



Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007

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Law and Bills Digest Section

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Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007

Date introduced: 13 September 2007

House: House of Representatives

Portfolio: Justice and Customs

Commencement: Schedule 1, item 1 commences on Royal Assent. Schedule 1, items 2 to 21 and 23 commence 28 days after Royal Assent. Schedule 1, item 22 commences on the later of (a) 28th day after Royal Assent or (b) immediately after the commencement of item 7 of Schedule 2 to the *Telecommunications (Interception and Access) Act 1979*. If (b) does not occur, item 22 lapses.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Disclaimer

This Bill was introduced on 13 September and is listed for debate in the House of Representatives on 19 September 2007. An imminent election may preclude the referral of the Bill to a Senate Committee. The unusually short time-frames involved in the bringing on of debate on the Bill have therefore precluded the writing of a more comprehensive Digest, as it has been produced to allow publication before the debate in the lower chamber.

Purpose

The Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007 (the Bill) would:

- amend the definition of ‘serious and organised crime’ in the *Australian Crime Commission Act 2002* to expressly include the existing child sex carriage service offences in the Criminal Code (**Schedule 1, item 1**)
- amend the *Crimes Act 1914* to provide for the forfeiture of child pornography and child abuse material, and equipment containing such material, that is used in the commission of Commonwealth child sex offences (**Schedule 1, item 2, proposed new section 10 to 12B**)

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- repeal Part IIIA of the *Crimes Act 1914* dealing with child sex tourism and insert these provisions into the *Criminal Code Act 1995* with some updating of the language and structure of the offences (**Schedule 1, item 9**)
- add a preparatory offence to capture the behaviour of people who are preparing to commit a child sex tourism offence (**proposed new section 272.17**)
- add new child sex tourism offences to capture the procuring and ‘grooming’ of a child for the purposes of child sex overseas (**proposed new sections 272.11 and 272.12**)
- add new offences that would make it illegal for Australian citizens and residents to possess, control, produce, distribute or obtain child pornography and/or abuse material while overseas (**proposed new section 273.5 and 273.6**), and
- make consequential amendments to the *Surveillance Devices Act 2004* (**items 17 to 18**) and the *Telecommunications (Interception and Access) Act 1979* (**items 19 to 23**).

Background

Basis of policy commitment

When introducing the Bill, the Attorney-General stated that:

The Australian government is committed to protecting children from the threat of sexual abuse. The measures contained in the bill will result in a strengthened child sex tourism regime and send a strong message to Australians contemplating such behaviour overseas. The measures also complement the government’s current initiatives with respect to the protection of Indigenous children in the Northern Territory and the protection of Australian families online.¹

Child sex tourism

The scope of the problem

The second reading speech states that ‘Australians play a large part in the child sex industry overseas, particularly in Asian and Pacific countries’.² No further details on the scope of the problem are offered in the Explanatory Memorandum.

‘Child sex tourism’ is not a term defined in the Bill but in the common parlance could be defined as travelling to a foreign country with the intent to engage in sexual activity with a

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1. The Hon. Philip Ruddock MP, Attorney-General, House of Representatives, *Debates*, 13 September 2007, p. 4.
 2. The Hon. Philip Ruddock MP, *op. cit.*, p. 2.

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child under the age of 18.³ Australian NGO Childwise summarises the situation of Australians and child sex tourism in the following manner:

- Thousands of Australians travel overseas to sexually abuse children.
- Australian child sex offenders have been identified in over 25 countries.
- Since 1994, 20 Australians have been prosecuted under the child sex tourism law: 12 convicted, 4 charges dropped and 4 outstanding.
- Australians were the first foreigners to be prosecuted for child sex offences in Thailand, the Philippines, Fiji, Samoa and East Timor.
- In recent years approximately 30 Australians have been prosecuted overseas for child sex crimes.⁴

Economic difficulties, civil unrest, poverty, and displacement of refugees all contribute to the growth of this industry.⁵ The United Nations International Children's Educational Fund (UNICEF) released a report in 1997 estimating more than 1 million children, overwhelmingly female, are forced into prostitution every year, the majority in Asia.⁶

The current legislative framework

Commonwealth child sex tourism offences are currently located in Part IIIA of the *Crimes Act 1914*, sections 50AA-50GA. The offences were inserted by the *Crimes (Child Sex Tourism) Amendment Act 1994* (no Bills Digest available). Some sections were amended by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*.

