of "produces" or in the offence creating provision, if it were to be modelled on s.130A of the Criminal Code 1924 (Tas), would cover the circumstances that we were concerned might not be captured by the word "produces" standing alone. The benefit of using that language would be that there would be uniformity with the language in proposed section 217 (Involving a child in child exploitation). The offence could then read …

"A person who produces, or is any way involved in the production of, child exploitation material is guilty of a crime etc."

The definition of "involved" in the Oxford English Dictionary includes: "to be occupied, engrossed, or embroiled in; to be concerned or associated with".

The Encarta Dictionary (UK) defines "involved" to include: "connected with or participating in something".

The Macquarie Dictionary defines "involve in (or with)" to mean: "to cause to have a concern in or an association with".

The word "production" is defined by the Oxford English Dictionary to mean, inter alia:

"1. a. The action or an act of producing, making, or causing anything; generation or creation of something; the fact or condition of being produced.

b. spec. The action or process of making goods from components or raw materials; the manufacture of goods for sale and consumption. …

5. a. The action or process of producing a play, record, film, etc. Also: the resulting work, esp. viewed in terms of its making or staging."

The last-mentioned definition of "production" is clear in its inclusion of the process of producing, short of the resulting work, which is separately included. It would follow that to be "involved in the production of child exploitation material" would include participating in the process of producing the material, irrespective of whether there was a resulting work. Arguably, on the definitions referred to above "involved in" would include conduct that is not in the form of direct participation in the production, but which enables production to occur, for instance by financing or allowing premises to be used for production of the illicit material. However, I am still

> *inclined to the view that "facilitates" more clearly includes such conduct. The Oxford English Dictionary definition for that word includes:*
>
> *1. Make easy or easier; promote; help forward (an action, result, etc)…*
>
> *3. Increase the likelihood of. Strengthen (a response); bring about the transmission of (an impulse).*
>
> *Accordingly, in my opinion, formulation in the following terms would be preferable:*
>
> *"A person who produces, or is any way involved in or facilitates the production of, child exploitation material is guilty of a crime etc."*
>
> *An alternative approach, if the current wording were to remain, would be to add an inclusive definition of "produces child exploitation material" in terms such as:*
>
> *"For the purpose of this section "produces child exploitation material" includes doing anything –*
>
> *a) for the purpose of producing child exploitation material; or*
>
> *b) to facilitate the production of child exploitation material -*
>
> *whether or not child exploitation material is actually produced."*
>
> *This would, in my view, cover attempts as well as those who enable production to occur without directly participating. However, I would defer to Parliamentary Counsel on the question of a preferred form of words.*[70]

8.62 The Committee sought the Parliamentary Counsel's views on the above and his preferred option.

8.63 The Parliamentary Counsel did not support the amendments proposed by the DPP:

> *We have some concerns about the effect that the suggested amendments would have on who could be convicted of the proposed section and on the integrity of the Code as a whole:*

---

[70] Answers to Questions on Notice from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 6 October 2009, pp2-3.

1. *The added words appear to be intended to displace, in part at least, the operation of section 7 of the Code. It is not clear to what extent that provision would be displaced. If it is interpreted as displacing the whole of section 7, there may be an unintended consequence of limiting who constitutes a principal offender under proposed section 218.*

2. *If it is argued that the words operate in addition to section 7, there appears to be cascading effect in relation to the offence i.e. a person who aids a person to facilitate the offence is also a principal offender liable to the full penalty. That, it seems, would be an unreasonable and unintended extension of the operation of the Code.*

3. *The added words might cast some doubt on the effect of other offence provisions, which do not include like words. Including the words could be said to imply that what they describe would not be adequately covered by section 7, raising questions as to the scope of section 7 as it applies to each other offence in the Code.*

4. *The Code is intentionally structured so that principal offenders are determined by reference to section 7. An amendment such as that proposed would undermine the basic fabric of the Code.*

Attempts to commit offences are offences under Chapter LVII of the Code. If it is intended that a person who attempts to commit an offence should be liable to the same penalty as a principal offender (not half the penalty as is provided for in the Code), specific provision should be made in proposed section 218 to that effect. However, consideration should be given as to whether this is appropriate or whether the operations of the existing provisions should apply to section 218 as they apply to other Code offences.[71]

8.64 However, Parliamentary Counsel advised that *if* the Committee decides to recommend an option proposed by the DPP, their preferred option is the first option noted in paragraph 8.61 with a minor amendment.[72] The preferred option would therefore be to amend proposed section 218 to read:

---

71 Letter from Mr Walter Munyard, Parliamentary Counsel, Parliamentary Counsel's Office, 12 October 2009, pp1-2.

72 Ibid, p2. As noted in paragraph 8.61**,** the DPP suggests the option (option 1) "*a person who produces, or is any way involved in or facilitates the production of, child exploitation material is guilty of a crime etc*". The Parliamentary Counsel's preference is for the word "*in*" to be inserted before "*any way*" in this option.

> *A person who produces, or is in any way involved in or facilitates the production of, child exploitation material is guilty of a crime and is liable to imprisonment for 10 years.*

8.65 It is worth noting that *The Criminal Code* (Tasmania) contains a provision similar to section 7,[73] as well as a production offence provision similar to the first option proposed by the DPP.

8.66 It is not clear to the Committee why section 7 would not continue to apply to *The Criminal Code* provisions if the section is amended as proposed or how this would "*undermine the basic fabric of the Code*".

8.67 The Committee prefers the option proposed by the DPP, as amended by the Parliamentary Counsel (see paragraph 8.64).

8.68 In forming this view the Committee has taken into account the Office of the DPP's primary role and expertise in prosecuting offenders and their knowledge of *The Criminal Code* provisions.

8.69 The Committee's primary concern is that the offence provision is clear and provides robust and appropriate legislation under which offenders will be prosecuted. The proposed option is clear and captures all who have a role in producing child exploitation material irrespective of whether a finished product is produced.

8.70 At present, the scope of "*produces*" in proposed section 218 is not clear to the Committee. It is not clear which persons in the production process are covered by the proposed provision (and, the Committee suggests, when section 7 would need to be relied on). In many cases there would be more than one person who "*produces*" child exploitation material (and perhaps more than one "*principal offender*"). The second important issue is that the proposed provision only applies when a final product is produced. The recommended option addresses these two issues. Under an amended provision, a court could sentence each person who produces such material based on the particular facts pertaining to their charge, and the maximum penalty of 10 years imprisonment provides adequate scope for a sentence to reflect the criminality of an offender's conduct.

8.71 Further, the Committee is of the view that the recommended option reflects the intention of the Bill, to deal with all persons involved in the production of child exploitation material.

---

[73] Section 3 of *The Criminal Code* (Tasmania).

Recommendation 3: The Committee recommends that proposed section 218 be amended by inserting after "produces" ", or is in any way involved in or facilitates the production of,". This may be achieved in the following manner:

Page 4, line 16 — delete "A person who produces child exploitation material" and insert

> **A person who produces, or is in any way involved in or facilitates the production of, child exploitation material**

Proposed section 219

8.72 Clause 4 of the Bill inserts proposed section 219 into *The Criminal Code*.

8.73 Proposed section 219 provides for offences relating to the distribution of child exploitation material.

8.74 "*Distribute*" is defined broadly in the proposed section to include making child exploitation material available for access or entering into an arrangement to do so. This section expands on the current offences to sell or supply, display or exhibit child pornography in sections 60(1)(b) and 60(3) of the Enforcement Act.[74]

8.75 One issue that arises out of consideration of this proposed section, and the possession offence in proposed section 220, is how children "sexting" should be dealt with (see paragraphs 11.1 to 11.27 of this report).

Proposed section 220

8.76 Clause 4 of the Bill inserts proposed section 220 into *The Criminal Code*.

8.77 Proposed section 220 provides:

> ***Possession of child exploitation material***
>
> *A person who has possession of child exploitation material is guilty of a crime and is liable to imprisonment for 7 years.*

8.78 The maximum penalty of 7 years imprisonment is higher than the 5 years recommended in the MCCOC Report (see paragraph 14.6 regarding this issue).

---

[74] Explanatory Memorandum to the Child Exploitation Material and Classification Legislation Amendment Bill 2009, p3. Section 60 of the Enforcement Act is attached at Appendix 7 of this report.

An aggravated possession of child exploitation material offence

8.79 Detective Inspector Seivwright advised the Committee that the Western Australia Police supports the inclusion of an aggravated offence of possession of child exploitation material.[75]

8.80 This issue is not within the scope of the Bill before the Committee. It is a matter of policy whether the Government includes an aggravated offence provision or a separate offence provision supporting the police proposal. The Committee, however, notes the conflicting evidence heard on this issue.

8.81 Detective Inspector Seivwright referred to the storage capacity of technology at present (see paragraph 5.5) and submitted:

> *The growth in storage capacity of computer equipment creates an opportunity for child sex offenders to acquire and store enormous numbers of CEM*[76] *images and videos. In my view the question for Parliament is:*
>
> > *"How many CEM images and/or videos does a person have to possess before it should be presumed he/she has an intent to supply or distribute to another?"*
>
> *It is my respectful submission that the number of images and/or videos that should give rise to the presumption of intent to supply or distribute is ten thousand (10000).*[77] *I am of the opinion that this is a significantly large number of CEM images and/or videos that takes the possessor out of the simple child sex offender category into a category that encourages and promulgates the further creation and distribution of CEM world wide.*
>
> [If] *we didn't have child sex offenders who have a desire for CEM, then we would not have CEM producers and distributors. It therefore follows that Policing agencies globally should be, and in fact are, targeting the producers and distributors of CEM. Appropriate legislation to support these policing efforts would be beneficial to the community and provide outcomes commensurate with the seriousness of the crime. … every CEM image and/or video is a contact child sex offence occurring somewhere in the world.*

---

75 Letter from Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, 14 September 2009, p1.

76 CEM means child exploitation material.

77 Detective Inspector Darren Seivwright advised the Committee at hearing that about 85 per cent of images that crossed his desk would involve 10,000 or more images: *Transcript of Evidence*, 9 September 2009, p12.

> *I am of the view that the community, parliament and judiciary have in the past viewed Possessing CEM as a secondary, or less serious offence, when compared with actual contact offending. This, in my view, is a nonsense and possessing images or video footage of a child being offended against should be treated the same as the actual contact offence itself. Both the contact offender and the possessor of the CEM image depicting the abuse are unquestionably child sex offenders.*
>
> *If an Aggravated Possession of CEM were to be created, I would submit that a maximum penalty of 14 years imprisonment would be appropriate.*[78]

8.82 At the hearing on 9 September 2009, Detective Inspector Seivwright added:

> *The Chairman: Are you aware whether any of the other jurisdictions—either the commonwealth or other states—have an aggravation circumstance?*
>
> *Detective Inspector Seivwright: No, they do not. That is why I think our state could be a leader in drawing a line with this type of material.*
>
> *Hon Liz Behjat: Are you aware of whether any other jurisdictions, commonwealth or state, have contemplated it and disregarded it or, like us, just have not contemplated it?*
>
> *Detective Inspector Seivwright: No, they are not aware. I think, generally, they would be supportive of it. In fact I know they would be supportive because we are having our ANZPAA CPC conference yesterday and today. All our heads of sex crime divisions Australia-wide and the AFP are here at the moment.*[79]

8.83 However, the DPP did not support the police proposal:

> *My view is that the actual maximum penalties that have been provided provide adequate scope for sentencing; in other words, they adequately reflect the seriousness of this sort of offending. If we are starting to get into people who are physically abusing children, we do have other provisions of the Criminal Code that we rely on as far as those sexual offences are concerned. The difficulty with introducing*

---

78 Letter from Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, 14 September 2009, pp1-2.

79 Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, *Transcript of Evidence*, 9 September 2009, p12.

aggravating circumstances that will increase the maximum penalty, especially if you are using ones that require quantification, is how do you arrive at an arbitrary figure that justifies the greater penalty? How do you justify having a different maximum penalty for a person who has say, 10 000 images—or, to do it the other way, for a person who has 9 999 images compared with a person who has one extra image?

