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LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

CRIMES LEGISLATION AMENDMENT BILL (NO 2) 2017

SUPPLEMENTARY EXPLANATORY STATEMENT

Presented by

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CRIMES LEGISLATION
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Introduction

This supplementary explanatory statement relates to the Crimes Legislation Amendment Bill 2017 (the Bill). It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

This explanatory statement must be read in conjunction with the Bill. It is not, and is not intended to be, a comprehensive description of the Bill. What is written about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

This supplementary explanatory statement specifically relates to government amendments to the Bill, and addresses drafting changes to clarify the legislature's policy intention.

Outline of the government amendments

Amendment 1 Clause 4

This amendment inserts a new section 56(11A) which provides that any sexual act alleged to constitute a sexual relationship must constitute, or have constituted (if particulars of the time and place at which the act took place were sufficiently particularised), an offence at the time the act occurred.

This section is intended to make clear that that the provisions of new section 56 do not criminalise conduct that was not an offence at the time the act occurred.

Amendment 2 Clause 4

This amendment omits paragraph (a) of the definition of ***sexual act*** in section 56(12) inserted by clause 4 of the Bill, and substitutes a revised paragraph (a) for this definition.

Section 56 provides that the unlawful sexual relationship, rather than individual sexual acts, constitutes the actus reus for the offence of maintaining a sexual relationship with a young person or a person under special care. Section 56(3) allows a charge under section 56 to be laid where the sexual relationship was maintained before the amendment day (the day the Act

commences). The prosecution must prove that the accused engaged in a ***sexual act*** with a young person or person under their special care on two or more occasions.

The definition of ***sexual act*** is drawn from section 2 of the Model Provision recommended by the Royal Commission into Institutional Child Sexual Abuse in the *Criminal Justice Report,* August 2017.[1]

The definition of ***sexual act*** includes all aspects of the Model Provision.

A ***sexual act*** includes an offence against Part 3 of the *Crimes Act 1900,* an act that constituted or would have constituted an offence against a previous Territory law that is substantially similar to an offence against this part (a ***historical offence***), an attempt to commit an act that constitutes an offence against Part 3 or a historical offence; or an act that, if particulars of the time when or place where the act took place were sufficiently particularised, would constitute an offence against this part or a historical sexual offence.

The definition also clarifies that a ***sexual act*** does not include an offence against section 55(2) (Sexual intercourse with young person) or section 61(2) (Act of indecency with young person) if the person who committed the act establishes the available defence for consenting young people. The defendant must prove that at the time of the offence he or she believed on reasonable grounds that the complainant was 16 years or above or at the time of the offence the complainant was between 10 and 16 years old and the complainant was in fact not more than two years younger than the defendant. In addition, the defendant must prove the complainant consented to the sexual conduct.

The intention of this amendment is to clarify that the amended section 56, permitting charges to be laid retrospectively, does not offend s25 of the *Human Rights Act 2004*, as it does not seek to criminalise conduct that was previously legal. The offence applies only to conduct that was unlawful at the time it was committed (***historical offences***), and the amendment only affects the way in which it can be charged.

Amendment 3 Clause 7

This amendment inserts “without reasonable excuse” after “must not” in section 66(1).

This amendment creates a defence of reasonable excuse to ensure that the offence does not have the unintended consequence of criminalising conduct that is otherwise permissible or lawful.

The original section 66(1)(a) was inserted in 2001. The policy intention behind this provision was to “establish a new offence where electronic messages are

[1] Recommendations 21 and 22 of the Royal Commission, *Criminal Justice Report,* August 2017.

sent to a young person that contain either pornographic material or a suggestion to include the young person in acts of a sexual nature."[2]

The Bill amends section 66(1)(a) so as not to limit this offence to conduct occurring online.

Grooming behaviour can occur in many contexts and it may not be overtly sexual or have any appearance of impropriety.

The overall policy intention of the amendments to section 66 are to introduce a broad grooming offence that captures any communication or conduct with a child undertaken with the intention of grooming the child to be involved in a sexual offence.