Australia signed the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* on 18 December 2001.⁷ It was ratified by Australia on 8 January 2007 and entered into force for Australia on 8 February 2007.

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3. Although the criminal provisions in this Bill deal with activities relating to children under the age of 16.
 4. Karen Flanagan Acting National Director, Child Wise (ECPAT in Australia) '[Global Action To Combat Child Sex Tourism](#)', Crime in Australia: international connections, Melbourne, 29-30 November 2004.
 5. Eva J. Klain. *Prostitution of Children and Child-Sex Tourism: An Analysis of Domestic and International Responses*. Alexandria, Virginia: National Center for Missing & Exploited Children, 1999, p. 33.
 6. Charlotte Bunch. *The Intolerable Status Quo: Violence Against Women and Girls*, 1997, <http://www.unicef.org/pon97/women1.htm> (accessed 17 September 2007).
 7. UNGA res. 54/263.

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The *Mutual Assistance in Criminal Matters Act 1987* deals with arrangements between Australia and foreign countries regarding mutual assistance in criminal justice proceedings. Where there is an agreement between Australia and a foreign country, Australia may request that evidence be taken in the foreign country⁸ and/or that a consenting foreign prisoner be released from a foreign country to appear as a witness in relation to proceedings in Australia.⁹

Once made, mutual assistance agreements are scheduled in separate regulations under the Act. Regulations currently exist in relation to Thailand, consistently the centre of many child sex tourism allegations and several successful prosecutions. The Attorney-General's Department issued a publication called [Fact Sheet 10 - Extradition and Mutual Assistance relationships with other countries](#), which contains a full list of agreements between Australia and other nations.¹⁰

Extraterritoriality— Part 2.7 of the Criminal Code

One of the key features of legal measures designed to combat child sex tourism is that the measures must have extraterritorial application. In other words, Australians can be prosecuted for their conduct outside Australian territory, instead of under the laws of the country in which they have committed the offence (for example, the Bali 9). Part 2.7 of the *Criminal Code* establishes common principles governing geographical jurisdiction. It describes a 'standard geographical jurisdiction', in which the conduct or a result of the conduct occurs or is intended to occur wholly or partly in Australia. It also describes different categories of 'extended geographical jurisdiction' for cases in which the conduct or results occur overseas, and:

- the person is an Australian citizen ('category A')
- the person is an Australian citizen and/or a resident of Australia ('category B')
- the jurisdiction is unrestricted, subject to a 'foreign law defence' ('category C'), or
- the jurisdiction is completely unrestricted ('category D').

The standard geographical jurisdiction applies to all Commonwealth offences unless a contrary intention appears. The extended categories apply by specific reference, subject to the Attorney-General's consent.

Proposed Division 272 would introduce new sex offences against children overseas. Under this Division, prosecutions can be undertaken against Australian citizens ('category

8. Part II.

9. Part IV.

10 Attorney-General's Department, Fact Sheet 10 - Extradition and Mutual Assistance relationships with other countries, online: www.ag.gov.au/extraditionandma, accessed 17 September 2007.

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A'), residents of Australia ('category B'), a body corporate under Australian law, and a body corporate that carries out their activities principally in Australia.

The link to Australian criminal jurisdiction is the nationality of the offender. Child sex tourism therefore stands as an exception to the general principle of 'international comity', which was originally proposed as a theory of criminal jurisdiction. In *Treacy*, the theory was stated in these terms: 'each sovereign state should refrain from punishing persons for their conduct within the territory of another sovereign state where that conduct has no harmful consequences within the territory of the state which imposes the punishment.'¹¹ However, even as an exception, prosecutions and investigations of extraterritorial offences such as these, especially involving children, are extremely difficult.

