

CABINET COVER SHEET

1. **TITLE:** *Criminal Law Consolidation Act* amendment to increase penalties for possession and production of child pornography, create new offences of procuring and grooming a child for the purpose of engaging in sexual acts, and filming for prurient purposes.
2. **MINISTER:** **MICHAEL ATKINSON M.P.
ATTORNEY-GENERAL**
3. **PURPOSE:** To seek Cabinet approval for the drafting and introduction of the *Criminal Law Consolidation (Child Pornography) Amendment Bill 2004*
4. **IDENTIFY THE RELEVANT GOVERNMENT POLICY OR STATE STRATEGIC PLAN TARGET OR BOTH:** State Strategic Plan Objective 2: improving Wellbeing. The proposal is to legislate to increase penalties associated with child pornography, procuring and grooming children and filming children for prurient purposes.
5. **RESOURCES REQUIRED FOR IMPLEMENTATION:** The Bill will allow for longer periods of detention for those convicted of child pornography offences.

There will be some increase in workload on the D.P.P. because the possession offences will move from summary to minor indictable and the production offence from summary to major indictable.

There may also be some cost shifting from the Magistrates Court to the District Court because of the change in classification of the offences.
6. **PUBLIC AND ENVIRONMENTAL IMPACT** There are no identifiable impacts on the public or environment. The amendments form part of the Government's commitment to child protection.
7. **RISKS** There are no identified risks that require management.
8. **CONSULTATION** In the time available it has not been possible to consult with other agencies about the implementation costs of this proposal.
9. **COMMUNICATION STRATEGY** None required

10. **URGENCY**

This is a late Cabinet submission owing to the Premier's announcing that the legislation to increase penalties for child pornography will be introduced into Parliament during the sitting week beginning 11 October 2004.

11. **RECOMMENDATION**

4.1 I RECOMMEND that Cabinet approve the drafting of amendments to the *Criminal Law Consolidation Act* and *Summary Offences Act* to increase the penalties for child pornography and create new offences of procuring and grooming a child for the purpose of engaging in sexual acts, and filming children for prurient purposes.

4.2 I RECOMMEND that Cabinet approve the introduction of the *Criminal Law Consolidation (Child Pornography) Amendment Bill 2004*.

I declare that I have no actual or potential conflict of interest about the proposals contained in this submission.

MICHAEL ATKINSON M.P.

PORTFOLIO:

DATE:

Contact Officer
Anna Guthleben
8207 1788

(signature)


ATTORNEY-GENERAL

8 October, 2004

TO THE HONOURABLE THE PREMIER FOR CABINET AND EXECUTIVE COUNCIL

Re: CHILD PORNOGRAPHY LEGISLATION

1. PROPOSAL

- 1.1 I propose that Cabinet approve the drafting of amendments to the *Criminal Law Consolidation Act* and *Summary Offences Act* to increase the penalties for child pornography and create new offences of procuring and grooming a child for the purpose of engaging in sexual acts, and filming children for prurient purposes.
- 1.2 I propose that Cabinet approve the introduction of the *Criminal Law Consolidation (Child Pornography) Amendment Bill 2004*.

2. BACKGROUND

- 2.1 Currently section 33 of the *Summary Offences Act 1953 (S.O.A.)* prohibits the production, sale, barter, exchange, or hire of indecent or offensive material. The basic penalty is \$20,000 or imprisonment for six months. However the maximum penalties are increased if the offence involves child pornography.
- 2.2 Child pornography is defined in s33(1) to mean indecent or offensive material in which a child (whether engaged in sexual activity or not) is depicted or described in a way that is likely to cause serious or general offence amongst reasonable adult members of the public. A child means a person under, or apparently under, the age of 16 years.
- 2.3 The production-of-child-pornography offence attracts a two-tier penalty so that the first offence attracts a maximum two-year imprisonment penalty and a subsequent offence a maximum four-year imprisonment penalty, making the first offence a summary matter and a subsequent offence a minor indictable offence.
- 2.4 Currently the offence of possession of child pornography carries a penalty of \$5,000 or one-year imprisonment. Possession of child pornography is classified as a summary offence.
- 2.5 On 30 September, 2004 the Premier announced that the penalty for possession of child pornography would be increased to a maximum of five-years imprisonment, and 10 years for creating or distributing child pornography.
- 2.6 The increase in penalties for child pornography offences appear consistent with moves in other jurisdictions to increase penalties for these offences.
- 2.7 A copy of the Bill and the second-reading report are attached.

3. **DISCUSSION**

3.1 The Bill will make amendments to the *Criminal Law Consolidation Act* and *Summary Offences Act*.

3.2 These amendments will increase the penalties for the offence of possession of child pornography and for the production or dissemination of child pornography, and introduce new offences of procuring and grooming a child for the purpose of engaging in sexual acts.

3.3 The penalty for the production or dissemination, or contracting to produce or disseminate, child pornography will increase to 10 years maximum imprisonment.

The penalty for possession of child pornography will increase to five years maximum imprisonment for a first offence and seven years maximum imprisonment for a subsequent offence. In determining whether an offence is a subsequent offence, all previous offences involving child pornography will count.

3.4 The current offence of inciting or procuring the commission by a child of an indecent act to gratify prurient interests is updated. The new offence will cover situations where a person incites or procures a child to commit an indecent act; and where a person, for prurient purposes, causes or induces a child to expose any part of their body.

There are also new offences for taking photographs or films of children for prurient purposes. It will not matter whether the acts that constitute the offence occur in private or in public; whether the child consents; or whether an adult or guardian consented to the act taking place. Some recent arrests interstate have involved teachers installing filming devices in change rooms to film children changing. Such actions are likely to be caught by the Bill.

