



## Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010

Monica Biddington  
Law and Bills Digest Section

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## Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010

**Date introduced:** 4 February 2010

**House:** House of Representatives

**Portfolio:** Home Affairs

**Commencement:** The day after Royal Assent

**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/>.

### Purpose

The Bill amends the *Australian Crime Commission Act 2002*, the *Crimes Act 1914*, the *Criminal Code Act 1995*, the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979*.

The Bill will:

- amend existing offences relating to child sex tourism as well as introduce new offences for dealing in child pornography and child abuse material overseas.
- introduce new offences for using a postal service for child sex-related activity as well as enhancing the coverage of offences for using a carriage service for sexual activity with a child, or for the supply and distribution of child pornography or child abuse material.

A new scheme is also introduced in this Bill to provide for the forfeiture of child pornography, child abuse material and items containing such material.

The Bill will make minor consequential amendments to ensure existing law enforcement powers continue to facilitate the prosecution of Commonwealth child sex-related offences.

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## Background

Since the enactment of the child sex tourism offences in 1994, 30 prosecutions have been commenced, with a total of 19 convictions obtained.<sup>1</sup> The Australian Institute of Criminology has noted that:

it is not known whether child sex tourism legislation has any real deterrent effect on Australians determined to have sex with children overseas, but there have been several successful prosecutions for such offences that would previously have been beyond the reach of Australian law.<sup>2</sup>

While the number of convictions is not significantly high, Australia's law in this context has been applauded internationally. For example in their reviews of sexual offence frameworks, the United Kingdom and Scotland referred to the Australian reforms and Australian views on best practice. Further, 'that Australia's laws have been used to guide reform internationally indicates that Australian practice is at a minimum on par with, and in some cases goes beyond, international practice'.<sup>3</sup>

The constitutional validity of the regime has also been tested, and upheld, by the High Court. In *XYZ v Commonwealth*<sup>4</sup>, the High Court held that the provisions were supported by section 51(xxix) of the Constitution (which allows the Commonwealth Parliament to make laws with respect to 'external affairs'), being laws which apply extraterritorially and which implement Australia's international treaty obligations under the Convention on the Rights of the Child.<sup>5</sup>

In 2005, amendments were made to the Criminal Code to prohibit using a carriage service (meaning telephone, Internet etc.) for sexual activity with children. Offences were also introduced to prohibit using a carriage service for child pornography and child abuse material. Possessing, producing, supplying or obtaining such material is also an offence. The policy reason behind these offences is that the anonymity of the Internet is exposing a large of number of children to being sexually abused. Further:

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1. Attorney-General's Department, *Proposed Reforms to Commonwealth Child Sex-Related Offences*, 2009, p. 9.
  2. Australian Institute of Criminology, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry in to the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 (Cth)*, February 2010, p. 2.
  3. Attorney-General's Department, *Proposed Reforms to Commonwealth Child Sex-Related Offences*, 2009, p. 11.
  4. *XYZ v Commonwealth* (2006) 227 CLR 532.
  5. Attorney-General's Department, *Proposed Reforms to Commonwealth Child Sex-Related Offences*, 2009, p. 9.

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there are links between the possession of child pornography and the commission of sexual offences against children. It is not necessarily the case that every person in possession of child pornography is also involved in sexually abusing children. There is also a lack of empirical research in this area. However, there is widespread support for the view that it is likely that the two may be connected.<sup>6</sup>

The creation, distribution and possession of child pornography and child abuse material fuels demand, and increases the market for the sexual and other exploitation of children. The production of child pornography requires a child to be victimised: sexual and other offences are often committed against real children in order to create photographic and video images of child pornography and child abuse activity. Creators of child pornography may travel overseas in order to exploit children in countries where there are inadequate child sex-related offences.<sup>7</sup>

### Basis of policy commitment

While the existing laws are capturing the intended conduct, the Rudd Government sees a need to improve the effectiveness and scope of the offences:

This Government is committed to taking all necessary action to prevent harm to children from occurring both in Australia and overseas. The sexual exploitation of children is devastating to the children involved, their families, and their communities.

We have a duty to ensure that with overseas travel commonplace, and the internet making information about destinations more accessible, Commonwealth laws provide a significant deterrent to abuse and a sound basis for prosecuting offenders.

Equally, rapidly changing technologies and the anonymity that the internet provides have resulted in unprecedented opportunities for child sex offenders. Our laws need to keep pace with the speed of technological change.<sup>8</sup>

This Bill is enhancing existing laws to achieve greater coverage of child sexual offences as well as to increase the penalties of some of the existing offences. It would be virtually impossible to argue against the Bill when the goal of protecting children from any harm, or potential harm, is a universal one. However, some provisions may attract particular attention for being unusually oppressive regarding the defendant and are inconsistent with the usual drafting rules for offences in the Criminal Code. As will be discussed throughout

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6. Attorney-General's Department, *Proposed Reforms to Commonwealth Child Sex-Related Offences*, 2009, p. 55.

7. Attorney-General's Department, *Proposed Reforms to Commonwealth Child Sex-Related Offences*, 2009, p. 55.

8. B O'Connor MP, 'Second reading speech: Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010', House of Representatives, *Debates*, 4 February 2010, pp. 408-410.

