

**Law Society of Tasmania
Bulletin Board Notice**

**Draft Bill for comment
Criminal Code Amendment Bill 2005**

Please find following a letter addressed to the President and a draft of the Criminal Code Amendment Bill 2005 for comment. The primary intention of the Bill is to insert "child exploitation material" offences into the Code (ie child pornography).

Unfortunately there has only been a relatively short timeframe in which to develop the Bill, and it is anticipated that the Bill will be introduced into Parliament by the end of May or early June.

If you would like to make comments on the Bill on behalf of the Society please forward by Friday 6 May 2005.

DEPARTMENT of JUSTICE

*Office of legislation development
and review*

JC00539 AM

22 April 2005

Mr Daniel Zeeman
President
Law Society of Tasmania
28 Murray Street
HOBART TAS 7000

Dear Mr Zeeman

Please find enclosed for your information a working draft of a Bill which proposes to amend the *Criminal Code Act 1924* to insert:

- “child exploitation material” offences, relating to depictions of children who are, or appear to be, under the age of 18 years;
- proposed sections 125C and 125D creating procuring and “grooming” offences in relation to persons under 17 years; and
- an amendment to section 129(c) to clarify that it is a crime to administer to a person, or cause a person to take, a drug or other thing with intent to stupefy or overpower the person to enable sexual activity to be engaged in with the person.

The proposed “child exploitation material” provisions are largely consistent with a set of principles developed by the Standing Committee of Attorneys-General for nationally consistent child pornography laws.

The Bill also proposes to amend the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* to:

- increase the penalties for the offences concerning “child exploitation material” (currently referred to as “child abuse products”); and
- to make Part 8 more consistent with the proposed equivalent Criminal Code offences.

Unfortunately there has been a relatively short timeframe for the development of this Bill, which we anticipate will be introduced into Parliament at the end of May or early June 2005.

I would therefore be grateful to receive any comments you may have on the Bill by Monday 9 May 2005.

If you have any queries please contact Anna Moulton on 6233 3798 or email:
anna.moulton@justice.tas.gov.au

Yours sincerely

Len Armsby
DIRECTOR

Enc.

TASMANIA

CRIMINAL CODE AMENDMENT BILL 2005

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CRIMINAL CODE AMENDMENT BILL 2005

(Brought in by the Minister for Justice and Industrial Relations, the Honourable Judith Louise Jackson)

A BILL FOR

An Act to amend the *Criminal Code Act 1924*

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

PART 1 – PRELIMINARY

1. Short title

This Act may be cited as the *Criminal Code Amendment Act 2005*.

2. Commencement

This Act commences on a day to be proclaimed.

PART 2 – CRIMINAL CODE ACT 1924 AMENDED

3. Principal Act

In this Part, the *Criminal Code Act 1924** is referred to as the Principal Act.

4. Schedule 1 amended (*Criminal Code*)

Schedule 1 to the Principal Act is amended as follows:

- (a) by inserting the following section after section 1:

1A. **Definitions for purposes of sections 130, 130A, 130B, 130C, 130D, 130E, 130F and 130G**

For the purposes of sections 130, 130A, 130B, 130C, 130D, 130E, 130F and 130G –

“child exploitation material” means material that describes or depicts, in a way that a reasonable person would regard as being, in all the circumstances, offensive, a person who is or who appears to be under the age of 18 years –

- (a) engaged in sexual activity; or
- (b) in a sexual context; or

*No. 69 of 1924

- (c) as the subject of torture, cruelty or abuse (whether or not in a sexual context);

“distribute”, in relation to child exploitation material, includes –

- (a) send, sell, deal, supply, exhibit, transmit or communicate that material to another person, or enter into an agreement or arrangement to do so; and
- (b) make that material available for access by another person (including access by electronic means) or enter into an agreement or arrangement to do so;

“material” includes any film, printed matter, electronic data and any other thing of any kind (including any computer image or other depiction);

“person” includes part of a person;

“produce” includes make, film, print, photograph and record;

- (b) by inserting the following sections after section 125B:

125C. Procuring person under 17 years to have unlawful sexual intercourse, &c.

- (1) Any person who procures a person under the age of 17 years to have unlawful sexual intercourse, either in this State or elsewhere, is guilty of a crime.

Charge: Procuring a person under the age of 17 years to have unlawful sexual intercourse.

- (2) Any person who procures a person under the age of 17 years to commit an indecent act, either in this State or elsewhere, is guilty of a crime.

Charge: Procuring a person under the age of 17 years to commit an indecent act.

- (3) It is a defence to a charge under this section to prove that the accused person believed on reasonable grounds that the other person was of or above the age of 17 years.

- (4) The consent of a person against whom a crime is alleged to have been committed under this section is a defence to such a charge only where, at the time the crime was alleged to have been committed –

(a) that person was of or above the age of 15 years and the accused person was not more than 5 years older than that person; or

(b) that person was of or above the age of 12 years and the accused

person was not more than 3 years older than that person.

