

## Senate Standing Committee on Legal and Constitutional Affairs

### Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010

#### Responses to questions taken on notice at hearing on Tuesday 9 March 2010

1. *What is the Department's view on the statement made by Victoria Police in its submission to the Inquiry that it notes the reference to sections in the Crimes Act 1914 in clauses 62 and 63 of the Bill are not contained in the Crimes Act?*

Clauses 62 and 63 refer to new provisions recently inserted into the *Crimes Act 1914* by the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2009* (the Serious and Organised Crime Act).

The Serious and Organised Crime Act was passed by Federal Parliament on 4 February 2010. The Act inserts a new Division 1 of Part IAB into the Crimes Act, containing preliminary provisions relating to the authorisation, conduct and monitoring of controlled operations. These provisions came into force on 20 February 2010.

Under new section 15GD, a *controlled operation* for the purposes of Part IAB is defined to mean an operation that:

- involves the participation of law enforcement officers
- is carried out to obtain evidence that may lead to the prosecution of a person for a serious Commonwealth offence or a serious State offence that has a federal aspect, and
- may involve a law enforcement officer or other person in conduct that would, apart from Part IAB, constitute a Commonwealth offence.

New section 15GE of Division 1 defines the *serious Commonwealth offences* to which Part IAB (as amended by the Serious and Organised Crime Act) will apply.

Items 62 and 63 will include updated references in new section 15GE to existing and new child sex offences in the Criminal Code relating to conduct engaged in outside Australia and the use of postal and carriage services. Item 64 sets out the application of the controlled operations provisions to child sex offences.

2. *How many submissions were received during the public consultation process on the proposed reforms?*

The Minister wrote to all State and Territory Attorneys-General, Police Ministers and Child Safety Commissioners seeking comments on a consultation paper detailing the proposed reforms. The Minister also wrote to interested non-government organisations, including the Law Council of Australia, Child Wise, Bravehearts, the National Association for the Prevention of Child Abuse and Neglect, Save the Children and World Vision. The Department received 14 submissions.

Submissions were received from the following bodies.

New South Wales Attorney-General  
New South Wales Police Minister  
Victorian Attorney-General and Police Minister (Joint submission)  
Victorian Child Safety Commissioner  
Western Australian Attorney-General  
Western Australia Commissioner for Children and Young People

South Australian Minister for Police  
Tasmania Commissioner for Children  
Northern Territory Minister for Justice and Attorney-General  
Northern Territory Minister for Police, Fire and Emergency Services  
Australian Capital Territory Attorney General  
Australian Capital Territory Children and Young People Commissioner  
Child Wise  
Save the Children

*Additional issue – inclusion of an element of consent in defences to child sex tourism offences*

The Department would also like to provide some further information in relation to an issue raised by the Law Council of Australia (the LCA) in its submission to the Inquiry. The LCA stated that it believes that an element of consent should be included in the existing defences (based on a belief about age or a valid and genuine marriage) applicable to child sex tourism offences.

Inclusion of an element of consent in both defences would mean that a defendant would have to prove both a belief that the person was over 16 (or that a valid and genuine marriage existed) *and* that the activity was consensual. The LCA is particularly concerned that, for example, a belief that the person was over 16 years of age ‘could absolve a defendant of criminal liability for engaging in non-consensual sexual activity with a person under 16.’

Consent is not an element of child sex offences. Inherent in the setting of an age of consent is the idea that persons under a certain age do not have the capacity to consent to sexual activity. Therefore, consent is generally thought to be irrelevant to offences involving sexual activity with persons under the age of consent.

Lack of consent is not an element of State or Territory child sex offences. With the exception of Victoria and the Australian Capital Territory, consent is also not relevant to State or Territory defences to child sex offences.

In relation to conduct occurring domestically, where a defendant establishes a defence to a child sex offence (for example because of a belief about age), there remains open the option of prosecuting the defendant for a more general offence of sexual activity without consent (or ‘rape’). This is because offences of sexual intercourse without consent are available regardless of the age of the alleged victim.

The option of prosecuting the defendant for an alternative Australian offence of sexual activity without consent is not available in the child sex tourism context. This is because the child sex tourism regime does not include a general offence of sexual intercourse without consent. For prosecutions for criminal behaviour falling outside the scope of child sex offences, reliance is placed on the domestic law of the country in which the offence took place. For example, an Australian who commits an offence of rape or assault or murder will be prosecuted under the criminal laws of the country in which the conduct occurred. Such offences are outside the intended scope of the child sex tourism offence regime.

The Department recognises the seriousness of this issue. However, the inclusion of consent as part of the defence to child sex tourism offences is at odds with the principle that consent is not relevant to child sex offences. Officers of the Commonwealth Director of Public Prosecutions indicated strong concerns about any inclusion of such an element in these provisions. The inclusion of an element of consent as part of the defence would often lead to the cross-examination of a child victim on the issue of consent in child sex tourism prosecutions, confusing the issues at trial and causing possible trauma to the child. This would be an unacceptable result.

For these reasons, the Bill does not amend existing defences to include consent as an element which must be proven for the defence to be made out.

This issue was also considered when the child sex tourism offence regime was first introduced in 1994. The Crimes (Child Sex Tourism) Amendment Bill 1994 was considered by the House of Representatives Standing Committee on Legal and Constitutional Affairs. The Committee examined this issue and in its report recommended that an element of consent not be included in the applicable defences.