

Legislation of Interpol member states on sexual offences against children

Australia - Australie - Australia

Canberra

I. The Australian Federal Legislation (as amended 2005)

RESPONSE TO INTERPOL SURVEY ON CHILD ABUSE IMAGES

1. DOES YOUR COUNTRY HAVE LEGISLATION AGAINST CHILD PORNOGRAPHY, AND/OR CHILD PROSTITUTION, AND/OR RAPE, AND/OR OTHER FORMS OF CHILD SEXUAL ABUSE?

On 1 March 2005, the Australian Government enacted new legislation by amending the Criminal Code 1995 to include offences dealing specifically with Online Child Sex Exploitation. The relevant Sections are 474.19 through to 474.29.

2. IF YES, COULD YOU PLEASE PROVIDE US WITH THE APPLICABLE LEGAL TEXTS REGARDING THESE OFFENCES?

See below.

3. WHAT IS THE AGE OF CONSENT TO SEXUAL ACTIVITY IN YOUR COUNTRY?

There is no specific age mentioned in the Criminal Code, however under the various State and Territory Legislation the general age of consent is 16 years

4. WHAT IS THE AGE IN CHILD PORNOGRAPHY LEGISLATION?

The definitions in the Criminal Code Act 1995 state:

child abuse material means:

- (a) material that depicts a person, or a representation of a person, who:
 - (i) is, or appears to be, under 18 years of age; and
 - (ii) is, or appears to be, a victim of torture, cruelty or physical abuse; and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
- (b) material that describes a person who:
 - (i) is, or is implied to be, under 18 years of age; and

(ii) is, or is implied to be, a victim of torture, cruelty or physical abuse; and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.

child pornography material means:

- (a) material that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age and who:
 - (i) is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
 - (ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
- (b) material the dominant characteristic of which is the depiction, for a sexual purpose, of:
 - (i) a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or
 - (ii) a representation of such a sexual organ or anal region; or
 - (iii) the breasts, or a representation of the breasts, of a female person who is, or appears to be, under 18 years of age;in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
- (c) material that describes a person who is, or is implied to be, under 18 years of age and who:
 - (i) is engaged in, or is implied to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
 - (ii) is in the presence of a person who is engaged in, or is implied to be engaged in, a sexual pose or sexual activity;and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
- (d) material that describes:
 - (i) a sexual organ or the anal region of a person who is, or is implied to be, under 18 years of age; or
 - (ii) the breasts of a female person who is, or is implied to be, under 18 years of age;and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.

COMMONWEALTH OF AUSTRALIA

CRIMINAL CODE ACT 1995

- SECT 474.19 Using a carriage service for child pornography material

(1)

A person is guilty of an offence if:

(a) the person:

- (i) uses a carriage service to access material; or
 - (ii) uses a carriage service to cause material to be transmitted to the person; or
 - (iii) uses a carriage service to transmit material; or
 - (iv) uses a carriage service to make material available; or
 - (v) uses a carriage service to publish or otherwise distribute material; and
- (b) the material is child pornography material.

Penalty: Imprisonment for 10 years.

(2)

To avoid doubt, the following are the fault elements for the physical elements of an offence against subsection (1):

- (a) intention is the fault element for the conduct referred to in paragraph (1)(a);
- (b) recklessness is the fault element for the circumstances referred to in paragraph (1)(b).

Note: For the meaning of *intention* and *recklessness* see sections 5.2 and 5.4.

(3)

As well as the general defences provided for in Part 2.3, defences are provided for under section 474.21 in relation to this section.

- SECT 474.20 Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service

(1)

A person is guilty of an offence if:

(a) the person:

- (i) has possession or control of material; or
 - (ii) produces, supplies or obtains material; and
- (b) the material is child pornography material; and
- (c) the person has that possession or control, or engages in that production, supply or obtaining, with the intention that the material be used:
- (i) by that person; or
 - (ii) by another person;
- in committing an offence against section 474.19 (using a carriage service for child pornography material).