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this Digest, the Attorney-General's Department has provided extensive and thorough justification for the application of absolute liability to these types of offences.

### Committee consideration

The Bill was referred to the Senate Legal and Constitutional Affairs Committee for inquiry and reported on 18 March 2010. Details of the inquiry are at

[http://www.aph.gov.au/Senate/committee/legcon\\_ctte/crimessexualoffences/index.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/crimessexualoffences/index.htm)

The Committee made one technical recommendation and that was to amend the Bill to provide that:

consistent with the proposed approach under Division 272, a proceeding for an offence under Division 273 of the *Criminal Code Act 1995* (relating to child pornography and child abuse material offences) must not be commenced without the consent of the Attorney-General, if the defendant was under 18 years of age at the time he or she allegedly committed the offence.<sup>9</sup>

## Financial implications

The Explanatory Memorandum notes that the amendments made by this Bill will have no financial impact on Government revenue.<sup>10</sup>

## Key issues

### Capturing unintended conduct

The Senate Committee on Legal and Constitutional Affairs received 8 submissions to its inquiry into this Bill. Those submissions were generally supportive of the Bill. However, there was an overarching unease that the provisions had the potential to capture unintended conduct. For example, the Law Council of Australia (LCA) is opposed to the introduction of the preparatory offence (**proposed section 272.20**)<sup>11</sup> in its current form and recommended that the offence be narrowly defined 'so that it only captures conduct of ... [a] 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

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9. Recommendation 1, Senate Legal and Constitutional Affairs Committee, *Inquiry into Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010*, March 2010, p. 35.

10. Explanatory Memorandum, p. 3.

11. Discussed at p.15.

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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.<sup>12</sup>

Similarly, the LCA had the view that the offence of causing a child to engage in sexual activity (**proposed section 272.9**) drafted in its current form may capture ‘innocent, everyday sexual relations between consenting adults that happen to be observed by children.’<sup>13</sup>

The practice of what is termed ‘sexting’<sup>14</sup> was also flagged as possible conduct that may be unintentionally captured by these offences. The apparent generality of drafting in **proposed section 474.27A** was specified as a section that may capture conduct of an 18 year old and a 15 year exchanging nude or otherwise sexual pictures over the internet or mobile phone, ie. sexting. The Australian Privacy Foundation:

acknowledged that the prosecution of young people in relation to such offences would depend on the discretion of police and prosecuting authorities [but] preferred an approach that relies on the availability of appropriate defences or definitions to ensure that sexting is not capture by child sex offences. In this way young people would not have to rely on discretionary decisions to otherwise avoid prosecution for very serious offences.<sup>15</sup>

The Senate Committee agreed that young people engaged in such behaviour should not be exposed to the grave consequences and stigma that attach to allegations of, and convictions for, child sexual offences.<sup>16</sup> The Committee therefore recommended that the discretion of the Attorney-General be extended to prosecution of people under 18 years of age for child sex offences:

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12. Law Council of Australia, Submission No. 8 to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010*, March 2010: [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/crimessexualoffences/submissions.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/crimessexualoffences/submissions.htm), p. 10.
  13. Law Council of Australia, Submission No. 8 to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010*, March 2010: [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/crimessexualoffences/submissions.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/crimessexualoffences/submissions.htm), p. 12.
  14. Sexting is electronic communication of non-professional images or videos portraying one or more persons in a state of nudity or otherwise in a sexual manner: D Svantesson, Australian Privacy Foundation, *Proof Committee Hansard*, 9 March 2010, p. 2.
  15. Senate Legal and Constitutional Affairs Committee, *Inquiry into the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010*, March 2010, p. 30.
  16. Senate Legal and Constitutional Affairs Committee, *Inquiry into the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010*, March 2010, p. 34.

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This would mean that a young person could not be prosecuted for an offence under Division 272 (as already proposed) or Division 273, without the consent of the Attorney-General. The committee is of the view that the extension of this safeguard may ensure that behaviour which is not exploitative of, or harmful to, children is not captured by the child sex offence regime (particularly where that behaviour involves children themselves).<sup>17</sup>

### Absolute liability and the consent to prosecute

The offence provisions in the Bill apply absolute liability to some elements of the offence. The Explanatory Memorandum outlines the justification for applying absolute liability in each case. For example:

Absolute liability is appropriate and required for the element of the offences that the sexual intercourse was engaged in outside Australia because this element is a jurisdictional element of the offence. A jurisdictional element of the offence is an element that does not relate to the substance of the offence, but marks a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth and those that do not. The issue of whether the person intended to engage in the conduct in Australia or overseas is not relevant to their culpability. This is consistent with Commonwealth criminal law practice, as described in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.<sup>18</sup>

A further example of applying absolute liability to some of the offences is under **proposed subparagraph 272.10(1)(b)(i)** (that the child had a mental impairment). With no fault element needing to be proven by the prosecution and the defence of mistake of fact not being available the only element the prosecution needs to prove is the fact that the child had a mental impairment. While this is a significant burden on the defendant, a specific defence based on a belief that the child did not have a mental impairment is inserted into the Bill to balance the provision.