The Chairman: But we do that with other offences, do we not, in terms of possession of a certain amount of cannabis or illicit drugs?

Mr Fiannaca: Yes, we do; that is true. But with this sort of offence, the judgement about the seriousness of the offence and the appropriate penalty in a particular case is something that is more on a continuum—it is more than just arriving at a cut-off and saying, "If you have more than a certain amount, you are liable to a heavier penalty." It seems to us that it is preferable to leave it to the discretion of the court. They are factors that will be taken into account anyway. Judges now do take into account the number of images in deciding the appropriate penalty. They take into account the context, the degree of abuse that is depicted in the imagery, in coming to an appropriate penalty. If they do not—our argument would be that they should, but, if they do not, and if that results in a penalty that we think is manifestly inadequate, then we would certainly consider taking an appeal against the sentence. In my view, it is just difficult to see why there would be a need to introduce different penalties because of aggravating circumstances. ... One does not need an arbitrary cut-off line to get a circumstance of aggravation to make a determination as to how serious the offence is and how it should be sentenced ...

the difficulty with the maximum penalty—I will not express a view as to its adequacy, but using that 10-year one for the production—is that once we start to have maximum penalties for the production of child pornography over 10 years, we could end up with a situation where the maximum penalties for those types of offences are actually greater than the penalties for the sexual offences against children that are already contained in the Criminal Code.[80]

---

80 Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, *Transcript of Evidence*, 16 September 2009, pp7-8. Mr Fiannaca was not provided with the detail of the police submission advocating an aggravated possession offence.

8.84 This is not a matter than falls within the scope of the Committee's consideration of the Bill, or a matter that can be dealt with during the limited time the Committee has to inquire into the Bill, particularly given the two different views expressed on this issue.

8.85 The Committee is of the view that the Government needs to consider this issue in detail and determine whether a further amendment to the Bill is required.

Recommendation 4: The Committee recommends that the Minister considers whether the Child Exploitation Material and Classification Legislation Amendment Bill 2009 should be further amended to include an aggravated possession of child exploitation material offence.

9 PROPOSED DEFENCES AND EXCLUSIONS

9.1 Clause 4 of the Bill inserts proposed section 221A into *The Criminal Code.*

9.2 Proposed section 221A provides defences and exclusions to the proposed offence provisions.

9.3 Provisions similar to proposed sections 221A(1) and 221A(2) are currently contained in sections 57 and 58 of the Enforcement Act. These provisions were reworded to make section 221A more consistent with other States and to implement the recommendations of the MCCOC Report.[81]

9.4 All States and the Commonwealth have legislated defences and exclusions to their child exploitation material/child pornography offence provisions.[82]

Proposed section 221A(1)(b)

9.5 Proposed section 221A(1)(b) provides:

> *It is a defence to a charge of an offence under section 217, 218, 219 and 220 to prove that —*
>
> …
>
> *(b) the accused person did not know, and could not reasonably be expected to have known, that the material to which the charge relates describes, depicts or represents a person or part of a person in a way likely to offend a reasonable person*
> …

[81] Mr James Thomson, Legal Officer, Department of the Attorney General, *Transcript of Evidence*, 9 September 2009, p8.

[82] For example, sections 474.21 and 474.24 of *The Criminal Code* (Cth), 91H of the *Crimes Act 1900* (NSW) and 228E of *The Criminal Code* (Qld).

9.6 The DPP advised that this defence leaves open the possibility that an accused could argue that while he was aware of the content of the material, he did not know that the contents were likely to offend a reasonable person:

> *The question is whether the provision leaves open the possibility for an accused to argue that, while he was aware of the content of the material, he did not know that the contents were likely to offend a reasonable person. Although perhaps fanciful, such an argument might be based on cultural factors or factors to do with the stunted social development of the accused. It is not readily apparent to me that the Government's intention is to allow such a defence to be raised. Indeed, the whole point of incorporating in the definition of "child exploitation material" the concept of what is offensive to the "reasonable person" is to have an objective measure by which to assess material, recognising that those who may possess or distribute such material are likely to have perverted views that do not reflect those of the reasonable community. Further, in the Government's Response to recommendation 5* [of Report 36]*, the one example given of the possible operation of s.221(1)(b) is that of an accused "in possession of material that the accused had never opened and did not know included material that was offensive to a reasonable adult".*
>
> *However, if the intention is to confine this defence of "lack of knowledge" only to a person who is not aware of what material he actually has in his possession or is distributing, there may be need to alter the language of the provision to make this clear. Further, if this is the intention, it's not clear why the lack of knowledge would not simply relate to the "material to which the charge relates" being "child exploitation material".*[83]

9.7 It appears to the Committee that this defence was intended to be restricted to cases where a person did not know the content of the material (for example, where a person orders a DVD believing it was not child exploitation material, but receives something that is child exploitation material), and was not intended to provide an accused with the defence that they were aware of the content of material, but did not know that the content was likely to offend a reasonable person.

9.8 Based on the above assumption, the Committee makes the following recommendation:

---

[83] Submission No. 7 from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 11 September 2009, p7.

Recommendation 5: The Committee recommends that proposed section 221A(1)(b) be amended to limit the defence to cases where an accused did not know the content of the material.

One option may be to delete "that the material to which the charge relates describes, depicts or represents a person or part of a person in a way likely to offend a reasonable person" and insert "that the material to which the charge relates was child exploitation material". This may be achieved in the following manner:

Page 5, line 22 — after "the accused person did not know, and could not reasonably be expected to have known," delete "that the material to which the charge relates describes, depicts or represents a person or part of a person in a way likely to offend a reasonable person; or" and insert

that the material to which the charge relates was child exploitation material; or

9.9 Paragraphs 9.46 to 9.54 of this report also comments on whether the defence in proposed section 221A(1)(b) reverses the onus of proof.

Proposed section 221A(1)(c)

9.10 Proposed section 221A(1)(c) provides:

> *It is a defence to a charge of an offence under section 217, 218, 219 and 220 to prove that —*
>
> *…*
>
> *(c) the material to which the charge relates was —*
>
> *(i) of recognised literary, artistic or scientific merit; or*
>
> *(ii) of genuine medical character,*
>
> *and that the act to which the charge relates is justified as being for the public good*

9.11 The Explanatory Memorandum states that this defence exists "*so that artists, scientists, doctors and other persons are able to carry on their work for the benefit of the community*".[84] This defence replicates the defence in sections 58 and 101(2) of the Enforcement Act.

[84] Explanatory Memorandum to the Child Exploitation Material and Classification Legislation Amendment Bill 2009, p4.

9.12 Under the proposed law, the tribunal of fact, the jury, would need to be satisfied that the material to which the charge relates was of recognised artistic merit *and* that the *act* to which the charge relates is justified as being in the "*public good*" for the defence to succeed. The jury would consider the defence if they accepted that the prosecution had proven beyond reasonable doubt that the material in question was "*child exploitation material*" as defined in the Bill (which includes the requirement that the material was "*likely to offend a reasonable person*").[85]

9.13 The Committee has some concern about the artistic merit defence. One concern is that the existence of this defence may deter prosecuting authorities from prosecuting the proposed offences. Another concern is that the defence could be abused and argued by people who do not produce, distribute or possess material for artistic reasons.

9.14 The case of Bill Henson's photographs in mid 2008 demonstrated diverse community views on such work and the need for Parliament to clearly legislate a balance between artistic rights and children's rights.

9.15 Detective Inspective Seivwright advised that the police have limited experience in the area of artistic merit as they are not often presented with situations like the Bill Henson case. He noted that other jurisdictions are in a similar position to this State and there are not enough cases to form a solid opinion on these matters. Detective Inspective Seivwright's personal view was that it is not appropriate to have an artistic material defence.[86]

9.16 Some states have an artistic merit defence, and in other states such conduct may fall within a general "*public good*" or "*public benefit*" defence (without the requirement to also prove material has artistic merit).[87] In Victoria, the use of the artistic merit defence is restricted in that it cannot be relied on in a case where the prosecution proves that the minor was actually under the age of 18 years.[88]

---

85 See paragraph 8.5 for the definition of "*child exploitation material*".

86 Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, *Transcript of Evidence*, 9 September 2009, pp3-4.

87 Other jurisdictions have a "*public benefit*" defence. For example, sections 474.21 and 474.24 of *The Criminal Code* (Cth) and section 91H(4) of the *Crimes Act 1900* (NSW).

88 See section 70(2) of the *Crimes Act 1958* (Victoria). Section 70 of the *Crimes Act 1958* (Victoria) provides an "*artistic merit*" defence with no general or conjunctive "*public benefit*" or "*public good*" requirement. Also, *The Criminal Code* (Cth) contains no artistic merit defence and sections 474.21 and 474.24 narrowly define "*public benefit*" to mean "*if and only if, the conduct is necessary for or of assistance in: (a) the enforcing a law of the Commonwealth, a State or a Territory; or (b) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State of a Territory; or (c) the administration of justice; or (d) conducting scientific, medical or educational research that has been approved by the Minister in writing for the purposes of this section.*" However, although *The Criminal Code* (Cth) does not include an artistic merit defence, section 473.4(b) provides that when deciding if a reasonable person would regard particular material as being, in all the circumstances, offensive, matters to be taken into account include the artistic merit (if any) of the material.

9.17 The Committee questioned the meaning of "*public good*". The term is used in sections 58 and 101 of the Enforcement Act. This concept of "*public good*" is based on the defence in the *Obscene Publications Act 1959* (UK)[89] and has been adopted internationally as a standard term in defence provisions.[90] A number of cases have considered the term "*public good*", including cases on *Lady Chatterley's Lover* and *Last Exit to Brooklyn.*[91]The term is incapable of being exactly defined,[92] but "*public good*" in the context of the provisions in the Bill might involve the jury considering the extent to which the material would be offensive to the reasonable person against the material's literary, sociological or ethical merit.[93]

9.18 The DPP expressed the view that it is difficult to see how possessing material in a private home could ever be for the "*public good*".[94]

9.19 The Committee acknowledges that this defence may apply to advertising campaigns, articles or documentaries promoting ending child abuse where there are good public policy reasons for such material being distributed.

Proposed section 221A(2)

9.20 Proposed section 221A(2) provides:

---

89 Document tabled by witnesses from the Department of the Attorney General at the hearing on 9 September 2009. At least one legal commentator considers that a common law "*artistic merit*" defence existed prior to the *Obscene Publications Act 1959*: see Sir James Fitzjames Stephen, *Digest of the Criminal Law (1877), 105.*

90 Answers to Questions on Notice from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 6 October 2009, p7.

91 In *R v Calder and Boyars, Ltd* [1969] 1 QB 151, the English Court of Appeal quashed a conviction against the publishers of *Last Exit to Brooklyn* contrary to the *Obscene Publications Act 1959* (UK) because of the absence of proper trial judge directions. The Court did not express a view on whether the "*public good*" defence in section 4 of the Act was proven but, in the first judgement on the meaning of the "*public good*" defence, opined "*In the view of this court, the proper direction on a defence under s4 in a case such as the present is that the jury must consider on the one hand the number of readers they believe would tend to be depraved and corrupted by the book, the strength of the tendency to deprave and corrupt, and the nature of the depravity or corruption; on the other hand, they should assess the strength of the literary, sociological or ethical merit which they consider the book to possess. They should then weigh up all these factors and decide whether on balance the publication is proved to be justified as being for the public good"*. In *R v Penguin Books Ltd* [1961] Crim.L.R. 176 the jury found the publishers of *Lady Chatterley's Lover* not guilty of a *Obscene Publications Act 1959* (UK) charge (publishing an obscene article).

