Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010

Senate Legal and Constitutional Affairs Committee

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Acknowledgement

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Introduction

Commonwealth child sex tourism offences are currently located in Part IIIA of the *Crimes Act,* sections 50AA-50GA.[1]

The *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010* would relocate the existing offences and corresponding defences to the proposed Division 272 of the *Criminal Code Act 1995.*

These offences would be redrafted to reflect the drafting regime of the Code and many would be modified by the new Bill. Modifications include increasing maximum penalties and the introduction of the term 'sexual activity' to replace the previous term 'sexual conduct'. For example, the existing offence of 'sexual conduct involving child under 16 outside Australia' (s50BC *Crime* Act) with a maximum penalty of 12 years imprisonment would be replaced with the offence of 'engaging in sexual activity with a child outside of Australia' (s272.9 *Criminal Code*) with a maximum penalty of 15 years imprisonment.

The Law Council generally regards the consolidation of offence provisions within the Criminal Code as a positive development.

In addition to relocating existing offences, the Bill also introduces a number of new offences including:

- causing a child to engage in sexual intercourse or a sexual activity in the presence of the defendant outside of Australia (ss272.8(2), 272.9(2));
- a new aggravated offence of engaging in sexual intercourse or a sexual activity, or causing a child to engage in sexual intercourse or a sexual activity, when the child has a mental impairment or is in the care, supervision or authority of the defendant (s272.10);
- persistent sexual abuse of a child outside Australia (s272.11);
- engaging in sexual intercourse or sexual activity with a young person (aged between 16-18 years) outside Australia by a defendant in a position of trust or authority (ss272.12-13)
- modified offences of procuring or grooming a child to engage in sexual activity outside Australia, regardless of means (ss272.14-15);
- new offences relating to the possession, production and distribution of child pornography by Australian citizens or residents while overseas (s273); and
- new offences involving the use of postal or similar services or carriage services to commit child sex tourism offences by Australian citizens or residents (ss470-474).

[1] These offences were inserted by the *Crimes (Child Sex Tourism) Amendment Act 1994*. Some sections were amended by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*. The offences largely target behaviour occurring outside of Australia. Under this legislative regime prosecutions can be undertaken against Australian citizens, residents of Australia, a body corporate under Australian law and a body corporate that carries out their activities principally in Australia. Child sex tourism stands as an exception to the general principle of 'international comity' which was originally proposed as a theory of criminal jurisdiction. The Constitutional validity of the child sex tourism offences was upheld by the High Court in *XYZ v The Commonwealth* [2006] ALR 495 where the legislative provisions were found to be a valid exercise of the external affairs power.

The Bill also makes a number of amendments relating to the investigation and prosecution of child sex tourism offences, including amendments to:

- the use of video link evidence;
- conduct of trials involving child sex tourism offences;
- forfeiture of child pornography and child abuse material;
- powers of the Australian Crime Commission and the definition of 'serious offence'; and
- the use of surveillance devices and telecommunication interception powers to investigate child sex tourism offences.

This Bill shares a number of similarities with the *Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007* (the 2007 Bill). The 2007 Bill also sought to introduce a range of new or amended child sex tourism offences and was the subject of inquiry by the Senate Legal and Constitutional Affairs Committee.[2] The Law Council made a submission to the Committee outlining its concerns with a number of the proposed provisions.[3] A number of these concerns remain pertinent to the current Bill.[4]

As noted in the Law Council's submission on the 2007 Bill, the Council recognises the paramount need to protect children from the threat of sexual abuse by providing a strong legislative regime criminalising child sex tourism and the production, distribution and possession of child pornography in line with Australia's international commitments.[5]

However, while the importance of protecting children from sexual predation cannot be overstated, the moral repugnance with which the community regards these offences means that allegations of offending conduct will have devastating consequences for accused persons, regardless of whether any charges laid proceed to prosecution and conviction. For this reason, the components of criminal liability for child sex offences must be clearly and specifically outlined in the amending legislation and the rights of the accused adequately protected.

In that regard, the Law Council is concerned about a number of features of the current Bill:

- the offence of preparing for or planning a child sex tourism offence (s272.20):
  - targets purely preparatory acts and goes beyond the principles of extended criminal liability in Chapter 2 of the Criminal Code; and

[2] The 2007 Bill was introduced to the House of Representatives on 13 September 2007 and passed though that House and into the Senate on 20 September 2007. The Bill was then subject to inquiry by the Senate Committee on Legal and Constitutional Affairs. The Committee released its report on the Bill in October 2007. The Bill lapsed at the dissolution of Parliament for the federal election on 17 October 2007.

[3] Law Council of Australia Submission to the Senate Legal and Constitutional Affairs Committee *Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007* (October 2007) available at www.lawcouncil.asn.au

[4] The Law Council notes that the 2010 Bill follows the release of a Discussion Paper on Proposed Reforms to Commonwealth Child Sex-Related Offences by the Attorney General's Department in October 2009 ('the Discussion Paper'). Due to resource constraints the Law Council was unable to comment on the contents of the Discussion Paper by the due date.

[5] See in particular *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (ratified by Australia on 8 January 2007) and the *Convention on the Rights of the Child* (ratified by Australia in December 1990), Article 34.

- unnecessarily extends the net of criminal liability in circumstances where the existing legislative regime targeting child sex tourism is already sufficiently wide in scope and already allows police to adopt a preventative, early intervention approach.

- the proposed offence of *causing* a child to engage in sexual activity in the presence of the defendant (s272.9(2) has the potential to capture a wide range of innocent conduct and should be amended either:

  - to include the intention to derive sexual gratification from the presence of the child as an element of the offence, or in the alternative,

  - to apply an evidential and not a legal burden to the defence of absence of intent to derive sexual gratification.