Prosecutions 1994-2007

The second reading speech states that there have been fifteen successful prosecutions of child sex tourism offences since their inception in July 1994.¹²

On 8 May 2007, the Federal Government renewed its commitment to combating [Child Sex Tourism](#) and Human Trafficking offences with funding extended to the AFP over a further four years.¹³ There is some further detail available in the latest AFP Annual Report:

The AFP is a leading law-enforcement agency in international efforts to combat sexual offences against children. Through its International Network, the AFP has contributed significantly to child sex-offences investigations. Australia has signed a number of memorandums of understanding (MOUs) with countries in Asia, the Pacific and South America to facilitate efforts combating child sex offences. Through these MOUs, international cooperation, information exchange and capacity-building programs have enhanced efforts to identify and investigate those involved in the sexual exploitation of children. The AFP also supports local law enforcement efforts by providing investigative assistance, forensic support, computer forensics and international liaison.

Current analysis indicates that Australian child sex offenders are almost exclusively male and travel to locations where they are able to take advantage of socioeconomic factors and lower law-enforcement capacity to exploit children sexually. Developing countries have been targeted, with Thailand, Cambodia and the Philippines being prominent. The AFP is actively assisting with law enforcement capacity-building in these countries and, as the efforts in countering this crime type increase, offenders are likely to travel to other places to exploit children sexually.

11. *Treacy* [1971] AC 537, per Diplock LJ, at p. 564.

12. The Hon. Philip Ruddock MP, *op. cit.*, p. 2.

13. Attorney-General's Department, 'More Resources to Combat People Trafficking', media release, 8 May 2007, Online: <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP7561D03F6952FB64CA2572D4000BB873>, (accessed 17 September 2007).

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...At the end of the reporting period the AFP was conducting 57 investigations into extra-territorial child sex offences with 11 matters before the courts or having prosecution briefs prepared.¹⁴

In June 2000, the Australian Institute of Criminology published a Trends and Issues paper on *Child Sex Tourism*, which gave details of the first four prosecutions, between 1996 and 1998.¹⁵ One of the first successful prosecutions took place in Perth in May 1999, when John Arthur Lee (aged 45) was found guilty of one count of sexual intercourse with a girl under 16, and eight counts of indecently dealing with underage girls while overseas in 1997. He was sentenced to 14 years with a non-parole period of six years and eight months.¹⁶

Extract: Commonwealth Director of Prosecutions, *Annual Report 1998–99*, pp. 52–3

Lee

This case is one of the first involving offences against the child sex tourism provisions in the Crimes Act 1914. The defendant was convicted on nine counts of sex tourism and 15 counts under WA law of possessing obscene material. He was sentenced to 14 years in jail with a non-parole period of six years and eight months. He has appealed against sentence.

In 1997 the defendant returned to Australia from a holiday in Cambodia bringing photographs which showed him engaged in sexual acts with young women. He brought the photos into Australia hidden in an album underneath innocuous photographs, but he subsequently showed some of the photos to workmates. The matter was reported to the WA Police who conducted an investigation with cooperation from the AFP.

The case posed a challenge to the investigators because they were not able to identify any of the young women in the photos and because the defendant's face did not appear in them. They were able to establish where the offences were committed by locating the hotel rooms shown in the photographs. The prosecution relied on the photographs and on expert evidence from a paediatric endocrinologist to establish that the women in the photos were under-age. The prosecution also relied on evidence from a forensic pathologist to establish that limbs and other body parts shown in the photographs belonged to the defendant. The investigators were also able to blow up a photograph which showed the defendant's fingers and obtain fingerprint details using computer enhancement techniques.

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14. Australian Federal Police, *Annual Report 2005-2006*, p. 36.
 15. Australian Institute of Criminology, 'Child Sex Tourism', *Trends and issues in crime and criminal justice*, No. 156, June 2000, <http://www.aic.gov.au/publications/tandi/ti156.pdf> (accessed 17 September 2007).
 16. Commonwealth Director of Prosecutions, *Annual Report 1998–99*, p. 52.

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In March 2004, Gregory Roy Cook (aged 51) was sentenced in Sydney to 18 months gaol for sexually assaulting an eight year old girl in Vietnam, an offence committed in Danang in July 2003. At that time, Senator Ellison, Minister for Justice, noted that 13 Australians had been charged in relation to paedophilia activities overseas.¹⁷ In August 2005, he noted that a further 13 had been convicted overseas with the help of Australian authorities.¹⁸ An April 2005 newspaper article noted that there had also been four *unsuccessful* prosecutions.¹⁹

Details of successful prosecutions can be found in the Annual Reports of the Commonwealth Director of Prosecutions. In the latest report, there is a description of the first successful prosecution for 'grooming' offences, the subject of reform in this Bill.