Penalty: Imprisonment for 10 years.

(2)

- A person may be found guilty of an offence against subsection (1) even if committing the offence against section 474.19 (using a carriage service for child pornography material) is impossible.
- (3) It is not an offence to attempt to commit an offence against subsection (1).

- SECT 474.21 Defences in respect of child pornography material

- (1) A person is not criminally responsible for an offence against section 474.19 (using a carriage service for child pornography material) or 474.20 (possessing etc. child pornography material for use through a carriage service) because of engaging in particular conduct if the conduct:

- (a) is of public benefit; and
(b) does not extend beyond what is of public benefit.

In determining whether the person is, under this subsection, not criminally responsible for the offence, the question whether the conduct is of public benefit is a question of fact and the person's motives in engaging in the conduct are irrelevant.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3).

- (2) For the purposes of subsection (1), conduct is of public benefit if, and only if, the conduct is necessary for or of assistance in:

- (a) enforcing a law of the Commonwealth, a State or a Territory; or
(b) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory; or
(c) the administration of justice; or
(d) conducting scientific, medical or educational research that has been approved by the Minister in writing for the purposes of this section.

- (3) A person is not criminally responsible for an offence against section 474.19 (using a carriage service for child pornography material) or 474.20 (possessing etc. child pornography material for use through a carriage service) if:

- (a) the person is, at the time of the offence, a law enforcement officer, or an intelligence or security officer, acting in the course of his or her duties; and
(b) the conduct of the person is reasonable in the circumstances for the purpose of performing that duty.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3).

(4)

A person is not criminally responsible for an offence against section 474.19 (using a carriage service for child pornography material) or 474.20 (possessing etc. child pornography material for use through a carriage service) if the person engages in the conduct in good faith for the sole purpose of:

(a) assisting the Australian Communications and Media Authority to detect:

(i) prohibited content (within the meaning of Schedule 5 to the *Broadcasting Services Act 1992*); or

(ii) potential prohibited content (within the meaning of that Schedule);
in the performance of the Authority's functions under that Schedule; or

(b) manufacturing or developing, or updating, content filtering technology (including software) in accordance with:

(i) a recognised alternative access-prevention arrangement (within the meaning of clause 40 of Schedule 5 to the *Broadcasting Services Act 1992*); or

(ii) a designated alternative access-prevention arrangement (within the meaning of clause 60 of that Schedule).

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3).

- SECT 474.22 Using a carriage service for child abuse material

(1)

A person is guilty of an offence if:

(a) the person:

(i) uses a carriage service to access material; or

(ii) uses a carriage service to cause material to be transmitted to the person; or

(iii) uses a carriage service to transmit material; or

(iv) uses a carriage service to make material available; or

(v) uses a carriage service to publish or otherwise distribute material; and

(b) the material is child abuse material.

Penalty: Imprisonment for 10 years.

(2)

To avoid doubt, the following are the fault elements for the physical elements of an offence against subsection (1):

(a) intention is the fault element for the conduct referred to in paragraph (1)(a);

(b) recklessness is the fault element for the circumstances referred to in paragraph (1)(b).

Note: For the meaning of *intention* and *recklessness* see sections 5.2 and 5.4.

(3)

As well as the general defences provided for in Part 2.3, defences are provided for under section 474.24 in relation to this section.

- SECT 474.23 Possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service

(1)

A person is guilty of an offence if:

(a) the person:

(i) has possession or control of material; or

(ii) produces, supplies or obtains material; and

(b) the material is child abuse material; and

(c) the person has that possession or control, or engages in that production, supply or obtaining, with the intention that the material be used:

(i) by that person; or

(ii) by another person;

in committing an offence against section 474.22 (using a carriage service for child abuse material).

Penalty: Imprisonment for 10 years.

(2)

A person may be found guilty of an offence against subsection (1) even if committing the offence against section 474.22 (using a carriage service for child abuse material) is impossible.