- the proposed offence of engaging in sexual activity with a young person aged between 16-18 (s272.12-13) goes beyond the scope of, and has the potential to capture a broader range of sexual interactions than, the like provisions existing in the five domestic jurisdictions that have such offences; and

- the proposed offence of persistent sexual abuse of a child outside Australia (s272.11) does not contain adequate protections against double jeopardy, in circumstances where part of the underlying conduct, which is the foundation for the charge, has already been the subject to prosecution in a foreign jurisdiction.

In addition to these concerns about the offence provisions, the Law Council also has some concerns about the available statutory defences. As submitted in relation to the 2007 Bill, the Law Council continues to question:

- whether the defence of valid and genuine marriage is a necessary and appropriate defence, in view of the aims of the legislation and the position under Australian domestic law; and

- whether it should be clarified that the listed statutory defences are only available in circumstances where the alleged sexual activity was consensual (that being a matter which, because of the age of the victim, is otherwise irrelevant).

Further, the Law Council submits that the requirement that the Attorney-General consent to the commencement of proceedings against a defendant under the age of 18 should be extended to cover proceedings against Division 273, in addition to Division 272 as is currently proposed.

Proposed Division 272

Preparing for or planning an offence against this Division

Proposed section 272.20 of the Bill makes it an offence to prepare for or plan an offence against Division 272.

Pursuant to subsection 272.2(1), a person commits an offence if he or she does an act with the intention of preparing for or planning the offence of:

- engaging in or causing a child to engage in sexual intercourse in the presence of the defendant (s272.8);
- engaging in or causing a child to engage in sexual activity in the presence of the defendant (s272.9);
- engaging in or causing a child to engage in sexual intercourse or sexual activity in the presence of the defendant where the child suffers from a mental impairment or is under the care, supervision or authority of the defendant (s272.10);
- persistent sexual abuse of a child outside of Australia (s272.11); or
- benefiting from an offence against Division 272 (s272.18).

This offence attracts a maximum penalty of 10 years imprisonment.

Pursuant to subsection 272.2(2) a person commits an offence if he or she does an act with the intention of preparing for, or planning the offence of:

- engaging in sexual intercourse with a young person (aged 16-18) outside of Australia when the defendant is in a position of authority (s272.12); or
- engaging in sexual activity with a young person (aged 16-18) outside of Australia when the person is in a position of authority (272.13).

This offence attracts a minimum penalty of 5 years imprisonment.

These offences apply regardless of whether the act was done within or outside of Australia, whether or not the substantive offence was in fact committed and whether or not the preparatory act was done in preparation for a specific offence.[6]

As explained in the Explanatory Memorandum to the Bill, in order to establish this offence, the prosecution is required to prove beyond reasonable doubt that the person intentionally did an act and that the person did so with *the intention* of committing any one of the specified child sex tourism offences. However, it is not necessary to prove that the person intended to commit a specific offence: it will be sufficient for the prosecution to prove that the particular conduct was related to an offence.

The Explanatory Memorandum provides the following rationale for the introduction of this offence:

> *Under the existing child sex tourism regime, a person who organises for others to engage in child sex tourism (eg as a child sex operator) would be captured by the*

[6] Proposed s272.20(3).

benefiting and encouraging offences. While these offences allow police to adopt an interventionist approach, they are not specifically directed at conduct where a person is planning his or her own participation in child sex tourism. It is not clear that such preparatory activity would be captured by existing offences.

Offences involved in child sex tourism are of a particularly serious nature and result in devastating consequences for the child victims involved. Evidence of a person's intent to travel overseas to sexually abuse children often comes to the attention of law enforcement agencies while the offender is still in Australia. Law enforcement should not have to wait until the offender is in the advanced stages of committing a child sex tourism offence to take action, as this places the child under unnecessary risk. A focus on prevention, rather than just addressing the conduct after the fact, will go further towards protecting children from such behaviour.[7]

The Explanatory Memorandum later states that this offence is intended to apply *before* the defendant leaves Australia and before contact with the child occurs, however it does require the existence of an *intention* to engage in a child sex tourism offence.[8]

Law Council Concerns

The Law Council shares the Government's concern to ensure Australia's laws allow for a robust approach to combating child sex tourism by protecting potential victims before any harm occurs and by facilitating an interventionist approach by law enforcement officers.

However, as submitted earlier in respect to the 2007 Bill, the Law Council is concerned that the proposed 'preparing and planning' offence in proposed section 272.20 unnecessarily extends established principles of criminal responsibility. The proposed offence represents a worrying trend in legislative reform where the gravity of the subject matter of the Bill is used to justify the introduction of vaguely defined offences which target a wide range of behaviour which is not in itself harmful or criminal. These offences necessarily and inappropriately rely entirely on police and prosecutorial discretion for their reasonable and proportionate enforcement.

A similar approach was observed in the context of terrorism laws where successive Governments have sought to criminalise purely preparatory acts.[9] Although both forms of criminal conduct, child sex abuse and terrorism, are inherently 'heinous' and both present challenges to law enforcement bodies, the Law Council is of the view that this does not justify a departure from established criminal law principles, particularly when the existing net of criminal liability is so wide. Indeed, the heinous character of child sex offending and the intense community opprobrium which it attracts demands that the greatest care is taken to avoid the possibility of wrongly accusing a person by unnecessarily extending criminal liability to cover a range of otherwise innocent acts.

[7] Explanatory Memorandum p.11.
[8] Explanatory Memorandum 2010 Bill p. 39.
[9] See for example Submission to the Senate Legal and Constitutional Legislation Committee, *Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills* (April 2002); Submission to the Attorney-General, House of Representatives, *Criminal Code Amendment (Terrorist Organisation) Bill* (3 March 2004); Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism Bill 2004* (26 April 2004) Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism Bill (No. 2) 2004* (15 July 2004); Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism (No. 2) Bill 2005* (11 November 2005); Submission to the Parliamentary Joint Committee on Intelligence and Security, *Review of the Power to Proscribe Organisations as Terrorist Organisations* (9 February 2007); Submission to the Hon Mr Clarke QC, *Clarke Inquiry into the case of Dr Mohamed Haneef* (16 May 2008) all available from the Law Council's website: www.lawcouncil.asn.au.