Extract: Commonwealth Director of Prosecutions, *Annual Report 2005–06*, p. 40.

John Douglas Holmes

John Holmes was one of the first people prosecuted in Australia under new provisions of the Criminal Code prohibiting the 'grooming' of children for sexual purposes. Holmes was also charged with offences of importing child pornography, possessing child pornography and using a carriage service to disseminate child pornography.

In September 2005, the AFP received information from the Queensland Police Service about an online paedophile network. Police intercepted an email from Holmes' email address which contained images of child pornography.

On 3 September 2005, Holmes travelled to the Philippines in the course of his employment, and returned carrying several images of child pornography in his luggage. Police executed a search warrant on Holmes' premises and found numerous images of child pornography on floppy disks and on a home computer. The computer was seized and subsequently examined.

The examination identified numerous chat logs of a sexually explicit nature between Holmes and a person he believed to be an 11 year old girl living in the United Kingdom. This person was in fact an adult male. The chat logs also revealed that Holmes attempted to meet up with this person in London for the purposes of having sex. The conversations between Holmes and this person constituted the grooming offence.

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17. Sen. Chris Ellison, [Australian man sentenced in Sydney for Vietnam child sex abuse](#), media release, 23 March 2005.
 18. Amanda Banks and Mark Dodd, '[Ex-cop's house raided after Thai sex charges](#)', *The Australian*, 26 August 2005, p. 7.
 19. Natalie O'Brien, '[Our sex tourists prey on SE Asia](#)', *West Australian*, 27 April 2005, p. 10.

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Holmes pleaded guilty, and was sentenced on 19 May 2006. For possessing child pornography, he received a sentence of one year and eight months' imprisonment, to serve one year and two months of that term. For using a carriage service to transmit child pornography, he was sentenced to two years' imprisonment, with non-parole period of one year and four months.

For importing the child pornography, he was sentenced to a good behaviour bond for four years. For the grooming offence, he was sentenced to two years and nine months' imprisonment, with non-parole period of one year and eight months.

Action has been taken to forfeit the computer equipment used in the offences to the Commonwealth under proceeds of crime legislation.

Further reading:

- Karen D Breckenridge, 'Justice beyond borders: a comparison of Australian and U.S. child-sex tourism laws', *Pacific Rim Law and Policy Journal* 13 (2) April 2004, pp. 405-438.
- Marianna Brungs, 'Abolishing child sex tourism: Australia's contribution', [2002] *Australian Journal of Human Rights*, Vol. 17.
- Fiona David, 'Child Sex Tourism', *Trends and issues in crime and criminal justice series no. 156*, Australian Institute of Criminology, June 2000.
- End Child Prostitution, Pornography and Trafficking (ECPAT) International. Preventing Child Sex Tourism project website. http://www.ecpat.net/eng/Ecpat_inter/projects/sex_tourism/sex_tourism.asp (accessed 17 September 2007)
- C. Penfold, 'Child pornography laws: the luck of the locale', *Alternative Law Journal*, vol. 30, June 2005, pp. 123-5, 140.
- Naomi L. Svensson, 'Extraterritorial Accountability: An assessment of the effectiveness of child sex tourism laws', *Loyola L.A. International and Comparative Law Review*, 28, 2006, pp. 641-664.

Financial implications

The Explanatory Memorandum claims there will be no financial implications as a result of this Bill. However, As noted above, the AFP have received an additional \$9.1 million over four years to 'substantially boost the capacity of the AFP Transnational Sexual

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Exploitation and Trafficking Team (TSETT) for assessing and investigating all forms of international trafficking offences, including child sex tourism'.²⁰

Main provisions

Schedule 1—Amendments to various Acts

Australian Crime Commission definition

Schedule 1, item 1 would amend the definition of 'serious and organised crime' in the *Australian Crime Commission Act 2002* to expressly include the existing child sex carriage service offences in the Criminal Code. This codifies in the ACC Act itself changes that were made by regulation in December 2006.