(3)

It is not an offence to attempt to commit an offence against subsection (1).

- SECT 474.24 Defences in respect of child abuse material

(1)

A person is not criminally responsible for an offence against section 474.22 (using a carriage service for child abuse material) or 474.23 (possessing etc. child abuse material for use through a carriage service) because of engaging in particular conduct if the conduct:

(a) is of public benefit; and

(b) does not extend beyond what is of public benefit.

In determining whether the person is, under this subsection, not criminally responsible for the offence, the question whether the conduct is of public benefit is a question of fact and the person's motives in engaging in the conduct are irrelevant.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3).

(2)

For the purposes of subsection (1), conduct is of public benefit if, and only if, the conduct is necessary for or of assistance in:

- (a) enforcing a law of the Commonwealth, a State or a Territory; or
- (b) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory; or
- (c) the administration of justice; or
- (d) conducting scientific, medical or educational research that has been approved by the Minister in writing for the purposes of this section.

(3)

A person is not criminally responsible for an offence against section 474.22 (using a carriage service for child abuse material) or 474.23 (possessing etc. child abuse material for use through a carriage service) if:

- (a) the person is, at the time of the offence, a law enforcement officer, or an intelligence or security officer, acting in the course of his or her duties; and
- (b) the conduct of the person is reasonable in the circumstances for the purpose of performing that duty.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3).

(4)

A person is not criminally responsible for an offence against section 474.22 (using a carriage service for child abuse material) or 474.23 (possessing etc. child abuse material for use through a carriage service) if the person engages in the conduct in good faith for the sole purpose of:

- (a) assisting the Australian Communications and Media Authority to detect:
 - (i) prohibited content (within the meaning of Schedule 5 to the *Broadcasting Services Act 1992*); or
 - (ii) potential prohibited content (within the meaning of that Schedule);in the performance of the Authority's functions under that Schedule; or
- (b) manufacturing or developing, or updating, content filtering technology (including software) in accordance with:
 - (i) a recognised alternative access-prevention arrangement (within the meaning of clause 40 of Schedule 5 to the *Broadcasting Services Act 1992*); or
 - (ii) a designated alternative access-prevention arrangement (within the meaning of clause 60 of that Schedule).

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3).

- SECT 474.25 Obligations of Internet service providers and Internet content hosts

A person commits an offence if the person:

- (a) is an Internet service provider or an Internet content host; and
- (b) is aware that the service provided by the person can be used to access particular material that the person has reasonable grounds to believe is:
 - (i) child pornography material; or
 - (ii) child abuse material; and
- (c) does not refer details of the material to the Australian Federal Police within a reasonable time after becoming aware of the existence of the material.

Penalty: 100 penalty units.

- SECT 474.26 Using a carriage service to procure persons under 16 years of age

(1) A person (the *sender*) commits an offence if:

- (a) the sender uses a carriage service to transmit a communication to another person (the *recipient*); and
- (b) the sender does this with the intention of procuring the recipient to engage in, or submit to, sexual activity with the sender; and
- (c) the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
- (d) the sender is at least 18 years of age.

Penalty: Imprisonment for 15 years.

(2)

A person (the *sender*) commits an offence if:

- (a) the sender uses a carriage service to transmit a communication to another person (the *recipient*); and
- (b) the sender does this with the intention of procuring the recipient to engage in, or submit to, sexual activity with another person; and
- (c) the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
- (d) the other person referred to in paragraph (b) is someone who is, or who the sender believes to be, at least 18 years of age.

Penalty: Imprisonment for 15 years.

(3)

A person (the *sender*) commits an offence if:

- (a) the sender uses a carriage service to transmit a communication to another person (the *recipient*); and

- (b) the sender does this with the intention of procuring the recipient to engage in, or submit to, sexual activity with another person; and
- (c) the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
- (d) the other person referred to in paragraph (b) is someone who is, or who the sender believes to be, under 18 years of age; and
- (e) the sender intends that the sexual activity referred to in paragraph (b) will take place in the presence of:
 - (i) the sender; or
 - (ii) another person who is, or who the sender believes to be, at least 18 years of age.