92 Answers to Questions on Notice from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 6 October 2009, pp7-8, quotes the *Law of Obscenity in India, USA and UK*, I.S. Rana (Mittal Publications, 1990, ISBN 817099 1692 9788170991694) at page 67 "*the concept of "Public good" is incapable of being defined with exactitude. It is a very "relative" and "dynamic" term which varies with the change of times, climes and civilisation. It has much to do with the standards of "public health" and "morality" in a given society. That is why we find a "plethora" of legislation in the modern times which deals directly and "indirectly" with the "public good*".

93 Ibid, p8.

94 Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, *Transcript of Evidence,* 16 September 2009, p12.

> *It is a defence to a charge of an offence under section 220 to prove that —*
>
> *(a) the material to which the charge relates came into the accused person's possession unsolicited; and*
>
> *(b) as soon as the accused person became aware of the nature of the material the accused person took reasonable steps to get rid of it.*

9.21 The Committee recommended, at Recommendation 6 of Report 36, that the Minister explain the preference in the Bill for an accused person taking reasonable steps to get rid of the unsolicited child exploitation material rather than taking reasonable steps to report receipt of the material to law enforcement agencies.[95]

9.22 The Government Response advised that this provision, which implements recommendation 17 of the MCCOC Report:

> [was enacted] *for fairly practical reasons. The likelihood is that a person could be caught up in a "pornado" and the most practical thing to do is to allow them to delete it.*
>
> *The Committee's recommendation that a person take reasonable steps to report receipt of the material to law enforcement agencies would be unworkable. For example, these agencies would become inundated with reports and not have resources to investigate such reports. Also, most "pornados" arrive from overseas and the WA Police would have no or very limited power to deal with the transmission of this overseas material.*[96]

9.23 The Committee considered the legal position of a person who held onto child exploitation material for the purpose of reporting the material to the authorities, and whether a defence was required to protect this conduct or legislation should encourage this conduct.[97] The difficulty posed by such a defence is that people who had no intention of reporting the material to the police could allege or argue this defence after they are caught with the material.

---

95 Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 36, *Child Exploitation Material and Classification Legislation Amendment Bill 2009,* 21 May 2009, p11.

96 Government Response to Report 36, p6: see Appendix 1 of this report.

97 This point was also raised by Hon Nick Goiran MLC in his submission. Hon Nick Goiran MLC asked the Committee to "*consider under the existing legislation whether it may be possible that a person acting in the public's interest by forwarding such material to authority to be considered as committing an offence if they retained the material until it was received by authority*": Submission No. 3 from Hon Nick Goiran MLC, 7 September 2009, p3.

9.24 Detective Inspector Seivwright, in support of proposed section 221A(2), advised:

> [I]*n the normal course of business, if you have an unsolicited email on your computer of child exploitation material and you do not want the police to do anything with it, we want you to delete it so that it does not create an issue for you further on down the track. If you want the matter investigated, we will obtain the internet protocol address. We will find out who sent it and investigate it. That is not an issue at all. However, given the amount of spam emails and things like that generally that are occurring, unless you ... have a particular issue with a particular person, most people would just want to delete it. ... The intent was to provide the public with an opportunity it delete it—delete it from their deleted items so they cannot view it.*[98]

9.25 On the question of what amounts to "*reasonabl*e" in proposed section 221A(2), Detective Inspector Seivwright stated:

> [If] *you are a normal everyday person who has come to the police to say, "I have had these images unsolicited appear on my telephone or my computer." Any investigator—I mean any investigator—will take that on face value and try to assist you to sort the problem out. However, if we were to come to your house and you had those images there and we found them, that may change what is reasonable. It still may be reasonable because it may have happened earlier that day and you did not have an opportunity, and the explanation you provide may be reasonable to the police. If it is reasonable to the police, we would not charge you. Although we would not want to put anyone through a court process, people get several opportunities to prove they are reasonable. They can present reasonable to us at the initial investigation stage. If we do not accept it and charge them, they get to prove reasonable to a jury and even before the trial they can go to the DPP to argue reasonable, as well as public interest and all those issues. ... The general gist of the laws that we need to enforce deals with much more vast issues than those ones—the organised criminal networks by which people exchange child exploitation material and things of that nature.*[99]

9.26 Mr Lindsay Fox, State Prosecutor, Office of the DPP, noted the difficulties in drafting a defence that could apply to a person who holds onto material in order to provide it to authorities:

---

98 Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, *Transcript of Evidence*, 9 September 2009, pp8-9.

99 Ibid.

> *If we start to draft a defence that would encompass that sort of thing, it could be misused by people invoking the defence unnecessarily, whereas in the situation that you have described, you would not expect the police to charge you; and, if they did, you certainly would not expect the DPP to charge in accordance with our guidelines—and, if that did happen, you certainly would not expect a jury to convict. I suggest that there are probably enough safeguards to avoid the type of scenarios that you have described.*[100]

9.27 The following actions may be unreasonable under proposed section 221A(2) — downloading material, putting it on a file on your computer and keeping it, sending it to another person who was not authorised to receive it, printing the material and keeping it in your office.[101]

9.28 The Committee does not take issue with proposed section 221A(2).

Proposed section 221A(3)

Child Protection Officers

9.29 The Committee previously questioned why the Bill does not afford child protection officers the same protection afforded to "*law enforcement agencies*".[102]

9.30 Proposed section 221A(3) provides:

> *Nothing in sections 219 and 220 makes it an offence —*
>
> *(a) for a member or officer of a law enforcement agency to possess or distribute child exploitation material when acting in the course of his or her official duties …*

9.31 "*Law enforcement agency*" is defined in proposed section 221A(4) to mean the police force or police service of the State,[103] the Office of the Director of Public Prosecutions of the State, the Corruption and Crime Commission, or any entity of another State or a Territory or that Commonwealth or another country that has functions similar to function of the above named. This expands the classes of persons exempt from

---

100 Mr Lindsay Fox, State Prosecutor, Office of the Director of Public Prosecutions, *Transcript of Evidence*, 9 September 2009, p16.

101 Mr Frank Morisey, Senior Policy Officer, and Mr James Thomson, Legal Officer, Department of the Attorney General, *Transcript of Evidence*, 9 September 2009, p13.

102 Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 36, *Child Exploitation Material and Classification Legislation Amendment Bill 2009*, 21 May 2009, pp11-12.

103 "*Police Force*" refers to officers in uniform, that is, officers appointed under the *Police Act 1892*. "*Police Service*" is the designated name of the Police Department (see section 4(3) and footnote 2 of the *Public Sector Management Act 1994*). Therefore, officers in uniform and public service officers in the Police Service fall within the exemption.

offences compared to the current section 103 of the Enforcement Act, which provides that it is not an offence to supply, display or to be in possession of an article for the purpose of classification or law enforcement. The MCCOC Report recommended a "defence" that a person was a law enforcement officer acting in the course of his or her official duties.[104]

9.32 In Report 36, at Recommendation 7, the Committee asked the Minister to explain why child protection workers are not afforded the exclusion from being charged with an offence that members of law enforcement agencies are given.[105] The Government Response stated:

> *The exclusions set out in proposed section 221A(3) relate to clearly defined classes of persons acting in clearly defined circumstances. This retains the exemption in section 103 in* [the Enforcement Act].
>
> *The defence set out in section 221A(1)(d) ("that the accused person was acting for a genuine child protection or legal purpose, and that the person's conduct was reasonable for that purpose") relates to a broader and less clearly established group of people who act in a range of circumstances. It is appropriate that the court should consider whether the person is acting in a way that genuinely relates to child protection and that the conduct was reasonable in the circumstances in which the person was acting.*[106]

9.33 The Committee sought the view of Hon Robyn McSweeney MLC, Minister for Child Protection, on this issue. The Committee was interested in whether child protection officers dealt with child exploitation material during the course of their duties. The Minister for Child Protection advised:

> *Child protection officers of the Department for Child Protection, have no cause to possess or distribute child exploitation material, as defined under the Amendment Bill in the course of carrying out their official duties under the Children and Community Services Act 2004. These officers work closely with the Western Australia Police and any circumstance involving the discovery of such material would be immediately referred to the Police for action.*

---

104 MCCOC Report, Recommendation 13: see Appendix 6 of this report.

105 Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 36, *Child Exploitation Material and Classification Legislation Amendment Bill 2009*, 21 May 2009, p12. The Commissioner for Children and Young People also supported the Committee's recommendation for further explanation of the justification for not affording child protections workers the same exclusion as law enforcement agencies, and why differing standards should apply: Submission No. 1 from Ms Michelle Scott, Commissioner for Children and Young People, 25 August 2009, pp5-6.

106 Government Response to Report 36, p4: see Appendix 1 of this report.

> *Therefore, officers of the Department do not require the protection that proposed section 221A(3) of the Amendment Bill affords to members or officers of law enforcement agencies when acting in the course of their official duties.*[107]

9.34 The Committee also notes that other States and the Commonwealth legislation provide an exclusion or "defence" to law enforcement agencies, but none specifically refer to child protection officers.[108]

9.35 Further, the Committee notes that Detective Inspector Seivwright did not support an exclusion in the Bill for child protection workers, arguing that the small likelihood of this situation arising would not justify a blanket protection for child protection workers:

> *An exception for child protection workers was considered. However, I must say that in the two years of this specific crime type that I have been involved in, plus 22 years of other policing, I have not experienced a child protection worker being in possession of child exploitation material. You need to understand that the likelihood of that happening is so small that it would not warrant, in my view, special mention in the legislation. Again, we were just discussing blanket protection for police and DPP and the like. I would not be a proponent of providing a blanket protection for child protection workers, because that may have the unintended negative consequence of providing employees of perhaps the DCP who are charged with possession of CEM or distributing CEM with a loophole that we would then need to navigate through the judicial process. To my knowledge, there is no other state that provides that protection. The practical application of it is very similar to the situation of a child protection worker who went to a particular home and discovered a bag of cannabis, for instance. The child protection worker would then be faced with two options—either collect the cannabis to prevent harm to the people in the home, or leave the cannabis there and potentially, as a child protection worker, neglect his or her duty. The worker would, of course, pick up the cannabis and drop it off at a police station. Under no circumstances would it be the case for that child protection worker—if it was done in a reasonable amount of time, and it was handed to the police—that a charge would be*

---

107 Letter from Hon Robyn McSweeney MLC, Minister for Child Protection, 1 October 2009, p1.

108 See sections 474.21 and 474.24 of *The Criminal Code* (Cth) and section 91H(4) of the *Crimes Act* 1900 (NSW). However, some States have broad definitions of law enforcement agencies/officers. Section 67A of the *Crimes Act 1958* (Victoria) defines law enforcement agency to includes "*any other authority or person responsible for the enforcement of the laws of Victoria*", and section 207A of *The Criminal Code* (Qld) defines "*law enforcement officer*" to include a person who is authorised in writing by the Commissioner of the Police Service to help a member or officer of a law enforcement agency.

> *preferred. We see that as being the same with child exploitation material. ... if you provide a blanket protection, there is a greater chance that that will be exploited by people committing offences than there is that people will be exposed by the potential flaw in the law that exposes them to committing offences.*[109]

9.36 As noted above, even if a child protection worker in possession of child pornography technically committed an offence, prosecutorial discretion would determine whether a charge would be preferred. The fact that defences under sections 221A(1)(d) and 221A(2)(b) may be available would be matters considered by the prosecution authorities in deciding whether to prosecute. Section 221A(1)(d) provides a defence for an accused acting for a genuine child protection or legal purpose, and 221A(2)(b) provides a defence where the accused took reasonable steps to get rid of material as soon as they became aware of the nature of the material (see paragraph 9.20). Proposed section 221A(1)(c)(ii) applies if the material is of a "*genuine medical character*" (see paragraph 9.10).

