

Crimes (Amendment) Bill

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EXPLANATORY MEMORANDUM

Clause 1 provides that the purpose of the Act is to amend the **Crimes Act 1958** by—

- (a) extending the definition of rape; and
- (b) creating a single new offence dealing with the sexual penetration of a child under the age of 16; and
- (c) increasing the penalty for possession of child pornography.

Clause 2 provides that this Bill will come into operation on the day after the day on which it receives Royal Assent.

Clause 3 provides that in this Bill, the **Crimes Act 1958** is called the Principal Act.

Clause 4 extends the definition of rape by providing that a person (the first person) commits rape if he or she compels a male person (the second person) to sexually penetrate, with his penis, either the first person or a third person. In this circumstance, the first person is guilty of raping the second person. Further, the provision provides that it does not matter whether the person who is sexually penetrated (being either the first or third person) consents to the act of sexual penetration.

As with other circumstances in which rape may be committed, the provision also provides that the offence of rape occurs where the second person is compelled to continue to sexually penetrate a first or third person, even where the second person initially consented to the act of sexual penetration.

The Bill provides that the first person compels a male person to sexually penetrate another if the first person compels (by force or otherwise) the male person to sexually penetrate another—

- (a) without his (the second person's) consent; and

- (b) while being aware that the male person (the second person) is not consenting or might not be consenting to the act of sexual penetration.

Section 36 of the **Crimes Act 1958** provides a definition of consent. Consent requires the free agreement of the male person.

Clause 5 substitutes a new section 45 for the existing sections 45 and 46 of the **Crimes Act 1958**.

Proposed section 45(1) provides that it is an offence to take part in an act of sexual penetration with a child under the age of 16.

There are currently two separate offences for sexual penetration of a child—one applies where the child is under 10 and the other where the child is aged between 10 and 16. If it is not known whether the child was under or over 10 years of age at the time of the offence, it is not possible to prove either offence.

Proposed section 45(1) closes this loophole by combining the two existing offences into one new offence.

The penalty structure of the existing offences has been retained and incorporated in the new offence. Further, where the accused pleads not guilty, the jury will continue to determine whether the child was under the care, supervision or authority of the accused and whether the child was aged over or under 10 at the time the offence is alleged to have occurred.

Proposed section 45(2) provides the penalties for this offence. The penalties are increased when there are aggravating circumstances.

Where the court is satisfied beyond reasonable doubt that the child was under the age of 10 years at the time of the offence, the maximum period of imprisonment is 25 years. This is the same maximum penalty as currently applies in this situation.

Where the court is satisfied beyond reasonable doubt that the child was aged between 10 and 16 at the time of the offence and was under the care, supervision or authority of the defendant, the person may be sentenced to a maximum period of imprisonment of 15 years. This is the same maximum penalty as currently applies in this situation.

In any other situation, a maximum period of imprisonment of 10 years applies. This is the same maximum penalty as currently applies in this situation.

Proposed section 45(3) provides that the offence in sub-clause (1) does not apply to an act of sexual penetration if the child is aged between 10 and 16 and the persons taking part in the act are married to each other.

Proposed section 45(4) replicates existing provisions (see section 46(2) of the **Crimes Act 1958**) concerning circumstances in which the offence in proposed section 45(1) is committed.

Proposed section 45(5) provides that a circumstance of aggravation in proposed section 45(2) does not constitute an element of the offence. However, consistent with existing practices, a circumstance of aggravation must be stated in the presentment if an offender is to be sentenced according to the increased maximum penalty applicable to an offence committed in aggravating circumstances.

Proposed section 45(6) provides that where an accused does not admit a circumstance of aggravation, a jury must determine this issue if the accused pleads not guilty to the offence. The jury must then determine this issue, even if the accused admits or does not dispute any of the acts, facts, matters or circumstances relied upon by the prosecution to support a finding of guilt. This preserves the current position where these issues are determined by a jury where an accused pleads not guilty.

In the situation outlined in proposed section 45(6), an accused will be regarded as having complied with the requirements of the **Crimes (Criminal Trials) Act 1999** if the accused is found guilty of the offence and the court is considering sentencing issues under section 5(2D) of the **Sentencing Act 1991**.

Proposed section 45(7) provides that a circumstance of aggravation (see proposed section 45(2)) must be determined by a jury if the accused pleads not guilty and by the judge if the accused pleads guilty.

Proposed section 45(8) ensures that in the circumstances described in proposed section 45(6) the current situation will continue to apply in determining at what stage an offender pleads guilty. The situation is analogous to a person who pleads

not guilty to intentionally causing injury, has indicated an intention to plead guilty to recklessly causing injury and is convicted by a jury of recklessly causing serious injury. In such circumstances, the relevant time for determining when the accused pleaded guilty is when the accused indicated an intention to plead guilty to the offence of recklessly causing injury.

Proposed section 45(9) provides that an offence against proposed section 45(1) is not an offence which is triable summarily.

Clause 6 provides that the penalty for knowingly possessing child pornography is 5 years imprisonment. The current maximum penalty for this offence is 2 years imprisonment. The Bill also provides that the offence is to be classified as an indictable offence (triable by a jury) rather than a summary offence.

Clause 7 provides a number of consequential amendments following the substitution of one offence of sexual penetration with a child under the age of 16 from the current provisions in the **Crimes Act 1958** which provide two offences of a sexual penetration of a child: one where the child is under the age of 10 and one where the child is aged between 10 and 16.

Clause 8 inserts transitional provisions for the amendments made by this Bill.

Proposed section 593(5) of the **Crimes Act 1958** provides that the new offence in proposed section 45(1) (see clause 5 of this Bill) may be used in any proceedings commenced on or after the commencement of this Bill. Proceedings may be commenced either by filing a charge or a presentment in a court. The new offence does not change the criminal responsibility of a person who sexually penetrates a child under the age of 16, as it has applied in Victoria since 5 August 1981. Accordingly, a person may be charged for committing an offence contrary to the proposed new section 45(1) for any unlawful sexual penetration of a child under 16 alleged to have taken place after 5 August 1991.

Clause 9 inserts consequential amendments to the **Education Act 1958**.

Clause 10 consequential amendments to the **Sentencing Act 1991**.

These amendments will ensure that convictions for an offence against the current section 45(1) or section 46(1) of the **Crimes Act 1958** can, in the specified circumstances, be considered in determining whether the person being sentenced is a serious sexual offender.

