
House of Representatives

Standing Committee on

*Legal
And
Constitutional
Affairs*

Government Response

Crimes (Child Sex Tourism) Amendment Bill 1994





Criminal Law Division

**GOVERNMENT RESPONSE TO THE HOUSE OF REPRESENTATIVES
COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS REPORT ON
THE CRIMES (CHILD SEX TOURISM) AMENDMENT BILL 1994**

The Government welcomes the Committee's Report. It contains a number of constructive suggestions which will improve the Bill in certain respects. The proposed legislation necessarily has some novel features. It is useful to have a body, such as the Committee, look at it from a fresh perspective. The Government accepts most, but not all of the Committee's suggestions.

The Government does not accept the Committee's general criticism that the Bill as introduced is not "sound legislation" (Report, para 2.2.3), or that it departs unreasonably from "traditional safeguards" (2.2.4), or in the extreme language the Report cites from one witness "throws aside 200 years of criminal justice with fairness for the accused" (2.2.6). Each specific criticism deserves to be carefully examined, and this the Government has done, finding merit in most of them but not in all. A particular source of confusion has been the suggestion that the Bill makes novel and unacceptable changes with respect to the burden of proving elements of the offences. This is an unjustified criticism, possibly based on ignorance of the law in Australia. Under the Bill, as under the law relating to similar sexual offences in all Australian jurisdictions, it is for the prosecution to prove beyond reasonable doubt the elements of the offence, but a defence is allowed as to the accused's belief (*reasonable* belief in some jurisdictions) which is a matter for the accused to establish on the balance of probabilities. Far from this being a novel approach, it is totally consistent with the existing law in Australia.

Recommendation 1

The Committee recommends that the Attorney-General and the Minister for Justice consult with other members of the Standing Committee of Attorneys-General, with a view to encouraging the States to reflect the issues raised in this report in supplementary and complementary state legislation.

Response

The process of consulting with jurisdictions is already underway. As agreed at the last meeting of the Standing Committee of Attorneys-General, the Bill, when finalised, will be referred to the Special Committee of Parliamentary Counsel as a model for any complementary State legislation. In view of the time involved in enacting new legislation on a uniform basis throughout Australia, there was no question that, if such legislation was to be enacted within a reasonable time, the best course was for the Commonwealth to take the lead in legislating and to save expressly the operation of subsequent supplementary and complementary State legislation, if enacted.

Central Office

Recommendation 2

The Committee recommends that the Bill uphold the legal protections afforded to accused persons which are at the heart of our criminal justice system.

Response

The Government accepts this recommendation.

Recommendation 3

The Committee recommends that the Government ensure that traditional standards of justice be given priority whenever video links are used in conducting a case under the legislation.

Response

The Government accepts the thrust of the Committee's recommendations 24, 25 and 26 but does not accept that its previous formulation violated traditional standards of justice.

Recommendation 4

The Committee recommends that the Government ensure adequate and effective consultation in the preparation of legislation. Such consultation should extend to practitioners experienced in both prosecution and defence, as well as to lawyers' organisations such as the bar associations and the Law Council and to non-legal organisations such as civil liberties groups.

Response

The Government is prepared to look the issue of wider consultation in the preparation of legislation.

It notes, however, that the Bill arose out of an initiative in the Standing Committee of Attorneys-General. A Commonwealth position paper was developed outlining the proposed legislation which was circulated to all jurisdictions in November 1993. A draft Bill was also circulated to jurisdictions, via that Committee, well over a month prior to its introduction in federal Parliament. It was envisaged that consultation would take place within jurisdictions in that period. As pointed out to the Committee and also noted in its Report, normally whenever there is federal legislation in which State governments have an interest, such as the Bill, State Attorneys-General would seek views within their jurisdiction, including the views of defence practitioners.

Recommendation 5

The Committee recommends that, to avoid doubt, the inclusion of a definition of 'act of indecency' in clause 50AA(1) should be considered.

Response

The Government is still considering this recommendation. As noted by the Committee, there was no unanimous view among the submissions it received on this issue.

It is noted that the case of *Saraswati v R* (1991) 172 CLR 1, which was referred to the Committee, is not relevant to this Bill. The High Court in that case was interpreting New South Wales sexual offence provisions which have a different legislative scheme and history. The reasoning of the Court in that case was based entirely on the existence of a separate statutory offence of indecent assault. There is no analogy with the Bill or the *Crimes Act 1914*. The expression in the *Crimes Act 1914* is to be interpreted in light of the common law (see section 4). However, out of an abundance of caution, it is agreed that 'act of indecency' will be defined to include an indecent assault.