125D. Communications with intent to procure person under 17 years, &c.

- (1) A person (the “**accused person**”) who makes a communication by any means with the intention of procuring a person under the age of 17 years, or a person the accused person believes is under the age of 17 years, to engage in a sexual activity, either in this State or elsewhere, is guilty of a crime.

Charge: Communicating with intent to procure a person under the age of 17 years to engage in a sexual activity.

- (2) A person (the “**accused person**”) who makes a communication by any means for an indecent purpose and with the intention of making a person under the age of 17 years, or a person the accused person believes is under the age of 17 years, amenable to engaging in a sexual activity, either in this State or elsewhere, is guilty of a crime.

Charge: Communicating for an indecent purpose with a person under the age of 17 years.

- (3) For the purposes of subsection (2), a person acts for an indecent purpose if the person acts with the intention of satisfying his or her own desire for

sexual arousal or gratification or of providing sexual arousal or gratification for another person.

- (4) A person (the “**accused person**”) who makes a communication by any means which exposes, without legitimate reason, a person under the age of 17 years, or a person the accused person believes is under the age of 17 years, to any indecent material, either in this State or elsewhere, is guilty of a crime.

Charge: Making a communication which exposes a person under the age of 17 years to indecent material.

- (5) It is a defence to a charge under this section to prove that –
- (a) the person who received the communication, or to whom the communication was directed, was of or above the age of 15 years and the accused person was not more than 5 years older than that person; or
 - (b) the person who received the communication, or to whom the communication was directed, was of or above the age of 12 years and the accused person was not more than 3 years older than that person.
- (6) In addition to the defences in subsection (5), it is a defence to a charge under subsection (1), (2) or (4) to prove

that the accused person believed on reasonable grounds that the other person was of or above the age of 17 years.

- (7) Subsection (1), (2) or (4) applies notwithstanding that the person who received the communication, or to whom the communication was directed, was a fictitious person represented to the accused person as a real person.
- (8) Evidence that the person who received the communication, or to whom the communication was directed, was represented to the accused person as being under the age of 17 years is, in the absence of evidence to the contrary, proof that the accused person believed the person was under that age.
- (c) by omitting from section 129(a) “elsewhere;” and substituting “elsewhere; or”;
- (d) by omitting from section 129(b) “elsewhere; or” and substituting “elsewhere –”;
- (e) by omitting paragraph (c) from section 129;
- (f) by omitting the charge from section 129 and substituting the following charge:

Charge: Procuring by threats [*or* fraud].
- (g) by inserting the following sections after section 129:

129A. Administering drugs with intent to stupefy, &c.

Any person who administers, or causes another person to take, any drug, alcohol or other thing with intent to stupefy or overpower that person in order to enable sexual activity to be engaged in with that person is guilty of a crime.

Charge: Procuring by administering drugs.

130. Involving person under 18 years in production of child exploitation material

A person who –

- (a) involves, or does anything to facilitate the involvement of, a person under the age of 18 years in the production of child exploitation material; and
- (b) knows, or ought to have known, that the material is child exploitation material –

is guilty of a crime.

Charge: Involving a person under the age of 18 years in the production of child exploitation material.

130A. 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 child exploitation material –

is guilty of a crime.

Charge: Producing child exploitation material.

130B. Distribution of child exploitation material

A person who –

- (a) distributes, or does anything to facilitate the distribution of, child exploitation material; and
- (b) knows, or ought to have known, that the material is child exploitation material –

is guilty of a crime.

Charge: Distributing child exploitation material

130C. Possession of child exploitation material

A person who –

- (a) is in possession of child exploitation material; and

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- (b) knows, or ought to have known, that the material is child exploitation material –

is guilty of a crime.

Charge: Possessing child exploitation material.

130D. Accessing child exploitation material

A person who, with the intention of obtaining access to child exploitation material, obtains access to child exploitation material or does anything towards obtaining access to child exploitation material is guilty of a crime.

Charge: Accessing child exploitation material.

130E. Defences in relation to child exploitation material

- (1) It is a defence to a charge under section 130, 130A, 130B, 130C or 130D to prove that –

- (a) the material which is the subject of the charge was classified (whether before or after the commission of the alleged offence) under the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth, other than as refused classification (RC); or

- (b) the accused person engaged in the conduct that is alleged to constitute the offence for a genuine child protection, scientific, medical, legal, artistic or public benefit purpose and the accused person's conduct was, in the circumstances, reasonable for that purpose; or
 - (c) the accused person was a police officer acting in the course of his or her official duties; or
 - (d) the accused person was acting in the course of his or her official duties in connection with the classification of the material which is the subject of the charge under the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth.
- (2) It is a further defence to a charge under section 130C to prove that –
- (a) the material which is the subject of the charge came into the accused person's possession unsolicited; and
 - (b) as soon as the accused person became aware that it was child exploitation material, he or she took reasonable steps to get rid of it.

