

CRIMINAL CODE AMENDMENT ACT 2007



BERMUDA

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CRIMINAL CODE AMENDMENT ACT 2007

Date of Assent: 29 March 2007

Operative Date: 7 May 2008

ARRANGEMENT OF SECTIONS

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WHEREAS it is expedient to amend the Criminal Code 1907 for the purposes of protecting children from being sexually exploited or being preyed upon for sexual purposes by way of, but not limited to, the internet environment:

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Citation

1 This Act, which amends the Criminal Code 1907 ("the principal Act") may be cited as the Criminal Code Amendment Act 2007.

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Amends Part X

2 Part X of the principal Act is amended by inserting before section 177 and after the heading “OFFENCES AGAINST MORALITY” the following —

“Interpretation of Part X

176A In this Part, where not inconsistent with the context —

“child”, for the purposes of this section and sections 182C to 182H, means a person under the age of sixteen.

“child abusive material” means material that depicts or describes a child or a representation of a child who is, or appears to be, a victim of torture, cruelty or physical abuse in a way that a reasonable person would regard as being, in all the circumstances, an abuse of the child;

“child pornography” means —

- (a) a photograph, film, video or other visual representation, whether or not it was made by electronic or mechanical means —
 - (i) that shows a child who is, or is depicted as being engaged in explicit sexual activity; or
 - (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a child;
- (b) any written material or visual representation or audio recording that advocates or counsels sexual activity with a child; or
- (c) any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a child.

“communications medium” includes any device used for processing, sending, receiving, and or retaining information, images or holograms; and

“material” includes —

- (a) an object;
- (b) a still visual image of any kind, whether a drawing, painting, photograph, or other representation on a surface of any kind, and whether printed or not;
- (c) a moving visual image of any kind, whether produced from a cinematographic film, video tape, or other medium;

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- (d) a hologram;
- (e) a written communication; and
- (f) an audio recording.”.

Inserts new sections 182C to 182K

3 The principal Act is amended by inserting next after 182B the following —

“Showing child abusive material, child pornography or offensive material to a child

182C (1) Any person who knowingly shows child abusive material, child pornography or offensive material to a child is guilty of an offence and is liable —

- (a) on conviction on indictment to imprisonment for ten years; or
- (b) on summary conviction to imprisonment for five years.

(2) In this section “offensive material” means material that —

- (a) describes, depicts, expresses, or otherwise deals with matters of sex, drug misuse or addiction, cruelty or violence or revolting or abhorrent phenomena, in a manner that is likely to offend a reasonable adult;
- (b) describes, depicts, expresses or otherwise deals with sexual activity of any kind between a human being and an animal;
- (c) is an obscene article within the meaning of the Obscene Publications Act 1973.

Use of children in the production of child abusive material or child pornography

182D (1) Any person who, having custody, charge or care of a child, knowingly allows the child to be used for the production of child abusive material or child pornography is liable —

- (a) on conviction on indictment to imprisonment for ten years; or
- (b) on summary conviction to imprisonment for five years.

(2) For the purposes of this section —

- (a) any person who is a parent or a guardian of a child is presumed to have custody of a child;

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- (b) any person to whose charge a child is committed by any person who has custody of the child is presumed to have charge of the child; and
- (c) any person exercising authority over or having actual control of a child is presumed to have care of the child.

Luring

182E (1) Any person who, by means of a communications medium, communicates with a child, for the purpose of committing any of the acts described in sections 177(1), 180, 181(1), 182A(1), 182B(1), 184(1), 185(1), 187(1), 188(1) or 189 is guilty of an offence and is liable —

- (a) on conviction on indictment to imprisonment for ten years; or
- (b) on summary conviction to imprisonment for five years.

(2) It is no defence to a charge under this section that the accused believed that the person was over the age of sixteen years unless the accused took all reasonable steps to ascertain the age of the person.

Making, distributing, etc. of child abusive material or child pornography

182F (1) Any person who knowingly makes, prints or publishes child abusive material or child pornography is guilty of an offence and is liable —

- (a) on conviction on indictment to imprisonment for ten years; or
- (b) on summary conviction to imprisonment for five years.

(2) Any person who knowingly distributes, transmits, makes available, sells, imports or exports child abusive material or child pornography is guilty of an offence and is liable —

- (a) on conviction on indictment to imprisonment for ten years; or
- (b) on summary conviction to imprisonment for five years.

Possession of child abusive material or child pornography

182G Any person who possesses child abusive material or child pornography for the purpose of making it available to, showing it

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to, or for viewing by, other persons, is guilty of an offence and is liable —

- (a) on conviction on indictment to imprisonment for five years; or
- (b) on summary conviction to imprisonment for three years.

Accessing child abusive material or child pornography

182H (1) Any person who knowingly accesses child abusive material or child pornography is guilty of an offence and is liable —

- (a) on conviction on indictment to imprisonment for five years;
- (b) on summary conviction to imprisonment for three years.

(2) In subsection (1), a person accesses child abusive material or child pornography if the person knowingly causes child abusive material or child pornography to be viewed by, or transmitted to, himself.

(3) It is no defence to a charge under this section that the accused believed that the person was over the age of sixteen years of age unless the accused took all reasonable steps to ascertain the age of the person.

Defences

182I (1) A person shall not be convicted of an offence under sections 182D or 182F to 182H if it is proved that the material in question is justified as being for the public good on the ground that it is in the interest of science, literature, art or learning.

