

TASMANIA

**CRIMINAL CODE AMENDMENT (CHILD
EXPLOITATION) BILL 2005**

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**CRIMINAL CODE AMENDMENT (CHILD
EXPLOITATION) BILL 2005**

*(Brought in by the Minister for Justice and Industrial
Relations, the Honourable Judith Louise Jackson)*

A BILL FOR

An Act to amend the *Criminal Code Act 1924*

Be it enacted by His Excellency the Governor of Tasmania, by
and with the advice and consent of the Legislative Council and
House of Assembly, in Parliament assembled, as follows:

PART 1 – PRELIMINARY

1. Short title

This Act may be cited as the *Criminal Code
Amendment (Child Exploitation) Act 2005*.

2. Commencement

This Act commences on a day to be proclaimed.

PART 2 – CRIMINAL CODE ACT 1924 AMENDED**3. Principal Act**

In this Part, the *Criminal Code Act 1924** is referred to as the Principal Act.

4. Schedule 1 amended (*Criminal Code*)

Schedule 1 to the Principal Act is amended as follows:

- (a) by inserting the following section after section 1:

1A. Definitions for purposes of sections 130, 130A, 130B, 130C, 130D, 130E, 130F, 130G and 337C

For the purposes of sections 130, 130A, 130B, 130C, 130D, 130E, 130F, 130G and 337C –

“access”, in relation to material, includes the display of the material by an electronic medium or any other output of the material by an electronic medium;

“child exploitation material” means material that describes or depicts, in a way that a reasonable

*No. 69 of 1924

person would regard as being, in all the circumstances, offensive, a person who is or who appears to be under the age of 18 years –

- (a) engaged in sexual activity; or
- (b) in a sexual context; or
- (c) as the subject of torture, cruelty or abuse (whether or not in a sexual context);

“electronic medium” means any thing that contains data from which text, images or sound can be generated;

“material” includes any film, printed matter, electronic data and any other thing of any kind (including any computer image or other depiction);

“person” includes part of a person;

“produce” includes make, film, print, photograph and record.

- (b) by inserting the following sections after section 125B:

125C. Procuring unlawful sexual intercourse with person under 17 years, &c.

- (1) In this section –

“**young person**” means a person under the age of 17 years.

- (2) A person who procures –

- (a) a young person to have unlawful sexual intercourse with another person, either in this State or elsewhere; or
- (b) another person to have unlawful sexual intercourse with a young person, either in this State or elsewhere –

is guilty of a crime.

Charge: Procuring unlawful sexual intercourse with young person.

- (3) A person who procures –

- (a) a young person to commit an indecent act, either in this State or elsewhere; or

- (b) another person to do an indecent act with, or directed at, a young person, either in this State or elsewhere –

is guilty of a crime.

Charge: Procuring indecent act by, or with, young person.

- (4) In any case in which it is provided that the consent of a person to the act charged is a defence to a charge under section 124 or 125B, the like consent to an act which is the subject of the alleged procurement given under the like conditions as to the age of the parties is a defence to a charge under this section.
- (5) It is also a defence to a charge under this section to prove that the accused person believed on reasonable grounds that the young person was of or above the age of 17 years.

125D. Communications with intent to procure person under 17 years, &c.

- (1) A person (the “**accused person**”) who makes a communication by any means with the intention of procuring a person under the age of 17 years, or a person the accused person believes is under

the age of 17 years, to engage in an unlawful sexual act, either in this State or elsewhere, is guilty of a crime.

Charge: Communicating with intent to procure a person under the age of 17 years to engage in an unlawful sexual act.

- (2) For the purposes of subsection (1) –

“unlawful sexual act” means an act that would, if committed in relation to a person under the age of 17 years, constitute an offence under section 124, 125B, 126, 127, 127A, 133 or 185.

- (3) A person (the **“accused person”**) who makes a communication by any means with the intention of exposing, without legitimate reason, a person under the age of 17 years, or a person the accused person believes is under the age of 17 years, to any indecent material, either in this State or elsewhere, is guilty of a crime.

Charge: Making a communication with the intention of exposing a person under the age of 17 years to indecent material.

- (4) For the purposes of subsection (3) –

“indecent material” means any indecent film, printed matter, electronic data and any other thing of any kind (including any computer image or depiction).

- (5) It is a defence to a charge under this section to prove that –

- (a) the person who received the communication, or to whom the communication was directed, was of or above the age of 15 years and the accused person was not more than 5 years older than that person; or
- (b) the person who received the communication, or to whom the communication was directed, was of or above the age of 12 years and the accused person was not more than 3 years older than that person; or
- (c) the accused person believed on reasonable grounds that the other person was of or above the age of 17 years.