Recommendation 6

The Committee recommends that the definition of "resident" in clause 50AC be given further consideration.

Response

During the drafting of the Bill, considerable thought was given to the possibility of defining this term, which is intended to apply to those persons who live in Australia with a right to permanent stay rather than to a limited period of stay. As in other Commonwealth legislation, the term was left undefined due to the problems posed by the notion of permanent residence under the *Migration Act 1958* and the existence of a class of foreign nationals (e.g., New Zealanders and Cook Islanders) who are able to live in Australia without a discretionary permit due to intergovernment agreements. It was considered that the scope of the term should be set by the courts which, in the past, have limited it to those with some long term or reasonably permanent connection with Australia. Being contained in a criminal statute, it was also considered that the expression would be construed narrowly.

The Government does not consider that it can do more in the Bill itself to address the Committee's concerns. However, it will consider meeting the Committee's concerns by the issuing of an appropriate direction to the Commonwealth Director of Public Prosecutions under the *Director of Public Prosecutions Act 1983*. This will ensure that prosecutions are brought only in respect of citizens or long-term or permanent residents.

Recommendation 7

The Committee recommends that

- (a) clauses 50BA, 50BC, 50BE and 50BG be deleted; and
- (b) the age of the child be amended in clauses 50BB, 50BD, 50BF and 50BH to read 'a person under 16'.

Response

The Government accepts this recommendation.

As noted by the Committee, the Department recognised that there was a potential difficulty in the way the Bill dealt with age groups and agreed, prior to the commencement of the Committee's hearings, to recommend amendment of the offence provisions accordingly. As the Committee is aware, the same problem arises in relation to sexual offences under State legislation upon which the Bill's provisions are partly based, but is insignificant because of Australia's universal birth records which establish age precisely.

Recommendation 8

The Committee recommends that the maximum penalties should be retained for the merged offences.

Response

The Government agrees to implement this measure as a consequence of the decision referred to above.

Recommendation 9

The Committee recommends that a provision be inserted stating that in sentencing a person convicted of an offence under this Part, the court must take the age and maturity of the complainant into account.

Response

The Government accepts this recommendation.

Recommendation 10

The Committee recommends that 'the offender' be deleted from clauses 50BE, 50BF, 50BG and 50BH and a neutral term substituted.

Response

The Government accepts this recommendation.

Recommendation 11

The Committee recommends that, in light of definitional problems with 'submits', the use of the term in subclauses 50BE(b) and 50BF(b) should be reconsidered.

Response

The Government has reconsidered this issue but has decided not to adopt this recommendation which was not broadly supported in the submissions made to the Committee.

It is considered that the mere witnessing of an act cannot be described as "submitting" to it. The ordinary meaning of the word 'submit' is 'to yield in surrender, compliance or obedience; to subject oneself to something imposed or to be undergone': see *The Macquarie Dictionary*, Revised Edition, 1985. As a matter of construction, "submitting to an act" in para. 50BF(b) is clearly intended to be the converse of "committing an act on" which is proscribed in para. 50BF(a).

It is clear from the language of proposed sections 50BE and 50BF that "submitting to" is to include more than "being present at". It is conceivable that an indecent act might be performed in such a way that the voluntary presence of a person in relation to the act amounts to an act of "submission" to the indecent act, but that situation would not encompass the example cited in para.3.10.3 where it is suggested that involuntary presence at an indecent act could amount to "submission" to it. As mere witnessing of, or watching,

an indecent act cannot reasonably be argued to be "submission to" the act, the involuntary witnessing of an act is even further removed from "submission".

Recommendation 12

The Committee recommends that 'intends to derive gratification' should be included as an element of subsections 50BE(a), 50BE(b), 50BF(a) and 50BF(b).

Response

The Government accepts this recommendation.

Recommendation 13

The Committee recommends that consideration be given to inserting 'sexual' before 'gratification', where appearing.

Response

The Government has decided not to accept this recommendation

It is impossible to imagine a form of "gratification" that is not sexual where the conduct should not also be caught: for example, sadistic (if different from sexual) gratification or gratification from exercising power or causing humiliation.

Recommendation 14

The Committee recommends that consideration should be given to inserting a provision so that persons under 18 years cannot be prosecuted under Part IIIA, unless the Attorney-General gives his or her consent in writing.

Response

The Government will implement this suggestion by issuing an appropriate direction to the Commonwealth Director of Public Prosecutions under the *Director of Public Prosecutions Act 1983*.

