

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CRIMES (CHILD SEX TOURISM) AMENDMENT BILL 1994

EXPLANATORY MEMORANDUM

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



# CRIMES (CHILD SEX TOURISM) AMENDMENT BILL 1994

## GENERAL OUTLINE

This Bill amends the *Crimes Act 1914* ("the Principal Act") by inserting new Part IIIA. The primary purpose of the new Part is to create offences aimed at Australian nationals and residents who engage in sexual relations with children overseas and at those involved in the organisation and promotion of child sex tourism.

Division 2 of new Part IIIA creates the following offences:-

- (a) prescribed sexual offences committed overseas against children under the age of 16 years;
- (b) aggravated sexual offences committed overseas against children under the age of 12 years.

Division 3 provides that it will be a defence to:

- (a) all offences under Division 2 if a valid and genuine marriage existed between the defendant and the child and the defendant believed that the child consented to the relevant conduct;
- (b) the offences involving children between the ages of 12 and 16 if at the time of the relevant conduct the defendant believed that the child was over 16 years and that the child consented to the conduct.

Division 3 also contains provisions designed to ensure that a belief in a child's consent will not be lightly inferred.

Division 4 creates offences of encouraging and benefiting from conduct of the kind that would constitute an offence under the proposed new Part.

To facilitate the prosecution of offences under this Part, and to minimise the costs involved, Division 5 provides for the taking of evidence from overseas witnesses by satellite video link.

Division 6 inserts provisions to assist in the conduct of trials under the proposed Part, including a provision which allows the jury to make a finding that a child is under 12 or between the ages of 12 and 16, where there is insufficient evidence to determine

the child's precise age; a provision allowing the jury to return alternative verdicts in certain cases, and a provision allowing the judge to terminate the trial and discharge the jury to permit a new trial in circumstances where the evidence at the trial indicates that the defendant in fact committed a different offence from that with which he or she is charged.

### FINANCIAL IMPACT

It is not anticipated that the Bill will occasion any additional costs to the Government. The costs of any prosecutions will come from the budgetary allocations for the Australian Federal Police and the Office of the Director of Public Prosecutions, which will be conducting investigations and prosecutions under the proposed legislation.

## NOTES ON CLAUSES

### **PART 1 - INTRODUCTORY**

#### **Clause 1 - Short title**

This is a formal provision identifying the *Crimes Act 1914* as "the Principal Act" and providing for this Act to be cited as the *Crimes (Child Sex Tourism) Amendment Act 1994*.

#### **Clause 2 - Commencement**

All provisions of the proposed legislation are to commence on the day on which it receives the Royal Assent.

#### **Clause 3 - Insertion of new Part IIIA**

This clause inserts new Part IIIA in the Principal Act.

### **Division 1 - Preliminary**

#### **Proposed section 50AA - Interpretation**

Proposed subsection 50AA(1) defines words and expressions used in this Part.

"act of indecency". The meaning of this expression is clarified in proposed subsection 50AB(3).

"Australia" is defined to include the external Territories.

"induce" means to induce by threats, promises or otherwise. The expression is used in proposed sections 50BC, 50BD, 50BG and 50BH.

"offence". For the purposes of the proposed Part this expression has the extended meaning provided in proposed subsection 50AA(2).

“sexual intercourse” has the meaning given to that expression by proposed section 50AB.

“vagina” is defined to include any part of a female person’s genitalia and a surgically constructed vagina. The expression is used in proposed section 50AB.

Proposed subsection 50AA(2) provides that a reference in this Part (except if that reference occurs in proposed section 50DB) to an offence against the Part or a particular provision of it, includes a reference to the inchoate and secondary offences under sections 5, 6, 7 and paragraph 86(1)(a) of the Principal Act (which include offences for aiding and abetting, attempts and conspiracy) and to an offence against proposed section 50DB (for encouraging conduct of a kind that would constitute an offence against this Part).

Proposed subsection 50AA(3) provides that a reference in proposed section 50DB to an offence against the Part or a particular provision of it does not include a reference to an offence because of section 5 of the Principal Act. It is not considered appropriate to extend criminal responsibility further in relation to proposed section 50DB by applying it to the preliminary offences created by section 5.

Proposed subsection 50AA(4) provides that section 7A (incitement) does not apply to any of the offences created under this Part. This is because proposed section 50DB applies to all the offences created by the Part (except itself) and performs, in relation to those offences, an equivalent function to section 7A of the Principal Act. It also carries a more severe penalty than section 7A (a maximum of 10 years imprisonment as opposed to 1 year).

