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.