

House of Assembly—No 35A

As reported with amendments, report agreed to and passed remaining stages,
8 December 2004

South Australia

Criminal Law Consolidation (Child Pornography) Amendment Bill 2004

A BILL FOR

An Act to amend the *Criminal Law Consolidation Act 1935* and to make consequential amendments to the *Criminal Law (Forensic Procedures) Act 1998* and the *Summary Offences Act 1953* and the *Summary Procedure Act 1921*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Criminal Law Consolidation (Child Pornography) Amendment Act 2004*.

5 2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Criminal Law Consolidation Act 1935*

4—Repeal of section 58A

Section 58A—delete the section

5—Redesignation of section 64

5 Section 64—re designate the section as section 60

6—Redesignation of section 65

Section 65—re designate the section as section 61

7—Insertion of Part 3 Division 11A

Part 3—after Division 11 insert:

10 **Division 11A—Child pornography and related offences**

62—Interpretation

In this Division—

child means a person under, or apparently under, the age of 16 years;

child pornography means material—

- 15 (a) that—
- (i) describes or depicts a child engaging in sexual activity; or
 - (ii) consists of, or contains, the image of a child or bodily parts of a child (or what appears to be the image of a child or bodily parts of a child) or in the production of which a child has been or appears to have been involved; and
- 20 (b) that is intended or apparently intended—
- (i) to excite or gratify sexual interest; or
 - (ii) to excite or gratify a sadistic or other perverted interest in violence or cruelty;
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disseminate—a person disseminates child pornography if the person—

- 30 (a) sends, supplies, exhibits, transmits or communicates it to another, or enters into an agreement or arrangement to do so; or
- (b) makes it available for access by another (including access by means of a computer) or enters into an agreement or arrangement to do so;

35 *material* includes—

- (a) any written or printed material; or

- (b) any picture, painting or drawing; or
- (c) any carving, sculpture, statue or figure; or
- (d) any photographic, electronic or other information or data from which an image or representation may be produced or reproduced; or
- (e) any film, tape, disc, or other object or system containing any such information or data;

pornographic nature of child pornography means the aspects of the material by reason of which it is pornographic;

private act means—

- (a) a sexual act; or
- (b) an act involving an intimate bodily function such as using a toilet; or
- (c) an act or activity involving undressing to a point where the body is clothed only in undergarments; or
- (d) an activity involving nudity or exposure or partial exposure of sexual organs, pubic area, buttocks or female breasts;

prurient purpose—a person acts for a prurient 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 someone else.

63—Production or dissemination of child pornography

A person who—

- (a) produces, or takes any step in the production of, child pornography knowing of its pornographic nature; or
- (b) disseminates, or takes any step in the dissemination of, child pornography knowing of its pornographic nature,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

63A—Possession of child pornography

(1) A person who—

- (a) is in possession of child pornography knowing of its pornographic nature; or
- (b) intending to obtain access to child pornography, obtains access to child pornography or takes a step towards obtaining access to child pornography,

is guilty of an offence.

Maximum penalty:

- (a) for a first offence—imprisonment for 5 years; or

(b) for a subsequent offence—imprisonment for 7 years.

(2) It is a defence to a charge of an offence against subsection (1) to prove that the material to which the charge relates came into the defendant's possession unsolicited and that the defendant, as soon as he or she became aware of the material and its pornographic nature, took reasonable steps to get rid of it.

(3) In determining whether an offence against subsection (1) is a first or subsequent offence, a court must treat a previous offence involving child pornography against any provision of this Division, or a corresponding previous enactment, as a previous offence.

63B—Procuring child to commit indecent act etc

(1) A person who—

(a) incites or procures the commission by a child of an indecent act; or

(b) acting for a prurient purpose—

(i) causes or induces a child to expose any part of his or her body; or

(ii) makes a photographic, electronic or other record from which the image, or images, of a child engaged in a private act may be reproduced,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(2) Subsection (1) applies whether the acts alleged to constitute the offence—

(a) occur in private or in public; or

(b) occur with or without the consent of the child, or the child's parent or guardian.

(3) A person who—

(a) procures a child or makes a communication with the intention of procuring a child to engage in, or submit to, a sexual activity; or

(b) makes a communication for a prurient purpose and with the intention of making a child amenable to a sexual activity,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

63C—Pornographic nature of material

(1) In determining whether material to which a charge of an offence relates is of a pornographic nature, the circumstances of its production and its use or intended use may be taken into account but no such circumstance can deprive material that is inherently pornographic of that character.

- (2) No offence is committed against this Division by reason of the production, dissemination or possession of material in good faith and for the advancement or dissemination of legal, medical or scientific knowledge.
- 5 (3) No offence is committed against this Division by reason of the production, dissemination or possession of material that constitutes, or forms part of, a work of artistic merit if, having regard to the artistic nature and purposes of the work as a whole, there is no undue emphasis on aspects of the work that might otherwise be considered
- 10 pornographic.
- (4) No offence is committed against this Division by reason of—
- (a) the possession or dissemination of a publication, film or computer game that has been classified under the *Classification (Publications, Films and Computer Games) Act 1995* (unless it is classified as a publication for which classification is refused (RC)); or
- 15 (b) the possession of a publication, film or computer game for the purposes of obtaining a classification under that Act.

Part 3—Amendment of the *Criminal Law (Forensic Procedures) Act 1998*

8—Amendment of Schedule—Serious offences

Schedule, offences against the *Summary Offences Act 1953*, entry relating to section 33—delete the entry

Part 4—Amendment of the *Summary Offences Act 1953*

9—Amendment of section 33—Indecent or offensive material

- (1) Section 33(1), definitions of *child* and *child pornography*—delete the definitions
- (2) Section 33(2), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$20 000 or imprisonment for 6 months.
- (3) Section 33(3)—delete subsection (3)

Part 5—Amendment of *Summary Procedure Act 1921*

10—Amendment of section 104—Preliminary examination of charges of indictable offences

- (1) Section 104(1)(a)(ii)—delete subparagraph (ii) and substitute:
- 35 (ii) copies of any documents on which the prosecutor relies as tending to establish the guilt of the defendant (other than documents that are, in the opinion of the prosecutor, of a pornographic nature or of only peripheral relevance to the subject matter of the charge);

- (2) Section 104(1)(a)(iii)—delete "(including documents of peripheral relevance that have not been filed in the Court)" and substitute:

(including documents that have not been filed in the Court because of their pornographic nature or their peripheral relevance to the subject matter of the charge)

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- (3) Section 104—after subsection (4) insert:

(5) If the prosecutor relies on pornographic material as tending to establish the guilt of the defendant—

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(a) the prosecutor must, at least 14 days before the date appointed for the defendant's appearance to answer the charge, inform the defendant of the nature of the material and appoint a time and place for inspection of the material by the defendant, the defendant's legal representative and any person who may be called to give expert evidence for the defendant; and

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(b) ensure that the material is available for inspection at the appointed time and place (but the time and place of inspection may be modified by agreement).