Schedule 2 of the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007 (part of the NT Bills package) recently amended the definition of 'serious and organised crime' to include Indigenous violence or child abuse.²¹

Forfeiture of equipment—Crimes Act

Schedule 1, item 2, proposed new section 10 to 12B would amend the *Crimes Act 1914* to provide for the forfeiture of child pornography and child abuse material, and equipment containing such material, that is used in the commission of Commonwealth child sex offences. At the moment, the AFP must rely on proceeds on crime legislation, as noted in the extract of the case of John Douglas Holmes, above.

Criminal Code project

Schedule 1, item 9 would repeal Part IIIA of the *Crimes Act 1914* dealing with child sex tourism and insert these provisions into the *Criminal Code Act 1995* with some updating of the language and structure of the existing offences, plus the addition of new offences as discussed below. The Explanatory Memorandum provides a useful table of the existing

20 Senator David Johnston, 'More Resources to Combat People Trafficking', Attorney-General's Department media release, 8 May 2007. Online: <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP7561D03F6952FB64CA2572D4000BB873>, (accessed 17 September 2007).

21. See further Sue Harris Rimmer, Bronwen Jaggars, Diane Spooner, Kirsty Magarey, and Mary Anne Neilsen and John Gardiner-Garden, 'Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007', [Bills Digest no. 21 2007–08](#), 13 August 2007, p. 17.

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provisions in the Crimes Act and the equivalent provisions introduced by this Bill in the Criminal Code.²²

This is part of a long term drafting project, explained in detail by Jennifer Norberry in [Bills Digest No. 92](#), 2000-01 of the Environment and Heritage Legislation Amendment (Application of Criminal Code) Bill 2000.

New child sex tourism offences

Procuring or 'grooming' a person under 16 years of age

In 2004, the Commonwealth Government made a range of amendments to crimes legislation, dealing with child sex offences, in particular the procurement and grooming of children, and also the use of 'carriage services' in child sex offence activities.

To some extent the introduction of the Commonwealth Internet procuring and 'grooming' offences has overtaken the need for parallel reforms in the States. In the absence of a specific NSW online grooming offence, NSW Police can (and does) refer cases to the Commonwealth Director of Public Prosecutions.²³

The amendments to **proposed section 272.11 and 272.12** reflect current laws dealing with the offences of procuring and grooming children for sex offences domestically. While the Criminal Code already deals with these offences as they occur in Australia, the proposed laws extend the Criminal Code to capture the same offences, where they might occur outside of Australia.

Proposed section 272.11 creates a new offence for a person to engage in conduct to procure a second person (who is either under 16, or the first person believes they are under 16 - the 'child') for sexual activity outside Australia. The definition of *procure* is to encourage, entice, or recruit a person, or to induce the person (whether by threats, promises or otherwise) for sexual activity. The definition of *sexual activity* is an exhaustive definition including sexual intercourse, acts of indecency or any other activity of a sexual or indecent nature that involves the human body, or bodily actions or functions (whether or not that activity involves physical contact between people).²⁴

22 Explanatory Memorandum, p. 7.

23 G. Griffith & L. Roth, 'Protecting Children From Online Sexual Predators', *Briefing Paper No. 10*, 2007. Online: <http://www.parliament.nsw.gov.au/prod/PARLMENT/publications.nsf/0/3043E49AB3F4ABF9CA2573530006F989>, (accessed 17 September 2007).

24 The definitions of procure and sexual activity, which are currently set out in subsection 472.28(11) of the Criminal Code, are relocated to the dictionary of the Code under items 12, 14 and 15 of Schedule 1 of the Bill.

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The procurement offence applies to a range of activities including committing acts of indecency, submitting to acts of indecency committed by a third person and engaging in sexual activity in front of a child. The Explanatory Memorandum provides a number of examples of prohibited conduct, to demonstrate the breadth of coverage of the new offences over a wide range of possible activities.