The new offence involves an unnecessary extension of criminal responsibility

Part 2.4 of the *Criminal Code* creates 'inchoate' or extended liability offences that apply to all Commonwealth crimes, including attempt (s11.1), incitement (s11.4) and conspiracy (s11.5). These offences aim to capture conduct where the requisite intent exists and steps are taken to undertake the prohibited criminal act, but the offence is not completed and no harm is caused. These provisions are based on well established criminal principles and are underpinned by the rationale of crime prevention.

The proposed new offence in proposed s272.20 goes much further than existing extension of liability offences by criminalising preliminary acts which, although undertaken in contemplation of criminal conduct of some kind, can not be connected to any clear intent to commit a specific criminal act.

Unlike the offence of attempt outlined in section 11.1 of the *Criminal Code,* which expressly excludes acts that are 'merely preparatory to the commission of the offence', the proposed offence in proposed s272.20 is specifically targeted at preparatory acts.

This represents a clear departure from the established principles of criminal law which has traditionally been reluctant to penalise the unrealised private intentions of a person which have only been advanced in a preliminary way, particularly where those intentions have not yet crystallised into a specific criminal intent. This reluctance to attach criminal liability to purely preparatory conduct stems from the notion that a person can plan for conduct then change his or her mind before the plan is implemented.

The Law Council believes that this should remain the case, particularly in light of the already extensive legislative regime designed to catch those persons seeking to participate in the child sex tourism industry. If enacted without the preparatory offence in proposed s272.20, the Bill would prohibit a range of conduct including:

- engaging in sexual intercourse or sexual activity with a child outside Australia (ss272.8(1) and 272.9(1));
- causing a child to engage in sexual intercourse or a sexual activity in the presence of the defendant outside of Australia (ss272.8(2), 272.9(2));
- engaging in sexual intercourse or a sexual activity, or causing a child to engage in sexual intercourse or a sexual activity, when the child has a mental impairment or is in the care, supervision or authority of the defendant (ss272.10);
- persistent sexual abuse of a child outside Australia (s272.11);
- engaging in sexual intercourse or sexual activity with a young person (aged between 16-18 years) outside of Australia by a defendant in a position of trust or authority (ss272.12, 272.13); and
- procuring a child to engage in sexual activity outside Australia, (s272.14);
- making it easer to procure ('grooming') a child to engage in sexual activity outside Australia (s272.15);
- benefiting from a child sex tourism offence in proposed Division 272 (s272.18); and

- encouraging a child sex tourism offence in proposed Division 272 (s272.19), where 'encouraging' is defined to include 'encourage, incite to, or urge, by any means whatever, for example, by written, electronic or other form of communication; or aid, facilitate, or contribute to, in any way whatever'.

In addition, the existing extended liability provisions in Chapter 2 of the Criminal Code, such as complicity, common purpose and conspiracy would apply to a number of these proposed new offences.[10]

The Law Council believes that the proposed legislative regime, without s272.20, already provides sufficient scope to allow police to adopt a preventative approach to child sex tourism. It enables police to intervene and charge a person in any circumstance where he or she has interacted with another with the intention of aiding, facilitating, encouraging or contributing to (*either as a participant or as an operator*) the commission of a sexual offence against a child overseas.

The Law Council notes the efforts of the Attorney-General's Department and the Australian Federal Police to demonstrate in the Discussion Paper and the Explanatory Memorandum why the proposed preparatory offence is necessary. However, the Law Council remains unconvinced that such an extension of criminal liability is required to meet the policy objectives of the Bill.

The following example is provided in the Explanatory Memorandum as justifying the introduction of clause 272.20:

> *Person A is in Australia and uses the Internet to research and collect information about the child sex tourism industry in a particular destination overseas. Person A contacts child sex tour operators and asks if they can organise the supply of a child under 16 for the purpose of engaging in sexual intercourse in that destination. Person A books flights and accommodation in that destination.*[11]

Despite acknowledging the need to ensure child sex tourism offending is prevented prior to exposing any child to harm, the Law Council is of the view that much of this conduct should not properly form the basis of a new criminal offence.

The example provided effectively covers three separate acts, each of which could, in and of themselves, potentially provide the basis for a charge under proposed section 272.20 as currently drafted.

The first act is using the internet to research and collect information about the child sex tourism industry in a particular destination. Such conduct could be undertaken legitimately for a range of purposes. Even if it is accompanied with a private intention to engage in some form of sexual activity with a child overseas, it should not, without something more, render a person liability to criminal prosecution. This is because the person could change his or her mind well before he or she takes any steps toward committing a substantive offence and well before any child is threatened or violated in any way.

The second act is booking flights and accommodation for a particular destination renowned for child sex tourism. Again, the act of booking tickets or accommodation is consistent with a wide range of legitimate conduct and, in and of itself, does not pose a

[10] Proposed s272.5 of the Bill deals with the application of extended criminal responsibility to the new offences in Division 272. The Law Council notes that the offence of incitement (s11.4 *Criminal Code*) does not apply to any offence against Division 272 and the offence of attempt (s11.2 of the *Criminal Code*) does not apply to the offences in proposed ss272.14-15, 272.20.

[11] Explanatory Memorandum p. 39.

risk of harm to a child. Even if it is accompanied by the requisite private intention and this can be established, the person could change his or her mind well before the plan has developed into a substantive offence.