Proposed subsection 50AA(5) provides that paragraph 86(1)(a) of the Principal Act does not apply to an offence against proposed section 50DB. Paragraph 86(1)(a) is disapplied because proposed section 50DB, although it creates a substantive offence, subsumes conduct covered by the offence of conspiracy. It is not considered appropriate to extend criminal responsibility further in relation to this offence by the application of preliminary offences.

### **Proposed section 50AB - Meaning of “sexual intercourse” and “act of indecency”**

Proposed subsection 50AB(1) provides a definition of the term “sexual intercourse”. The expression is used in the offences created under Division 2 of this Part. As the definition is exhaustive, conduct of a sexual nature which does not fall within any of the conduct listed in paragraphs 50AB(1)(a) to (e), will not amount to sexual

intercourse for the purposes of the offences that use that term (although the conduct may amount to an act of indecency for the purposes of the offences under proposed sections 50BE, 50BF, 50BG and 50BH).

Proposed subsection 50AB(2) makes it clear that acts carried out for a proper medical, hygienic or law enforcement purpose will not amount to sexual intercourse for the purposes of the new Part.

Proposed subsection 50AB(3) is in similar terms to subsection 50AB(2) making it clear that acts carried out for a proper medical, hygienic or law enforcement purpose will not amount to acts of indecency for the purposes of the new Part.

**Proposed section 50AC - Persons who may be prosecuted for an offence committed overseas.**

This provision limits the persons who may be prosecuted under this Part for conduct committed overseas. They are persons who, at the time of the relevant act or omission, are: (i) Australian citizens; (ii) residents of Australia (including residents of the external Territories); (iii) companies incorporated under Australian law or; (iv) companies whose activities are carried on principally in Australia.

The provision does not limit the persons who may be prosecuted for an offence committed within Australia. Foreign visitors in Australia who promote, encourage or organise child sex tours, for example, are liable to be prosecuted for the offences under new sections 50DA and 50DB.

**Division 2 - Sexual offences against children overseas**

The Division does not apply to the situation where a child is only incidentally present during sexual activity because of, for example, crowded living conditions. It is only if the child can be considered to be involved in or part of the sexual activity, or if such activity is directed at the child, that an offence will be committed.

**Proposed Section 50BA - Sexual intercourse with child under 12 while overseas**

This provision makes it an offence for an Australian citizen or resident to engage in sexual intercourse (as defined) with a child under the age of 12 years, whilst outside Australia. It provides a maximum penalty of 17 years imprisonment.

**Proposed section 50BB - Sexual intercourse with child 12-15 years while overseas**

This provision creates an offence in similar terms to section 50BA, but with respect to children over 12 years and under 16 years. It provides a maximum penalty of 14 years imprisonment.

**Proposed section 50BC - Inducing child under 12 years to engage in sexual intercourse**

This provision makes it an offence for an Australian citizen or resident to induce a child under the age of 12 years to engage in sexual intercourse (as defined) with a third person, whilst outside Australia and in the presence of the Australian citizen or resident. For an offence to be committed under this provision the child must actually engage in sexual intercourse with the third person. The maximum penalty for the offence is 17 years imprisonment.

**Proposed section 50BD - Inducing child 12-15 years old to engage in sexual intercourse**

This provision creates an offence in similar terms to proposed section 50BC, but with respect to children over 12 years and under 16 years. As in the case of proposed section 50BC, an offence is only committed under this provision if the child actually engages in sexual intercourse with the third person. The maximum penalty for the offence is 14 years imprisonment.

**Proposed section 50BE - Sexual conduct involving child under 12**

This provision makes it an offence for an Australian citizen or resident, whilst outside Australia, to: (i) commit an act of indecency on, or in the presence of a child under 12 years; (ii) submit to an act of indecency being committed on him or her by, or in the presence of, a child under 12 years; or (iii) engage in sexual intercourse (as defined) with a third person in the presence of a child under 12 years with the intention of deriving gratification from the child's presence during sexual intercourse. The maximum penalty for the offence is 12 years imprisonment.

**Proposed section 50BF - Sexual conduct involving child 12-15 years old**

This provision creates an offence in similar terms to section 70, but with respect to children over 12 years and under 16 years. It provides a maximum penalty of 10 years imprisonment.