If the offences in the Bill applied strict liability rather than absolute liability, it would not be necessary to have such specific defences drafted alongside the offences. The drafting of the Bill is a little unconventional yet is justified by the nature of the conduct and the seriousness of the offences. The Senate Legal and Constitutional Affairs Committee agreed yet sought to ensure that prosecutions for these offences are not brought in inappropriate circumstances. In recommending that the Attorney-General's consent be required to prosecute, the provisions in this Bill will join a small number of existing Acts that provide that a prosecution for an offence under the Act cannot be commenced or, if

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17. Senate Legal and Constitutional Affairs Committee, Inquiry into the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010, March 2010, p. 31.

18. Explanatory Memorandum, p.16.

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commenced, cannot proceed except with the consent of the responsible Minister or some specified officer.<sup>19</sup> The Director of Public Prosecutions Prosecution Policy explains that

in some cases the consent provisions will have been included as it was not possible to define the offence so precisely that it covered the mischief aimed at and no more. Other cases may involve a use of the criminal law in sensitive or controversial areas, or must take account of important considerations of public policy. In appropriate cases the decision whether to consent to a prosecution is made after consultation with a relevant department or agency.<sup>20</sup>

### Defence of lawful authority

Section 10.5 of the Criminal Code contains a defence of lawful authority that excludes a person from being criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law. Provisions in this Bill have sought to make specific exclusion from prosecution where a person is investigating the potential offence, or is involved with the monitoring of an internet site or developing an internet content filter (see for example **proposed subsection 273.9**). On the face of it, it would seem unnecessary drafting to be so explicit in the immunity from prosecution when the defence of lawful authority would likely apply. However, maybe because of the gravity of the offences, the drafters sought to put it beyond doubt that law enforcement or similar persons involved with information technology are not criminally responsible for the offence (if acting in the course of his or her duties and is engaging in reasonable conduct).

### Minor error

Page 36 of the Explanatory Memorandum notes that **proposed subsection 272.16(2)** will provide a defence to offences committed under section 272.15 or 272.16. A minor error in this explanation is that 272.16 is not an offence provision so much as a list of defences

against offences provided for in other sections.

## Main provisions

### Schedule 1 – Amendments relating to sexual offences against children

#### Part 1 – Amendments relating to child sex offences outside Australia

**Item 1** will repeal Part IIIA of *Crimes Act 1914*. This is to facilitate the movement of the offences into the *Criminal Code Act 1995*. It has been general practice, where possible and

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19. Director of Public Prosecutions, *Prosecution Policy*, paragraph 2.24. Some examples include the *Defence Force Discipline Act 1982* (section 63), *Crimes Act 1914* (section 24AC), *Criminal Code* (if conduct occurs in foreign country) (section 16.1).

20. Director of Public Prosecutions, *Prosecution Policy*, paragraph 2.26.

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when appropriate, to transfer Commonwealth criminal offences enacted prior to 1995 into the Criminal Code.

### Subdivision A

After Division 271 of the Criminal Code, insert new Division 272 – child sex offences outside Australia

#### New Division 272 – Child sex offences outside Australia

**Item 4** inserts new Divisions 272 and 273. Division 272 deals with child sex offences outside Australia. Division 273 deals with offences involving child pornography material or child abuse material outside Australia.

**Proposed section 272.1** will insert new Definitions for the purposes of this Division. The terms ‘cause’, ‘offence’, ‘position of trust or authority’ and ‘sexual intercourse’ are then defined in **proposed sections 272.2-272.5**. Note that there are further definitions provided in the Bill for other terms such as ‘make available’ and ‘engage in sexual activity’ (see page 12).

**Proposed section 272.6** outlines the jurisdiction for the offences in this Division. At the time of the offence, the person must be a citizen or resident of Australia, a body corporate incorporated under an Australian law or any other body corporate that carries on its activities in Australia.

It is made clear by **proposed section 272.7** that the Divisions does not limit or exclude the operation of any other Australian law.

### Subdivision B

This subdivision outlines the proposed offences and their defences. Together the offences are titled ‘Sexual offences against children outside Australia’.

**Proposed section 272.8** creates two offences, both with a penalty of imprisonment for 20 years. **Proposed subsection 272.8(1)** makes it an offence if the person engages in sexual intercourse with another person (the child) and the child is under 16 and the sexual intercourse is engaged in outside Australia. **Proposed subsection 272.8(2)** creates a new offence of causing the child to engage in sexual intercourse in the presence of the defendant (outside Australia). Further:

**[Proposed] subsection 272.8(3)** will exclude the application of the automatic fault element applying to a result of conduct under section 5.6 of the Criminal Code (recklessness) and specifies that intention is the fault element applying to the physical element in paragraph 272.8(2)(b). Under paragraph 272.8(2)(b), the prosecution will have to prove that the person’s conduct *caused* the child to engage in sexual intercourse in the presence of the person (as the high maximum penalty reflects).