The third act involves contacting a child sex tourism operator and asking if they can organise the supply of a child for sexual purposes. Such an action is of a less preparatory character than that previously described and although it may not result in the actual commission of an offence, it may, even without more, contribute to the perpetuation and furtherance of the child sex tourism industry. For this reason, the Law Council would agree that such conduct may appropriately be the subject of a criminal charge.

However, the Law Council submits that this type of activity is already covered by other proposed offences. For example, there already exists an offence of 'encouraging conduct of a kind that would give rise to a child sex tourism offence', where the term 'encouraging' is broadly defined to include 'to urge, by any means whatever or to aid, facilitate, or contribute to, in any way whatever.' The Law Council submits that contacting a child sex tourism operator and requesting the supply of a child could potentially fall within the scope of *encouraging* the child sex tourism operator to engage in the offence of procuring or inducing a child for sexual activity.

If it is not agreed that such behavior could be adequately captured by the 'encouraging' offence, then the Law Council submits that the current 'preparing' offence should be more narrowly defined so that it only captures conduct of this more advanced and direct nature. In that way, the likelihood of innocent and legitimate conduct erroneously becoming the subject of charge and prosecution would be decreased. Likewise, the likelihood of malevolent but nascent private intentions, which are yet to result in any harm and are still several significant steps from being realised, would also be avoided.

In opposing the introduction of the 'preparing and planning' offence in its current form the Law Council further notes the following:

- Even without section 272.20, the proposed offence provisions are already broad enough to legitimately enliven, at a very early stage, the wide ranging investigative powers, including telephone interception and surveillance powers, which are available to law enforcement agencies investigating activity connected with child sex tourism.[12]

- Other mechanisms are also available to prevent potential child sex tourism offenders from causing harm. For example, when giving evidence at the 2007 Inquiry, the Department of Foreign Affairs and Trade explained that the *Australian Passports Act 2005* empowers the Minister to cancel or refuse to issue an Australian travel document at the request of a law enforcement authority. Such a request can be made where an authority suspects on reasonable grounds that a person would be likely to engage in conduct that would *endanger the health or physica*l safety of other persons inside or outside Australia, or would constitute an indictable offence under Australian law.[13] DFAT advised the Committee that these provisions "have been successful on a number of occasions to prevent or restrict international travel of child sex offenders since coming into force in 1 July 2005."[14] However, the

[12] For example, under the *Australian Crime Commission Act 2002,* the *Telecommunications (Interception Access) Act 1979,* the *Surveillance Devices Act 2004* and the *Crimes Act 1914*.
[13] Senate Committee on Legal and Constitutional Affairs, *Inquiry into the Crimes Legislation Amendment (Child Sex Tourism and Related Measures) Bill 2007,* October 2007(the '2007 Committee Report') p. 14.
[14] 2007 Committee Report p.15.

Australian Federal Police advised the Committee that it had experienced some difficulties in using these powers.[15]

- The introduction of new and revised legislative provisions is only one small part of the challenge of combating and preventing child sex tourism. As submitted by Child Wise and World Vision Australia at the Inquiry into the 2007 Bill, it is essential that people understand the crime of child sex tourism and how to report such cases to the authorities.[16] It was submitted that a public awareness campaign was vital to ensuring that suspicious activity is reported, offences are prevented and victims supported.[17] World Vision Australia also emphasised the importance of ensuring that appropriate resources are available for the enforcement and prosecution of child sex tourism offences and greater investment in training, capacity building and support for local law enforcement agencies in the region. [18] Clearly, the adoption of an effective 'preventative approach' in practice requires significantly more than the introduction of broad, poorly defined preparatory offences.

Other New Offences

Causing a child to engage in sexual activity (ss272.9(2) and 272.12(2))

Pursuant to clause 272.9(2), a person commits an offence if:

- he or she engages in conduct in relation to a child;
- that conduct causes the child to engage in sexual activity (other than sexual intercourse) in the presence of the person; and
- the child is under 16 when the sexual activity is engaged in; and
- the sexual activity is engaged in outside of Australia.

The maximum penalty for this offence is imprisonment for 15 years.

Item 10 of the 2010 Bill, inserts a definition of 'sexual activity' which includes sexual intercourse and:

> *any other activity of a sexual or indecent manner (including indecent assault) that involves the human body, or bodily actions or functions (whether or not that activity involves physical contact between people'.*

Item 6 of the 2010 Bill also inserts a new definition that a person is taken to 'engage in sexual activity' if he or she:

> *is in the presence of another person (including by a means of communication that allows the person to see or hear the other person) while the other person engages in sexual activity.*

[15] ibid
[16] 2007 Committee Report p.18-19.
[17] 2007 Committee Report p.18-19.
[18] 2007 Committee Report p.19

This means that under the offence proposed in s272.9(2), the child does not have to physically engage in a sexual activity with the defendant – it is enough that the child is present or able to see or hear the other person engage in a sexual activity. [19]

The Law Council is concerned by the breadth of this offence and its potential to cover a wide range of innocent conduct. For example, the offence in s272.9(2) could be committed where a family was sleeping in the same hotel room while on holiday overseas and the parents engaged in consensual kissing or groping which happened to be observed by their children. Other examples abound, such as circumstances where a group of young people are on an overseas excursion together and sharing a dormitory. Two of the friends engage in consensual sexual activity while another friend aged under 16 is awake in the room.

The Explanatory Memorandum to the 2010 Bill recognises the potential for the offence in proposed s272.9(2) to cover this type of innocent conduct and in response explains that an additional defence (other than the defence of belief in age and valid and genuine marriage) will be available. Proposed s272.9(5) will make it a defence where the young person was present during the sexual activity but the defendant did not intend to derive gratification from the child being present. Like the other defence provisions, the defendant will bear a legal burden. The Explanatory Memorandum states that this defence has been included to:

> *ensure that a person will not be captured by the offences in cases where a child happens to be present but there was no intention on the part of the person to derive gratification from the child's presence.* [20]

The Law Council is not convinced that the existence of this defence provides adequate protection against the potential for the proposed offence in s272.9(2) to capture innocent, everyday sexual relations between consenting adults that happen to be observed by children.