**Proposed section 50BG - Inducing child under 12 to be involved in sexual conduct**

Proposed subsection 50BG(1) makes it an offence for an Australian citizen or resident to induce a child under the age of 12 years 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. The maximum penalty for the offence is 12 years imprisonment.

Proposed subsection 50BG(2) makes it an offence for an Australian citizen or resident to induce a child under the age of 12 years to be present while a third person engages in sexual intercourse with a fourth person outside Australia and in the presence of the Australian citizen or resident. The maximum penalty for the offence is 12 years imprisonment.

**Proposed section 50BH - Inducing child 12-15 years old to be involved in sexual conduct**

This provision creates offences in similar terms to those created under sub-sections 50BG(1) and (2), but with respect to children over 12 years and under 16 years. It provides a maximum penalty of 10 years imprisonment.



### **Division 3 - Defences**

#### **Proposed section 50CA - Defence based on belief about age and consent**

Proposed section 50CA provides for a defence to the offences of sexual intercourse and acts of indecency involving children between 12 years and under 16 years (i.e., the offences created under proposed sections 50BB, 50BD, 50BF or 50BH). The defence applies if, at the time of the sexual intercourse or act of indecency, the defendant believed that (i) the child was 16 or over and, (ii) the child consented to participating in the relevant conduct, or to being present, as the case may be.

The defence is not available in respect of the offences created under proposed sections 50BA, 50BC, 50BE, and 50BG which relate to children under 12 years.

In order to establish the defence in proposed section 50CA it will not be necessary for the defendant to prove that his or her mistaken belief as to the child's age and consent was reasonable in the circumstances. However, proposed section 50CD provides that the jury may take reasonableness into account when determining whether the defendant in fact held the claimed belief.

#### **Proposed section 50CB - Defence based on valid and genuine marriage and belief about consent**

Proposed section 50CB provides a defence to all of the offences created under proposed Division 2, including the offences involving children under the age of 12 years. The defence applies if: (a) at the time of the relevant conduct a marriage existed between the child and the defendant which was valid, or recognisable as valid, under the law of the country (i) where the marriage was solemnised, (ii) where the offence was allegedly committed, or (iii) of the defendant's residence or domicile; (b) the marriage was genuine at the time it was entered into; and (c) the defendant believed that the child consented to participating in the relevant conduct or to being present whilst it was performed, as the case may be. The requirement that marriage be genuine at the time it was entered into is intended to prevent the use of sham or fictitious marriages as a defence.

### **Proposed section 50CC**

Proposed section 50CC requires the defendant to establish the elements of the defence on the balance of probabilities.

### **Proposed section 50CD**

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

### **Proposed section 50CE - Lack of physical resistance not conclusive**

Proposed section 50CE ensures that the defendant cannot rely solely on a child's lack of physical resistance to base a belief in the child's consent to the prohibited conduct. The provision makes it clear that the jury may find that the defendant did not in fact believe that the child consented even though the child offered no physical resistance.

### **Proposed section 50CF - When belief about consent must be disregarded.**

This provision is relevant to the belief in consent requirement of both the defence of mistaken belief in age (under proposed section 50CA) and the valid marriage defence (under proposed section 50CB).

Proposed section 50CF provides that the defendant's belief in consent must be disregarded if he or she knew that the consent was given because of one or more of the reasons listed in the provision. Those reasons include inflicting violence or threatening to inflict violence on the child or on a third person; threatening to publicly humiliate or disgrace the child or a third person; the effects of alcohol or drugs; anyone abusing a position of authority over the child; or because of the child's inability to understand the nature of the act performed.

Proposed subsection 50CF(2) makes it clear that it will not be necessary each time the defence is raised for the defendant to establish that consent was not given, or that he or she did not know that consent was given, for any of the reasons listed in proposed subsection 50CF(1). The defendant will be required to show that the subsection does not apply if the evidence introduced at the trial tends to prove that

consent was given for one or more of those reasons. If such evidence is raised the defendant will be required to prove, on the balance of probabilities, that the particular negating factor(s) raised by the evidence do not apply, or that he or she did not know that consent was caused by it (or them).

Proposed subsection 50CF(3) makes it clear that the proposed section does not limit the grounds on which the defence of mistaken belief in age (under proposed section 50CA) and the valid marriage defence (under proposed section 50CB) may fail. It is open to the prosecution to establish that the defence fails for some other reason not specified in the proposed section.

