

SEXUAL OFFENCES (PROTECTION OF CHILDREN) AMENDMENT BILL 2002

EXPLANATORY NOTES

AMENDMENTS TO BE MOVED IN COMMITTEE BY THE HONOURABLE ROD WELFORD MP, ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

Title of the Bill

Sexual Offences (Protection of Children) Amendment Bill 2002

Objectives of the Amendments

The amendments in committee to the *Sexual Offences (Protection of Children) Amendment Bill 2002* have the following purpose:—

- (a) amend the *Magistrates Act 1991* to enable a wider range of persons to be appointed as acting Magistrates;
- (b) amend the *Bail Act 1980* to correct a drafting anomaly in section 33, caused by renumbering in section 28A and to clarify the awarding of costs in a bail proceeding;
- (c) amend the *Sexual Offences (Protection of Children) Amendment Bill 2002* to correct the numbering of the amendments to section 19 of the *Criminal Law Amendment Act 1945* and change the definition of ‘indecent matter’ (as used in new section 218A of the Criminal Code) to an inclusive definition.

Achievement of the Objectives

Magistrates Act 1991

At present, only a Clerk of the Court can be appointed as an acting Magistrate. The proposed amendment will ensure consistency with provisions relating to acting judges in the *Supreme Court of Queensland Act 1991*, by permitting any person qualified for appointment as a Magistrate to be appointed on an acting basis, as well as a current or former judge or Magistrate of a court of another State or Territory. A Queensland judge may also be appointed. The current limitation on who may act as a Magistrate has led to Clerks of the Court acting for lengthy periods, impacting on the efficient operation of court registries.

Bail Act 1980

A new section 10B of the *Bail Act 1980* mandates a court cannot make any order concerning costs in a bail proceeding.

On 29 January 2003 the Court of Appeal delivered an ex tempore judgment in the case of *Henry v The Director of Public Prosecutions* [2003] QCA 2. Henry was refused bail by two Supreme Court judges. He appealed against both refusals to the Court of Appeal. The Court of Appeal determined that there were errors in the exercise of the discretion to refuse bail. They reconsidered the application on the merits and granted bail. Costs were then awarded to the applicant.

It has never been the practice for costs to be awarded to the successful applicant (or respondent) in bail applications or for costs to be awarded following a bail appeal. However, the Court of Appeal, in the case of *Scrivener* [2001] QCA 454 discussed the history of bail applications and determined that bail applications were usually civil proceedings and as such are governed by the rules for civil and not criminal appeals. The Uniform Civil Procedure Rules, unlike the criminal jurisdiction, permit the awarding of costs for a successful party unless the court determines otherwise.

The logical implication of this ruling is that there is no reason why costs orders cannot be made in all bail applications where the prosecution unsuccessfully opposed bail. Such orders would place an unsustainable burden on the financial resources of the Director of Public Prosecutions and the Queensland Police Service. It would also not be in the public interest for decisions on opposing bail applications to be made with a view to minimising costs rather than protecting the public. It is also not in the public interest to deter persons in custody from applying for bail because they may be ordered to pay the costs of the application.

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Section 33 of this Act creates offences relating to a person who:—

- (a) fails to surrender into custody in accordance with his/her undertaking as to bail; and
- (b) is apprehended under a warrant issued under section 28 or 28A(1)(a).

Prior to 2002, section 28A(1)(a) of the Act set out in a number of subparagraphs the types of bail on which a person could be released, and for which a warrant could issue if the defendant failed to surrender into custody.

Section 28A was amended by the *Criminal Law Amendment Act 2002* on the advice of Parliamentary Counsel to reflect modern drafting practice. No change to the law was intended. The subparagraphs in section 28A(1)(a) were replaced with new paragraphs. However, there was no consequential amendment to section 33. As a result, the offence created by section 33 may now only apply to a person released on Supreme or District Court bail and required to appear in the Magistrates Court. A person released on bail granted by a Magistrate or Children's Court, or on watch house bail, arguably no longer commits an offence if the person is arrested on a warrant issued for failing to surrender into custody in accordance with the terms of that bail.

The amendments correct the problem and validate convictions during the period since the commencement of the schedule of the *Criminal Law Amendment Act 2002*.

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The Scrutiny of Legislation Committee recommended correcting numbering in the amendments to section 19 of the *Criminal Law Amendment Act 1945*.

The definition of “*indecent matter*” in the new section 218A (Using Internet etc. to procure children) is amended to be an inclusive definition rather than a closed definition to ensure that the definition will cover new communication technologies that might be used by paedophiles seeking to expose children to indecent matter.

Estimated Cost for Government Implementation

Failure to validate prosecutions under s. 33 may lead the State open to claims for false imprisonment.

Consistency with Fundamental Legislative Principles

Proposed new section 10B of the Bail Act 1980

The new section 10B of the *Bail Act 1980* provides that a court may not make any order concerning costs in a bail proceeding. The provision will not affect cases where a costs order has been made. However, it will apply to bail proceedings after the commencement of the section even where the bail proceeding or the offence was committed prior to the commencement of the provision.

There may be concern about retrospectively removing a right to costs. However, the awarding of costs in bail proceedings has never been the practice in Queensland. The new section 10A will apply equally to the defendant and the prosecution and reflects the position at law as was previously understood to apply in Queensland.