The gravity of the subject matter of the offence, coupled with the serious penalty it attracts, would have devastating consequences for a person charged with this offence. In such circumstances, it is not appropriate that the only recourse available to a defendant is to discharge a legal burden and establish on the balance of probabilities that he or she did not intend to derive sexual gratification from the presence of the child.

The Law Council submits that the policy objective of this offence provision, namely to protect children from participating in sexual activity or from being used to derive sexual gratification for adults, would be better met by including the requirement that sexual gratification be derived from presence of the child as an element of the offence itself . Specifically, the Law Council submits that proposed s272.9(5) should be re-drafted to provide that:

> *in a prosecution for an offence against subsection (1) or (2), if the conduct constituting the offence consists only of the child being in the presence of the defendant while sexual activity is engaged in – a further element of the offence that must be established is that the defendant intended to derive gratification from the presence of the child during that activity.*

The Law Council submits that such an approach would be more consistent with the approach set out in the Guide to Framing Commonwealth Offences, Civil Penalties and

[19] Explanatory Memorandum p. 32.
[20] Explanatory Memorandum p.20.

Enforcement Powers,[21] particularly given that the matter in question is 'central' to the question of culpability for the offence.

It suggested in the Explanatory Memorandum that the offence has been framed in the current manner because:

> *whether or not the defendant derived gratification from something is a matter peculiarly within the defendant's knowledge and not readily available to the prosecution. The defendant is better placed to adduce evidence that he or she did not intend to derive gratification from the presence of the child during the activity concerned*.[22]

The Law Council submits that such an argument could be made in relation to the intent (fault) element of most crimes and that the Explanatory Memorandum is erroneously conflating the imposition of a burden on the defendant to establish an exculpatory state of belief (which will often be appropriate) with the imposition of a burden on the defendant to establish the absence of the requisite state of intention.

If the legislature is not inclined to include the intention to derive sexual gratification as an element of the offence, the Law Council submits, in the alternative, that the defence proposed in s272.9(5) be amended to place an evidentiary rather than legal burden on the defendant.

The Law Council is of the view that, given the very broad definition of sexual activity, it is overly burdensome to require a parent who engaged in a relatively innocuous sexual activity such as kissing in the presence of his or her children to have to adduce evidence and establish on the balance of probabilities that he or she did not intend to derive sexual gratification from the fact that his or her child was present during the act.

The Law Council's submission in relation to proposed s272.9(5) is equally applicable to proposed s272.12(6) – which creates a similar defence to the offence of causing a young person to engage in sexual activity in presence of defendant, where the defendant is in a position of trust or authority.

Persistent Sexual Abuse of a Child Outside Australia (s272.11)

Proposed s272.11 will create an offence where a person commits one or more child sex tourism offences against a child outside Australia on three or more separate occasions during any period.

This offence will be punishable by a maximum penalty of 25 years imprisonment.

To establish this offence, the prosecution would need to prove beyond reasonable doubt that:

- the person committed an underlying offence in relation to the same person (the child) and
- such an offence was committed on three or more separate occasions during any period.

[21] As approved by the Minister for Home Affairs, December 2007 – see in particular p.28 "Appropriate Use of Defences"
[22] Explanatory Memorandum p. 20.

Specifically, the prosecution will be required to establish beyond reasonable doubt all of the elements constituting the relevant underlying offence, including any fault elements applicable to that offence.

The prosecution would not be required to prove the dates or exact circumstances of the occasions on which the conduct constituting the offence occurred. However, the nature of each of the three offences, and the general period in which they were alleged to occur, would need to be reasonably particularised.

In accordance with the rules against double jeopardy, it is proposed that sub-section 272.11(11) would provide as follows:

> *A person who has been convicted or acquitted of an offence against section 272.8, 272.9 or 272.10 in relation to a person (the child) may not be convicted of an offence against this section in relation to the child if any of the occasions relied on as evidence of the commission of the offence against this section includes the conduct that constituted the offence of which the person was convicted or acquitted.*

The Law Council supports the inclusion of a provision of this nature which is designed to ensure that a person who has been acquitted or convicted of an offence, is not able to be prosecuted again in respect of the same conduct, simply because a different offence provision is relied upon that focuses on a broader course of conduct, of which the original target conduct forms only one part.

However, the Law Council notes that there appears to be a gap in the protection provided by sub-section 272.11(11) in that it does not prevent a person from being convicted of an offence under s272.11 where he or she has already been convicted or acquitted *in a foreign jurisdiction* in respect of one of the three underlying acts alleged to form the basis of the persistent sexual abuse.

Proposed s272.29 does provide that if a person has been convicted or acquitted in a country outside Australia of an offence against the law of that country in respect of any conduct, the person cannot be convicted of an offence against Division 272 in respect of that conduct.

However, the Law Council's concern is that given that the offence provision in s272.11 is directed at a course of conduct, essentially the carrying on of a sexually abusive relationship, a prior conviction or acquittal in a foreign jurisdiction for a single act may not be regarded as relating to the same conduct as that targeted by s272.11. As a result, proposedsection 272.29 may not apply.

In that respect the Law Council notes that sub-section 4C(1) of the *Crimes Act 1914* relevantly provides that "*where an act or omission constitutes an offence under 2 or more laws of the Commonwealth ....the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those laws of the Commonwealth ... but shall not be liable to be punished twice for the same act or omission."* Nonetheless, despite the existence of this provision, the inclusion of proposed sub-section 272.11(11) was deemed necessary to clarify that a prior acquittal or conviction under the Criminal Code for a relevant underlying offence would bar a further conviction under s272.11.