3.5 On 30 August, 2004 the Commonwealth passed an amendment to the *Criminal Code Act 1995 (Cth)* that created offences for using the Internet for the purposes of disseminating, accessing or downloading child pornography and child abuse material. The Commonwealth drafted the amendments so that the States and Territories would also be able to legislate in this area without running into constitutional problems.

3.6 The Bill will reflect some of the Commonwealth internet provisions, with some minor amendments. The Bill will introduce new offences of communicating with a child to procure or groom the child to engage in sexual activity.

These offences are drafted as separate offences which is appropriate given that grooming is a preparatory offence and procuring involves more substantial acts. The Bill is carefully drafted to cover the situation where a police officer using the Internet poses as a child to attract those who would groom or procure a child. It should be noted that the provisions are drafted in general terms and are not limited to the use of the Internet.

3.7 The Bill broadens the definition of child pornography to include material that is intended or apparently intended to excite or gratify a sadistic or other perverted

interest in violence or cruelty. This will allow for the prosecution of offences where the material may be highly offensive but not overtly sexual.

The Bill will also expand the definition of child pornography to include morphed images. Nowadays it is possible to create child pornography that may or may not involve the abuse of children. Using digital graphics software, it is possible to combine two images into one, or distort pictures to create a totally new image: a process called morphing. Non-pornographic images of real children can be made to appear as pornography, and pornographic images of 'virtual children' can be generated.

- 3.8 The age of a minor for the purposes of the of the depiction of child pornography will remain at the current level of 16 years. It is clear that pornographic images of children are abhorrent and ought to be subject to criminal sanctions. To differentiate child pornography clearly from other behaviour that may not necessarily be criminal, it is important not to lift the age of the depicted person to 18 years old.

To redefine child to mean a person under, or apparently under, the age of 18 years raises issues about the age of consent and possession of child pornography. For example, there are circumstances where persons between the ages of 16-18 might legally be able to have sexual intercourse, and may take (digital) photos or films (material) of such activities in the context of personal use (rather than sale). Assuming that the material meets the definition of child pornography, then it would be an offence to possess photographs of what is a legal activity because of the change to the definition of the age of a child as it relates to child pornography. This is not the sort of conduct that the Bill is prohibiting. The focus of the Bill is on child pornography.

The State should still be compliant with our international obligations.

- 3.9 The definition of a 'child' will still include a person who is 'apparently under the age of 16' to criminalise possession and trade in those images that may involve an older 'child' masquerading as someone younger.
- 3.10 The Bill continues to distinguish between the offences of possession and the production or supply of child pornography. This is because there is a fundamental difference between those who operate alone and those who have an element of collusion in their offending. In other areas of the criminal law, possession offences generally attract a lower penalty than the production or supply of prohibited material.
- 3.11 The Bill when dealing with possession of child pornography is careful not to include people who received unsolicited child pornography and take reasonable steps to get rid of it as soon as they become aware of the material and its pornographic nature.
- 3.12 The Bill stipulates maximum penalties of imprisonment rather than fines. As in the current offences, this will allow the courts to impose fines under the general discretion provided by section 34 of *Criminal Law Sentencing Act*. Section 34 allows the Supreme Court to impose a maximum fine of \$75,000, the District Court to impose a maximum fine of \$35,000 and the Magistrates Court to impose a maximum fine of \$10,000.

3.13 The Bill makes consequential amendments to the *Summary Offences Act* to remove the child pornography offences, leaving the offence of indecent and offensive material, which will cover material that would cause serious and general offence amongst reasonable adult members of the community.

3.14 Other implications and Impacts

3.14.1 Economic, Financial and Budget Implications

In the time available it has not been possible to consult with other agencies about the implementation costs of this proposal. However, the police already have powers to arrest and charge for offences of child pornography.

SAPOL records indicate that 54 offenders were detected for the offence of "Being in Possession of Child Pornography" during the 30 month period from 1 July, 2001 to 31 December, 2003. The Courts Administration Authority records indicate that 52 offenders were dealt with during this period. Some of the offenders dealt with by the courts would have been detected by police before to 1 July, 2001.

The list shows the results of those 52 cases:

27	Convicted
9	Without Conviction
6	Withdrawn
3	Dismissed want of prosecution
2	Agreed (Family Conference)
2	Committed
1	Sentenced
1	No appearance youth (Family Conference)
1	Not proceeded with.

The Act will allow for longer periods of detention for those convicted of child pornography offences. In the last decade there has only been one conviction for production of indecent and offensive material. It is difficult to judge whether the changes to the law will result in an increase in the conviction rate for the offence.

There will be some increase in workload on the DPP because the possession offences will move from summary to minor indictable and the production offence from summary to major indictable. There may also be some cost shifting from the Magistrates Court to the District Court because of the change in classification of the offences.

3.15 Impacts on the public and the environment

There are no identifiable impacts on the public or the environment. The amendments form part of the Government's commitment to child protection.

3.16 Risk Management Strategy

There are no identified risks that require management.

10. URGENCY

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11. RECOMMENDATION

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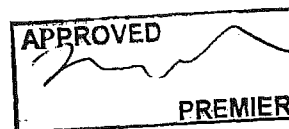
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ATTORNEY-GENERAL

8 October, 2004

In Cabinet

11 OCT 2004



**Criminal Law Consolidation (Child Pornography)
Amendment Bill 2004 – Draft Bill**

Exempt - Clause 10(1) – Legal professional privilege

11 pages removed