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Given the offence is intended to address the occurrence of actual sexual intercourse, it is appropriate for the prosecution to have to prove that the person meant the child to engage in sexual intercourse in their presence (rather than that they were reckless as to this fact).<sup>21</sup>

**Proposed section 272.9** will create two new offences and insert a specific defence provision against those offences. The first (**proposed subsection 272.9(1)**) will create a wide reaching offence for a person engaging in sexual activity with another person, where that person is under 16. The sexual activity must be engaged in outside Australia and the penalty for that offence is 15 years' imprisonment. **Proposed subsection 272.9(2)** creates an offence for a person to engage in conduct that causes the other person (the child) to engage in sexual activity in the presence of that person. The child must be under 16 at the time and the conduct must occur outside Australia. The person must *intend* (rather than be reckless for example) for his or her conduct to cause the child to engage in sexual activity.

It is a defence under **proposed subsection 272.9(5)** to a prosecution under this section if the conduct constituting either offence in the subsection consists only of the child being in the presence of the defendant while sexual activity is engaged in. Further, the defendant must prove that he or she did not intend to derive gratification from the presence of the child during that activity.

The Law Council of Australia is critical of this proposed defence to this offence, saying it is not convinced that:

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.<sup>22</sup>

The Attorney-General's Department responded by saying that with a fault element of intention, the drafting of the offence is acceptable.<sup>23</sup>

Note that it is a defence in **proposed subsection 272.16(1)** to an offence under **proposed sections 272.8** or **272.9** if the defendant proves that at the time, he or she believed that the child was at least 16. **Proposed subsection 272.16(2)** will provide a defence to these offences based on a belief about age. This is discussed further at page 12.

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21. Explanatory Memorandum, p. 16.

22. Law Council of Australia, Submission No. 8 to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010*, March 2010:  
[http://www.aph.gov.au/Senate/committee/legcon\\_ctte/crimessexualoffences/submissions.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/crimessexualoffences/submissions.htm), p. 2.

23. Senate Legal and Constitutional Affairs Committee, *Inquiry into the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010*, March 2010, p. 36.

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**Proposed section 272.10** will create a new aggravated offence where the above offences (in sections 272.8 and 272.9) occur where the child has either (i) a mental impairment; and/or (ii) the person is in a position of trust or authority in relation to the child, or the child is otherwise under the care, supervision or authority of the person. The penalty for this aggravated offence is 25 years imprisonment. The Explanatory Memorandum provides a thorough explanation of the liability that applies to these subparagraphs, at page 22 which can be used as an aid to the law's interpretation.

**Proposed section 272.11** creates a new offence relating to persistent sexual abuse of a child (under 16 years of age) outside Australia. The offence is technically complex and the Explanatory Memorandum provides a good overview of what is required for a successful prosecution under this section (see pages 23-24). This section contains 11 subsections. A person will commit an offence under section 272.11 if the person commits an offence (under sections 272.8(1), (2) or 272.9(1) or (2)) on 3 or more separate occasions during any period. The offence must have also been committed against the same child. The penalty for this offence is 25 years imprisonment. **Proposed subsection 272.11(4)** will provide that it is immaterial whether the underlying offence or conduct is the same on each occasion.

Further, it will not be required to specify or to prove the dates, or exact circumstances of the occasions, on which the conduct constituting the offence against this section occurred (**proposed subsection 272.11(5)**). However, a charge must specify, with reasonable particularity, the nature of and the period during which the offence occurred (**proposed subparagraphs 272.11(6)(a) and (b)**).

**Proposed subsection 272.11(7)** explicitly outlines what the trier of fact needs to be satisfied of (beyond reasonable doubt). The trier of fact must be satisfied about the material facts of certain occasions but need not turn his or her mind to the dates or chronology of these occasions. A judge will be required (under **proposed subsection 272.11(8)**) to warn the jury of these requirements.

**Proposed subsections 272.11(9)-(11)** make it clear that while double jeopardy cannot apply, alternative verdicts (under **proposed section 272.28**) can apply.

**Proposed section 272.12** creates two new offences for when the defendant is in a position of trust or authority. A person will commit an offence (with a penalty of 10 years imprisonment) if the person engages in sexual intercourse with a young person who is at least 16 but under 18 and, that person is in a position of trust or authority in relation to the young person. **Proposed paragraph 272.12(d)** provides that the sexual intercourse must be engaged in outside Australia. It will also be an offence, with a penalty of 10 years imprisonment) under **proposed subsection 272.12(2)** to cause a young person to engage in sexual intercourse in the presence of the person. The prosecution will be required to show that the person *intended* to cause the young person to engage in sexual intercourse. The Explanatory Memorandum provides an explanation of the applicability of absolute and strict liability to aspects of these offences (see pages 27-28).

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Similarly, a new offence under **proposed section 272.13** will carry a penalty of 7 years imprisonment if the person engages in, or causes the young person to engage in, sexual activity with or in the presence of the defendant (**proposed subsections (272.13(1) and (2))**). It will be a defence to a prosecution under this section if the conduct constituting the offence consists only of the young person being in the presence of the defendant while sexual activity is engaged in and the defendant proves that he or she did not intend to derive gratification from the presence of the young person during that activity (**proposed subparagraphs 272.13(6)(a) and (b)**). Again, the Explanatory Memorandum provides an overview and explanation of the applicability of fault elements and absolute or strict liability to these offences (see pages 29-30).