130F. Forfeiture of child exploitation material, &c.

- (1) This section applies if a person is prosecuted for a crime under section 130, 130A, 130B, 130C or 130D.
- (2) The court may, if it considers material which is the subject of a charge under any of the sections referred to in subsection (1) to be child exploitation material, order that the material be forfeited to the Crown.
- (3) The court may make an order under subsection (2) whether or not the person is convicted of a crime under any of the sections referred to in subsection (1).
- (4) If the person is convicted of a crime under any of the sections referred to in subsection (1), the court may also order that any thing used to commit the crime be forfeited to the Crown.
- (5) Subsection (2) or (4) applies whether the thing to be forfeited has been seized or is in its owner's possession.
- (6) The court may also make any order that it considers appropriate to enforce the forfeiture.
- (7) This section does not limit the court's powers under the *Crime (Confiscation of Profits) Act 1993* or any other law.
- (8) When any thing is forfeited to the Crown, the thing becomes the Crown's property and may be disposed of or

destroyed in such manner as the Attorney-General may direct.

130G. Excluding non-essential persons from court when child exploitation material displayed

- (1) When material alleged to be child exploitation material is on display in court, the court may exclude from the court any person who is not an essential person.
- (2) For the purposes of subsection (1), an “**essential person**” is –
 - (a) a party, or a person representing a party, to the proceeding in relation to the child exploitation material; or
 - (b) a Crown Law Officer or a person authorised by a Crown Law Officer; or
 - (c) the prosecutor; or
 - (d) a witness giving evidence; or
 - (e) a person who a witness is entitled to have present in court under the *Evidence (Children and Special Witnesses) Act 2001*; or
 - (f) a person whose presence is, in the court’s opinion, necessary or desirable for the proper conduct of the proceeding; or

- (g) a person who applies to the court to be present and whose presence, in the court's opinion –
 - (i) would serve a proper interest of the person; and
 - (ii) would not be prejudicial to the interests of any person under the age of 18 years described or depicted in the child exploitation material, whether or not any person under the age of 18 years can be identified from the child exploitation material.
- (3) When forming an opinion under subsection (2)(f) or (g), the court is to consider the public benefit of limiting the number of persons with access to child exploitation material.
- (h) by omitting paragraphs (b) and (c) from section 335 and substituting the following paragraph:
 - (b) sexual intercourse with a person with a mental impairment;
- (i) by omitting paragraphs (a) and (b) from section 336 and substituting the following paragraph:
 - (a) sexual intercourse with a person with a mental impairment;

- (j) by omitting paragraphs (b) and (c) from section 337 and substituting the following paragraph:
 - (b) sexual intercourse with a person with a mental impairment;
- (k) by omitting from section 337(d) “assault;” and substituting “assault; or”;
- (l) by omitting paragraphs (d) and (e) from section 337B(1) and substituting the following paragraph:
 - (d) sexual intercourse with a person with a mental impairment;
- (m) by inserting the following section after section 337B:

337C. Involving person under 18 years in production of child exploitation material

Upon an indictment for involving a person under the age of 18 years in the production of child exploitation material, the accused person may be convicted of one or more of the following crimes:

- (a) sexual intercourse with a young person under the age of 17 years;
- (b) indecent act with or directed at a young person under the age of 17 years;
- (c) procuring a person under the age of 17 years to have unlawful sexual intercourse;

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- (d) procuring a person under the age of 17 years to commit an indecent act;
- (e) communicating with intent to procure a person under the age of 17 years to engage in a sexual activity;
- (f) communicating for an indecent purpose with a person under the age of 17 years;
- (g) making a communication which exposes a person under the age of 17 years to indecent material;
- (h) procuring by threats or fraud;
- (i) procuring by administering drugs;
- (j) sexual intercourse with a person with a mental impairment;
- (k) indecent assault;
- (l) aggravated sexual assault;
- (m) incest;
- (n) rape.

**PART 3 – CLASSIFICATION (PUBLICATIONS, FILMS
AND COMPUTER GAMES) ENFORCEMENT ACT 1995
AMENDED**

5. Principal Act

In this Part, the *Classification (Publications, Films and Computer Games) Enforcement Act 1995** is referred to as the Principal Act.

6. Section 3 amended (Interpretation)

Section 3 of the Principal Act is amended as follows:

- (a) by omitting the definitions of “child” and “child abuse publication”;
- (b) by omitting paragraph (b) from the definition of “objectionable publication”.