Penalty: Imprisonment for 15 years.

- SECT 474.27 Using a carriage service to "groom" persons under 16 years of age

(1)

A person (the *sender*) commits an offence if:

- (a) the sender uses a carriage service to transmit a communication to another person (the *recipient*); and
- (b) the communication includes material that is indecent; and
- (c) the sender does this with the intention of making it easier to procure the recipient to engage in, or submit to, sexual activity with the sender; and
- (d) the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
- (e) the sender is at least 18 years of age.

Penalty: Imprisonment for 12 years.

(2)

A person (the *sender*) commits an offence if:

- (a) the sender uses a carriage service to transmit a communication to another person (the *recipient*); and
- (b) the communication includes material that is indecent; and
- (c) the sender does this with the intention of making it easier to procure the recipient to engage in, or submit to, sexual activity with another person; and
- (d) the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
- (e) the other person referred to in paragraph (c) is someone who is, or who the sender believes to be, at least 18 years of age.

Penalty: Imprisonment for 12 years.

(3)

A person (the *sender*) commits an offence if:

- (a) the sender uses a carriage service to transmit a communication to another person (the *recipient*); and
- (b) the communication includes material that is indecent; and
- (c) the sender does this with the intention of making it easier to procure the recipient to engage in, or submit to, sexual activity with another person; and
- (d) the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
- (e) the other person referred to in paragraph (c) is someone who is, or who the sender believes to be, under 18 years of age; and
- (f) the sender intends that the sexual activity referred to in paragraph (c) will take place in the presence of:
 - (i) the sender; or
 - (ii) another person who is, or who the sender believes to be, at least 18 years of age.

Penalty: Imprisonment for 15 years.

- (4)

In a prosecution for an offence against subsection (1), (2) or (3), whether material is indecent is a matter for the trier of fact.
- (5)

In this section:
indecent means indecent according to the standards of ordinary people.

- SECT 474.28 Provisions relating to offences against sections 474.26 and 474.27

Age-related issues

- (1)

For the purposes of an offence against section 474.26 or 474.27, absolute liability applies to the physical element of circumstance of the offence that the recipient is someone who is under 16 years of age.

Note 1: For *absolute liability*, see section 6.2.

Note 2: For a defence based on belief about age, see section 474.29.

- (2)

For the purposes of an offence against subsection 474.26(2) or (3) or 474.27(2) or (3), absolute liability applies to the physical elements of circumstance of the offence that the other person referred to in paragraph 474.26(2)(b) or (3)(e) or 474.27(2)(c) or (3)(f) is at least 18 years of age.

Note 1: For *absolute liability*, see section 6.2.

Note 2: For a defence based on belief about age, see section 474.29.

- (3)

For the purposes of sections 474.26 and 474.27, evidence that the recipient was represented to the sender as being under or of a particular age is, in the absence of evidence to the contrary, proof that the sender believed the recipient to be under or of that age.

(4)

For the purposes of sections 474.26 and 474.27, evidence that the other person referred to in paragraph 474.26(2)(b) or (3)(e) or 474.27(2)(c) or (3)(f) was represented to the sender as being:

- (a) at least 18 years of age; or
- (b) over or of a particular age;

is, in the absence of evidence to the contrary, proof that the sender believed the other person to be at least 18 years of age or over or of that age.

(5)

In determining for the purposes of sections 474.26 and 474.27 how old a person is or was at a particular time, a jury or court may treat any of the following as admissible evidence:

- (a) the person's appearance;
- (b) medical or other scientific opinion;
- (c) a document that is or appears to be an official or medical record from a country outside Australia;
- (d) a document that is or appears to be a copy of such a record.

(6)

Subsection (5) does not make any other kind of evidence inadmissible, and does not affect a prosecutor's duty to do all he or she can to adduce the best possible evidence for determining the question.