Procuring and grooming offences are set out in **proposed sections 272.14 and 272.15**.<sup>24</sup> **Proposed section 272.14** will create the offence of procuring a child to engage in sexual activity in Australia. Note that the term ‘sexual activity’ will be defined in the Dictionary to mean:

Sexual intercourse or any other act of a sexual or indecent nature (including an indecent assault) that involves the human body, or bodily actions or functions (whether or not that activity involves physical contact between people).<sup>25</sup>

Further, the phrase ‘engage in sexual activity’ means:

Without limiting when a person engages in sexual activity, a person is taken to engage in sexual activity if the person 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.<sup>26</sup>

The offence will apply when the person engage in conduct with the intention of procuring the child in engage in sexual activity (whether or not with the person outside Australia). The child is someone who is under 16, or who the person believes to be under 16. Paragraph 272.14(1)(d) provides that the offence will apply regardless of where, or by what means, the procuring took place, provided the intention was to procure the child to

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24. The term ‘grooming’ generally refers to behaviour that is designed to make it easier for the offender to procure a child for sexual activity. For example, an offender might build a relationship of trust with the child, and then seek to sexualise that relationship (eg. by encouraging romantic feelings or exposing the child to sexual concepts through pornography). The term ‘procuring’ generally refers to behaviour that encourages, entices, recruits or induces a child to engage in sexual activity. For example an offender might promise gifts or money to a child to have sex with the offender, or threaten a child with violence if they do not: Attorney-General’s Department, *Proposed Reforms to Commonwealth Child Sex-Related Offences*, 2009, p. 7.

25. See Item 10 of the Bill.

26. See Item 6 of the Bill.

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engage in sexual activity outside Australia. The penalty for this offence is 15 years imprisonment.

**Proposed section 272.15** will create the offence of grooming a child to engage in sexual activity outside Australia. A person will commit an offence if the person's conduct has the intention of making it easier to procure the child to engage in sexual activity (whether or not with the person) outside Australia. The child must be under 16 or the person must believe the person to be under 16. **Proposed subparagraph 272.15(1)(d)** provide that the offence will apply regardless of where, or by what means, the procuring took place, provided the intention was to procure the child to engage in sexual activity outside Australia. The penalty for this offence is 12 years imprisonment.

A defence based on the defendant's belief about age is outlined in **proposed section 272.16**. The Explanatory Memorandum confirms that this section is based on existing sections 50CA, 50CC and 50CD of the Crimes Act. The Explanatory Memorandum further states that 'the purpose of the defence is to ameliorate the effect of applying absolute liability to the circumstances of the offences that the child was a certain age'.<sup>27</sup>

It will be a defence to a prosecution for offences against **proposed sections 272.8, 272.9, 272.14** or **272.15** if the defendant proves that at the time he or she engaged in the conduct, he or she believed that the child was at least 16. Additionally, it is a defence to a prosecution under **proposed section 272.12** or **272.13** if the defendant proves that, at the time of the sexual intercourse or sexual activity, he or she believed that the young person was at least 18.

**Proposed section 272.17** will provide a defence to the same offences in this subdivision if the defendant proves that a valid and genuine marriage exists between the defendant and the child. This must be proven on the balance of probabilities.

### Subdivision C

This subdivision outlines the offences of benefiting from, encouraging or preparing for sexual offences against children outside Australia.

A penalty of 20 years imprisonment will apply to a person who engages in conduct with the intention of benefiting from an offence against the Division. **Proposed section 272.18** requires that the conduct must be reasonably capable of resulting in the person benefiting from an offence. This will apply whether within or outside Australia and whether or not the intention is for *financial* benefit. It is immaterial whether or not the offence is in fact committed.

Further, a person will commit an offence (under **proposed section 272.19**) if they have the intention to encourage an offence and the conduct is reasonably capable of encouraging

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27. Explanatory Memorandum, p. 36.

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such an offence. The penalty for this offence is 20 years imprisonment. To ‘encourage’ means to incite to, or urge, by any means whatever (including by a written, electronic or other form of communication); or aid, facilitate or contribute to in any way whatever (**proposed subsection 272.19(4)**).

Preparing for, or planning an offence involving sexual intercourse, or other sexual activity with a child will also be an offence (**proposed section 272.20**), with a penalty of 10 years imprisonment. Further, if a person does something with the intention of preparing for, or planning an offence against **proposed sections 272.12** or **272.13**, that person may be found guilty of an offence and subject to 5 years imprisonment. These offences apply regardless of where the act is done, regardless of whether the offence was actually committed. Under **proposed subparagraphs 272.20(3)(c) and (d)** both offences will apply whether or not the act is done in preparation for, or planning, a specific offence against a provision referred to in subsections (1) or (2). The Explanatory Memorandum states that

this clarifies that it is not necessary for the prosecution to identify a specific offence – it will be sufficient for the prosecution to prove that the particular conduct was related to ‘an’ offence. This ensures that the offence will be available where a person has planned a range of activities preparatory to committing a child sex tourism offence, that are still in formative stages. For example, the person may not necessarily have decided on a particular target, time or date or other specific particulars of the elements that would constitute one of the specified child sex tourism offences.<sup>28</sup>

#### Subdivision D

This subdivision deals with use of video link evidence in proceedings for an offence against this Division. So long as the witness is not a defendant in the proceeding, **proposed section 272.21** will allow the court to direct that the witness give evidence by video link. There are a number of sound factors (including technical factors specified under **proposed section 272.22**) that the court needs to satisfy itself of in making this direction.