Recommendation 15

The Committee recommends that the belief as to consent should be removed as an element of the defences in clauses 50CA and 50CB.

Response

After much consideration, the Government reluctantly agrees to remove the element of consent as an element of the defences in clauses 50CA and 50CB.

The consent requirement was included out of a concern to protect persons under the age of 16 (from conduct by Australians) where the perpetrator of the conduct either does not believe the person is under the age of 16 or does not believe the person consents to the conduct - keeping in mind that for a conviction it must be proved that the victim is 15 or younger. It was considered that the lack of a consent requirement could allow an individual to escape liability merely because he or she believed the person was over 16, irrespective of the fact that the evidence disclosed that the child had been raped or, for

example, was forced to commit indecent acts. Further, the lack of a consent requirement in proposed section 50CB was seen as being out of step with recent Australian reforms relating to rape in marriage. In the absence of an alternative offence relating to non-consensual sexual acts with children overseas, extradition proceedings would then be the only option (and then only if the other State was interested in pursuing the matter).

This was not a novel requirement. Consent is a requirement of the "reasonable mistake" defence available in respect of similar offences under some State laws where the elements of the defence are consent *and* mistaken belief in age *and* reasonableness of the belief.

Notwithstanding the requirement of consent, the focus of the Bill remained sexual activity involving children under the age of 16. It still had to be still proven beyond a reasonable doubt that the defendant committed the proscribed act with the child who was under 16 years at the time. If there was a reasonable doubt that the child was under the age of 16 at the time the act occurred, the jury must acquit, irrespective of whether the defendant has made out the defence or has attempted to make it out.

This was an extremely difficult decision for the Government. However, it has decided to give weight to the concerns expressed by the Committee and remove consent as an element of the defences. It intends to monitor any future cases where defendants are acquitted in respect of non-consensual sexual acts in relation to children, with a view to possible amendment.

Recommendation 16

The Committee recommends that the defence based on belief about age should be retained for the merged offences.

Response

The Government accepts this recommendation.

Recommendation 17

If the merger approach is not accepted, the Committee recommends that the defence based on belief about age should be available for all offences, including those offences where the child is under 12 years.

Response

In view of the above, this recommendation is now irrelevant.

Recommendation 18

- (a) The Committee recommends that the current clause 50CC should be deleted.
- (b) The Committee's view is that the onus of proof in relation to the defence based on belief about age should not be reversed.
- (c) The Committee recognises that the onus of proof in relation to the defence based on valid and genuine marriage should be reversed and the accused should be required to prove this defence on the balance of probabilities.

Response

The Government will not accept subclauses (a) and (b) of this recommendation. It is firmly of the view that proposed section 50CC should be retained in its present form. It accepts subclause (c).

The proposed section follows existing law and practice in Australia; see, for example, *R v Douglas* [1985] VR 721 and Heath, *Indictable Offences in Victoria*, 1992, at p.351 and the authorities cited therein. It reflects existing law in all State and Territory jurisdictions. As the President of the Australian Law Reform Commission pointed out to the Committee, it is considered to be the standard approach to require the defence to establish belief in age on the balance of probabilities (a point also made by the Law Faculty of the University of New South Wales and by the Attorney-General of South Australia in their submissions to the Committee). The Senate Standing Committee on the Scrutiny of Bills also had no difficulty with the proposed section.

Also, unlike its counterparts in some State legislation, proposed section 50CA currently only requires a subjective belief to be proven on the balance of probabilities. It would be extremely difficult for the prosecution to negate beyond a reasonable doubt an assertion of what was in the mind of the accused at the time of the alleged offence when what may be asserted need not be reasonable or rational and when intoxication can be used to assist a defence of mistaken belief. As Justice Elizabeth Evatt noted knowledge of age - a matter peculiarly within the knowledge of the accused - is not an element of the offences which must be proved by the prosecution beyond reasonable doubt.

Recommendation 19

The Committee recommends that the notes on clause 50CD in the Explanatory Memorandum should be amended to include a reference to the defendant's belief as to the child's age.

Response

The Government accepts this recommendation.

Recommendation 20

The Committee recommends that clauses 50CE and 50CF should be deleted.

Response

This recommendation is accepted. It follows from Recommendation 15.

Recommendation 21

The Committee recommends that no prosecution should proceed in Australia if the actions are not criminal in the laws of the foreign country.

Response

This recommendation is rejected.