Aspects of the procurement offence to note are:

- actual ‘successful’ procurement of a victim is not required for the offence; an offending person is captured by the provision if they simply engage in conduct to encourage, entice, recruit or induce a child for sexual activity. In addition to this, the potential for ‘successful’ procurement is also not required for the offence – **subsection 272.11 (4)** states that a person may be found guilty, even if it is impossible for the procurement to take place
- **subsection 272.11(5)** clarifies that the offence does not require that the child actually exist. This provision captures investigations where law enforcement officers assume false identities to catch potential offenders²⁵
- the offending conduct can take place in a range of geographical circumstances, including:
 - where the defendant is in Australia, and the child is overseas
 - where the defendant is overseas, and the child is overseas
 - where both the defendant and child are in Australia²⁶
- the proposed offences are modelled on existing offences in section 472.26 of the Criminal Code, dealing with the use of carriage service to procure a person under 16 for sexual activity²⁷
- a maximum penalty of 15 years imprisonment
- absolute liability²⁸ applies to the location of the conduct, and the fact that the person is under 16. Therefore, a prosecution need only prove that conduct occurred outside Australia and/or that the child is a person under 16 years of age. Intent, or recklessness to these facts, need not be shown by the prosecution. However, a defence based on belief about the child’s age is available (see discussion with respect to **proposed subsection 272.13(2)** on page 13).

25 Explanatory Memorandum, p. 13.

26 Explanatory Memorandum, p. 13.

27 Explanatory Memorandum, p. 12.

28 Absolute liability removes the need for prosecution to show intent.

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Proposed section 272.12 creates the offence of 'grooming' a child for child sex tourism. The concept of child 'grooming' was first introduced into the Criminal Code in 2004, when the Government created an offence for grooming of children domestically. In the Explanatory Memorandum for the 2004 Bill, the Government described the new grooming offences as:

Targeting adult offenders who exploit the anonymity of telecommunications services (for example, the Internet) to win the trust of a child as a first step towards the future sexual abuse of that child. The practice is known as 'online grooming'.²⁹

The proposed tourism offences are modelled on those existing offences.³⁰ However, unlike the domestic offences, the proposed offences are not limited to conduct which involves the use of a carriage service.³¹ The proposed new offences in **section 272.12** capture conduct (regardless of use of a carriage service) which a person engages in which makes it easier to either procure a child for sexual activity outside of Australia (either with the offender or a third person), or procure a child to be present during sexual activity outside Australia. The purpose of the provision is explained further by the Explanatory Memorandum:

Grooming can include a range of conduct that makes it easier to procure a person for sexual activity including through building trust with a person under 16 and taking steps to desensitise the person to the thought of engaging in sexual activity with adults. For example the person may expose the person under 16 to pornographic images or encourage romantic feelings in them.³²

Aspects of the grooming offence to note are:

- a maximum penalty of 12 years imprisonment
- as with the procurement offence (above):
 - the offending conduct can take place in a range of geographical circumstances, capturing conduct including:
 - where the defendant is in Australia, and the child is overseas
 - where the defendant is overseas, and the child is overseas

29 Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004, p. 44.

30 Section 472.27 of the Criminal Code.

31 Explanatory Memorandum, p. 14. 'Carriage service', as defined by the *Telecommunications Act 1997*, means 'a service for carrying communications by means of guided and/or unguided electromagnetic energy.'

32 Explanatory Memorandum, p. 14.

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- where both the defendant and child are in Australia³³
- absolute liability applies to the location of the conduct and the fact that the person is under 16
- **proposed subsection 272.12(5)** clarifies that the offence does not require that the child actually exist.

Both the procurement and grooming offences are subject to a defence based on belief about age, set out in **proposed subsection 272.13(2)**. The defence applies if the person believed that the child was 16 or over at the time of the conduct constituting the offence. This defence may be subject to a test of reasonableness by a jury (**proposed subsection 272.13(3)**). **Proposed subsection 272.14(2)** also provides a defence based on valid and genuine marriage.

New preparatory offence—proposed section 272.17

Proposed Subdivision C deals with offences of benefiting from, encouraging or preparing to commit sexual offences against children overseas.

Proposed section 272.17 is a new offence, designed to 'capture the behaviour of people who are preparing to commit a child sex offence'³⁴ against proposed sections 272.7 to 272.10 and section 272.15 dealing with having or inducing or benefiting from sexual intercourse or sexual conduct with a child under 16 overseas. The Explanatory Memorandum explains that the section would prevent harm occurring to a child, as well as allowing for arrests within Australia.

The inclusion of an offence of this kind would enable the client to be arrested prior to a person under 16 being harmed. The offence of engaging in preparatory acts applies both inside and outside Australia.