#### Subdivision E

Subdivision E deals with specific rules about the conduct of trials for offences under this Division. This includes requiring the consent of the Attorney-General if the defendant was under 18 at the time her or she allegedly engaged in the conduct constituting the offence (**proposed section 272.31**).

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28. Explanatory Memorandum, p. 41.

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## New Division 273

A new **Division 273** is proposed to be inserted into the Criminal Code (**Item 4**). This Division is entitled ‘**Offences involving child pornography material or child abuse material outside Australia**’.

### Subdivision A

**Subdivision A** addresses preliminary matters including definitions, jurisdiction and double jeopardy. In submissions to the Senate Committee’s Inquiry into the Bill, the Victorian Police queried if the definition of certain material includes copies of documents. However, for consistency with the existing arrangements in the *Evidence Act 1995* and similar criminal offences, copies of documents have been included in the definition.

### Subdivision B

**Subdivision B** contains three new offences. These offences cover the possession, control, production, distribution or obtaining of child pornography or child abuse material outside Australia (**proposed sections 273.5 and 273.6**). Both offences have a penalty of 15 years imprisonment. There is also an aggravated offence (**proposed section 273.7**) which makes it an offence to engage in conduct under **proposed section 273.5 and 273.6** on 3 or more occasions and with 2 or more people. This aggravated offence carries a penalty of 25 years imprisonment.

### Subdivision C

**Subdivision C** outlines the defence to offences in this Division. A person is not criminally responsible for an offence against **proposed section 273.5 or 273.6** if their engagement in that conduct is of public benefit and does not extend beyond what is of public benefit. **Proposed subsection 273.9(2)** outlines that conduct is only of public benefit if and only if, the conduct is necessary for or assistance in law enforcement, compliance monitoring, the administration of justice or conducting scientific, medical or educational research. The conduct must be reasonable having regard to the purpose (**proposed subparagraph 273.9(3)**).

If a person is a law enforcement, intelligence or security officer (or similar) and is acting in the course of his or her duties, and engages in reasonable conduct, they will not be found guilty of the offences under **proposed sections 273.5 and 273.6**. Further, under **proposed subsection 273.9(5)**, if the person is assisting the Australian Communications and Media Authority to detect specific prohibited content, that person is not criminally responsible for an offence against **proposed sections 273.5 and 273.6**. Similarly, if a person is involved in manufacturing or developing content filtering technology that person is not criminally responsible for an offence against **proposed sections 273.5 or 273.6**. It is not clear why the defence of lawful authority in the Code (section 10.5) would not be sufficient for a defence against these offence provisions. However, it may be a policy

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decision to put it beyond doubt because of the seriousness and stigma that would be attached to a person who is charged with an offence under this section. The drafters may have also considered that it might serve as a necessary and an effective guide for prosecutors.

#### Subdivision D

This subdivision (**proposed sections 273.10-273.15**) allows and facilitates the giving of evidence by a witness by videolink.

**Items 5-11** insert new definitions into the Criminal Code's Dictionary of the following terms:

- cause
- engage in sexual activity
- mental impairment
- position of trust or authority
- procure
- sexual activity and sexual intercourse.

Part 2 – Amendments relating to child sex offences involving postal or similar services, or carriage services.

**Part 2** of the Bill makes amendments relating to child sex offences involving postal or similar services, or carriage services. These amendments are to Divisions 470, 471, 473, 474 of the Criminal Code.

**Proposed section 470.4** provide that the definitions that presently apply to other telecommunications offences in the Criminal Code will also apply to **proposed Subdivisions B and C** of Division 471.

**Item 14** inserts a new subdivision B at the end of Division 471. This Subdivision is entitled 'Offences relating to use of postal or similar service for child pornography material or child abuse material'. The general offence is at **proposed section 471.16** and creates an offence if a person causes an article to be carried by a postal or similar service and the article is, or contains, child pornography material. The penalty for this offence is 15 years imprisonment. The Explanatory Memorandum notes that:

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The purpose of this offence is to ensure that the use of a postal or similar service for conduct relating to child pornography is criminalised in a way that is consistent with comparable offences directed at the Internet.<sup>29</sup>

It will also be an offence (under **proposed subsection 471.17(1)**) where a person possesses, controls, produces, supplies or obtains child pornography material with the intention that the material will be used by that person, or another, in committing an offence against **proposed section 471.16**. Again, the penalty for this offence is 15 years imprisonment. **Proposed subsection 471.17(3)** states that it is not an offence to *attempt* to commit any offence. A person may be guilty of an offence under **proposed subsection 471.17(2)** even it is impossible to send the material, for example, if a computer contains child abuse material but is not connected to the internet.

Defences available to these two offences are listed in **proposed section 471.18** and are similar to those relating to child sex offences. That is, if a person is a law enforcement, intelligence or security officer (or similar) and is acting the course of his or her duties, and engages in reasonable conduct, they will not be found guilty of the offences under **proposed sections 471.16** and **471.17**. While the defence of lawful authority under the Code would likely apply to this provision, it would seem that the Government intends to put it beyond doubt that these persons are not to be captured by this offence.

