

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CRIMES (CHILD SEX TOURISM) AMENDMENT BILL 1994

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

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



CRIMES (CHILD SEX TOURISM) AMENDMENTS BILL 1994

GOVERNMENT AMENDMENTS

General outline

The purpose of the amendments is to implement a number of recommendations made by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its Report on the Bill.

A major change is the merging of the offences in Division 2 of the Bill into one age group to create offences that cover children under the age of 16. These offences were originally framed to distinguish between offences where the child is under 12 from offences where the child is at least 12 but under 16.

A requirement to prove an intent to derive gratification has been added to the offences concerning acts of indecency committed by an accused in the presence of children.

The term 'act of indecency' has also been defined for the purposes of the new Part.

The requirement of a belief in consent has been removed as an element of the defences in Division 3 of the Bill.

The maximum penalties for offences of encouraging or benefiting from child sex tourism in Division 4 have been increased to 17 years imprisonment.

Proposed sections 50EA and 50EB have been combined into one section detailing when a court may make a direction that evidence be taken by video link and to make it a requirement that the court must be satisfied that it is consistent with the interests of justice that evidence be taken by such means.

Proposed section 50FA, which deals with matters which may be taken into account in determining the age or age range of a child, has been redrafted to meet the concerns of the House of Representatives Standing Committee.

Proposed section 50FC has also been deleted.

A new provision has been inserted into the Bill to require a sentencing court to take into account the age and maturity of the person in relation to whom the offence was committed.

Financial Impact

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

NOTES ON CLAUSES

Amendment (1)

This amends proposed subsection 50AA(1) to provide that the expression 'act of indecency' has the meaning given by proposed section 50ABA.

Amendment (2)

This inserts proposed section 50ABA into Division 1 of the Bill.

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.

Amendment (3)

This amendment omits proposed subsection 50AB(3) as a consequence of Amendment (2).

Amendment (4)

This amends proposed subsection 50BA to make it an offence for a person, while outside Australia, to engage in sexual intercourse with a person who is under 16 years of age.

Amendment (5)

This omits proposed section 50BB as a consequence of Amendment (4).

Amendment (6)

This amends proposed subsection 50BC to make it an offence for a person to induce a person who is under 16 years of age to engage in sexual intercourse with a third person outside Australia and in the presence of the first-mentioned person.

Amendment (7)

This omits proposed section 50BD as a consequence of Amendment (6).

Amendment (8)

This repeals proposed section 50BE and substitutes it with a new offence. The new provision makes it an offence for a person, while 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 new provision provides a maximum penalty of 12 years imprisonment.

Amendment (9)

This omits proposed section 50BF as a consequence of Amendment (8).

Amendment (10)

This replaces the term 'offender' in proposed section 50BG with the neutral expression 'first person'.

Amendment (11)

This amends proposed subsection 50BG(1) to make it an offence for a person to induce a person who is under 16 years of age 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.

Amendment (12)

This amends proposed subsection 50BG(2) to make an offence for a person to induce a person who is under 16 years of age to be present while a third person engages in sexual intercourse with fourth person and in the presence of the first-mentioned person.

Amendment (13)

This omits proposed section 50BH as a consequence of Amendments (11) and (12).

Amendment (14)

This amendment applies proposed section 50CA to all the amended offences in Division 2.

Amendment (15)

This omits the expression '(the alleged victim)', when first occurring, from proposed section 50CA.

Amendment 16

This amendment removes the element of a belief in consent from the defence provided by proposed section 50CA by omitting all the words from and including 'over and consented' to the end of the section and by replacing them with 'over'.

Amendment (17)

This omits the expression '(the alleged victim)', when first occurring, from proposed section 50CB.

Amendment (18)

This amendment removes the element of a belief in consent from the defence provided by proposed section 50CB by omitting proposed paragraph 50CB(c).

Amendment (19)

This amends proposed section 50CD as a consequence of Amendment (18).

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

Amendment (20)

This repeals proposed section 50CE as a consequence of Amendments (16) and (18).

Amendment (21)

This repeals proposed section 50CF as a consequence of Amendments (16) and (18).

Amendment (22)

This inserts the words 'whether financially or not,' after the term 'benefiting' in proposed paragraph 50DA(1)(a) in order to ensure that the latter term is not limited to obtaining a financial benefit.

Amendment (23)

This amendment increases the maximum penalty for an offence against proposed subsection 50DA(1) to 17 years imprisonment.

Amendment (24)

This amendment increases the maximum penalty for an offence against proposed subsection 50DB(1) to 17 years imprisonment.

Amendment (25)

This inserts proposed paragraph 50EA(ca) into proposed section 50EA to provide that a court may direct a witness to give evidence by video link if all the requirements in proposed paragraphs 50EA(a), (b), (c) and (d) are met and court is also satisfied of the following matters; namely that the witness's attendance in Australia would (i) cause unreasonable expense or inconvenience; or (ii) cause the witness psychological harm or unreasonable distress; or (iii) cause the witness to become so intimidated or distressed that his or her reliability as a witness would be significantly reduced.

Amendment (26)

This amends proposed paragraph 50EA(d) to provide that a court may direct a witness to give evidence by video link if all the requirements in proposed paragraphs 50EA(a), (b), (c) and (ca) are met and the court is satisfied that it is consistent with the interests of justice that evidence be taken by video link.

Amendment (27)

This omits proposed section 50EB as a consequence of Amendments (25) and (26).

Amendment (28)

This corrects a drafting error by deleting the word 'defendant' from proposed paragraph 50EF(a) and substituting the word 'witness'.

Amendment (29)

This replaces proposed section 50FA with a new provision.

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.

Amendment (30)

This replaces proposed section 50FB with a new provision as a consequence of the merging of the offences in Division 2 of the Bill.

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.

Amendment (31)

This repeals proposed section 50FC.

Amendment (32)

This inserts a new provision into Division 6 of proposed Part IIIA.

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*.