#### **Division 4 - Benefiting from or encouraging child sex tourism**

This Division creates offences specifically directed at the organisers and promoters of child sex tourism.

#### **Proposed section 50DA - Benefiting from child sex tourism**

Proposed subsection 50DA(1) makes it an offence for a person to perform an act or make an omission, whether in Australia or overseas, with the intention of benefiting from conduct of a kind that would constitute an offence under this proposed Part, if the act (or omission) is reasonably capable of resulting in the person benefiting from such conduct. An offence is committed against proposed subsection 50DA(1) as soon as the person performs the relevant act (or omission). It is irrelevant whether the conduct, which would constitute the other offence under this proposed Part, occurs or has occurred and whether that conduct was, or may have been, committed by a person other than an Australian citizen or resident.

The maximum penalty that may be imposed for an offence under proposed subsection 50DA(1) is 10 years imprisonment or \$60,000.00 pecuniary penalty for a natural person and \$300,000.00 pecuniary penalty for a body corporate. The pecuniary penalty is calculated in accordance with the formula specified in section 4B of the Principal Act.

Proposed subsection 50DA(2) provides an example of an act intended to be caught by subsection (1), namely "profiting from an arrangement that facilitates..." an offence under the new Part. However, this is an example only and any act which falls within the terms of the provision will constitute an offence under this section.

## **Proposed section 50DB - Encouraging offence against this Part**

Proposed subsection 50DB(1) is in similar terms to subsection 50DA(1) but proscribes acts (or omissions) performed with the intention of “encouraging” conduct of a kind that would constitute an offence under this Part (other than an offence under this section) if the act (or omission) is reasonably capable of encouraging such conduct.

The maximum penalty for this offence is the same as the penalty provided for proposed section 50DA.

Proposed subsection 50DB(2) defines the term “encourage”, for the purposes of this provision, to mean to encourage, incite to, or urge, by any means whatever (including by written, electronic or other form of communication) or to aid, facilitate or contribute to, in any way whatever. This is an exhaustive definition for the purposes of the proposed section.

Proposed subsection 50DB(3) provides examples of acts capable of falling within the terms of proposed subsection 50DB(1), namely:-

- (a) organising an arrangement that facilitates an offence against this Part (but not including an offence under this section);
- (b) assisting a person to travel overseas in order to commit an act that would constitute an offence under proposed Division 2 of this legislation; and
- (c) advertising an offer so to assist a person or an arrangement for so assisting a person.

As in the case of proposed subsection 50DA(1), the examples provided are a guide only and are not intended to be an exhaustive list of the kind of acts that would be caught by the provision.

## **Division 5 - Video Link Evidence**

This Division does not provide a power to direct that evidence be taken by video link from the External Territories.

### **Proposed section 50EA - When court may take evidence by video link**

Proposed section 50EA authorises the court to direct that a witness give evidence by video link if all of the following conditions are satisfied; namely that (i) the witness is willing to give evidence from outside Australia; (ii) he or she is not a defendant in the proceedings; (iii) the facilities for taking such evidence (in accordance with the requirements of proposed section 50ED) are or can reasonably be made available and (iv) the court is satisfied that it is in the interests of justice for the evidence to be taken by video link.

### **Proposed section 50EB - When court must take evidence by video link**

Proposed subsection 50EB(1) provides that, subject to subsection 50EB(2), the court must make an order that the evidence of a witness be taken by video link if (a) the first three conditions specified in proposed section 50EA have been met and (b) the court is also satisfied of one or more of the following matters; namely that the witness's attendance in Australia would (i) cause unreasonable expense or inconvenience; (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.

Proposed subsection 50EB(2) provides that even if all the requirements of subsection 50EB(1) are met, the court must not direct that evidence be taken by video link if it is satisfied that it would be contrary to the interests of justice to do so.

### **Proposed section 50EC - Motion of parties**

This provision provides that an order for video link evidence can only be made on the application of a party to the proceedings and not by the court on its own motion.

### **Proposed section 50ED - Technical requirements for video link**

This provision relates to the requirement in paragraph 50EA(c) and provides that video link evidence is not to be given unless the place where the court is sitting and the place where the evidence is to be given are each equipped with video facilities to enable the persons whom the court considers appropriate to see and hear each other via the video-link.