The Royal Commission noted the following regarding broad grooming offences:

> In recommending a broader grooming offence, we do not anticipate that it will be charged frequently outside of the circumstances to which the narrower offences would apply, particularly online and electronic grooming offences.
>
> However, in so many of the cases we have examined, we have seen the breadth of grooming behaviour and the range of people at which grooming behaviour has been directed. We have also seen the damage grooming behaviour has done, including in relation to establishing circumstances where the victim will not disclose the abuse even once contact abuse occurs and circumstances where parents or carers might be unlikely to believe a disclosure because they too have been groomed to trust and respect the perpetrator.
>
> We consider that a broader grooming offence could help to emphasise the wrongfulness of grooming behaviour, which should perform an educative function for institutions, their staff, parents, children and the broader community. A broader grooming offence also provides the criminal law context for institutional codes of conduct. These codes would prohibit conduct that is risky, in the sense that it creates the opportunity for abuse, rather than taking the narrower criminal law focus on intention.
>
> We do not consider that there is any material risk that grooming offences will be charged in circumstances involving entirely innocent conduct, and it will be important that institutions educate their staff and volunteers to understand the necessary differences between the approach in the code of conduct and the approach of the criminal law.[3]

In the context of these provisions examples of reasonable excuse may include:

- parents exercising their daily care responsibility under the *Children and Young People Act 2008.* Under section 19(1) a parent has responsibility to make care decisions about education – this would

[2] Explanatory Statement to the Crimes Amendment Bill 2001 - http://www.legislation.act.gov.au/es/db_11217/20010809-12961/pdf/db_11217.pdf
[3] Royal Commission, *Criminal Justice Report,* August 2017, Parts III-VI, page 94.

obviously include sex education and permitting a child to watch certain TV shows;

- health practitioners prescribing contraceptives to young people under 16 years in accordance with their legal obligations.

This approach is consistent with the Queensland provision that was identified as a useful starting point by the Royal Commission.[4] The Queensland provision uses the phrase "without legitimate reason" which was drawn from the Protection of Children Act 1978 (UK). As Lord Scarman said during the debate on that Act in the House of Lords: "This phrase really embraces a question of fact on which courts and juries are well able to reach a sensible decision in determining the meaning".

It is a matter for the court to make an assessment as to whether a reasonable excuse exists based on the individual circumstances of a case.

This does cast upon a person an evidential burden of proof. This is appropriate given that the excuse is a matter that is generally solely within the knowledge of the accused. However, the prosecution must negative the defence is it is raised in evidence. The issue is whether the Crown has eliminated any reasonable possibility that the accused acted with a reasonable excuse.

Additional protections

The police and the Director of Public Prosecutions also play an important role in ensuring that charges are not laid in relation to conduct that is otherwise permissible or lawful.

The police retain the discretion to decline to lay charges against adults and children or young people and refer appropriate matters to restorative justice.

The Director of Public Prosecutions is separately obligated to decide whether it is appropriate for a prosecution to continue. In making such decisions, prosecutors are guided by the procedures and standards which the law requires to be observed, and in particular by the Prosecution Policy and Guidelines promulgated by the Director under section 12 of the *Director of Public Prosecutions Act 1990*. The Policy was updated in 2015 to acknowledge and encompass the *Human Rights Act 2004* and provides as follows:

> It is not the case that every allegation of criminal conduct must culminate in prosecution. The decision to prosecute should not be made lightly or automatically but only after due consideration. An inappropriate decision to prosecute may mean that an innocent person suffers unnecessary distress and embarrassment. Even a

[4] Section 218B (Grooming children under 16) of the *Criminal Code Act 1899*.

> person who is technically guilty may suffer undue hardship if, for example, he or she has merely committed an inadvertent or minor breach of the law. On the other hand, an inappropriate decision not to prosecute may mean that the guilty go free and the community is denied the protection to which it is entitled. It must never be forgotten that the criminal law reflects the community's pursuit of justice and the decision to prosecute must be taken in that context….

The decision to prosecute can be understood as a two-stage process. First, does the evidence offer reasonable prospects of conviction? If so, is it in the public interest to proceed with a prosecution?[5]

Police discretion to charge and the additional scrutiny of whether charges should proceed in the public interest by the DPP, are critical features of the ACT criminal justice system which provide additional protection against charges being prosecuted in circumstances that are out of step with community expectations.

Amendment 4 Clause 14

Section 31(c), example, proposed new dot points

Page 10, line 15

This amendment alters the example of a combination sentence to reflect the amendment made by clause 15 of the Bill. Clause 15 inserts new section 31(2) which requires the court to set the start date of a good behaviour order after the end of any sentence of imprisonment, including any period of possible parole.

[5] ACT DPP - Prosecution Policy and Guidelines - http://www.dpp.act.gov.au/__data/assets/pdf_file/0006/715506/PROSECUTION-POLICY-OF-THE-AUSTRALIAN-CAPITALTERRITORY.Pdf