- (6) Subsections (1) and (3) apply notwithstanding that the person who received the communication, or to whom the communication was directed, was a person of or above the age of 17 years who was represented to the accused person as a person under the age of 17 years with a fictitious identity.
- (7) Evidence that the person who received the communication, or to whom the communication was directed, was represented to the accused person as being under the age of 17 years is, in the absence of evidence to the contrary, proof that the accused person believed the person was under that age.
- (c) by omitting from section 129(a) “elsewhere;” and substituting “elsewhere; or”;
- (d) by omitting from section 129(b) “elsewhere; or” and substituting “elsewhere –”;
- (e) by omitting paragraph (c) from section 129;
- (f) by omitting the charge from section 129 and substituting the following charge:
- Charge: Procuring by threats [*or* fraud].
- (g) by inserting the following sections after section 129:

130. Involving person under 18 years in production of child exploitation material

A person who –

- (a) involves, or does anything to facilitate the involvement of, a person under the age of 18 years in the production of child exploitation material; and
- (b) knows, or ought to have known, that the material is or will be child exploitation material –

is guilty of a crime.

Charge: Involving a person under the age of 18 years in the production of child exploitation material.

130A. Production of child exploitation material

A person who –

- (a) produces, or does any thing to facilitate the production of, child exploitation material; and
- (b) knows, or ought to have known, that the material is or will be child exploitation material –

is guilty of a crime.

Charge: Producing child
exploitation material.

**130B. Distribution of child exploitation
material**

(1) A person who –

- (a) distributes, or does anything to facilitate the distribution of, child exploitation material; and
- (b) knows, or ought to have known, that the material is child exploitation material –

is guilty of a crime.

Charge: Distributing child
exploitation material.

(2) For the purposes of subsection (1) –

“**distribute**”, in relation to child exploitation material, includes –

- (a) send, sell, deal, supply, exhibit, transmit or communicate that material to another person, or enter into an agreement or arrangement to do so; and

- (b) make that material available for access by another person, or enter into an agreement or arrangement to do so.

130C. Possession of child exploitation material

A person who –

- (a) is in possession of child exploitation material; and
- (b) knows, or ought to have known, that the material is child exploitation material –

is guilty of a crime.

Charge: Possessing child exploitation material.

130D. Accessing child exploitation material

A person who, with intent to access child exploitation material, accesses child exploitation material is guilty of a crime.

Charge: Accessing child exploitation material.

130E. Defences in relation to child exploitation material

- (1) It is a defence to a charge under section 130, 130A, 130B, 130C or 130D to prove that –

- (a) the material which is the subject of the charge was classified (whether before or after the commission of the alleged offence) under the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth, other than as refused classification (RC); or
- (b) the accused person engaged in the conduct that is alleged to constitute the offence for a genuine child protection, scientific, medical, legal, artistic or public benefit purpose and the accused person's conduct was, in the circumstances, reasonable for that purpose; or
- (c) the accused person was a police officer acting in the course of his or her official duties and the accused person's conduct was reasonable, in the circumstances, for the performance of the duties; or
- (d) the accused person was acting in the course of his

or her official duties in connection with the classification of the material which is the subject of the charge under the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth.

- (2) It is also a defence to a charge under section 130, 130A, 130C or 130D to prove that the material which is the subject of the charge depicts sexual activity between the accused person and a person under the age of 18 years that is not an unlawful sexual act.
- (3) It is also a defence to a charge under section 130C to prove that –
 - (a) the material which is the subject of the charge came into the accused person's possession unsolicited; and
 - (b) as soon as the accused person became aware that it was child exploitation material, he or she took reasonable steps to dispose of that material.
- (4) For the purposes of this section –

“police officer” includes –

- (a) a member of the Australian Federal Police; and
- (b) a member of the police force or service of another State or a Territory of the Commonwealth;

“unlawful sexual act” means an act that constitutes an offence under section 124, 125B, 126, 127, 127A, 133 or 185.

130F. Forfeiture of child exploitation material, &c.

- (1) This section applies if a person is prosecuted for a crime under section 130, 130A, 130B, 130C or 130D.
- (2) The court may, if it considers material which is the subject of a charge under any of the sections referred to in subsection (1) to be child exploitation material, order that the material be forfeited to the Crown.
- (3) The court may make an order under subsection (2) whether or not the person is convicted of a

crime under any of the sections referred to in subsection (1).

- (4) If the person is convicted of a crime under any of the sections referred to in subsection (1), the court may also order that any thing used to commit the crime be forfeited to the Crown.
- (5) The court may also make any order that it considers appropriate to enforce the forfeiture.
- (6) This section does not limit the court's powers under the *Crime (Confiscation of Profits) Act 1993* or any other law.
- (7) When any material or thing is forfeited to the Crown, the material or thing becomes the Crown's property and may be disposed of or destroyed in such manner as the Attorney-General may direct.