### **Proposed section 50EE - Application of laws about witnesses**

Proposed subsection 50EE(1) provides that a witness who gives video link evidence is taken to be giving it at the place where the court is sitting.

Proposed subsection 50EE(2) makes it clear that the effect of subsection 50EE(1) is to apply local Australian law to the giving of evidence by video link, including laws relating to the rules of evidence, procedure, contempt of court and perjury.

### **Proposed section 50EF - Administration of oaths and affirmations**

This proposed section provides for the oath or affirmation to be administered either by the Australian court over the video link or by authorised officials at the place where the witness is to give evidence on behalf of the court.

### **Proposed section 50EG - Expenses**

This provision authorises the court to make orders for the payment of expenses incurred in connection with the giving of evidence by video link.

### **Proposed section 50EH - Other laws about foreign evidence not affected**

This provision expressly preserves the operation of other laws relating to the taking of evidence from overseas witnesses for the purposes of proceedings concerning offences against this proposed Part.

## **Division 6 - Other Rules about conduct of trials**

### **Proposed section 50FA - Finder of fact to determine the age of victim**

Proposed subsection 50FA(1) provides that, if the court is satisfied that there is insufficient evidence to determine a child's age, the jury may nevertheless find beyond a reasonable doubt that the child is under 12 years or over 12 years and under 16 years. In making a finding under this provision, the jury may take into account any relevant matters and whatever evidence of age is available, including the child's appearance and demeanour and the evidence of medical experts.

Proposed subsection 50FA(2) provides that a determination made under subsection (1) is taken to be a fact established by the evidence.

### **Proposed section 50FB - Alternative verdicts**

This provision allows the jury to return alternative verdicts in certain cases where it is satisfied that the accused is not guilty of the offence charged but is guilty of another offence under the proposed Part. The provision contains a table which identifies most of the cases in which the jury may return an alternative verdict. If the original charge is for an offence identified in column 1 of the table the jury may, if it is satisfied on the evidence, find the defendant guilty of the corresponding offences identified in column 2. For example, if the original charge is for an offence of sexual intercourse with a child under 12 years (a section 50BA offence), the jury may return an alternative verdict for: (i) sexual intercourse with a child 12 years or older (a section 50BB offence); (ii) an act of indecency with a child under 12 years (a section 50BE offence); or (iii) an act of indecency with a child 12 years or older (a section 50BF offence).

Because of the operation of proposed subsection 50AA(2), this section will also allow alternative verdicts to be returned for secondary and inchoate offences. For example, a person charged with attempting to have sexual intercourse with a child under the age of 12 (section 50BA) could be found guilty of attempting to have sexual intercourse with a child over the age of 12 (section 50BB) or of attempting to commit an act of indecency on a child under the age of 12 (section 50BE).

In addition to this provision, all State and Territories have laws which allow for the jury to find an accused guilty of an attempt in circumstances where the completed offence is charged. Proposed section 50GA expressly provides for the continued operation of such laws so that they would apply with respect to offences charged under this Part. Therefore, if the original charge is for a completed offence under new section 50BA the jury may on the evidence return an alternative verdict of attempting to commit a section 50BA offence.

### **Proposed section 50FC - Judge may direct new trial for alternative offence**

This provision allows the trial judge a discretion to terminate a trial if it appears to him or her that (i) the jury may find the defendant not guilty of the offence charged but guilty of another offence under this Part, or that (ii) the defendant is guilty of another

offence under this Part, which is punishable by an equal or greater penalty to the offence charged. The discretion is available regardless of whether the other offence is covered by the alternative verdict provisions under proposed section 50FB. However, the discretion may only be exercised if the judge is satisfied that the interests of justice require such action and the jury has not already retired to consider its verdict.

The provision is intended, in part, to avoid any injustice that may arise from the use of alternative verdicts by, for example, denying an accused the opportunity of preparing a defence to the 'alternate' offence which was not available for the charged offence.

If the trial is terminated under proposed section 50FC, the Crown retains a discretion as to whether the defendant will be presented on the other offence at a later time.

### **Proposed section 50FD - Double jeopardy**

This provision makes it clear that a person is not liable to prosecution for an offence against this Part for conduct for which he or she has already been convicted or acquitted in another country for offences against the law of that country.

### **Proposed section 50GA**

This provision preserves the operation of any other law of the Commonwealth or any law of a State or Territory with respect to this new Part.