This recommendation would undermine the purposes of the Bill. As stated in the Department's submission to the Committee, the policies behind the Bill require the

Commonwealth to act to eradicate the phenomenon of child sex tourism; that is, the resorting to other countries for child-sex because of the perceived ready availability in some other countries. This must be done notwithstanding the legality or otherwise of the proscribed conduct in the countries concerned. In this regard the dissenting opinion of the Committee's Deputy Chairman, Mr Cadman MP, is noted. A defence of legality would merely encourage paedophiles to avoid the Bill by targeting those countries whose laws against child sexual abuse may be inadequate or who lack the resources to combat it. They would be liable to prosecution neither in the country concerned nor in their home country. Moreover, the Convention on the Rights of the Child represents an internationally agreed standard for the treatment of children and places an onus on signatories to encourage other States to review their relevant laws in light of that standard. Furthermore, in part as a result of pressure created by this kind of measure, reforms can be expected in the course of time to be undertaken by those countries in which the exploitation of children occurs in order to bring their laws into line with international standards. Thailand, for example, is expected to introduce legislation which will, among other things, expressly make it an offence to have sex with a child prostitute.

Further, a defence that a proscribed act is not criminal in the laws of the foreign country will necessarily lead to a need to call expert evidence and to a real contest as to what the requirements of the foreign law are, including the content of the background law, such as questions of mens rea. This would appear to be at odds with the Committee's stress on the need to avoid any potential confusion for juries and on simplifying the issues in any trial under the legislation.

Recommendation 22

The Committee recommends that consideration should be given to ensuring that the term 'benefiting' is not limited to obtaining a financial benefit in clause 50DA.

Response

The Government accepts this recommendation. In order to avoid any doubt, the Government proposes to insert the words 'whether financially or otherwise' after the term 'benefiting' in proposed section 50DA.

Recommendation 23

The Committee recommends that the maximum penalties in Division 4 should be increased to seventeen years imprisonment.

Response

The Government accepts this recommendation.

Recommendation 24

The Committee recommends that clauses 50EA and 50EB be combined into one provision detailing when the court may make a direction that evidence be taken by video link.

Response

The Government accepts this recommendation.

The proposed clauses were intended to overcome costs and difficulties for both the defence and the prosecution in using foreign evidence. They were also intended to reduce the trauma of the victim of appearing in court. However, the essential question for the court in deciding whether to direct a witness give evidence by video link remained whether it was in the interest of justice that such a direction be made (proposed para. 50EA(d)). Proposed subsection 50EB(2) also contained a discretion which was intended to ensure that the evidence of foreign witnesses was put before the court in the most useful and convenient form, subject to that interest. It included a power to revoke or suspend a direction to give evidence by video link in the interests of justice. The court also has a general power and responsibility to ensure that a trial is conducted fairly and in accordance with procedural requirements. In every case, the judge would have been required to consider the issue of any unfairness to the accused in making such an order.

Proposed subsection 50EB(2) was intended to reflect a clear intention that, in the absence of compelling reasons to the contrary, the defence and the prosecution should be allowed to use video link technology where the circumstances listed in proposed paragraphs 50EB(1)(a),(b) and (c) are met.

Proposed paragraphs 50EB(1)(a),(b) and (c) are not novel. Proposed paragraph 50EB(1)(a) is based on an identical provision in the *Crimes (Fraud) Bill 1992* (Vic). The enactment of such a provision was recommended by the 1992 National Crime Authority Conference on White Collar Crime which was attended by members of the judiciary, the prosecution and the private profession. After examining the provision, a report by the Australian Institute of Judicial Administration also recommended the enactment of such a provision. Proposed paragraphs 50EB(1)(b) and (c) are based on criteria in State and Territory provisions concerning the use of closed circuit television.

Recommendation 25

The Committee recommends that:

- (a) the 'unreasonable expense and inconvenience' requirement be retained provided the provision is not mandatory; and
- (b) the 'interests of justice' formulation in current subclause 50EB(d) be used rather than that in subclause 50EB(2) because it places the onus of proof on the party seeking to persuade the court that evidence should be taken by video link.

Response

The Government accepts this recommendation with a modification.

In the combined provision, it is proposed that the onus be to satisfy the court that 'evidence may be taken by video link consistently with the interests of justice'. The purpose of this formulation is to place an onus on the party seeking to have a video link used, but to avoid any implication that the applicant must show an additional ground to those already specified that it is in the interests of justice to depart from the traditional means of receiving evidence.