The preparatory offences address a gap in the coverage of the existing child sex tourism offences. Currently, sections 50DA (proposed section 272.15) and 50DB (proposed section 272.16) of the Crimes Act prohibit a person from 'benefiting from' or 'encouraging' conduct which would amount to a child sex tourism offence being committed overseas. These offences are targeted at child sex 'tour' operators rather than the child sex client. There is nothing in the current offence provisions which clearly prohibits any preliminary steps being taken by a person who wishes to participate in a child sex tour.³⁵

33 Explanatory Memorandum, p. 15.

34. Explanatory Memorandum, p. 16.

35 *ibid.*

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The maximum penalty for this offence is 15 years or 17 years imprisonment. This proposed provision criminalises an act in preparation for, or planning conduct of a kind which would constitute an offence under the other substantive provisions. The intent required to constitute the offence is not clear in the drafting of the section. The note to the section reads as follows:

Note: An example of an act that would constitute an offence against subsection (1) is booking an airline ticket to travel outside Australia in preparation for engaging in sexual intercourse with a person who is under 16 while outside Australia.

The note seems to present immediate evidentiary problems. The intent required becomes less clear when subsection 3 is taken into account:

- (3) A person commits an offence under subsection (1) or (2) even if:
- (a) conduct of a kind that would constitute the offence referred to in that subsection does not occur; or
 - (b) the person's act is not done in preparation for, or planning, specific conduct of a kind that would constitute the offence referred to in that subsection; or
 - (c) the person's act is done in preparation for, or planning, more than one course of conduct of a kind that would constitute the offence referred to in that subsection.

Comparable preparatory offences in the counter-terrorism area have been criticised for not providing sufficient certainty when defining criminal behaviour. For example, in relation to Part 5.3, Divisions 101, 102 and 103 of the *Criminal Code 1995*, the Gilbert and Tobin Centre for Public Law raised with the Security Legislation Review the following concerns about the 'width' of preparatory offences:

Assuming that change was necessary in order to have such an effect, these provisions now expressly have the effect of criminalising people for conduct committed before any specific criminal intent has formed. While preparatory conduct should certainly constitute an offence, two key objections may be raised to an attempt to provide for this in the absence of an intention to pursue a sufficiently detailed plan.

First, this is contrary to ordinary principles of criminal responsibility, since people who think in a preliminary or provisional way about committing crimes may always change their mind and not implement their plans. This amendment allows a person to be prosecuted before a genuine criminal intention has taken shape.

Second (and once more, we acknowledge that this assertion will benefit from seeing what transpires in the courts in respect of recent arrests), as a matter of the practicality of securing a criminal conviction, the width of the offences as amended seems hardly helpful. Indeed it might be said to encourage authorities to act precipitately. Of course, with delay may lie danger, but to arrest persons on the basis of activities or possessions which cannot, at that point in time, be connected to any specific terrorist act risks failure in convincing the courts that a crime was in fact being prepared. It

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also, by corollary, might be said to expose a range of innocent activities to criminal sanction by casting the net so very wide.³⁶

New Division 273 – Offences involving child pornography material or child abuse material outside Australia

New Division 273 creates offences for Australians to possess, control, produce, distribute or obtain child pornography and/or abuse material while overseas. This includes Australian citizens, Australian residents, and any body corporate that is incorporated in Australia, or carries on activities principally in Australia (**section 273.2**). The Bill includes a saving provision for other State, Territory or Commonwealth laws (**section 273.4**).³⁷

The Bill includes a provision clarifying the position of double jeopardy—that is, a person convicted or acquitted of an offence for conduct in another country, cannot be subsequently convicted with respect of that conduct in Australia. The Explanatory Memorandum explains that the purpose of the new division is:

To allow prosecution, under Australian law, of Australians who engage in such conduct overseas, in practice to deal with circumstances where the foreign country does not have specific laws to deal with this behaviour or is unwilling or unable to prosecute.³⁸

The situation described in the Explanatory Memorandum is not the usual meaning given to double jeopardy rules. The person would not face prosecution twice for the same offence. Rather, the provision is to fill any legal vacuums that would allow a person not to be prosecuted at all.

