

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

CRIMES (CHILD SEX TOURISM) AMENDMENT BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice,
the Hon Duncan Kerr, MP)



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CRIMES (CHILD SEX TOURISM) AMENDMENT BILL 1994

GENERAL OUTLINE

This Bill amends the *Crimes Act 1914* ("the Principal Act") by inserting new Part IIIA. The primary purpose of the new Part is to create offences aimed at Australian nationals and residents who engage in sexual relations with children overseas and at those involved in the organisation and promotion of child sex tourism.

Division 2 of new Part IIIA creates prescribed sexual offences committed overseas against children under the age of 16 years.

Division 3 provides that it will be a defence to all offences under Division 2:

- (a) if a valid and genuine marriage existed between the defendant and the child; or
- (b) if at the time of the relevant conduct the defendant believed that the child was aged 16 years or over.

Division 4 creates offences of encouraging and benefiting from conduct of the kind that would constitute an offence under the proposed new Part.

To facilitate the prosecution of offences under this Part, and to minimise the costs involved, Division 5 provides for the taking of evidence from overseas witnesses by satellite video link.

Division 6 inserts provisions to assist in the conduct of proceedings under the proposed Part, including: a provision allowing the jury to return alternative verdicts in certain cases; and a provision which allows the jury or the court to determine, where there is insufficient evidence to determine the child's age with precision, whether that a child is, or was at a particular time, under the age of 16 years, or how old the child was at particular time.

FINANCIAL IMPACT

It is not anticipated that the Bill will occasion any additional costs to the Government.

NOTES ON CLAUSES

PART 1 - INTRODUCTORY

Clause 1 - Short title

This is a formal provision identifying the *Crimes Act 1914* as "the Principal Act" and providing for this Act to be cited as the *Crimes (Child Sex Tourism) Amendment Act 1994*.

Clause 2 - Commencement

All provisions of the proposed legislation are to commence on the day on which it receives the Royal Assent.

Clause 3 - Insertion of new Part IIIA

This clause inserts new Part IIIA in the Principal Act.

Division 1 - Preliminary

Proposed section 50AA - Interpretation

Proposed subsection 50AA(1) defines words and expressions used in this Part.

"act of indecency". The meaning of this expression is provided in proposed subsection 50ABA.

"Australia" is defined to include the external Territories.

"induce" means to induce by threats, promises or otherwise. The expression is used in proposed sections 50BC and 50BG.

"offence". For the purposes of the proposed Part this expression has the extended meaning provided in proposed subsection 50AA(2).

“sexual intercourse” has the meaning given to that expression by proposed section 50AB.

“vagina” is defined to include any part of a female person’s genitalia and a surgically constructed vagina. The expression is used in proposed section 50AB.

Proposed subsection 50AA(2) provides that a reference in this Part (except if that reference occurs in proposed section 50DB) to an offence against the Part or a particular provision of it, includes a reference to the inchoate and secondary offences under sections 5, 6, 7 and paragraph 86(1)(a) of the Principal Act (which include offences for aiding and abetting, attempts and conspiracy) and to an offence against proposed section 50DB (for encouraging conduct of a kind that would constitute an offence against this Part).

Proposed subsection 50AA(3) provides that a reference in proposed section 50DB to an offence against the Part or a particular provision of it does not include a reference to an offence because of section 5 of the Principal Act. It is not considered appropriate to extend criminal responsibility further in relation to proposed section 50DB by applying it to the preliminary offences created by section 5.

Proposed subsection 50AA(4) provides that section 7A (incitement) does not apply to any of the offences created under this Part. This is because proposed section 50DB applies to all the offences created by the Part (except itself) and performs, in relation to those offences, an equivalent function to section 7A of the Principal Act. It also carries a more severe penalty than section 7A (a maximum of 17 years imprisonment as opposed to 1 year).

Proposed subsection 50AA(5) provides that paragraph 86(1)(a) of the Principal Act does not apply to an offence against proposed section 50DB. Paragraph 86(1)(a) is disapplied because proposed section 50DB, although it creates a substantive offence, subsumes conduct covered by the offence of conspiracy. It is not considered appropriate to extend criminal responsibility further in relation to this offence by the application of preliminary offences.

Proposed section 50ABA - Meaning of “act of indecency”

Proposed subsection 50ABA(1) provides that, for the purposes of the proposed Part IIIA, an act of indecency is an act of a sexual nature involving the human body, or bodily actions or functions, that is so unbecoming or offensive that it amounts to a gross breach of ordinary contemporary standards of decency and propriety in the Australian community.