Recommendation 26

The Committee recommends that the clause detailing when evidence may be taken by video link provides that:

- (i) all the requirements in 50EA(a), (b) and (c) must be met before a direction can be made;
- (ii) one of the requirements in clause 50EB(1)(a), (b) or (c) must be satisfied; and
- (iii) the court should be satisfied that it is in the interests of justice that the evidence be taken by video link.

Response

The Government accepts this recommendation with a modification (see above).

Recommendation 27

The Committee recommends that consideration be given to amending the *Mutual Assistance in Criminal Matters Act 1987* and any other relevant Acts to enable perjury and contempt laws and laws relating to conspiring to pervert the course of justice to be enforced against witnesses who give evidence via video link in proceedings under Part IIIA.

Response

The Government accepts this recommendation. This aspect will be given consideration in a current review of the *Mutual Assistance in Criminal Matters Act 1987*.

Recommendation 28

The Committee recommends that 'defendant' should be deleted from subclause 50EF(a) and substituted with the word 'witness'.

Response

The Government accepts this recommendation. This is clearly a drafting error.

Recommendation 29

The Committee recommends that the Government give more detailed consideration as to how expenses are to be dealt with, and in particular, to whether there is a need for regulations in this area or for the Court to have rule-making powers.

Response

The Government accepts this recommendation.

The issue of costs will be addressed outside the proposed legislation itself. It is directed to future conduct and there are no time considerations that make it necessary to commit special resources at the outset.

Concerns were expressed that there was a need to increase the resources of law enforcement as a consequence of the legislation. It is recognised that the preparation of a case in respect of conduct outside Australia is likely to be more expensive, as a general rule, than those in respect of conduct within Australia. The level of effort to be applied is a matter for separate decision. Australian law enforcement is accustomed to exercising investigative and prosecuting discretions based on cost and prospects-of-conviction

considerations, among others, and there has been no suggestion that the policy in this regard is inappropriate or has not been applied fairly and consistently in the public interest. There is no reason to assume that there will be a distortion in priorities. The means already exists to monitor patterns of conduct that might call for closer attention and to conduct some investigations, without need to commit new resources.

Recommendation 30

The Committee recommends that proposed clauses 50EFB and 50FAC dealing with the separate representation of child witnesses should not be included in the Bill.

Response

The Government accepts this recommendation. [subject to negotiation with the Democrats].

Recommendation 31

The Committee recommends that:

- (a) clause 50FA be deleted; and
- (b) it be replaced with modification 3.

Response

The Government accepts this recommendation.

Recommendation 32

The Committee recommends that the inclusion of a warning as to the difficulty in determining the age from the appearance of the persons should be considered.

Response

The Government accepts this recommendation.

It will amend the provision to require the judge to direct the jury that it must be satisfied beyond reasonable doubt that the child is, or was at a particular time, under a certain age.

Recommendation 33

The Committee recommends that clause 50FC be deleted.

Response

The Government accepts this recommendation.

Recommendation 34

The Committee recommends that the possibility of deleting 'in respect of that conduct' from clause 50FD and substituting 'for the same or a similar offence' should be considered.

Response

The Government has reconsidered this issue carefully as requested by the Committee but has not altered its view.

The appropriate words are 'in respect of that conduct'. Experience in determining double criminality for the purposes of extradition have shown that it is extremely difficult to compare elements of offences as they may exist under foreign and Australian laws. The relevant comparison must focus on the conduct and be directed to the question whether the conduct has been the subject of the foreign proceedings which have dealt with the matter on its merits.

Recommendation 35

Pursuant to recommendation 1, the Committee recommends that clause 50GA be reconsidered in light of the State and Territory laws that will apply to this legislation.

Response

The Government will reconsider the operation of proposed section 50GA in light of the State and Territory laws that may be enacted.

It notes, however, the proposed section is not intended to prevent the operation of section 109 of the Constitution in cases of direct inconsistency between the proposed new Part and a State law. Nor could it do so as a matter of constitutional law. Rather it seeks to prevent a court from concluding the proposed new Part 'covers the field' in the area of overseas child sex offences. This is necessary to preserve complementary State and Territory legislation at all.

Recommendation 36

The Committee recommends that the Government accept the generous offers made by Mr James QC, Mr Sides QC and the New South Wales Bar Association.

Response

The Government has given Mr James QC and Mr Sides QC an opportunity to comment on the amendments to be made to the Bill.

Recommendation 37

The Committee recommends that the Parliament pass the *Crimes (Child Sex Tourism) Bill 1994* as soon as the serious problems raised in this report are considered and addressed.

Response

The Government seeks passage of the Bill, amended as outlined above, as soon as possible.