The new offences of using a postal or similar service for child abuse material (**proposed section 471.19**) or for possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service (**proposed section 471.20**) are similarly framed to the new child pornography offences and have the same penalty provision (15 years imprisonment). Again, defences are prescribed (under **proposed section 471.21**) and an aggravated offence (**proposed section 471.22** involving conduct on 3 or more occasions and 2 or more people) will result in a penalty of 25 years imprisonment.

**Subdivision C** creates new offences relating to the use of postal or similar services involving sexual activity with a person under the age of 16. These are procuring and grooming offences. **Proposed section 471.24** will create an offence to send an article by post or a similar service to another, with the intention of procuring the recipient to engage in sexual activity. Further, the recipient is, or who the sender believes to be under 16. The penalty for this offence is 15 years imprisonment (**proposed subsection 471.24(1)**). The Explanatory Memorandum explains that the offence will apply:

Where a person (the sender) engages in conduct using a postal or similar service with the intention of procuring the child (the recipient) to participate in the following:

- sexual activity with the sender

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29. Explanatory Memorandum, p. 60.

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- sexual activity with another person who is at least 18 years of age (a participant), or
- sexual activity with another person who is under 18 years of age in the presence of the sender or a participant who is, or the sender believes to be, at least 18 years of age.

The offence is modelled on the existing carriage service offence in section 474.26 of the Criminal Code, which deals with the use of a carriage service to procure a person under 16 for sexual activity.<sup>30</sup>

Similarly **proposed section 471.25** will create an offence of using a postal or similar service to “groom” a person (or persons) under 16. The Explanatory Memorandum notes that the purpose of this offence

is to give law enforcement authorities the means to deal with preparatory conduct and enable a person to be arrested before any physical harm to the child occurs.<sup>31</sup>

The term “grooming” is taken to mean ‘intentionally making it easier to procure’ an individual to participate in sexual activity.<sup>32</sup>

The offence in **proposed subsection 471.25(3)** operates in the same way as the other offences in the section with the additional element that the sender intends that the sexual activity take place with another person who is under 16 in the presence of the sender, or another person who is at least 18. While the previous two offences in this section carry 12 years imprisonment, this offence will carry 15 years imprisonment. Further, absolute liability will apply to all three offences in this section on the physical element of belief about the child’s age. As explained in the Explanatory Memorandum:

The effect of applying absolute liability to an element of an offence means that no fault element needs to be proved and the defence of mistake of fact is not available. Accordingly, the prosecution will not be required to prove that the person knew or was reckless as to the fact that the recipient was under 16 years of age. Applying absolute liability to this element of the offence is appropriate given the intended deterrent effect of this offence and the availability of a specific ‘belief about age’ defence available under **proposed subsection 471.29**.<sup>33</sup>

Sending indecent material to a person under 16 will also be an offence against this Subdivision. **Proposed section 471.26** will carry a penalty of 7 years imprisonment if a person sends indecent material to a person who is, or is believed to be under 16. The

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30. Explanatory Memorandum, pp. 71-72.

31. Explanatory Memorandum, p. 74.

32. Explanatory Memorandum, p. 74.

33. Explanatory Memorandum, p. 75.

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meaning of indecent is provided as ‘indecent according to the standards of ordinary people’ (**proposed subsection 471.26(3)**).

Because the age-related provisions in these offences can only be determined by the defendant’s exclusive knowledge, **proposed section 471.27** sets out a number of age-related provisions about how the age of the sender, recipient and participant affects the criminality of conduct under this Subdivision. **Proposed subsection 471.27(5)** outlines the admissible evidence in determining how old a person is or was at the time of the offence. This includes: the person’s appearance, medical or other scientific opinion, a document (or copy of a document) that is or appears to be an official or medical record from a foreign country (**proposed subparagraphs 471.27(5)(a)-(d)**).

**Proposed section 471.28** provides that a person may be found guilty of an offence under **proposed section 471.24** or **471.25** even if it is impossible for the sexual activity referred to in that section to take place. The Explanatory Memorandum explains that this

is consistent with the fundamental component of the offence – criminalising the person’s intention to engage in sexual activity with a child. It will not matter if it is impossible for the sexual activity to take place.<sup>34</sup>

Attempting to commit an offence under **proposed sections 471.24** or **471.25** will not be an offence. This is appropriate because those are preparatory offences. It is not specified that it is not an offence to attempt to commit an offence under **proposed section 471.26**.

Defences to the offences in this Subdivision are outlined in **proposed section 471.29**. It is a defence to a prosecution if the defendant proves that at the time of the offence, the defendant believed that the recipient was at least 16. For the procuring and grooming offences, it is a defence if the defendant can prove that he or she believed that the participant was under 18.

Category A jurisdiction will apply to an offence against Subdivision B or C of this Division. As the Explanatory Memorandum notes, this is consistent with the jurisdiction applying to the carriage service offence regime.<sup>35</sup>

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34. Explanatory Memorandum, p. 78.