This would tend to support the Law Council's concern that proposed s272.29 may be insufficient in the circumstances to prevent a person being successfully tried under s272.11 where he or she has already been convicted or acquitted abroad of one of the relied upon, underlying offences

Sexual Intercourse or Sexual Activity with Young Person - Defendant in Position of Trust or Authority (s272.12-13)

Pursuant to proposed s272.12 it is an offence to engage in sexual intercourse with a young person or to cause a young person to engage in sexual intercourse, where the young person is aged between 16 and 18 and where the defendant is in a position of trust or authority in relation to the young person. Strict liability applies to the fact that the person is in a position of trust or authority in relation to the young person. The maximum penalty for this offence is ten years imprisonment.

Pursuant to proposed s272.13 it is an offence to engage in sexual activity with a young person, or to cause a young person to engage in sexual activity, where the young person is aged between 16 and 18 and where the defendant is in a position of trust or authority in relation to the young person. Strict liability applies to the fact that the person is in a position of trust or authority in relation to the young person. The maximum penalty for this offence is 7 years imprisonment.

The term 'position of trust or authority' is defined in proposed s272.3 which contains a prescribed list of relationships including where the offender is the young person's parent, guardian, teacher, religious leader, sports coach or employer.

The Law Council shares the Government's concern to protect from exploitation young people who are in certain relationships where the potential for an imbalance of power may compromise the young person's capacity to consent to sexual contact. However, the Council is concerned that the proposed offence goes beyond the scope of, and has the potential to capture a broader range of sexual interactions than like provisions in the domestic jurisdictions that have such offences.

Currently, there exist offences directed at sexual intercourse or indecent conduct with a young person aged between 16 and 18 years where the offender is in a position of trust or authority in five Australian jurisdictions.[23] In two of these jurisdictions, South Australia and New South Wales, the offence is limited to *sexual intercourse* between the young person and the offender. In Victoria, Western Australia and the Northern Territory an offence will also be committed if the young person and the offender engage in an '*indecent act'* or an act of '*gross indecency'*. In contrast, the offence in proposed s272.13 would cover any '*sexual activity'* between the young person and the offender. As noted above, the definition of 'sexual activity' is very broad, encompassing any activity of a sexual nature whether or not that activity involves physical contact between people. It has the potential to capture, for example, a consensual act of kissing or groping and would also cover circumstances where a young person sees or hears a sexual activity between other persons.

In addition, the proposed offence covers a range of relationships of trust and authority broader than that proposed by the former Model Criminal Code Officers Committee ('the MCCOC'). [24] When recommending that an offence of this type be created, the MCCOC stated that the commission of the offence should be limited to:

[23] *Crimes Act 1990* (NSW) s73; *Crimes Act 1958* (Vic) s48; *Criminal Law Consolidation Act 1935* (SA) s49(5); *Criminal Code Act 1913* (WA) s322; *Criminal Code* (NT) s 128.
[24] See MCCOC 'Model Criminal Code 'Report: Chapter 5 Sexual Offences Against the Person' May 1999, p. 167.

school teachers, step parents, foster parents, adoptive parents, legal guardians, legal custodians, religious instructors, health professionals (including psychiatrists), counsellors, police and correctional officers. [25]

Proposed s272.3 of the Bill extends the class of persons falling within the definition of 'position of trust and authority' for the purposes of the offences in clause 272.2-13 to include sports coaches and employers or those persons who have the authority to determine significant aspects of the young person's employment.[26]

This extension, coupled with the broad meaning given to 'sexual activity', results in an offence which has the potential to capture a range of consensual sexual contact involving young persons in circumstances that may not necessarily suggest an abuse of trust or authority by the defendant. For example, a 17 year old and a 19 year old could form a consensual sexual relationship in Australia and then travel together overseas. While overseas, the 19 year old attains a position of trust or authority over the 17 year old by becoming his or her sports coach. If sexual activity such as kissing or groping continues, this type of relationship may now be captured by the proposed offence in proposed s272.13. Whether or not the young person consented to the sexual activity, whether the relationships involved an actual abuse of trust or authority, the circumstances in which the relationship commenced, and the age gap between the defendant and the young person are irrelevant for the purpose of the proposed offence.

In light of its potential to capture a broader range of sexual contact than that currently criminalised domestically, the Law Council would urge the Committee to carefully consider the appropriateness of the scope of this proposed offence.

Requirement for Attorney-General's Consent to Commence Proceedings where Defendant is under 18 Years

Under the proposed child sex tourism regime, there is no requirement that the offender be at least 18 years of age.[27] Nor is there any requirement that there be a certain age gap between the offender and the victim.

In its submission to the Committee on the 2007 Bill, the Law Council explained that in a number of Australian jurisdictions it is a defence to a charge of unlawful sexual conduct with a minor, if the alleged perpetrator is no more than a specified number of years older than the alleged victim (for example, two years) and the alleged sexual activity was consensual.[28]

[25] See MCCOC 'Model Criminal Code 'Report: Chapter 5 Sexual Offences Against the Person' May 1999, p. 165-173.
[26] See proposed sub-sections 272.3(e) and (h).
[27] The Law Council notes that under the existing offences of grooming or procuring a child for child sex tourism using a carriage service in ss474.26-27 of the Criminal Code, there is a requirement that the defendant be at least 18 years of age, however this age requirement is not duplicated in the modified offences in clauses 272.14-15 of the 2010 Bill.
[28] For example see *Crimes Act 1900 (ACT)* s55; *Criminal Law Consolidation Act 1935* (SA) s49; Criminal Code (TAS) ss 124(2), 124(3), 124(4) (consent is a defence for vaginal intercourse where the person who consented was above the age of 15 and the accused was not more than five years older or the person was of or above the age of 12 years and the accused was not more than three years older. Consent is not a defence for anal intercourse); Crimes Act 1958 (VIC) s 45(4)(b) (consent is not a defence unless the child was aged at least 10 years and the accused was not more than two years older than the child).