9.37 There is also a concern that a person in possession of material for educational purposes commits an offence. Clinical Associate Professor Peter Winterton, Medical Director, Child Protection Unit, Princess Margaret Hospital, submitted:

> *Under the proposed legislation section 221A, IC, ID and 2 are of particular importance to Child Protection workers. In order to be able to reach other practitioners medical, social work, nursing and others about Child Protection it is necessary on occasions to have images of children who have been abused. Whilst in general the nature of these images differs from that which is used in child exploitation scenarios, it is important that legal protection be given to workers in their chosen field of expertise.*[110]

9.38 In these cases, the medical defence in proposed section 221A(1)(c)(ii) may apply. This provides that it is a defence if the material to which the charge relates was of a genuine medical character and that the act to which the charge relates is justified as being for the public good.

9.39 On reviewing the evidence, the Committee is satisfied that child protection officers do not require the protection afforded to "*law enforcement agencies*".

Finding 3: The Committee finds that child protection officers do not require the same protection afforded to "law enforcement agencies" in proposed section 221A(3)(a).

---

109 Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, *Transcript of Evidence*, 9 September 2009, pp5-6.

110 Submission No.2 from Clinical Associate Professor Peter Winterton, Medical Director, Child Protection Unit, Princess Margaret Hospital, 28 September 2009, p1.

Section 24 of *The Criminal Code*

9.40 The Bill does not make it clear whether an accused person can rely on section 24 of *The Criminal Code*, that is, the defence (or excuse) of an honest and reasonable mistaken belief.

9.41 Section 24 of *The Criminal Code* provides:

> *A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.*
>
> *The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.*

9.42 If this section applied, an accused could argue, for example, that they believed the child they involved in child exploitation material was aged 16 years or over. (This section would most often be argued where the child was aged 14 or 15 years).

9.43 The DPP advised the Committee that there is legal authority for the proposition that a claim of honest and reasonable mistaken belief as to the age of the person described or depicted in the material is not an answer to a charge of producing child pornography.[111] However, the DPP advised that, notwithstanding this authority, there remains disagreement among legal practitioners as to whether honest and reasonable mistaken belief is available as an excuse on child pornography charge. Of concern, is that in one case last year, where a section 24 "defence" was argued, while the Court expressed the view that it would be a rare case where the section did apply (and in that case was not prepared to leave in the "defence"), the Judge did not rule out the possibility that it may be available.[112]

9.44 It is a policy decision for the Government to decide whether the defence (or excuse) of honest and reasonable belief is available in relation to the proposed offences. In sections 321(9) and 321A(9) of *The Criminal Code*, dealing with sexual offences against children between 13 and 16 years, Parliament provided a limited defence based on the age of the child.[113]

---

111 Submission No. 7 from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 11 September 2009, p8.

112 Ibid, p9.

113 Similar legislation relating to child exploitation material in other States includes section 229 of *The Criminal Code* (Qld), which provides that it is immaterial that the accused person did not know that the person was under the specified age, or believed that the person was not under that age, and section 70(2)(c) of the *Crimes Act 1958* (Victoria) which provides a defence if the defendant believes on reasonable grounds that the minor was aged 18 years or older or that he or she was married to the minor.

9.45 To avoid doubt, the Committee is of the view that the Government should clearly state in the Bill whether the defence applies or not, or whether a limited defence applies. As the DPP stated:

> *If it is intended to exclude the application of s24 to the "child exploitation material" offences in the Bill, insofar as it may concern belief as to the age of a person depicted in such material, then, notwithstanding the existence of authority on point (R v Clarke), it would be prudent, in order to avoid the need for the issue to be litigated, to specifically exclude honest and reasonable mistaken belief as to the age of the child as an excuse. This could be done by an express provision to the effect that such a belief is not a defence to the offences. In my opinion, while it is arguable that the existence of the specific defence in s221A(1)(b) relating to the knowledge suggests the legislature intended to exclude the application of Code s.24, if that is indeed the intention, it should be stated clearly.*
>
> *If, on the other hand, it is intended that a mistaken belief as to age based on reasonable grounds should be a defence, then it should be expressed as one of the defences in s.221A(1) in terms that clearly place the onus of proof on the accused as in sections 321(9) and 321A(9) of the Code.*[114]

Recommendation 6: The Committee recommends that proposed section 221A be amended to clearly reflect the Government's intention in relation to whether section 24 of *The Criminal Code* applies to the proposed offences.

If the Government intended that an honest and reasonable, but mistaken, belief as to the age of a child should be a defence, then this should be clearly stated in proposed section 221A(1).

If the Government intended that an honest and reasonable, but mistaken, belief as to the age of a child should be excluded as a defence, then this should be clearly stated in proposed section 221A.

114 Submission No. 7 from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 11 September 2009, p9.

Onus of proof

9.46 In Report 36 the Committee raised the issue of the accused bearing the onus of proving the defences in proposed sections 221A(1) and 221A(2) of the Bill.[115]

9.47 The Government Response advised that providing a defence is not reversing the onus of proof:

> *Providing a defence to an offence does not constitute reversing the onus of proof. The matters set out in the defences are not elements of the offence. The burden of proving the elements of the offence (eg that the accused was in possession of child exploitation material) remains with the prosecution. The accused is provided with defences that would not otherwise apply in relation to the offence.*
>
> *As the Explanatory Memorandum for the Bill indicates, these defences apply, with some variations, in various other States, some defences (eg proof of classification) are more easily proved than others (eg artistic merit). In each case, the accused can raise the defence if the accused is of the opinion than the defence has merit. If the defences were made elements of the offence it would be very difficult, if not impossible, for the prosecution to establish as case. For example, it is possible for the prosecution to prove that material is child exploitation material but it would not be possible for the prosecution to prove that the accused knew that the material was offensive to a reasonable adult.*[116]

9.48 The DPP essentially agreed with the Government Response[117] but noted that it is arguable that the defence provided in proposed section 221A(1)(b) reverses the onus of proof. However, in his view, this defence is appropriate:

> *The onus of proving an offence lies on the prosecution, and it must do so beyond reasonable doubt before an accused can be convicted. However, what the prosecution must prove to that standard are the elements of an offence. The Government's response is premised on the assumption that the matters set out in the defences are not matters on which the prosecution would carry the onus of proof (by negating the facts that constitute the defences). I think this is essentially correct … However, it is arguable that, but for the provisions of s.221A(1)(b), on*

---

115 Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 36, *Child Exploitation Material and Classification Legislation Amendment Bill 2009,* 21 May 2009, pp8-10.

116 Government Response to Report 36, p3: see Appendix 1 of this report.

117 Submission No. 7 Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 11 September 2009, p7.

> *a charge of possession of child exploitation material, the prosecution would be required to prove that the accused knew the nature of the item in his possession … it would be necessary to prove that the accused knew he was in possession of child exploitation material. If that is correct, then the effect of s.221A(1)(b) would be to reverse the onus of proof on the issue of knowledge.*
>
> *However, in my opinion, this is appropriate, having regard to the nature of the offence. In some circumstances, for instance if the accused is in possession of an item that is wrapped, it may be difficult to prove what belief he had in relation to the nature of the item. If the prosecution has proved beyond reasonable doubt that the accused has possession of the item (i.e. exercised control or dominion over it), then in the absence of evidence to suggest he believed it was something different to what it was, the tribunal of fact ought to be able to conclude that he did know what it was. The placing on the onus on an accused to prove this lack of guilty knowledge in response of this kind of offending is not inconsistent with the policy that underpins the Bill. The paramount consideration is the protection of children from abuse and exploitation. There is precedent for the reversal of the onus on issues of knowledge in the sphere of sexual offending against children. For instance, see s.321(9) of the Code which provides a defence to the charges of sexual offending against children aged over 13 years and under 16 years if the accused believed on reasonable grounds that the child was over the age of 16 years, and the offender was no more than three years older than the child. Section 321A(9) is in similar terms in respect of the offence of engaging in persistent sexual conduct with a child under the age of 16 years.*[118]

9.49 The defence in proposed section 221A(1)(b) was the subject of MCCOC Report Recommendation 15.[119]

9.50 More generally, the Committee notes that the Commonwealth and every other State includes a number of defences in similar legislation, and defences are currently in the Enforcement Act.

9.51 If an accused chose to argue a defence, the accused must prove a defence on the balance of probabilities for that defence to succeed.

---

118 Answers to Questions on Notice from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 6 October 2009, p6.

119 See Appendix 6 of this report. Also, section 91H(4)(a) of the *Crimes Act 1900* (NSW) contains a similar defence.

9.52 The Committee notes that other "exculpatory provisions" (which are not true defences but are sometimes called defences), such as sections 23A (unwilled acts) and 23B (accident) of *The Criminal Code* also apply to the proposed offences. [120]

9.53 The Committee has commented on the defence in proposed section 221A(1)(b) at paragraphs 9.5 to 9.8 of this report, proposed section 221A(1)(c) at paragraphs 9.10 to 9.19 and proposed section 221A(2) at paragraphs 9.20 to 9.28.

9.54 The Committee does not take issue with the defences provided in proposed section 221A. The Committee finds that the defences are reasonable in all the circumstances.

10 CLAUSES 13, 14 AND 15 OF THE BILL

10.1 Clauses 13 to 15 (in Part 2 of the Bill) provide for consequential amendments to the *Community Protection (Offender Reporting) Act 2004*, *Prostitution Act 2000* and *Working with Children (Criminal Record Checking) Act 2004* (**WWC Act**).

10.2 Hon Robyn McSweeney MLC, Minister for Child Protection, raised whether clause 15, which amends the WWC Act, needed to be amended:[121]

> *Section 101* [of the Enforcement Act] *relates to "objectionable material" offences, with the important qualification that it is only a Class 2 offence for the purposes of the WWC Act if the objectionable material is child pornography. Under the proposed amendments, therefore, the offence as described in Schedule 2 will no longer exist following the deletion of "child pornography" from the definition of objectionable material (section 99(b)). The offence as described will become an historical offence under section 7(2)(e) of the WWC Act. A consequential amendment is required to section 101 along similar lines to that being proposed with the deletion of section 60 from Schedule 2.*

10.3 Clauses 13 and 14 amend the *Community Protection (Offender Reporting) Act 2004* and *Prostitution Act 2000* respectively in a similar manner to how clause 15 amends the WWC Act. All clauses delete "*s.60*" and insert "*the deleted s.60*" into the relevant Act but do not make any amendments to reflect amendments to section 99 of the Enforcement Act.

10.4 The Committee asked the Department for their response to the issue raised by the Minister for Child Protection. The Department advised that amendments to the Bill were not required:[122]

---

120 Answers to Questions on Notice from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 6 October 2009, p7.

121 Submission No. 5 from Hon Robyn McSweeney MLC, Minister for Child Protection, 7 September 2009, pp1-2.

> *This matter was discussed with Parliamentary Counsel during the drafting of the Bill and again upon the receipt of your letter.*
>
> *Section 101 of the …* [Enforcement Act] *… is not being repealed so an amendment along the lines of that relating to section 60 would not be appropriate. The reference to section 101 of the* [Enforcement Act] *will remain in Schedule 2 of the WWC Act as a historical reference that applies in relation to child pornography convictions prior to the coming into operation of the proposed amendments to the* [Enforcement Act]. *Therefore, it will not be necessary for any amendments to be made to clauses 13, 14 and/or 15 of the Bill.*

10.5 The Committee accepts the above advice from the Department.

11 CHILDREN AND YOUNG PEOPLE

11.1 The offence provisions the Bill will insert into *The Criminal Code* apply to children and young people as well as adults.[123]

11.2 The Commissioner for Children and Young People is concerned that "*children and young people could become criminalised, when clearly the intention of such legislation is to prosecute adults involved in the production and consumption of exploitative images of children and young people*".[124]

11.3 Very young children cannot be held criminally responsible for their actions. Under Western Australian law, a child under 10 years of age cannot be held criminally responsible for any act or omission and a person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that, at the time of doing the act or making the omission, he had capacity to know that he ought not to do the act or make the omission.[125]

11.4 The Committee considered issues arising out of the application of the proposed offences to the recent practice of young people sexting.

