

Criminal Code Amendment (Cyber Predators) Bill 2005

EXPLANATORY MEMORANDUM

PART 1 – PRELIMINARY MATTERS

Clause 1. Short Title

Cites the short title of the Act – Criminal Code Amendment (Cyber Predators) Act 2005.

Clause 2. Commencement

Apart from Clause 6, the Act comes into operation on the day it receives Royal Assent. Clause 6 is effective from a date fixed by proclamation.

Clause 3. The Criminal Code Amended

Identifies the Act to be amended by this Act (other than clause 7), *The Criminal Code*

PART 2 –AMENDMENTS TO THE CRIMINAL CODE

Clause 4. Section 204B inserted

This clause inserts a new section 204B into *The Criminal Code*. Section 204B creates an offence where a person uses electronic communication in either of two circumstances:

- a) with the intent to procure a child to engage in sexual activity; or
- b) to expose a child to indecent matter.

The penalty for the offence is 5 years imprisonment if the victim is under 16 but not under 13 years of age, or 10 years imprisonment if the victim is under 13 years of age.

For the purposes of this offence, the victim engages in sexual activity if

- a) the victim allows a sexual act to be done to the victim by the accused or another person
- b) a sexual act is done by the victim to the victim himself or herself or to the accused or another person
- c) the victim otherwise engages in an indecent act.

The term "sexual act" is undefined so that it may be interpreted as broadly as reasonably possible. The term "indecent" is intended to be interpreted as in the Common Law.

The sexual activity does not need to involve penetration or physical contact. The prosecution does not need to show an intent to procure the victim to engage in any particular sexual or indecent act. If, however, an intent to procure a specific sexual act is alleged, the fact that it was actually impossible to do that act is not relevant to the offence.

The offence is committed if the accused believes the victim to be under 16, or under 13, regardless of the victim's actual age, and regardless of whether the victim is a real person or a fictitious entity. In this regard, the section provides police with the ability to conduct undercover operations by posing as children, and an accused will incur liability to the same extent as if the victim was actually a child. Evidence of the victim representing him or her self as being of a particular age is sufficient proof that the accused believed the victim to be that age, unless the accused provides sufficient proof to the contrary.

Clause 5. Chapter LXXII heading amended

Chapter LXXII of the Criminal Code deals with searches and seizure of property. Clause 5 amends the heading of Chapter LXXII to include reference to the provision inserted by Clause 6; Obtaining data from data storage devices.

Clause 6. Section 711AA inserted

This clause inserts a new section 711AA into the Criminal Code. This section provides for the making of a magistrate's order requiring a person to provide information or assistance that would provide access to police to data held on any data storage device controlled by that person.

The purpose of this clause is to enable police to gain access to evidence of specific offences related to the sexual exploitation of children, where that evidence is in the form of data and is electronically secured by the accused. Typically this data will correspond to text or image files related to child exploitation offences, and the securing of data might be by way of encryption or password security.

The order must relate to a prescribed offence, and these specific offences are listed in Clause 6. The prescribed offences include the offence created by Clause 4, sexual offences involving a child, and child pornography offences.

Before making the order, a magistrate must be satisfied, on reasonable grounds, that;

- a) relevant evidence exists on a data storage device;
- b) either the person is suspected of the offence, or the device is owned or leased by the person or their employer;
- c) the person has relevant knowledge to assist in accessing the data.

The penalty for a suspect failing to comply with an order is 5 years imprisonment. For a person who is not a suspect, the penalty is 12 months imprisonment or a fine of \$12,000.

Clause 7. Consequential amendment to *Working With Children (Criminal Record Checking) Act 2004*

This clause inserts a reference to the offences under section 204B of the Criminal Code into Schedule 2 of the *Working With Children (Criminal Record Checking) Act 2004*, thus identifying them as Class 2 offences under that Act irrespective if the offence related to a child under 13 or under 16.