7. Section 71 amended (Interpretation of Part)

Section 71 of the Principal Act is amended as follows:

- (a) by inserting the following definition after the definition of “bestiality product”:

“**child**” means a person under the age of 18 years;

*No. 105 of 1995

- (b) by omitting the definitions of “child abuse product” and “make” and substituting the following definitions:

“child exploitation material” means material that describes or depicts, in a way that a reasonable person would regard as being, in all the circumstances, offensive, a person who is or who appears to be under the age of 18 years –

- (a) engaged in sexual activity; or
- (b) in a sexual context; or
- (c) as the subject of torture, cruelty or abuse (whether or not in a sexual context);

“make” includes produce, film, print, photograph and record;

“material” includes any film, printed matter, electronic data and any other thing of any kind (including any computer image or other depiction);

“person” includes part of a person.

8. Section 72 amended (Offence to make or reproduce bestiality product)

Section 72 of the Principal Act is amended as follows:

- (a) by omitting from paragraph (a) “child abuse product or”;
- (b) by omitting from paragraph (b) “child abuse product or”;
- (c) by omitting from paragraph (c) “child abuse product or”.

9. Section 72A inserted

After section 72 of the Principal Act, the following section is inserted in Part 8:

72A. Offence to make or reproduce child exploitation material

- (1) A person must not –
 - (a) make or reproduce child exploitation material; or
 - (b) cause or permit child exploitation material to be made or reproduced; or
 - (c) be in any way involved in the making or reproduction of child exploitation material.

Penalty: Fine not exceeding 400 penalty units or imprisonment for a term not exceeding 4 years, or both.

- (2) It is a defence to an offence against subsection (1) to prove that at the time the alleged offence was committed the defendant had reasonable grounds to believe that the person described or

depicted in the material to which the offence relates had attained the age of 18 years.

10. Section 73 substituted

Section 73 of the Principal Act is repealed and the following sections are substituted:

73. Offence to procure child to be involved in making child exploitation material

- (1) A person must not procure or invite or attempt to procure a child to be involved in the making of child exploitation material.

Penalty: Fine not exceeding 400 penalty units or imprisonment for a term not exceeding 4 years, or both.

- (2) It is a defence to an offence against subsection (1) to prove that at the time the alleged offence was committed the defendant had reasonable grounds to believe that the person described or depicted in the material to which the offence relates had attained the age of 18 years.

73A. Offence to distribute child exploitation material

- (1) A person must not distribute, or do anything to facilitate the distribution of, child exploitation material.

Penalty: Fine not exceeding 400 penalty units or imprisonment for a term not exceeding 4 years, or both.

(2) It is a defence to an offence against subsection (1) to prove that at the time the alleged offence was committed the defendant had reasonable grounds to believe that the person described or depicted in the material to which the offence relates had attained the age of 18 years.

(3) In this section –

“**distribute**” includes –

- (a) send, sell, deal, supply, exhibit, transmit or communicate child exploitation material to another person, or enter into an agreement or arrangement to do so; and
- (b) make child exploitation material available for access by another person (including access by electronic means), or enter into an agreement or arrangement to do so.

11. Section 74 amended (Offence to possess bestiality product)

Section 74 of the Principal Act is amended by omitting paragraph (a).

12. Sections 74A and 74B inserted

After section 74 of the Principal Act, the following sections are inserted in Part 8:

74A. Possession of child exploitation material

- (1) A person must not –
- (a) have possession of child exploitation material; or
 - (b) with the intention of obtaining access to child exploitation material, obtain access to child exploitation material or do anything towards obtaining access to child exploitation material.

Penalty: Fine not exceeding 200 penalty units or imprisonment for a term not exceeding 2 years, or both.

- (2) It is a defence to an offence against subsection (1) to prove that –
- (a) at the time the alleged offence was committed the defendant had reasonable grounds to believe that the person described or depicted in the material to which the offence relates had attained the age of 18 years; or
 - (b) the material to which the offence relates came into the defendant's possession unsolicited and, as soon as the defendant became aware that it was child

exploitation material, he or she took reasonable steps to get rid of it.

74B. Defence to offences with respect to child exploitation material

In any proceedings for an offence against this Part, in addition to any other defence specified in this Part, it is a defence to prove that –

- (a) the material to which the offence relates was classified (whether before or after the commission of the alleged offence) under the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth, other than as refused classification (RC); or
- (b) the defendant engaged in the conduct that is alleged to constitute the offence for a genuine child protection, scientific, medical, legal, artistic or public benefit purpose and the defendant's conduct was, in the circumstances, reasonable for that purpose; or
- (c) the defendant was a police officer acting in the course of his or her official duties; or
- (d) the defendant was acting in the course of his or her official duties in connection with the

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classification of the material
concerned under the
*Classification (Publications,
Films and Computer Games) Act
1995* of the Commonwealth.

**13. Section 81 amended (Defence to offences with
respect to minors)**

Section 81 of the Principal Act is amended by
omitting subsection (2).