(7)

If, on a trial for an offence against sections 474.26 and 474.27, evidence may be treated as admissible because of subsection (5), the court must warn the jury that it must be satisfied beyond reasonable doubt in determining the question.

Impossibility of sexual activity taking place

(8)

A person may be found guilty of an offence against section 474.26 or 474.27 even if it is impossible for the sexual activity referred to in that section to take place.

Fictitious recipient

(9)

For the purposes of sections 474.26 and 474.27, it does not matter that the recipient to whom the sender believes the sender is transmitting the communication is a fictitious person represented to the sender as a real person.

Attempt not offence

(10)

It is not an offence to attempt to commit an offence against section 474.26 or 474.27.

Definitions

(11)

In sections 474.26 and 474.27 and this section:

procure a person to engage in sexual activity includes:

- (a) encourage, entice or recruit the person to engage in that activity; or
- (b) induce the person (whether by threats, promises or otherwise) to engage in that activity.

sexual activity means:

- (a) sexual intercourse as defined in section 50AC of the *Crimes Act 1914*; or
- (b) an act of indecency as defined in section 50AB of that Act; or
- (c) any other activity of a sexual or indecent nature that involves the human body, or bodily actions or functions.

The activity referred to in paragraph (c) need not involve physical contact between people.

- SECT 474.29 Defences to offences against section 474.26 or 474.27

(1)

It is a defence to a prosecution for an offence against section 474.26 or 474.27 that the defendant believed at the time the communication was transmitted that the recipient was not under 16 years of age.

Note: A defendant bears an evidential burden in relation to the matter in this section, see subsection 13.3(3).

(2)

It is a defence to a prosecution for an offence against subsection 474.26(2) or (3) or 474.27(2) or (3) that the defendant believed at the time the communication was transmitted that the other person referred to in paragraph 474.26(2)(b) or (3)(e) or 474.27(2)(c) or (3)(f) was not at least 18 years of age.

Note: A defendant bears an evidential burden in relation to the matter in this section, see subsection 13.3(3).

(3)

In determining whether the defendant had the belief referred to in subsection (1) or (2), the jury may take into account whether the alleged belief was reasonable in the circumstances.

474.28 Provisions relating to offences against sections 474.26 and 474.27

Age-related issues

- (1) For the purposes of an offence against section 474.26 or 474.27, absolute liability applies to the physical element of circumstance of the offence that the recipient is someone who is under 16 years of age.
Note 1: For ***absolute liability***, see section 6.2.
Note 2: For a defence based on belief about age, see section 474.29.
- (2) For the purposes of an offence against subsection 474.26(2) or (3) or 474.27(2) or (3), absolute liability applies to the physical elements of circumstance of the offence that the other person referred to in paragraph 474.26(2)(b) or (3)(e) or 474.27(2)(c) or (3)(f) is at least 18 years of age.
Note 1: For ***absolute liability***, see section 6.2.
Note 2: For a defence based on belief about age, see section 474.29.
- (3) For the purposes of sections 474.26 and 474.27, evidence that the recipient was represented to the sender as being under or of a particular age is, in the absence of evidence to the contrary, proof that the sender believed the recipient to be under or of that age.
- (4) For the purposes of sections 474.26 and 474.27, evidence that the other person referred to in paragraph 474.26(2)(b) or (3)(e) or 474.27(2)(c) or (3)(f) was represented to the sender as being:
 - (a) at least 18 years of age; or
 - (b) over or of a particular age;is, in the absence of evidence to the contrary, proof that the sender believed the other person to be at least 18 years of age or over or of that age.
- (5) In determining for the purposes of sections 474.26 and 474.27 how old a person is or was at a particular time, a jury or court may treat any of the following as admissible evidence:
 - (a) the person's appearance;
 - (b) medical or other scientific opinion;
 - (c) a document that is or appears to be an official or medical record from a country outside Australia;
 - (d) a document that is or appears to be a copy of such a record.