Proposed new section 39 of the Bail Act 1980

The *Criminal Law Amendment Act 2002* omitted and remade section 28A(1)(a) of the *Bail Act* as section 28A(1)(a), (b), (c) and (e). A cross reference in section 33 of the *Bail Act* to section 28A(1)(a) was not updated. This meant that while warrants could still be validly issued under all paragraphs of section 28A(1), section 33 on its face no longer appeared to make it an offence to be apprehended on the warrants issued under section 28A(1)(b), (c) or (e).

The amendments to the *Bail Act 1980* will have retrospective effect and will validate past prosecutions conducted under the mistaken belief that no substantive change had been made to section 28(1)(a). It was never intended to alter the effect of section 28A(1)(a), and the fact that a consequential amendment was not made to section 33 was an oversight.

Proposed new section 39 declares the application of section 14H of the *Acts Interpretation Act 1954* during the relevant period.

Section 14H of the *Acts Interpretation Act 1954* is an extremely flexible provision designed to ensure that cross references in Queensland and other Australian laws remain correctly linked despite legislative activity. Cross-references are ordinarily updated by the legislation that makes the cross-reference change necessary. On the rare occasions this is overlooked or impracticable, a cross-reference would be updated by the next available appropriate legislation without any cause for concern.

In this particular case, the cross-referencing oversight was discovered soon after Parliament rose in December 2002 and arguably affected the

rights and liberties of individuals by calling into question the validity of convictions and imprisonment imposed under section 33

The serious consequences of continuing to apply section 33 of the *Bail Act 1980* as if the reference to section 28A(1)(a) included references to section 28A(1)(b), (c) and (e) and the length of the time before Parliament could clarify its intention made it undesirable to rely in a practical sense on section 14H of the *Acts Interpretation Act* during the relevant period.

The concern about retrospectivity and immunity is to be considered in the context of practicality. Adverse affects of the oversight were minimised by not relying on the *Acts Interpretation Act* during the relevant period. Further, ensuring the validity of the actions taken previously because of failure of individuals to comply with the terms of their bail can be seen as a just outcome in the circumstances.

Consultation

The Crown Solicitor has provided advice on the proposed amendments to the *Bail Act 1980*.

NOTES ON PROVISIONS

Amendment 1 amends clause 2 of the Bill to provide that PART 1A (Amendment of *Bail Act 1980*) commences on assent. The remaining provisions of the Bill commence on proclamation.

Amendment 2 inserts new clause 2A - 2E into the Bill.

New clause 2A provides that the new Part 1A amends the *Bail Act 1980*.

New clause 2B inserts a new section 10B into the Act. The effect of 10B is to provide that a court cannot make any order concerning costs in a bail proceeding. Bail proceeding is defined to include an application under this Act, other Acts or an appeal against such applications to the Court of Appeal.

Section 10B(2) provides that the provision has effect no matter whether the proceeding started before or after the commencement of this section.

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The reference to other Acts refers to s. 6 of the *Supreme Court of Queensland Act 1995* that provides for release on bail on application for a writ of habeas corpus.

New clause 2C amends the reference in section 28B (Warrant authority to apprehend defendant on other charges) to include references to sections 28A(1)(a), (b), (c) and (e).

New clause 2D amends section 33 (Failure to appear in accordance with undertaking) to change the reference in section 33(1)(b) and section 33(3)(b)(i) to section 28A(1)(a), (b), (c) or (e).

New clause 2E inserts a new section 39 in to the *Bail Act 1980*.

The effect of section 39 is to provide that:

- Section 14H of the *Acts Interpretation Act 1954* applied to the reference to section 28A(1)(a) in sections 28B and 33 to include a reference to sections 28A(1)(b), (c) and (e).
- Where a defendant was apprehended by an affected warrant between the relevant period the references to a warrant issued under s. 28A(1)(a) include a warrant issued not only under s. 28A(1)(a) but s. 28A(1)(b), (c) or (e).

New section 39 includes definitions for ‘affected warrant’, ‘commencement date’, ‘old’ and ‘relevant period’.

Amendment 3 inserts a new clause 14A into the Bill. Clause 14A amends s. 1 (Definitions) of the Criminal Code to insert definitions for ‘computer generated image’, ‘indecent matter’ and ‘picture’. The definitions for ‘indecent matter’ are for use in respect to the new section 218A (Using internet etc to procure children under 16).

Amendment 4 amends clause 17 by including a footnote to the term ‘indecent matter’ to refer the reader to the definition of ‘indecent matter’ in section 1.

Amendment 5 omits the definition of ‘indecent matter’ in the section 218A(10).

Amendment 6 amends clause 21 by renumbering sub-sections (6) and (7) to sub-sections (5) and (6).

Amendment 7 amends the reference in section 21(1) to section 19(8).

Amendment 8 inserts a new clause 26A and 26B into the Bill. These clauses include amendments to the *Magistrates Act 1991*.

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Clause 26B inserts a new section 6 (Appointment of acting magistrates) increasing the list of persons who may be eligible to be appointed acting magistrates. New section 6A (Acting magistrates who are clerks of the court) replicates the present section 6(2) – (4).