Proposed sections 273.5 and 273.6 create offences for dealing with child pornography material and child abuse material respectively. The offences draw on definitions of *child*

36 Andrew Lynch and George Williams, 'Submission to the Security Legislation Review', 1 February 2006, p. 6. Online: <http://www.gtcentre.unsw.edu.au/news/docs/2006SecurityLegislationReview.pdf> (accessed 17 September 2007)

37 State and Territory provisions relating to possession etc of child pornography include the following provisions: Australian Capital Territory *Crimes Act 1900*—sections 64, 64A and 65; New South Wales *Crimes Act 1900*—section 91H; Northern Territory *Criminal Code Act 1983*—Schedule 1, section 125B; Queensland *Criminal Code 1899* sections 228A, 228B, 228C and 228D; South Australia *Criminal Law Consolidation Act 1935*—sections 63 and 63A; Tasmania *Criminal Code Act 1924* sections 130 and 130A-D, and the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* section 74; Victoria *Crimes Act 1958* sections 68, 69 and 70; Western Australia *Classification (Publications Films and Computer Games) Enforcement Act 1996*, section 60.

38 Explanatory memorandum, p. 21.

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pornography material and **child abuse material** currently being used in the Criminal Code.³⁹ The proposed offences capture people who:

- have possession or control of such material
- produce, distribute or obtain such material; or
- facilitate the production or distribution of such material outside of Australia.

Both offences carry maximum penalties of 10 years imprisonments and absolute liability applies to circumstances where the conduct occurs outside Australia (**sections 273.5(2) and 273.6(2)**).⁴⁰ Of the use of absolute liability, the explanatory memorandum states that:

The application of absolute liability is appropriate because the issue of whether the person intended to engage in the conduct in Australia or overseas is not central to their culpability. It is appropriate to penalise a person for such conduct irrespective of their knowledge or intention as to where the conduct occurs.⁴¹

The Bill provides a range of defences to the offences in this provision, such as where the conduct was engaged for the purposes of:

- public benefits, such as law enforcement, monitoring, administration or research (**subsections 273.7(2)(a) to (d)**)
- the duties of law enforcement, intelligence or security officers (**subsection 273.7(4)**)
- detecting prohibited content by the Australian Communications and Media Authority (**subsection 273.7(5)**)

Consequential amendments

The Bill would also make consequential amendments to the *Surveillance Devices Act 2004* (**items 17 to 18**) and the *Telecommunications (Interception and Access) Act 1979* (**items 19 to 23**) to allow access to various law enforcement warrants for these offences.

39 Child pornography material is defined at section 473.1 of the Criminal Code to include material that depicts or describes a child engaged in sexual activity in a way that reasonable persons would regard as being, in all the circumstances, offensive. Child abuse material is defined at section 473.1 of the Code to include material that depicts or describes a child who is the victim of torture, cruelty or physical abuse in a way that reasonable persons would regard as being, in all circumstances, offensive.

40 Therefore, a prosecution does not need to prove a person's intention, or recklessness, to the occurrence of the conduct outside Australia; it only needs to prove that the prohibited conduct occurred outside Australia.

41 Explanatory memorandum, p. 23.

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Concluding comments

Arguably, the preparatory offences contained in **proposed section 272.17** under this Bill lack the certainty required of a penal provision. The requirement of intention is implicit in the required element of 'planning', but this is more clear in the drafting note than in the section itself. **Subsection 272.17(3)** makes several exceptions for the need for specific conduct that would constitute an offence. As heinous as the possibly intended crimes are, the mere act of booking a hotel room or an airline ticket without sufficient evidence of clear intention and no further conduct should not constitute a criminal offence. The danger of convicting a person for a never to be fulfilled intention should be considered carefully in criminal law.

While the Explanatory Memorandum identifies the new offences as a 'gap' in the current legislation as highlighted by recent investigations,⁴² it does not elaborate on the way in which Australian authorities will be gaining intelligence (presumably from overseas sources) to utilise these proposed laws. There is no evidence presented by the Government of the actual scope of the problem, or what are the general policy solutions required to successfully prevent child sex tourism, and why these new laws are needed as part of that solution. More information could have been set out in the Explanatory Memorandum to contextualise the new offences.

The issue of child sex tourism by Australians is an important one, and deserves careful deliberation by Parliamentarians.

42 *ibid.*

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