The Law Council submitted that a defence of this nature should be included in the 2007 Bill. It was argued that such a defence would not be inconsistent with the objects of the Bill and would help distinguish between sexual behaviour involving an adult sexual predator and a young person and consensual sexual interaction between two young persons.

In the Discussion Paper which preceded the introduction of the 2010 Bill, the Attorney-General's Department explained that following the introduction of the child sex tourism regime in 1994 the Attorney-General issued a direction that proceedings for alleged offences against the child sex tourism regime should not be instituted against a person under 18 years of age without consent of the Attorney-General.[29]

The 2010 Bill seeks to enshrine this direction in legislation in proposed s272.31 of the Bill.

The Law Council welcomes this development which provides some safeguard against the inappropriate use of this legislation to criminalise sexual conduct between young people of similar age, as opposed to sexual conduct involving a sexual predator and a child.

However, the Law Council notes that the Attorney-General's consent to commence proceedings is only required in relation to the offence provisions in proposed Division 272. It is not required in relation to the offence provisions in proposed Division 273, which deals with the possession, control, production, distribution or obtaining of child pornography material outside Australia.

Given the broad definition of "child pornography material" in the Criminal Code[30], the offence provisions could capture a wide variety of photographic and video material commonly captured and distributed by young persons using mobile phones and internet-based social networking sites. For example, the provisions could capture footage of the drunken antics of a group of schoolies abroad posted on a facebook page by one of the participants. As explained in detail in the submission of the Australian Privacy Foundation, the provisions could also capture the activities of teenagers engaged in 'sexting', that is, the exchange of sexually suggestive picture texts amongst peers.

Without suggesting that such behaviour is ever innocuous and victimless, let alone to be encouraged or condoned, the Law Council submits that it is nonetheless not necessarily the type of predatory and exploitative behaviour sought to be targeted by the current Bill. A person successfully prosecuted under these provisions will be labelled a child sex offender, may well have to register as such and will be faced with the intense social stigma which attaches to that label. For those reasons, and for want of a more comprehensive and satisfactory legislative solution to distinguish between the different types of conduct which are currently captured by the child pornography provisions, the Law Council submits that, at the very least, an additional provision should be inserted into proposed Division 273 requiring the Attorney-General's consent before proceedings are commenced under that Division against a defendant under the age of 18.

In that regard, the Law Council notes that there is currently no equivalent requirement in relation to the domestic offences set out in sections 474.19 (Using a carriage service for child pornography material) and 474.20 (Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service) of the Criminal Code. However, the Law Council submits that it would be equally appropriate.

[29] Discussion Paper p. 42.
[30] See section 473.1 – which would be applied to the offence provisions in Division 273 by proposed 273.1(1)

Defence Provisions

Two defences to child sex tourism offences are set out in sections 50CA and 50CB of the *Crimes Act*: a defence based on belief about age (section 50CA) and a defence based on valid and genuine marriage (section 50CB). The Bill would relocate these defences to proposed ss272.16 and 272.17 of the *Criminal Code*.

As submitted in respect of the 2007 Bill, the Law Council encourages the Committee to take the opportunity provided by this consolidation of the legislation to consider:

- whether the defence of valid and genuine marriage is a necessary and appropriate defence, in view of the aims of the legislation and the position under Australian domestic law; and
- whether it should be clarified that all the listed defences are only available in circumstances where the alleged sexual activity was consensual (that being a matter which, because of the age of the victim, is otherwise irrelevant).

Defence based on valid and genuine marriage (s272.17)

It is a defence to offences in proposed ss272.8(1), 272.9(1), 272.12(1), 272.13(1) (engaging in sexual intercourse or other sexual activity with a child or young person outside Australia) if at the time of the sexual intercourse or act of indecency a valid and genuine marriage[31] existed between the defendant and the person under 16. A similar defence is available for offences under proposed sub-sections 272.14(1) and 272.15(1) (procuring or grooming a child for a child sex tourism offence).

This defence is based on existing sections 50CB of the *Crimes Act*, however the proposed s272.17 defence no longer extends to situations where a person outside the marital relationship is directly involved. The defendant bears the legal burden in establishing these defences and must establish the elements of the defence on the balance of probabilities.

The defence of valid and genuine marriage has been included in the legislative regime since the child sex tourism provisions were originally introduced in 1994.

In the second reading speech, Senator Ray, the then Minister for Defence, explained the inclusion of the defence as follows:

> *Marriages celebrated in foreign countries, where one of the parties is under 18 years, are generally not recognisable in Australia. Nevertheless, it is quite possible that an Australian citizen or resident who came to Australia from a foreign country, or whose parents did so, might return to that country to marry according to its customs. The government has no intention, in multicultural Australia, of rendering any such person vulnerable to conviction for a criminal offence on returning to Australia. That would be an entirely different matter from simply not recognising the marriage.*

[31] Pursuant to proposed s272.17 a marriage is "valid" if it is valid under the law of the country where the marriage took place or the country where the offence was committed or the defendant's residence or domicile. A marriage is "genuine" if when it was solemnised, the marriage was genuine.

This statement is a somewhat at odds with the position in the majority of Australian states and territories, which appear to make no provision for marriage as a defence to charges of engaging in sexual activity with a person below the age of consent.[32]

The Law Council is concerned that the defence in proposed s272.14 may detract from the primary purpose of the Bill, namely to protect children from being forced or encouraged to engage in sexual activity before they have reached the requisite level of maturity and are above the age of consent. The defence could result in a double standard of protection for child victims of sexual abuse overseas, determined by marital status.