The question of whether or not an act amounts to an act of indecency remains a question of fact for the jury to decide.

In order to avoid any doubt, proposed subsection 50ABA(2) provides that the meaning of an act of indecency includes an indecent assault. This is to avoid any argument to the contrary based on cases such as *Saraswati v R* (1991) 172 CLR 1.

Proposed section 50AB - Meaning of "sexual intercourse"

Proposed subsection 50AB(1) provides a definition of the term "sexual intercourse". The expression is used in the offences created under Division 2 of this Part. As the definition is exhaustive, conduct of a sexual nature which does not fall within any of the conduct listed in paragraphs 50AB(1)(a) to (e), will not amount to sexual intercourse for the purposes of the offences that use that term (although the conduct may amount to an act of indecency for the purposes of the offences under proposed sections 50BE and 50BG).

Proposed subsection 50AB(2) makes it clear that acts carried out for a proper medical, hygienic or law enforcement purpose will not amount to sexual intercourse for the purposes of the new Part.

Proposed section 50AC - Persons who may be prosecuted for an offence committed overseas.

This provision limits the persons who may be prosecuted under this Part for conduct committed overseas. They are persons who, at the time of the relevant act or omission, are: (i) Australian citizens; (ii) residents of Australia (including residents of the external Territories); (iii) companies incorporated under Australian law or; (iv) companies whose activities are carried on principally in Australia.

The provision does not limit the persons who may be prosecuted for an offence committed within Australia. Foreign visitors in Australia who promote, encourage or organise child sex tours, for example, are liable to be prosecuted for the offences under new sections 50DA and 50DB.

Division 2 - Sexual offences against children overseas

Proposed Section 50BA - Sexual intercourse with child under 16 while overseas

This provision makes it an offence for an Australian citizen or resident to engage in sexual intercourse (as defined) with a child under the age of 16 years, whilst outside Australia. It provides a maximum penalty of 17 years imprisonment.

Proposed section 50BC - Inducing child under 16 years to engage in sexual intercourse

This provision makes it an offence for an Australian citizen or resident to induce a child under the age of 16 years to engage in sexual intercourse (as defined) with a third person, whilst outside Australia and in the presence of the Australian citizen or resident. For an offence to be committed under this provision the child must actually engage in sexual intercourse with the third person. The maximum penalty for the offence is 17 years imprisonment.

Proposed section 50BE - Sexual conduct involving child under 16

This provision makes it an offence for an Australian citizen or resident, whilst outside Australia, to:

- . commit an act of indecency on a person who is under 16 years of age;
- . submit to an act of indecency committed by a person who is under 16 years of age;
- . commit an act of indecency in the presence of a person who is under 16 years of age with the intention of deriving gratification from the latter's presence during the act;
- . submit to an act of indecency committed in the presence of a person who is under 16 years of age with the intention of deriving gratification from the latter's presence during the act; or

engage in sexual intercourse with another person in the presence of a person who is under 16 years of age with the intention of deriving gratification from the latter's presence during intercourse.

The maximum penalty for the offence is 12 years imprisonment.

Proposed section 50BG - Inducing child under 16 to be involved in sexual conduct

Proposed subsection 50BG(1) makes it an offence for an Australian citizen or resident to induce a child under the age of 16 years to: (i) commit an act of indecency, outside Australia and in his or her presence, but not upon him or her; (ii) submit to an act of indecency outside Australia and in his or her presence, but which is not committed by or upon him or her; or (iii) to be present while a third person commits an act of indecency outside Australia and in his or her presence, but which is not committed upon him or her. The maximum penalty for the offence is 12 years imprisonment.

Proposed subsection 50BG(2) makes it an offence for an Australian citizen or resident to induce a child under the age of 16 years to be present while a third person engages in sexual intercourse with a fourth person outside Australia and in the presence of the Australian citizen or resident. The maximum penalty for the offence is 12 years imprisonment.

Division 3 - Defences

Proposed section 50CA - Defence based on belief about age and consent

Proposed section 50CA provides for a defence to all the offences in Division 2. The defence applies if, at the time of the sexual intercourse or act of indecency, the defendant believed that the child was 16 or over.

In order to establish the defence in proposed section 50CA it will not be necessary for the defendant to prove that his or her mistaken belief as to the child's age was reasonable in the circumstances. However, proposed section 50CD provides that the jury may take reasonableness into account when determining whether the defendant in fact held the claimed belief.