11.5 Sexting is the practice of swapping sexually explicit images of *oneself* on mobile phones (or by email). It has been suggested that teenagers tend to send such photos as a joke, to feel sexy or to be funny and flirtatious.[126]

---

122 Letter from Mr Frank Morisey, Senior Policy Officer, Department of the Attorney General, 29 September 2009, p1.

123 A child is a person under 18 years of age.

124 Submission No. 1 from Ms Michelle Scott, Commissioner for Children and Young People, 25 August 2009, p3.

125 Section 29 of *The Criminal Code.*

126 "Should "sexting" be a Criminal Act?", *US Politics Today*, 20 August 2009, http://eupolitics.einnews.com/247pr/113062 (viewed on 13 October 2009).

11.6 A person under 16 years old sexting commits an offence under the Bill.[127] Also, a 15 year old drawing a sexual or offensive nude picture of himself, taking a similar photo of himself or a friend, or engaging in other similar forms of adolescent "self expression" may commit an offence.[128]

11.7 The critical questions are: does the above behaviour, particularly sexting, warrant criminal sanction; in what circumstances is a prosecution likely and when is a prosecution appropriate; and what are the consequences of being charged or convicted of the proposed offences.

11.8 The Commissioner for Children and Young People advised of the "*common practice*" of sexting between young people:

> *The National Campaign to Prevent Teen and Unplanned Pregnancy in the United States found that one in five teens had sent or posted a nude or semi nude image of themselves via phone or the internet in and two in five teens had also sent a sexually suggestive text message, email or instant message. A survey of 2,000 young people in the UK found that one third of 11 to 18 year olds had received a sexually explicit text or message. … Research in Australia indicates that young people may see sexting as a rite of passage and as a safe and controlled means of sexual experimentation.*[129]

11.9 In May 2009, Detective Senior Sergeant Lindsay Garrett, from the Western Australian Police Online Child Exploitation Squad, was reported as stating that "*we are seeing a steady increase in the number of (sexting-related) incidents reported … Talking to my colleagues at the Department of Education, they are starting to get more reports of this type of offending as well*".[130]

11.10 In Victoria, a survey of 4,800 students in late 2008 showed that one in ten students had been asked by others to electronically post a nude photo of themselves in recent

---

127 Depending on the facts of a particular case, offences committed could include producing, distributing or possessing child exploitation material.

128 To be convicted of an offence at trial the tribunal of fact (the Children's Court President or magistrate in juvenile matters, as there is no jury in Children's Court cases) would have to be satisfied beyond reasonable doubt that the material in question was "*child exploitation material*" as defined in the Bill (which includes the requirement that the material was "*likely to offend a reasonable person*"), see paragraph 8.5 for the definition of "*child exploitation material*".

129 Submission No. 1 from Ms Michelle Scott, Commissioner for Children and Young People, 25 August 2009, pp2-3. The Commissioner footnotes the following article in her submission: N Funnell, ""Sexting" gives teens more control", 18 August 2009, news.ninemsm.com.au.

130 J Catanzaro, "Police alarm over rise in kids' nude photo texts", *The West Australian*, 9 May 2009, p4. The article also noted that the police and education authorities were preparing a pamphlet warning parents about the increase in sexting.

months.[131] In May 2009, the New South Wales Government launched an awareness campaign for parents and children, fearing the cases of sexting were on the rise.[132] In Queensland, the Education Department acknowledged in September 2009 that sexting is an increasing phenomenon in schools (and is also occurring in primary schools) and was set to consult an expert about the appropriateness of using a sexting fact sheet sent to New South Wales public schools in May 2009.[133]

11.11 There is a clear distinction between the circumstances of a person sexting their girlfriend or boyfriend an image and the case when a recipient distributes the image to others (perhaps after a break-up). As the Commissioner for Children and Young People noted "*there are incidents of young people distributing images in a malicious or exploitative manner and it may be deemed appropriate to apply criminal sanctions of some sort in these cases*".[134] Children need to feel safe from such behaviour. A child (a person aged under 18 years) may also commit a more serious offence and exploit another child.

11.12 When asked about the application of the offences in a Bill to a 15 year old sexting, Detective Inspector Seivwright stated:[135]

> *The Chairman: So if a child takes a photo of himself or herself naked, is that an offence?*
>
> *Detective Inspector Seivwright: Once they process that image, yes, it is. That is the educational route that we take with our kids.*
>
> *The Chairman: So it is not just the distribution of that image?*

---

131 See F Tomasin, "Pupils subject to phone sexting", *The Age* online, 21 February 2009, www.theage.com.au/national/pupils-subject-to-phone-sexting-20090220-8dqx.html (viewed on 13 October 2009). The online survey was conducted by the Association of Independent Schools of Victoria. Also, Victorian teenagers have been cautioned and charged in relation to sexting incidents. "Teenager sexting a problem, police warn", *ABC Melbourne*, 10 July 2008, noted that "*32 Victorian teenagers were charged with child pornography offences last year because of the practice of sexting … police became involved when the images were forwarded on to others*": www.abc.net.au/news/stories/2008/07/10/2300318.htm (viewed on 13 October 2009). Further, ""Sexting" sparks call for student phone restrictions", *ABC News* online, 23 July 2009, noted that two teenage boys in Victoria had been cautioned and another faced court for his alleged involvement in sexting: www.abc.net.au/news/stories/2009/07/23/2634387.htm (viewed on 13 October 2009).

132 See "Police warn teenagers of "sexting" charges", *ABC News* online, 17 July 2009, at www.abc.net.au/news/stories/2009/07/17/2628666.htm (viewed on 13 October 2009).

133 See T Chilcott, "Crackdown looms on "sexting" in Schools", *The Australian* online, 2 September 2009, at www.theaustralian.news.com.au/story/0,25197,26015839-5006786,000.htlm (viewed on 13 October 2009).

134 Submission No. 1 from Ms Michelle Scott, Commissioner for Children and Young People, 25 August 2009, p3.

135 Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, *Transcript of Evidence*, 9 September 2009, pp9-10.

> *Detective Inspector Seivwright: No. They are possessing that image. I know it sounds weird, but quite often we get calls from parents who have looked at their kid's phone and have a seen a photo of their daughter, naked and doing whatever she is doing, and they contact us. So we then engage the child down the educational path, rather than saying, "We are the moral police, and you are coming with us", or that sort of thing. But to provide a blanket* [exemption] *for children is very, very dangerous in my view.*

11.13 Detective Inspector Seivwright advised his division does not deal with children often. Their principal purpose is to detect adult child sex offenders. As noted above, on the occasions they deal with children, the police often use their discretion and do not charge an offence. The police often caution the child[136] and educate the child and their parents about this behaviour.[137]

11.14 Formal and informal cautions are options under the *Young Offenders Act 1994*. Section 22B of the *Young Offenders Act 1994* provides:

> ***Police officer to consider alternatives to court proceedings***
>
> *A police officer, before starting a proceeding against a young person for an offence, must first consider whether in all the circumstances it would be more appropriate —*
>
> *(a) to take no action; or*
>
> *(b) administer a caution to the young person.*

11.15 Detective Inspector Seivwright advised that, in determining whether a child should be prosecuted, the police consider all the circumstances of the case including the nature and seriousness of the offence, whether there have been adverse consequences of the offending (has anyone been harmed), whether the child comprehended his or her actions and other public interest factors.

11.16 When asked at hearing about police experience and practice in these cases, Detective Inspector Seivwright stated:

---

136 Parents also sign a caution.

137 The Australian Federal Police appears to take the same educative approach most times in sexting cases. On 9 September 2009, Commander Neil Anthony, National Manager, High Tech Crime Operations, Australian Federal Police, advised a Parliament of Australia, House of Representatives, Standing Committee on Communication hearing in relation to the Inquiry into Cyber Crime that sexting "*is a criminal offence. Kids sometimes miss that. If the child is under 18 — we will say under 16 — and he or she has taken a photo of themselves naked or in an erotic pose, it is child abuse material. There has been one instance in Victoria where they moved forward with a prosecution. Most times, in that particular instance, we would educate*". See Hansard transcript, p14, at www.aph.gov.au/hansard/reps/committee/R12380.pdf (viewed on 13 October 2009).

> *in the few texting cases that we have had—as you know, it is a fairly new phenomenon—we have gone more down the educational path with the child, because we have the Young Offenders Act and we have all those options when it appears that it is a technical offence rather a true exploitation offence. …*
>
> [If] *the boyfriend sends the photo* [his ex girlfriend sent him] *to his entire contact list or posts it on the web or puts it on You Tube or something like that …* [we] *would charge that person with that, because that is malicious …*
>
> *The Chairman: Is there currently a police set of guidelines or a directive in relation to charging children in those sexting circumstances? Do you have any established protocols for that?*
>
> *Detective Inspector. Seivwright: No, we do not have established written protocols. However, we have an agreed course of action within our division, which generally—not generally; exclusively—ends up with those investigations.*[138]

11.17 Police officers draft prosecution notices (charges) against children.[139] Prosecutors from the Office of the DPP, who prosecute matters in the Perth Children's Court, may amend the charges or draft new prosecution notices (charges) if necessary.[140]

11.18 The DPP advised that, with regard to sexual acts between children, "*the State would not ordinarily prosecute unless there was an element of abuse involved*".[141] At hearing, the DPP stated:

> *whether anyone would actually be charged or prosecuted in those circumstances would obviously depend on the circumstances of the case. If there is an element of abuse involved, then that would more likely be a situation where a prosecution might occur. But if you are dealing with people who are young people, who are simply being silly or engaging in consensual activity of this sort, it is probably analogous to cases of sexual acts between teenagers under the age of 16 where a judgement has to be made as to whether there is any*

---

138 Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, *Transcript of Evidence*, 9 September 2009, pp9-10.

139 Detective Inspector Darren Seivwright advised that the practice in the Sex Crime Division is that a prosecution notice (charge) drafted by a police officer is checked by another officer, usually a more senior officer.

140 These prosecution notices are prepared and signed by the Office of the Director of Public Prosecution's Children's Court team manager (a Class 1 prosecutor or above): Email from Ms Nuala Keating, Legal Policy Officer, Office of the Director of Public Prosecutions, 7 October 2009, p1.

141 Answers to Questions on Notice from Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 6 October 2009, p11.

public interest in prosecuting two kids, both of whom are technically committing an offence—and we would not. We would usually only prosecute cases of sexual acts between teenagers where there is a lack of consent on the part of one of those children. There is precedent for having to deal with this kind of situation. I would hope that that precedent would satisfy any persons who have concerns about whether this sort of sexting would be captured.

The Chairman: What about in a situation where a 14-year-old takes a photo of her breast to send to her boyfriend, they then split up and he decides to send that photo to 50 of his schoolmates to embarrass her? Would you then prosecute the boyfriend? …

Mr Fiannaca: No; I think we have had to deal with that kind of scenario. Lindsay makes the point that there was one that we did prosecute that involved adults, but it would equally be applicable here. …

The Chairman: … I can understand that, in the case of a 14-year-old sending a photo of herself to a boyfriend, you might say, "Well, maybe a line has not been crossed there." You may provide a caution to that person rather than proceed with a prosecution. But if that boyfriend then sends that photo to 50 other people, without the consent of the person who has been photographed, that is clearly an offence, I would have thought, under the proposed provisions of the legislation.