While nearly all jurisdictions within the Asia Pacific region set the minimum marital age at over 16, many jurisdictions permit persons younger than the minimum age to be married by order of the court for reasons such as religion. There may also be circumstances in some countries where marriage of persons under 16 pursuant to customary law will fall within the definition of a valid and genuine marriage for the purposes of this defence.

The Law Council urges the Committee to review the appropriateness of this defence in view of both the aims of the legislation and the position under the domestic law in the majority of states and territories.

The Law Council notes that both in the Discussion Paper which preceded the current Bill and in the Explanatory Memorandum, the primary jusitification offered for retaining this defence is as follows:

> *Sovereignty issues prevent the Federal Government from regulating the legality of marriage, or of cultural practice more generally, in the territory of a foreign country. If the defence were not provided for, a couple married under the laws of a particular country (which may differ to the minimum age requirements under Australian law) and who were acting lawfully under the laws of the country in which they were in, may be subject to criminal charges under the Australian child sex tourism offence regime.*

Such a justification is entirely at odds with the rationale for the Bill more generally, which is that it is both appropriate and necessary to criminalise the targeted conduct, precisely because that conduct may not be the subject of effective prosecution, *and may not even be illegal*, in the foreign jurisdiction in which it occurs.

As currently drafted the Bill is inherently contradictory. On one hand it advocates a staunchly protectionist approach of both the vulnerable and the deemed vulnerable – even criminalising, in certain circumstances, consensual sexual relationships with a person over the age 16. On the other hand it potentially permits sexual intercourse with a child of any age, even where there is clear evidence of a lack of consent, provided that it occurs in the context of a valid and genuine marriage (see below).

<u>Clarifying that statutory defences are only available where the sexual activity is consensual</u>

Under the proposed provisions, a person may be prosecuted for an offence under Division 272, whether or not the alleged victim is claimed to have consented to the sexual conduct which is the subject of the charge.

[32] It is, however, consistent with the position in SA (*Criminal Law Consolidation Act 1935* s 49(8)), VIC (*Crimes Act 1958* s 45(3)(b)) and WA (*Criminal Code* s 321(10)).

The Explanatory Memorandum states that an absence of consent is not a matter the prosecution is required to prove because of the age of the alleged victim. This position is, of course, entirely appropriate given the protective aims of the legislation.

However, the Law Council believes that where the issue of consent should become relevant is where a defendant seeks to rely on one of the statutory defence provisions. That is, the Law Council believes that a defendant should only be able to rely on the defence of belief in age or the defence of valid or genuine marriage, if the sexual conduct which is the subject of the charge was consensual. As currently formulated, the Law Council is concerned that a belief that the person was over 16 or the existence of a valid and genuine marriage could absolve a defendant of criminal liability for engaging in non-consensual sexual activity with a person under 16.

The Law Council believes that it is particularly important that the statutory defence provisions are amended in this way because, unlike under domestic state and territory law, the option is not available under the Criminal Code to charge an offender with the more general offence of sexual intercourse without consent (thus rendering both age and marital status and any belief in relation thereto irrelevant). This is because the child sex tourism regime does not include a general offence of sexual intercourse without consent. Reliance would need to be placed on the law of the country where the offending took place.

The Law Council's concerns were shared by the Senate Committee on Legal and Constitutional Affairs when it inquired into similar provisions in the 2007 Bill. The Majority of the Committee observed:

> *… it seems incongruous, given the purpose of the legislation, that a belief about the age of the child or the existence of a valid or genuine marriage with the child, should provide a defence where Australians engage in non-consensual sexual activity overseas.*[33]

The Majority of the Committee recommended that:

> *the defences based on belief about age, …, and valid and genuine marriage …, be amended by adding a requirement that the sexual intercourse or act of indecency is consensual.*[34]

In its Discussion Paper on the proposed offences, the Attorney General's Department acknowledged the 'seriousness of this issue' and agreed that:

> *criminal responsibility for non-consensual activity should not be avoided simply because the defendant establishes a belief about age or valid and genuine marriage and there is no alternative offence with which the defendant could be tried.*[35]

However, the Department went on to say that the inclusion of consent as part of the defence to child sex tourism offences is at odds with the general principle that consent is not relevant to these types of offences. It said that the inclusion of consent could lead to the cross examination of a child victim possibly causing trauma to the child and could also confuse the issue at trial by mistakenly suggesting that consent was relevant to the offence. [36] The Department concluded that:

[33] 2007 Committee Report p. 21
[34] 2007 Committee Report Recommendation 1, p. 21
[35] Discussion Paper p. 41-42.
[36] Discussion Paper p. 42.

> *in the absence of a clear way to reconcile the general principles that consent is not relevant to child sex offences, it is not proposed to include consent as an element which must be proven for the defence to be made out.*

The Law Council does not accept this conclusion as an adequate response to what it considers to be a serious gap in the protection offered to victims of child sex tourism under the Bill.

As the Bill currently stands, once a defendant has established, on the balance of probabilities, that he or she held a belief on reasonable grounds that the child complainant was at least 16 or that he or she was in a valid and genuine marriage with the child complainant, the defendant will be acquitted of the offence charged. This may occur despite the fact that there is ample evidence of a lack of consent on behalf of the child victim.

While the Law Council is cognisant of the general principle that consent is not a relevant element of child sex offences, it appears counter-intuitive to cite this principle as a justification for allowing a person who engages in forced sexual activity with a child to go unpunished simply because he or she believed that the child was over sixteen or because the child was his or her spouse. The Law Council does not accept the assertion that the introduction of a consent requirement as part of the defence provisions will confuse the issue at trial and suggests that juries are frequently called upon to address far more complicated offence and defence provisions.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.