130G. Excluding non-essential persons from court when child exploitation material displayed

- (1) When material alleged to be child exploitation material is on display in court, the court may exclude from the court any person who is not an essential person.

- (2) For the purposes of subsection (1), an “**essential person**” is –
- (a) a party, or a person representing a party, to the proceeding in relation to the child exploitation material; or
 - (b) a Crown Law Officer or a person authorised by a Crown Law Officer; or
 - (c) the prosecutor; or
 - (d) a witness giving evidence; or
 - (e) a person who a witness is entitled to have present in court under the *Evidence (Children and Special Witnesses) Act 2001*; or
 - (f) a person whose presence is, in the court’s opinion, necessary or desirable for the proper conduct of the proceeding; or
 - (g) a person who applies to the court to be present and whose presence, in the court’s opinion –
 - (i) would serve a proper interest of the person; and

(ii) would not be prejudicial to the interests of any person under the age of 18 years described or depicted in the child exploitation material, whether or not any person under the age of 18 years can be identified from the child exploitation material.

(3) When forming an opinion under subsection (2)(f) or (g), the court is to consider the public benefit of limiting the number of persons with access to child exploitation material.

(h) by omitting section 169 and substituting the following section:

169. Administering drug to facilitate offence

Any person who administers or causes another person to take any drug, alcohol or other thing with intent to stupefy or overpower that person in order to facilitate the commission of an offence, or to facilitate the flight of an offender after the commission or

attempted commission of an offence, is guilty of a crime.

Charge: Administering a drug with intent to facilitate the commission of an offence [*or* the flight of an offender].

- (i) by omitting paragraphs (b) and (c) from section 335 and substituting the following paragraph:
 - (b) sexual intercourse with a person with a mental impairment;
- (j) by omitting paragraphs (a) and (b) from section 336 and substituting the following paragraph:
 - (a) sexual intercourse with a person with a mental impairment;
- (k) by omitting paragraphs (b) and (c) from section 337 and substituting the following paragraph:
 - (b) sexual intercourse with a person with a mental impairment;
- (l) by omitting from section 337(d) “assault;” and substituting “assault; or”;
- (m) by omitting paragraphs (d) and (e) from section 337B(1) and substituting the following paragraph:
 - (d) sexual intercourse with a person with a mental impairment;

- (n) by inserting the following section after section 337B:

337C. Involving person under 18 years in production of child exploitation material

Upon an indictment for involving a person under the age of 18 years in the production of child exploitation material, the accused person may be convicted of –

- (a) producing child exploitation material; or
- (b) distributing child exploitation material; or
- (c) possessing child exploitation material.

**PART 3 – CLASSIFICATION (PUBLICATIONS, FILMS
AND COMPUTER GAMES) ENFORCEMENT ACT 1995
AMENDED**

5. Principal Act

In this Part, the *Classification (Publications, Films and Computer Games) Enforcement Act 1995** is referred to as the Principal Act.

6. Section 3 amended (Interpretation)

Section 3 of the Principal Act is amended as follows:

- (a) by omitting the definitions of “child” and “child abuse publication”;
- (b) by omitting paragraph (b) from the definition of “objectionable publication”.

7. Part 8: Heading amended

Part 8 of the Principal Act is amended by omitting “**CHILD ABUSE AND BESTIALITY PRODUCTS UNLAWFUL**” from the heading to that Part and substituting “**CHILD EXPLOITATION MATERIAL AND BESTIALITY PRODUCTS UNLAWFUL**”.

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8. Section 71 amended (Interpretation of Part)

Section 71 of the Principal Act is amended as follows:

- (a) by inserting the following definition before the definition of “bestiality product”:

“**access**”, in relation to material, includes the display of the material by an electronic medium or any other output of the material by an electronic medium;

- (b) by inserting the following definition after the definition of “bestiality product”:

“**child**” means a person under the age of 18 years;

- (c) by omitting the definitions of “child abuse product” and “make” and substituting the following definitions:

“**child exploitation material**” means material that describes or depicts, in a way that a reasonable person would regard as being, in all the circumstances, offensive, a person who is or who appears to be under the age of 18 years –

- (a) engaged in sexual activity; or
- (b) in a sexual context; or

- (c) as the subject of torture, cruelty or abuse (whether or not in a sexual context);

“electronic medium” means any thing that contains data from which text, images or sound can be generated;

“make” includes produce, film, print, photograph and record;

“material” includes any film, printed matter, electronic data and any other thing of any kind (including any computer image or other depiction);

“person” includes part of a person.

9. Section 72 amended (Offence to make or reproduce bestiality product)

Section 72 of the Principal Act is amended as follows:

- (a) by omitting from paragraph (a) “child abuse product or”;
- (b) by omitting from paragraph (b) “child abuse product or”;
- (c) by omitting from paragraph (c) “child abuse product or”.