Proposed section 50CB - Defence based on valid and genuine marriage and belief about consent

Proposed section 50CB provides a defence to all of the offences created under proposed Division 2. The defence applies if: (a) at the time of the relevant conduct a marriage existed between the child and the defendant which was valid, or recognisable as valid, under the law of the country (i) where the marriage was solemnised, (ii) where the offence was allegedly committed, or (iii) of the defendant's residence or domicile; and (b) the marriage was genuine at the time it was entered into. The requirement that marriage be genuine at the time it was entered into is intended to prevent the use of sham or fictitious marriages as a defence.

Proposed section 50CC

Proposed section 50CC requires the defendant to establish the elements of the defences on the balance of probabilities.

Proposed section 50CD

Proposed section 50CD provides that the reasonableness of the defendant's alleged mistaken belief as to the child's age is a matter which the jury may take into account in determining whether that belief was in fact held.

Division 4 - Benefiting from or encouraging child sex tourism

This Division creates offences specifically directed at the organisers and promoters of child sex tourism.

Proposed section 50DA - Benefiting from child sex tourism

Proposed subsection 50DA(1) makes it an offence for a person to perform an act or make an omission, whether in Australia or overseas, with the intention of benefiting, whether financially or otherwise, from conduct of a kind that would constitute an offence under this proposed Part, if the act (or omission) is reasonably capable of resulting in the person benefiting from such conduct. An offence is committed against proposed subsection 50DA(1) as soon as the person performs the relevant act (or omission). It is irrelevant whether the conduct, which would constitute the other offence under this proposed Part, occurs or has occurred and whether that conduct

was, or may have been, committed by a person other than an Australian citizen or resident.

The maximum penalty that may be imposed for an offence under proposed subsection 50DA(1) is 17 years imprisonment or \$102,000.00 pecuniary penalty for a natural person and \$510,000.00 pecuniary penalty for a body corporate. The pecuniary penalty is calculated in accordance with the formula specified in section 4B of the Principal Act.

Proposed subsection 50DA(2) provides an example of an act intended to be caught by subsection (1), namely "profiting from an arrangement that facilitates..." an offence under the new Part. However, this is an example only and any act which falls within the terms of the provision will constitute an offence under this section.

Proposed section 50DB - Encouraging offence against this Part

Proposed subsection 50DB(1) is in similar terms to subsection 50DA(1) but proscribes acts (or omissions) performed with the intention of "encouraging" conduct of a kind that would constitute an offence under this Part (other than an offence under this section) if the act (or omission) is reasonably capable of encouraging such conduct.

The maximum penalty for this offence is the same as the penalty provided for proposed section 50DA.

Proposed subsection 50DB(2) defines the term "encourage", for the purposes of this provision, to mean to encourage, incite to, or urge, by any means whatever (including by written, electronic or other form of communication) or to aid, facilitate or contribute to, in any way whatever. This is an exhaustive definition for the purposes of the proposed section.

Proposed subsection 50DB(3) provides examples of acts capable of falling within the terms of proposed subsection 50DB(1), namely:-

- (a) organising an arrangement that facilitates an offence against this Part (but not including an offence under this section);
- (b) assisting a person to travel overseas in order to commit an act that would constitute an offence under proposed Division 2 of this legislation; and

- (c) advertising an offer so to assist a person or an arrangement for so assisting a person.

As in the case of proposed subsection 50DA(1), the examples provided are a guide only and are not intended to be an exhaustive list of the kind of acts that would be caught by the provision.

Division 5 - Video Link Evidence

This Division does not provide a power to direct that evidence be taken by video link from the External Territories.

Proposed section 50EA - When court may take evidence by video link

Proposed section 50EA authorises the court to direct that a witness give evidence by video link if all of the following conditions are satisfied; namely that

- (i) the witness is willing to give evidence from outside Australia;
- (ii) he or she is not a defendant in the proceedings;
- (iii) the facilities for taking such evidence (in accordance with the requirements of proposed section 50ED) are or can reasonably be made available;
- (iv) the court is satisfied that the witness's attendance in Australia would (a) cause unreasonable expense or inconvenience; or (b) cause the witness psychological harm or unreasonable distress; or (c) cause the witness to become so intimidated or distressed that his or her reliability as a witness would be significantly reduced; and,
- (v) the court is satisfied that it consistent with the interests of justice for the evidence to be taken by video link.

Proposed section 50EC - Motion of parties

This provision provides that an order for video link evidence can only be made on the application of a party to the proceedings and not by the court on its own motion.