Mr Fiannaca: … I think that a case of that nature might well attract prosecution; whereas the consenting kids who are exchanging this sort of material would not be prosecuted. It is something that we would need to give further thought to in the future in terms of whether there is a need for guidelines. Generally, getting back to the question of prescription, one does not want to be too prescriptive about guidelines. There needs to be that ability to exercise judgement in a particular case without having to simply tick off boxes.[142]

[142] Mr Bruno Fiannaca SC, Acting DPP, Office of the Director of Public Prosecutions, *Transcript of Evidence,* 16 September 2009, pp16-17.

11.19 The Office of the DPP's *Statement of Prosecution Policy and Guidelines* provides specific guidelines relating to the prosecution of juveniles.[143] This states in part:

> *Special considerations may apply to the prosecution of juveniles. The longer term damage which can be done to a juvenile because of the encounter with the criminal law early in his or her life should not be underestimated. Consequently, in some cases prosecutions must be regarded as a severe measure with significant implications for the future development of the juvenile concerned. The welfare of the child must therefore be considered when prosecutorial discretion is exercised.*[144]

11.20 In the United States, debate is growing regarding whether the act of sexting should be perceived as an innocent prank or prosecuted. A number of States are proposing legislation to respond to this conduct. In many States sexting remains a felony. However, in New Jersey, legislation is being drafted to create a diversionary educational program for teens who are charged with sexting. The accused will avoid criminal prosecution by completing the program.[145] In Ohio, State legislators are considering legislation that will reduce sexting charges to a first degree misdemeanour. In Nebraska, State legislators are seeking to change sexting laws to dismiss defendants who send photos of themselves. However, if the photo's recipient distributes the photo after receipt, that person can be charged with possession and distribution.[146]

11.21 It is important to consider that there will be significant consequences for any person, including a child, charged or convicted of the proposed offences. If the Bill is passed:

- a person charged or convicted of these offences will be issued a Negative Notice prohibiting the person from child-related work unless exceptional circumstances are identified;[147]

---

143 Director of Public Prosecutions for Western Australia, *Director of Public Prosecutions Act 1991 Statement of Prosecution Policy and Guidelines 2005*, p11, paragraphs 34 to 36. It is also worth noting that section 321A(7) of *The Criminal Code* (persistent sexual conduct with a child under 16 years old) provides a legislated check on the charging practice applying to this provision. Section 321A(7) provides that "*An indictment containing a charge of an offence under subsection (4) must be signed by the Director of Public Prosecutions or the Deputy Director of Public Prosecutions*".

144 Ibid, paragraph 34.

145 "Should "sexting" be a Criminal Act?", *US Politics Today*, 20 August 2009, http://eupolitics.einnews.com/247pr/113062 (viewed on 13 October 2009). New Jersey also prohibits retail stores selling mobile phones (cellular phones) unless stores provide an information brochure about sexting to customers: see www.law.com/jsp/article.jsp?id=1202432466455 (viewed on 13 October 2009).

146 See http://im.about.com/od/sexting/United_States_Sexting_Laws.htm, and choose the relevant link for each State (viewed on 13 October 2009).

147 Submission No. 5 from Hon Robyn McSweeney MLC, Minister for Child Protection, 7 September 2009, p1, and section 12 of the *Working with Children (Criminal Record Checking) Act 2004.*

- a person convicted of a proposed offence will be placed on the Australian National Child Offender Register, known as ANCOR. There are long-term implications of this – a person can have his name on the ANCOR register for seven years, 15 years or life (for a repeat offender).[148] Pursuant to the consequential amendments in the Bill (clause 13) to the Community Protection (Offender Reporting) Act 2004,[149] a person convicted of a proposed offence may be monitored by police and ordered to keep the police informed of their whereabouts and other personal details; and

- a charge or conviction may impede work or travel opportunities.

11.22 The Commissioner for Children and Young People also noted that there is no general "*public interest*" defence in the proposed legislation. A young person may not be in a position to argue the "*narrow*"[150] categories in the defence in proposed section 221A(1)(c).[151]

11.23 The Commissioner expressed the view that such a defence could apply to young people "*for example at the cutting edge of literary or artistic expression, or created as part of the usual rites of social development … including young person's crude and provocative depiction of their peers and other forms of expression*".[152] The Commissioner submitted that the "*public interest*" lies "*in the preservation of the capacity to freely express oneself, balanced with other interests such as the protection on* [sic] *personal reputation*".[153]

11.24 To summarise, the Committee considers it important to note the implications of the proposed offences on children, particularly for children under 16 years of age engaging in sexting, and the long term consequences on a child charged or convicted of a proposed offence.

11.25 How prosecuting authorities exercise their discretion to prosecute is important. The Committee approves of Detective Inspector Seivwright's comment that in such cases the police would likely go down the educational path and caution a child (an option under the *Young Offenders Act 1994*) (as they have done in texting cases to date) rather than charge a child when it appears that the offence is a "*technical offence*

---

148 Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, *Transcript of Evidence*, 9 September 2009, p7.

149 This legislation is reviewed every five years.

150 Submission No. 1 from Ms Michelle Scott, Commissioner for Children and Young People, 25 August 2009, p5.

151 Paragraph 9.10 of this report outlines the terms of proposed section 221A(1)(c) which requires proof of "*artistic merit*" and other matters and that the act be in the "*public good*" for the defence to succeed.

152 Submission No. 1 from Ms Michelle Scott, Commissioner for Children and Young People, 25 August 2009, p5.

153 Ibid.

rather than a true exploitation offence".[154] As noted above, the DPP also advised that the Office of the DPP would not ordinarily prosecute such offending unless there was an element of abuse involved. The Office of the DPP has written guidelines on prosecuting a child (a person under 18 years of age) and the Children's Court team manager signs any charges they prefer. The Committee is of the view that the above prosecuting practices are appropriate and should be maintained.

11.26 To provide an appropriate check and ensure that charges against a child are only preferred in appropriate cases after careful consideration, the Committee is of the view that a senior officer from the Sex Crime Division of the Western Australia Police should approve any charge against a child. This check is particularly important in sexting cases. It is important to provide this check before a charge is preferred, particularly given that consequences arise from simply being charged. The Committee considers that this check is appropriate even though prosecutors from the Office of the DPP may later appear on these charges in the Children's Court.

11.27 The Committee has written to the Commissioner of Police drawing his attention to the Committee's comments on this issue.

12 PART 3 OF THE BILL

12.1 As noted earlier in this report, Part 3 of the Bill deals with amendments consequential to the *Classification (Publications, Film and Computer Games) Amendment Act 2007* (Cth).

12.2 The Committee noted at Recommendation 8 in Report 36 that clause 24(2)(b) contains a minor typographical error.[155] The Government Response agreed to this recommendation.[156]

12.3 For completeness, the recommendation is noted below.

Recommendation 7: The Committee recommends that a comma be inserted after the term "educational" in clause 24(2)(b). This may be achieved in the following manner:

Page 15, Line 20 — delete the word "educational" and insert

educational,

---

154 Detective Inspector Darren Seivwright, Sex Crime Division, Western Australia Police, *Transcript of Evidence*, 9 September 2009, p9.

155 Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 36, *Child Exploitation Material and Classification Legislation Amendment Bill 2009*, 21 May 2009, p12.

156 Government Response to Report 36, p4: see Appendix 1 of this report.

13 AMENDMENTS TO THE BILL

13.1 There are no further amendments to the Bill proposed by the Government.[157]

14 IS THIS BILL CONSISTENT WITH ITS SUPPORTING DOCUMENTATION?

14.1 The uniformity issues relating to Part 2 of the Bill are identified in the Committee's review of MCCOC Report recommendations below.

14.2 There are no uniformity issues arising out of the Committee's consideration of Parts 3 and 4 of the Bill.

MCCOC Report

14.3 The Committee noted in Report 36 that many of the twenty MCCOC Report recommendations were varied or not included in the Bill. Recommendation 1 of Report 36 stated:

> *The Committee recommends that the Minister explain:*
>
> *(a) in respect of each of the varied/not included 20 recommendations of the Model Criminal Code Officers Committee Report, the reasons for the variation/non-inclusion; and*
>
> *(b) whether the objective of consistency with other jurisdictions is achieved given the cross border nature of child exploitation material.*[158]

14.4 On the issue of consistency with the recommendations, the Government Response advised:

> [The MCCOC Report] *contained 20 "recommendations" which could be used to assist the development of child pornography laws.*
>
> *Like other recommendations, State and Territory Parliaments, while taking into account such recommendations, can and do develop laws that they consider appropriate and relevant for their purposes … on many occasions Ministerial forums have devised model legislation which is to be used as a basis or a guide for the States and Territories to prepare legislation suitable to their needs …*

---

157 Answers to Questions on Notice from Ms Cheryl Gwilliam, Director General, Department of the Attorney General, 14 September 2009, p2.

158 Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 36, *Child Exploitation Material and Classification Legislation Amendment Bill 2009*, 21 May 2009, p5.

> [The MCCOC Report] *recognises that given the different emphasis of the existing child pornography laws across Australia full agreement would never be achieved. However, an attempt has been made to make the laws as uniform as possible.*[159]

14.5 It is clear on reviewing other jurisdictions' legislation that each legislation varies, to some degree, from the others, the Bill and the MCCOC Report recommendations, and there is no absolute inter-jurisdictional uniformity of legislation.

14.6 The Department advised the following in relation to each MCCOC Report recommendation that was not similar to a provision in the Bill:[160]

- Recommendations 1 and 2. These recommendations relate to the proposed term "*child pornography material*" and the minimum requirements of the definition of that term. The proposed legislation defines a child to be a person under 16 years (not 18 years of age) which is consistent with the age of consent in Western Australia. Regarding recommendations 1 and 2, the Department advised:

  > *In the committee report, they talk about definitions and reference to common terminology, and they say that the SCAG starting point was the Queensland legislation. Queensland uses the term "child exploitation material" ... Other jurisdictions use "child abuse material". Other jurisdictions refer to "child pornography" but encapsulate "child abuse material". The commonwealth has separate definitions. Again, I do not think it was ever going to be possible for someone to come up with a uniform definition, but all the definitions aspire to do the same thing—that is, define what is this material. ...*
  >
  > [We] *did not adhere to the uniform recommendation in recommendation 1, because we were expanding the definition of "child pornography".*[161]

- Recommendations 4, 5 and 7.

  These recommendations recommend that the fault element of "*knowing*" be included in various offences. The Bill does not include these fault elements in proposed offences.

---

159 Government Response to Report 36, pp3-4: see Appendix 1 of this report.

160 See Appendix 6 of this report for the full text of each MCCOC Report recommendation. The MCCOC Report includes commentary on each recommendation.

161 Mr Frank Morisey, Senior Policy Officer, and Mr James Thomson, Legal Officer, Department of the Attorney General, *Transcript of Evidence*, 9 September 2009, p16. Paragraphs 8.11 to 8.14 of this report contain further evidence in support of the new terminology.

Recommendation 4 recommends an offence that a person who produces child pornography knowing that it is child pornography material should be included in the package of offences. Recommendation 5 states that an offence that a person who distributes child pornography knowing that it is child pornography should be included in the package of offences. Recommendation 7 states that an offence that a person who is in possession of child pornography knowing that it is child pornography should be included in the package of offences. Offence provisions in other States legislation do not include a "*knowing*" fault element.