10. Section 72A inserted

After section 72 of the Principal Act, the following section is inserted in Part 8:

72A. Offence to make or reproduce child exploitation material

A person must not –

- (a) make or reproduce child exploitation material; or
- (b) cause or permit child exploitation material to be made or reproduced; or
- (c) be in any way involved in the making or reproduction of child exploitation material.

Penalty: Fine not exceeding 300 penalty units or imprisonment for a term not exceeding 3 years, or both.

11. Section 73 substituted

Section 73 of the Principal Act is repealed and the following sections are substituted:

73. Offence to procure child to be involved in making child exploitation material

A person must not procure or invite or attempt to procure a child to be involved in the making of child exploitation material.

Penalty: Fine not exceeding 300 penalty units or imprisonment for a term not exceeding 3 years, or both.

73A. Offence to distribute child exploitation material

- (1) A person must not distribute, or do anything to facilitate the distribution of, child exploitation material.

Penalty: Fine not exceeding 300 penalty units or imprisonment for a term not exceeding 3 years, or both.

- (2) In this section –

“**distribute**” includes –

- (a) send, sell, deal, supply, exhibit, transmit or communicate child exploitation material to another person, or enter into an agreement or arrangement to do so; and
- (b) make child exploitation material available for access by another person, or enter into an agreement or arrangement to do so.

12. Section 74 amended (Offence to possess bestiality product)

Section 74 of the Principal Act is amended by omitting paragraph (a).

13. Sections 74A and 74B inserted

After section 74 of the Principal Act, the following sections are inserted in Part 8:

74A. Possession of child exploitation material

A person must not –

- (a) possess child exploitation material; or
- (b) with intent, access, or attempt to access, child exploitation material.

Penalty: Fine not exceeding 200 penalty units or imprisonment for a term not exceeding 2 years, or both.

74B. Defence to offences in respect of child exploitation material

- (1) In any proceedings for an offence against this Part, it is a defence to prove that –
 - (a) the material to which the offence relates was classified (whether before or after the commission of the alleged offence) under the Commonwealth Act, other than as refused classification (RC); or
 - (b) the defendant engaged in the conduct that is alleged to constitute the offence for a genuine child protection, scientific, medical, legal, artistic or public benefit purpose and the defendant's conduct was, in the

circumstances, reasonable for that purpose; or

- (c) the defendant was a police officer acting in the course of his or her official duties and the defendant's conduct was reasonable, in the circumstances, for the performance of the duties; or
 - (d) the defendant was acting in the course of his or her official duties in connection with the classification of the material concerned under the Commonwealth Act; or
 - (e) at the time the alleged offence was committed the defendant had reasonable grounds to believe that the material to which the offence relates was not child exploitation material.
- (2) In any proceedings for an offence against section 72A, 73 or 74A, it is also a defence to prove that the material to which the offence relates depicts sexual activity between the defendant and a person under the age of 18 years that is not an unlawful sexual act.
- (3) In any proceedings for an offence against section 74A(a), it is also a defence to prove that the material to which the offence relates came into the defendant's possession unsolicited and, as soon as the defendant became aware that it was child exploitation material, he or she took

reasonable steps to dispose of that material.

(4) For the purposes of subsection (1) –

“police officer” includes –

- (a) a member of the Australian Federal Police; and
- (b) a member of the police force or service of another State or a Territory of the Commonwealth;

“unlawful sexual act” means an act that constitutes an offence under section 124, 125B, 126, 127, 127A, 133 or 185 of the *Criminal Code*.

14. Section 77 substituted

Section 77 of the Principal Act is repealed and the following section is substituted:

77. Forfeiture of child exploitation material, &c.

- (1) This section applies if a person is prosecuted for an offence under Part 8.
- (2) The court may, if it considers material which is the subject of a charge for an offence under Part 8 to be child exploitation material or a bestiality product, order that the material be forfeited to the Crown.

- (3) The court may make an order under subsection (2) whether or not the person is convicted of the offence to which the child exploitation material or bestiality product relates.
- (4) If the person is convicted of an offence under Part 8, the court may also order that any thing used to commit the offence be forfeited to the Crown.
- (5) The court may also make any order that it considers appropriate to enforce the forfeiture.
- (6) This section does not limit the court's powers under the *Crime (Confiscation of Profits) Act 1993* or any other law.
- (7) When any material or thing is forfeited to the Crown, the material or thing becomes the Crown's property and may be disposed of or destroyed in such manner as the Attorney-General may direct.

15. Section 79 amended (Proceedings on prosecutions)

Section 79(a) of the Principal Act is amended by omitting "section 72 or 73" and substituting "Part 8".

16. Section 81 amended (Defence to offences with respect to minors)

Section 81 of the Principal Act is amended by omitting subsection (2).