(2) Whether the material is justified as being for the public good is to be a question of fact.

Offence by Director and Officer

182J (1) Where an offence under section 182F or 182G is committed by a body corporate and is proved to have been committed with the acquiescence, consent or connivance of any person, being a director, officer or other similar officer of such body or a person who was purporting to act in any such capacity, that person as well as the body corporate shall be guilty of the offence.

(2) For the purposes of this section, where the affairs of a body corporate are managed by members, the member shall be deemed to be a director of the body corporate.

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(3) Any person, being a director, officer, or other similar officer of a body corporate that is convicted of an offence under section 182F or 182G shall be liable —

- (a) on conviction on indictment to imprisonment for ten years; or
- (b) on summary conviction to imprisonment for five years.

(4) A body corporate that is convicted of an offence under section 182F or 182G shall be liable —

- (a) on conviction on indictment to a fine of one million dollars; or
- (b) on summary conviction to a fine of \$20,000

Prosecution of offences

182K No prosecution shall be commenced under sections 182C to 182H or 182J without the prior consent of the Director of Public Prosecutions.”.

Amends section 329D

4 Section 329D (1) of the principal Act is amended by inserting next after paragraph (xii) of the definition “sexual offence” the following —

- “(xiii) showing child abusive material, child pornography or offensive material to a child [section 182C];
- (xiv) use of children in the production of child abusive material or child pornography (section 182D);
- (xv) luring of a child (section 182E);
- (xvi) making, distributing, etc. of child abusive material or child pornography (section 182F);
- (xvii) possession of child abusive material or child pornography (section 182G);
- (xviii) accessing of child abusive material or child pornography (section 182H).”.

Inserts new section 464A to 464D

5 The principal Act is amended by inserting next after 464 the following—

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“Search and seizure of child abusive material etc

464A (1) Any police officer or customs officer may seize, remove and detain any thing which he has reason to suspect to be child abusive material or child pornography, within the meaning of Part X.

(2) If a magistrate or justice of the peace is satisfied by information on oath that there are reasonable grounds for suspecting that in or on any premises or place specified in the information any person has child abusive material or child pornography, in respect of which an offence under this Act is being or has been committed, he may issue a warrant under his hand empowering any police officer named in the warrant to search the premises or place within fourteen days of the date of the warrant.

(3) Nothing in this section shall derogate from any powers of search and seizure under any provision of law apart from this section.

Forfeiture of things used for child pornography etc.

464B (1) On application of the Director of Public Prosecutions a court that convicts a person of an offence under section 182C to 182H, in addition to any other punishment that it may impose, may order that any material be forfeited to the Crown and disposed of as the Court directs if the Court is satisfied, on a balance of probabilities, that the material—

(a) was used in the commission of the offence; and

(b) is the property of —

- (i) the convicted person or another person who was a party to the offence, or
- (ii) a person who acquired the material from a person referred to in subparagraph (i) under circumstances that give rise to a reasonable inference that it was transferred for the purpose of avoiding forfeiture.

(2) Before making an order under subsection (1), the court shall cause notice to be given to, and shall hear, any person whom it considers to have an interest in the material, and may make an order declaring the nature and extent of the person’s interest in it.

Relief from forfeiture

464C (1) Within thirty days after an order under section 464B (1) is made, a person who claims an interest in the material

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forfeited may apply in writing to the court that made the order of forfeiture for an order that the forfeiture order be varied or set aside.

(2) The court that made the order of forfeiture shall fix a date on which the application is to be heard.

(3) At least fifteen days before the hearing, the applicant shall serve notice on the Director of Public Prosecutions.

(4) The court may make an order declaring that the applicant's interest in the material is not affected by the forfeiture and declaring the nature and extent of the interest if the court is satisfied that the applicant was not a person referred to in section 464B (1)(b)(i) or (ii).

Forfeiture Appeals

464D (1) Any person who received a notice given under section 464B (2) and was heard by the court may appeal against the order of forfeiture-

(a) to the Supreme Court if the court that made the order is one of summary jurisdiction; or

(b) to the Court of Appeal if the court that made the order is the Supreme Court.

(2) The Director of Public Prosecutions may appeal to the Supreme Court on the refusal of a court of summary jurisdiction to grant an order of forfeiture.

(3) The Director of Public Prosecutions may appeal to the Court of Appeal on the refusal of the Supreme Court to grant an order of forfeiture.”.

Amends section 329D

6 Section 329D(1) of the principal Act is amended in the definition of Minister by deleting the words “public safety” in the definition of “Minister” and inserting the word “Justice.”

Consequential amendments

7 (1) Section 2 of the Obscene Publications Act 1973 is amended by inserting next after subsection (2) the following—

“ (3) A thing shall be deemed to be obscene for the purposes of this Act if it is child abusive material or child pornography within the meaning of Part X of the Criminal Code”.

(2) The Police and Criminal Evidence Act 2005 is amended in Schedule 1 by adding the following after item 19 of Part II thereof —

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- “25. Section 182C (showing child abusive material, child pornography or offensive material to a child).
26. Section 182D (use of children in the production of child abusive material or child pornography).
27. Section 182E (luring).
28. Section 182F (making, distributing, etc. of child abusive material or child pornography).
29. Section 182G (possession of child abusive material or child pornography).
30. Section 182H (accessing of child abusive material or child pornography).”.

Commencement

8 The provisions of this Act shall come into force on such day or days as are appointed by the Minister by notice in the Gazette.