The Committee asked for an explanation of this issue in Recommendation 2 of Report 36.[162] The Government Response noted that the proposed offences maintain the same strict liability offences currently in section 60 of the Enforcement Act.[163] The Government Response also explained why the existence of fault elements in the Criminal Codes of the Commonwealth, Australian Capital Territory and the Northern Territory makes in inter-jurisdictional uniformity difficult:

> *Fault elements include intention, knowledge, recklessness and negligence. The Codes of those jurisdictions provide rules for the drafting of offences which rely on the definitions in the Code. This results in a very different style of drafting of the offences to the drafting of offences in common States and code States of WA and Queensland.*[164]

- Recommendation 8. This provides that the possession offence should also include a provision which states that taking steps toward obtaining child pornography is also an offence. The Department advised:[165]

  > *I understand that the WA bill does not include this particular issue, but section 219(1) in the definition of "distribute" encapsulates this particular position.*

- Recommendation 9. This states that an aggravated penalty of 14 years imprisonment "*could*" be incorporated into the offence of involving a child in the making of child pornography. This recommendation is not in the Bill. The Department advised:

---

162 Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 36, *Child Exploitation Material and Classification Legislation Amendment Bill 2009*, 21 May 2009, p5.

163 Government Response to Report 36, p3: see Appendix 1 of this report.

164 Ibid, p4.

165 Mr James Thomson, Legal Officer, Department of the Attorney General, *Transcript of Evidence*, 9 September 2009, p16.

Again, there was not a uniform response to this. Some jurisdictions preferred that the aggravated penalty in the New South Wales legislation be adopted. The ACT agreed with that, and Queensland agreed with that. However, Queensland did not support some other recommendations on two grounds. It set circumstances of aggravation at 12 years. There was no uniformity in the age. WA, in considering other offences in the Criminal Code about the making of child pornography, accepted that 10 years was a sufficient maximum penalty, because you need to have parity with other criminal offences in the code.[166]

- Recommendation 11. This states that the penalty for possession of child pornography should be 5 years imprisonment. The penalty in the Bill is 7 years imprisonment. The Department advised:

  The WA bill has seven years for mere possession and that is in accordance with an election commitment given by the Gallop government in 2005 to increase penalties for child pornography offences.[167]

- Recommendation 12. This recommendation states that a general "*public benefit*" test should be included in the legislation. The Department advised:

  We actually refer to that in section 221A(1)(c), where you can mount a defence if the material is of recognised literacy, artistic or scientific merit, or of a genuine medical character, and if the act to which the charge relates is justified as being in the public good. That has maintained the position in sections 58 and, I think, 101 of the current legislation.[168]

14.7 For completeness, the following MCCOC Report recommendations were included in the Bill in the recommended, or a similar, form in the proposed sections noted below:

- Recommendation 3 – proposed section 217;
- Recommendation 6 – proposed section 219;
- Recommendation 10 – proposed sections 218 and 219;
- Recommendation 13 – proposed section 221A(3);

166 Mr Frank Morisey, Senior Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 9 September 2009, p16.

167 Ibid, p8.

168 Ibid, p16.

- Recommendation 14 – proposed section 221A(1)(a);
- Recommendation 15 – proposed section 221A(1)(b);
- Recommendation 16 – proposed section 221A(3)(b);
- Recommendation 17 – proposed section 221A(2);
- Recommendations 18 and 19 – proposed section 217; and
- Recommendation 20 – proposed section 216.

Substantial uniformity

14.8 The Bill is substantially uniform with other States and the Commonwealth legislation. Absolute uniformity was not sought or necessary.

14.9 The Department explained why substantial uniformity was sufficient and appropriate and why they had no concerns about areas where uniformity had not been achieved:

> *Mr Thomson:* [This model uniform scheme was] *... a give and take within the parameters that absolute uniformity was neither achieved nor necessarily an objective of this process; that is, substantial uniformity is often an objective of this process. One of the reasons for that is that it allows each jurisdiction to tailor the legislation to some extent to its own needs and requirements. It also enables the legislation to indicate, as time goes on, what provisions might be a better way of dealing with a particular issue—the classic argument in a federal system for experimentation and diversity. Therefore, again, absolute uniformity was not sought and, obviously, not achieved because there are some variations. But I do not think necessarily there are substantial and major variations. To the extent, again, in all these model uniform schemes, that there is, variation at least in my experience, that does not necessarily hinder jurisdictional enforcement between jurisdictions. Again, in this instance, the ability of people who commit an offence in one jurisdiction moving across jurisdictions was not necessarily seen as being undermined by some diversity.*
>
> *The Chairman: I understand you are saying that we have achieved substantial consistency, but not absolute consistency. So clearly there are some areas where we do not have national consistency as a result of the bill currently before the house. Are there any areas of concern where we have not achieved national consistency through this bill?*

> *Mr Thomson: I think the answer to that is no; it is not of concern and it will not be of concern, particularly where we think Western Australia has got a better provision or stricter penalties. ... I think there is substantial uniformity; there is not absolute uniformity. Again, if you take a federal perspective, that is not necessarily a bad thing if you take the view that Western Australians have a particular concern that might not be shared with South Australia and New South Wales. ... The second area of not being uniform is obviously the drafting. Parliamentary Counsel obviously has different techniques of drafting. Again, there is not necessarily uniformity in all aspects of the drafting. Again, for two reasons: it may not be considered necessary because you encapsulate the same substantive offence or proposals; it also may not be necessary because we want to have in Western Australia consistency across our Western Australian legislation, as other jurisdictions do.*[169]

14.10 The Committee considers that substantial uniformity is appropriate, desirable and sufficient in all the circumstances.

Finding 4: The Committee finds that the Child Exploitation Material and Classification Legislation Amendment Bill 2009 is substantially consistent with its supporting documentation.

15 CONCLUSION

15.1 The offence provisions in the Bill are an important step forward in protecting children from the harm caused by child exploitation material. The Bill strengthens and modernises the legislation in this area.

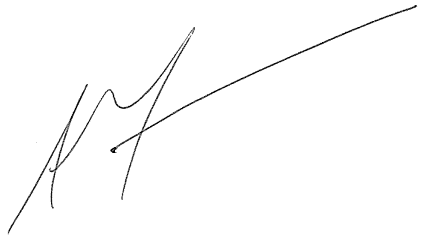
15.2 This type of crime has evolved and become more prevalent with the development of new forms of technology and communication. An additional challenge is that modern technology gives a person the capacity to commit an offence involving a large number of child exploitation pictures using a home computer.

15.3 The challenge in the future is for legislation to evolve with new forms of technology and communication to ensure that robust laws exist to prosecute those who engage in the exploitation of children.

---

169 Mr James Thomson, Legal Officer, Department of the Attorney General, *Transcript of Evidence*, 9 September 2009, p2.

15.4 The Committee commends its report to the House.



Hon Adele Farina MLC
Chairman

22 October 2009

APPENDIX 1

GOVERNMENT RESPONSE TO REPORT 36

APPENDIX 1

GOVERNMENT RESPONSE TO REPORT 36

WA GOVERNMENT RESPONSE TO

REPORT 36
STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

CHILD EXPLOITATION MATERIAL AND CLASSIFICATION LEGISLATION AMENDMENT BILL 2009 (WA)

Recommendation 1: The Committee recommends that the Minister explain:

a) in respect of each of the varied/not included 20 recommendations of the Model Criminal Code Officers Committee Report, the reasons for the variation/non-inclusion; and

b) whether the objective of consistency with other jurisdictions is achieved given the cross border nature of child exploitation material.

The Model Criminal Code Officers Report (December 2004) on *Nationally Consistent Child Pornography Laws* contains 20 "recommendations" which could be used to assist the development of child pornography laws.

Like other recommendations, State and Territory Parliaments, while taking into account such recommendations, can and do develop laws that they consider appropriate and relevant for their purposes.

Members of the Standing Committee would be aware that on many occasions Ministerial forums have devised model legislation which is to be used as a basis or a guide for the States and Territories to prepare legislation suitable to their needs. For example, the complementary State and Territory enforcement legislation which under pins the National Cooperative Classification Scheme (NCCS), which is based on model legislation, is slightly different in each jurisdiction [provisions for the sale and advertising of X films].

Recommendations 5 and 7 of the 2004 Officers' Report use the word "knowing" in relation to offences. "Knowing" requires the prosecution to prove that there is an element of intent, The offences in the Bill do not include that element and therefore, are strict liability offences. This maintains, in the Bill, the same strict liability offences as currently in section 60 of the *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA).

The maximum penalty for possession has been increased from 5 years to 7 years imprisonment which is in line with the previous Government's 2005 electoral commitments to increase penalties for child pornography offences and transfer those offences to the *Criminal Code* (WA). As a matter of interest, the penalty in the *Criminal Code Act 1995* (Clth) is 10 years.

Indeed, the 2004 Officers' Report recognises that given the different emphasis of the existing child pornography laws across Australia full agreement would never be achieved. However, an attempt has been made to make the laws as uniform as possible.

This is one of the measures which the Government is taking to protect children. The proposed laws will protect children in WA. The laws in other jurisdictions have the same objective.

Recommendation 2: The Committee recommends that the Minister explain why the issue of *"fault"* makes inter-jurisdictional uniformity difficult to achieve.

The Committee is referring to an Officers' paper considered by the Standing Committee of Attorneys General (SCAG) in November 2004 which noted that it was difficult to achieve uniformity for child pornography offences when different jurisdictions, especially "Code States", deal differently with issues of fault.

The issues of fault that SCAG is referring to are the "fault elements" in the Criminal Codes of the Commonwealth, the ACT and the Northern Territory. Fault elements include intention, knowledge, recklessness and negligence. The Codes of those jurisdictions provide rules for the drafting of offences which rely on the definitions in the Code. This results in a very different style of drafting of the offences to the drafting of offences in common law States and Code States of WA and Queensland.

Recommendation 3: The Committee recommends that the Minister explain why publications were excluded from the National Cooperative Classification Scheme in 1995 and if this continues to be the case today.

WA operated its own classification regime for publications from 1973. The decision by the WA Minister in 1995 maintained this classification regime. As a result of 2003 WA amendments to the *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA), WA became a full member of the NCCS on 1 July 2003 and no longer classifies publications.

Recommendation 4: The Committee recommends that the Minister explain the absence of prescription in:
(1) the phrase *"likely to offend a reasonable person"* and the terms *"offensive"* and *"demeaning"* in proposed section 216; and

(2) proposed new sub sections 217(1)(a) and (b).

As the Committee suggests, it is a deliberate policy decision to leave to the courts the task of determining the meaning of the terms referred to in recommendation 4(1) and the provision referred to in recommendation 4(2).

The term "likely to offend a reasonable person" is used in the current definition of "child pornography" in the *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) and has been used in the legislation of other States and the Commonwealth for many years. There is a considerable body of law about the meaning of the term. The term incorporates the notion of community standards into what should be classified as child exploitation material. For these reasons, these terms have not been further defined or elaborated.

As noted by the Committee, South Australia has adopted a more prescriptive approach in relation to its definition of "child pornography". Other States were concerned about three things under the South Australian approach. First, it could be difficult to establish the elements of child exploitation offences. Second, conventional cases would be more difficult to prosecute. Third, the South Australian approach would be likely to have unintended consequences.

Similar concerns apply in relation to being prescriptive as to the meaning of "offensive", "demeaning" and "in any way concerned in the production of child exploitation material".

Recommendation 5: The Committee recommends that the Minister justify reversing the onus of proof in proposed sections 221A(1) and (2) and the basis of the four defences.

Providing a defence to an offence does not constitute reversing the onus of proof. The matters set out in the defences are not elements of the offence. The burden of proving the elements of the offence (eg that the accused was in possession of child exploitation material) remains with the prosecution. The accused is provided with defences that would not otherwise apply in relation to the offence.

As the Explanatory Memorandum for the Bill indicates, these defences apply, with some variations, in various other States. Some defences (eg proof of classification) are more easily proved than others (eg artistic merit). In each case, the accused can raise the defence if the accused is of the opinion that the defence has merit. If the defences were made elements of the offence it would be very difficult, if not impossible, for the prosecution to establish a case. For example, it is possible for the prosecution to prove that material is child exploitation material but it would not be possible for the prosecution to prove that the accused knew that the material was offensive to a reasonable adult. However, the accused may raise that as a defence. For example, the accused was in possession of material that the accused had never opened and did not know included material that was offensive to a reasonable adult. This is a defence that has been very carefully drafted in consultation with the WA DPP and police to ensure that the accused is given a fair defence but is not given an opportunity to make every prosecution unviable.