Proposed section 50ED - Technical requirements for video link

This provision relates to the requirement in paragraph 50EA(c) and provides that video link evidence is not to be given unless the place where the court is sitting and the place where the evidence is to be given are each equipped with video facilities to

enable the persons whom the court considers appropriate to see and hear each other via the video-link.

Proposed section 50EE - Application of laws about witnesses

Proposed subsection 50EE(1) provides that a witness who gives video link evidence is taken to be giving it at the place where the court is sitting.

Proposed subsection 50EE(2) makes it clear that the effect of subsection 50EE(1) is to apply local Australian law to the giving of evidence by video link, including laws relating to the rules of evidence, procedure, contempt of court and perjury.

Proposed section 50EF - Administration of oaths and affirmations

This proposed section provides for the oath or affirmation to be administered either by the Australian court over the video link or by authorised officials at the place where the witness is to give evidence on behalf of the court.

Proposed section 50EG - Expenses

This provision authorises the court to make orders for the payment of expenses incurred in connection with the giving of evidence by video link.

Proposed section 50EH - Other laws about foreign evidence not affected

This provision expressly preserves the operation of other laws relating to the taking of evidence from overseas witnesses for the purposes of proceedings concerning offences against this proposed Part.

Division 6 - Other Rules about conduct of trials

Proposed section 50FA - Finder of fact to determine the age of victim

Proposed subsection 50FA(1) provides that, in determining for the purposes of proposed Part IIIA whether a person is or was at a particular time under the age of 16 years, or how old a person is or was at a particular time, a jury or court may have regard to, as evidence, the appearance of the person, medical or other scientific

opinions and documents being or purporting to be official or medical records of a foreign country or copies of such records.

In order to avoid any doubt, proposed subsection 50FA(2) provides that the proposed section does not: (i) relieve the prosecution authorities from the duty of making every effort to obtain the best evidence of age of the person; or (ii) limit the evidence which may be received in proceedings for the purposes of the proposed Part.

Proposed subsection 50FA(3) provides that where proposed subsection 50FA(1) is relied upon, the court must warn the jury that it must be satisfied beyond reasonable doubt that the person in question: (i) is, or was at a particular time, under the age of 16 years; or (ii) is, or was at a particular time, of a certain age.

Proposed section 50FB - Alternative verdicts

This provision allows the jury to return alternative verdicts in certain cases where it is satisfied that the accused is not guilty of the offence charged but is guilty of another offence under the proposed Part.

Proposed subsection 50FB(1) provides that, if on a trial for an offence against proposed section 50BA, the jury is not satisfied that the defendant is guilty of an offence against proposed section 50BA, but is satisfied that he or she is guilty of an offence against proposed section 50BE, it may find the defendant guilty of the offence against section 50BE instead.

Proposed subsection 50FB(2) provides that if on a trial for an offence against proposed section 50BC, the jury is not satisfied that the defendant is guilty of an offence against proposed section 50BC, but is satisfied that he or she is guilty of an offence against proposed subsection 50BG(1), it may find the defendant guilty of the offence against subsection 50BG(1) instead.

Because of the operation of proposed subsection 50AA(2), this section will also allow alternative verdicts to be returned for secondary and inchoate offences. For example, in the appropriate circumstances, a person charged with attempting to have sexual intercourse with a child under the age of 16 (section 50BA) could be found guilty of attempting to have act of indecency with a child over the age of 16 (section 50BE).

In addition to this provision, all State and Territories have laws which allow for the jury to find an accused guilty of an attempt in circumstances where the completed offence is charged. Proposed section 50GA expressly provides for the continued operation of such laws so that they would apply with respect to offences charged under this Part. Therefore, if the original charge is for a completed offence under section 50BA the jury may on the evidence return an alternative verdict of attempting to commit a section 50BA offence.

Proposed section 50FD - Double jeopardy

This provision makes it clear that a person is not liable to prosecution for an offence against this Part for conduct for which he or she has already been convicted or acquitted in another country for offences against the law of that country.

Proposed section 50FE - Sentencing

Proposed subsection 50FE(1) provides that in sentencing a person convicted of an offence against Division 2, the court must take into account the age and maturity of the person in relation to whom the offence was committed, where these matters are relevant and known to the court.

To avoid any doubt, proposed subsection 50FE(2) provides that the matters listed in proposed subsection 50FE(1) are in addition to any other matters which the court must take into account when sentencing, such as those listed in subsection 16A(2) of the *Crimes Act 1914*.

Proposed section 50GA

This provision preserves the operation of any other law of the Commonwealth or any law of a State or Territory with respect to this new Part.