Recommendation 6: The Committee recommends that the Minister explain the preference in the Bill for an accused person taking reasonable steps to get rid of the unsolicited child exploitation material rather than taking reasonable steps to report receipt of the material to law enforcement agencies.

As noted, proposed sections 221A(2)(a) and (b) in the Bill conform with recommendation 17 of the 2004 Officers' Report, and allow a person to "get rid off" (namely, delete or remove) unsolicited child exploitation material for fairly practical reasons. The likelihood is that a person could be caught up in a "pornado" and the most practical thing to do is to allow them to delete it.

The Committee's recommendation that a person take reasonable steps to report receipt of the material to law enforcement agencies would be unworkable. For example, these agencies would become inundated with reports and not have resources to investigate such reports. Also, most "pornados" arrive from overseas and the WA Police would have no or very limited power to deal with the transmission of this overseas material. If necessary, WA Police refer such material to international law enforcement agencies.

Recommendation7: The Committee recommends that the Minister explain why child protection workers are not afforded the two *exclusions* from being charged with an offence that members of law enforcement agencies are given.

The exclusions set out in proposed section 221A(3) relate to clearly defined classes of persons acting in clearly defined circumstances. This retains the exemption in section 103 in the *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA).

The defence set out in section 221A(1)(d) ("that the accused person was acting for a genuine child protection or legal purpose, and that the person's conduct was reasonable for that purpose") relates to a broader and less clearly established group of people who act in a range of circumstances. It is appropriate that the court should consider whether the person is acting in a way that genuinely relates to child protection and that the conduct was reasonable in the circumstances in which the person was acting.

Recommendation 8: The Committee recommends that a comma be inserted after the term "educational". This may be achieved in the following manner:

Page 15, Line 20, delete the word "educational" and insert "educational,"

The Committee's recommendation about the inclusion of a comma is agreed to.

APPENDIX 2

LIST OF STAKEHOLDERS

APPENDIX 2

LIST OF STAKEHOLDERS

Hon CC Porter MLA, Attorney General

Hon RM McSweeney MLC, Minister for Child Protection

Hon RF Johnson MLA, Minister for Police

Ms Michelle Scott, Commissioner for Children and Young People

Ms Andrea Mitchell MLA, Chairman, Joint Standing Committee on the Commissioner for Children and Young People

Hon Dr Kim Hames MLA, Minister for Health

The Hon Chief Justice Wayne Martin, Chief Justice of Western Australia, Supreme Court of Western Australia

Her Honour Judge Antoinette Kennedy, Chief Judge, District Court of Western Australia

His Honour Judge Denis Reynolds, President, Children's Court of Western Australia

Mr Steven Heath, Chief Magistrate, Magistrates Court of Western Australia

Clinical Associate Professor Peter Winterton, Medical Director, Child Protection Unit, Princess Margaret Hospital for Children

Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions

Mr Dudley Stow, President, The Law Society of Western Australia

Mr Craig Colvin SC, President, The Western Australian Bar Association

Ms A Blackburn, Secretary, Criminal Lawyers Association of Western Australia

Mr George Turnbull, Director, Legal Aid Western Australia

Mr Dennis Eggington, Chief Executive Officer, Aboriginal Legal Service of Western Australia

Ms Mary Anne Kenny, Chair, Law Reform Commission of Western Australia

Ms Wendy Murray, Director, Office of Crime Prevention

Associate Professor Frank Morgan, Director, Crime Research Centre

Ms Amanda Just, Executive Officer, Community Legal Centres Association

Associate Professor William Ford, Dean, Faculty of Law, The University of Western Australia

Associate Professor Jane Power, Dean, School of Law, The University of Notre Dame Australia

Professor Mark Stoney, Head of School, School of Law and Justice, Edith Cowan University

Professor Gabriel Moens, Dean, School of Law, Murdoch University

Dr Joan Squelch, Head of School, School of Business Law and Taxation, Curtin University of Technology

APPENDIX 3

LIST OF SUBMISSIONS

APPENDIX 3

LIST OF SUBMISSIONS

1. Ms Michelle Scott, Commissioner for Children and Young People, received 25 August 2009

2. Clinical Associate Professor Peter Winterton, Medical Director, Child Protection Unit, Princess Margaret Hospital, received 28 August 2009

3. Hon Nick Goiran MLC, Member for the South Metropolitan Region, received 7 September 2009

4. Hon Alison Xamon MLC, Member for the East Metropolitan Region, received 7 September 2009

5. Hon Robyn McSweeney MLC, Minister for Child Protection , received 7 September 2009

6. Mr Dudley Stow, President, The Law Society of Western Australia, received 8 September 2009

7. Mr Bruno Fiannaca SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, received 11 September 2009

APPENDIX 4

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

APPENDIX 4

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper entitled *Scrutiny of National Schemes of Legislation*. A brief description of each is provided below.

Structure 1: *Complementary Commonwealth-State or Co-operative Legislation*. The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.

Structure 2: *Complementary* or *Mirror Legislation*. For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.

Structure 3: *Template, Co-operative, Applied* or *Adopted Complementary Legislation*. Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.

Structure 4: *Referral of Power*. The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.

Structure 5: *Alternative Consistent Legislation*. Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.

Structure 6: *Mutual Recognition*. Recognises the rules and regulations of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism*. Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model*. Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition*. A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

APPENDIX 5

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

APPENDIX 5

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

Does the legislation have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?

2. Is the Bill consistent with principles of natural justice?

3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons? Sections 44(8)(c) and (d) of the Interpretation Act 1984. The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.

4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?

5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?

6. Does the Bill provide appropriate protection against self-incrimination?

7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?

8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?

9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?

10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?

11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?

13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?

14. Does the Bill allow or authorise the amendment of an Act only by another Act?

15. Does the Bill affect parliamentary privilege in any manner?

16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?

APPENDIX 6

MCCOC REPORT RECOMMENDATIONS

APPENDIX 6

MCCOC REPORT RECOMMENDATIONS

Definition

Recommendation 1: That the term "child pornography material" be used to describe the material to be covered by the offence.

Recommendation 2: That the definition of child pornography material should, as a minimum, contain the following elements:

- material that describes or depicts;
- in a way that reasonable persons would regard as being, in all the
- circumstances, offensive;
- a child who is, or who appears to be
- under the age of 18 years,
- engaged in sexual activity or in a sexual context; or
- the subject of child abuse activity.

Elements

Recommendation 3: The Queensland offence of involving a child in the making of child pornography should be included in the package of offences

Recommendation 4: An offence that a person who produces child pornography knowing that it is child pornography material should be included in the package of offences.

Recommendation 5: An offence that a person sho distributes child pornography knowing that it is child pornography should be included in the package of offences.

Recommendation 6: The definition of distribution should include the concept of entering into an arrangement or agreement to distribute.

Recommendation 7: An offence that a person who is in possession of child pornography knowing that it is child pornography should be included in the package of offences.

Recommendation 8: This offence should include a provision which states that taking steps towards obtaining child pornography is also an offence.

Penalties

Recommendation 9: That an aggravated penalty of 14 years imprisonment could be incorporated into this offence for children under the age of 14 years. For children aged 14 to 18 the penalty should be 10 years imprisonment.

Recommendation 10: The penalty for production and distribution of child pornography should be 10 years imprisonment

Recommendation 11: The penalty for possession of child pornography should be 5 years imprisonment.

Defences

Recommendation 12: A general public benefit test should be included within this legislative package.

Recommendation 13: A defence that the person was a law enforcement officer acting in the course of his or her official duties should be included in this legislative package.

Recommendation 14: A classification defence should also be included.

Recommendation 15: Whether a defence that the defendant did not know, and could not have reasonably been expected to have known, that he or she produced, disseminated or possessed child pornography is required will depend on whether the specific fault requirement of knowledge is included in the relevant offences.

Recommendation 16: A defence that the defendant was acting in the course of his or her official classification duties be included within this legislative package.

Recommendation 17: A specific defence to possession of child pornography, that material was unsolicited and that as soon as the defendant became aware of the nature of the material, he or she took reasonable steps to get rid of it, should be included in this legislative package.

Grooming

Recommendation 18: Procuring offences should be included within the package of offences.

Recommendation 19: These offences should be broad enough to cover procuring a child for a third person.

Recommendation 20: The age of consent for each jurisdiction should be used as the threshold age for a child for these offences.

APPENDIX 7

DELETED OFFENCES

APPENDIX 7

DELETED OFFENCES

Classification (Publications, Films and Computer Games) Enforcement Act 1996

3. Interpretation

In this Act, unless the contrary intention appears —

…

child pornography means an article that describes or depicts, in a manner that is likely to cause offence to a reasonable adult, a person who is, or who looks like, a child under 16 years of age (whether the person is engaged in sexual activity or not);

60. Child pornography

(1) A person who —

(a) with intent to sell or supply the child pornography or the copy to another, possesses or copies child pornography; or

(b) sells or supplies, or offers to sell or supply, to another, child pornography,

is guilty of a crime, and is liable to imprisonment for 7 years.

(2) A person who publishes —

(a) anything likely to be understood as conveying that the person publishes or supplies child pornography; or

(b) an advertisement for child pornography,

is guilty of a crime, and is liable to imprisonment for 5 years.

(3) A person who displays, exhibits or demonstrates child pornography is guilty of a crime, and is liable to imprisonment for 5 years.

(4) A person who possesses or copies child pornography is guilty of a crime, and is liable to imprisonment for 5 years.

(5) In proceedings for an offence against subsection (1), evidence that a person had possession of, or made, 10 or more copies of an article that is child pornography is evidence that the person intended to sell the child pornography and, in the absence of evidence to the contrary, is proof of that fact.

(6) For the purposes of subsection (2)(b), if a person publishes an advertisement for child pornography at the request of another person, that other person alone must be taken to have published it.

(7) A person liable to imprisonment under this section may be sentenced to pay a fine of any amount in addition to or instead of being sentenced to imprisonment.

Classification (Publications, Films and Computer Games) Enforcement Act 1996

99. Interpretation

In this Division —

…

objectionable material means —

Only paragraph (b) (child pornography) in the definition of "*objectionable material*" in section 99 is being deleted.

(a) a film classified RC, a computer game classified RC, or a publication classified RC;

(b) child pornography;

(c) an article that promotes crime or violence, or incites or instructs in matters of crime or violence; or

(d) an article that describes or depicts, in a manner that is likely to cause offence to a reasonable adult —

(i) the use of violence or coercion to compel any person to participate in, or submit to, sexual conduct;

(ii) sexual conduct with or upon the body of a dead person;

(iii) the use of urine or excrement in association with degrading or dehumanizing conduct or sexual conduct;

(iv) bestiality;

(v) acts of torture or the infliction of extreme violence or extreme cruelty;

Therefore, section 101 offences will no longer apply to "*objectional material*" that is "*child pornography*".

101. Objectionable material: offences

(1) A person must not use a computer service to —

(a) transmit an article knowing it to be objectionable material;

(b) obtain possession of an article knowing it to be objectionable material;

(c) demonstrate an article knowing it to be objectionable material;

(d) advertise that objectionable material is available for transmission; or

(e) request the transmission of objectionable material knowing it to be objectionable material.

Penalty: $15 000 or imprisonment for 18 months.

(2) It is a defence to a charge of an offence against this section to prove that the article concerned is —

(a) an article of recognized literary, artistic or scientific merit; or

(b) a bona fide medical article,

and that transmitting, obtaining possession of, demonstrating, advertising, or requesting the transmission of, the article is justified as being for the public good.