35. Explanatory Memorandum, p. 79. Category A geographical jurisdiction will be satisfied if (i) the conduct constituting the offence occurs wholly or partly in Australia, or wholly or partly on board an Australian aircraft or an Australian ship; (ii) a result of the conduct occurs wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship; or (iii) at the time of the alleged offence the person charged with the offence was an Australian citizen or body corporate. Where the conduct constituting an offence occurs wholly in a foreign country and only a result occurs in Australia, there is a defence available if there is no corresponding offence in that foreign country. However, that defence is not available if jurisdiction is to be exercised on the basis of the person's nationality.

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**Items 15 – 19** of the Bill will re-structure Subdivision C and D, including retitling them ‘General offences relating to use of telecommunications’ and ‘Offences relating to use of carriage service for child pornography material or child abuse material’ respectively.

**Items 20-27** will change the parameters of existing offences in Division 474. **Item 20** will expand the conduct criminalised under section 474.19(1)(a) of the Criminal Code. If a person uses a carriage service to advertise or promote child pornography or abuse material, they will be guilty of an offence. This applies to persons whether or not the person engages in transmitting or making available actual child pornography or abuse material. The amendments will also extend the operation of the offences to cover soliciting such material. The restructuring of existing sections 474.19 and 474.22 will:

criminalise accessing, causing material to be transmitted, transmitting, making available, publishing, distributing, advertising, promoting or soliciting child pornography or abuse material using a carriage service. The amendments will separate the conduct of accessing, causing material to be transmitted, transmitting, making available, publishing, distributing, advertising, promoting or soliciting from the means by which this conduct occurs. This will allow for the application of absolute liability to the element of the offence that this conduct occurs using a carriage service.<sup>36</sup>

**Items 21, 23, 25 and 27** will amend the child pornography carriage service offences by increasing the maximum penalty from 10 to 15 years imprisonment. The Explanatory Memorandum justifies this increase by stating that ‘... in light of the scale of contemporary offending [this increase] will ensure that the maximum penalty reflects the worse case scenario.’<sup>37</sup>

**Item 28** will insert a new aggravated offence (**proposed section 474.24A**) involving conduct on 3 or more occasions and 2 or more people in relation to these carriage service offences. The aggravated offence will attract a penalty of 25 years imprisonment.

**Item 29** will insert new Subdivision F, creating offences relating to the use of a carriage service involving sexual activity with a person under 16 years of age. The penalty for this offence (under **proposed section 474.25A**) is 15 years imprisonment. Similarly, to cause a child to engage in sexual activity with another person will attract a penalty of 15 years imprisonment. And aggravated offence under **proposed section 474.25B** will increase the penalty to 25 years imprisonment if the child has a mental impairment and/or the person is in a position of trust or authority in relation to the child, or the child is otherwise under the care, supervision or authority of the person.

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36. Explanatory Memorandum, p. 81.

37. Explanatory Memorandum, p. 82.

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**Items 30 to 43** make some improvements in the drafting and the subsequent operation of the existing grooming and procuring offences at sections 474.26 and 474.27. These are comprehensively explained in the Explanatory Memorandum at pages 92-95.

The existing general ‘catch-all’ provision in section 474.17 of the Criminal Code carries with it a penalty of 3 years imprisonment. Rather than increasing the penalty for this general offence, a new offence will be created that explicitly targets using a carriage service for indecent communications with a child, or a person the defendant believes to be a child (**proposed section 474.27A**). The penalty for this offence will be 7 years imprisonment. Further, **item 45** will repeal the existing subsection 474.28(1) and replace it with a provision making it clear that absolute liability applies to the physical element of circumstance of the offence. That is, where the recipient is someone who is under 16 years of age. Other amendments in **items 46-55** amend section 474.28 to extend its application to the new offences created under this Subdivision. These items also clarify to which elements of the offence absolute or strict liability applies. For a full and thorough explanation, see pages 98-101 of the Explanatory Memorandum.

**Item 59** will insert an important provision in **proposed section 475.1B**. This section inserts the presumption relating to the requirement in all offences in Division 474 that the relevant criminal conduct was engaged in using a carriage service. The Explanatory Memorandum discusses this in full at page 104:

The purpose of this section is to address problems being encountered by law enforcement agencies in proving beyond reasonable doubt that a carriage service was used to engage in the relevant criminal conduct.

Division 474 contains offences directed at telecommunications services, criminalising the use of a carriage service for a diverse range of criminal conduct. These offences rely on the Commonwealth’s telecommunications power under the Constitution. Thus, the requirement in offences across Division 474 that the relevant criminal conduct be carried out through a carriage service is a jurisdictional requirement, ... marking a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth and those that do not.<sup>38</sup>

**Item 60** inserts a new definition relevant to existing offences in section 474.19 and 474.22. The term ‘make available’ will include, but not be limited to, describing how to obtain access, or describing methods that are likely to facilitate access, to material (for example: by setting out the name of a website, an IP address, a URL, a password or the name of a newsgroup).

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38. Explanatory Memorandum, p. 104.

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### Part 3 –Consequential amendments

**Part 3** of the Bill makes consequential amendments to the *Australian Crime Commission Act 2002*, the *Crimes Act 1914*, the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979* to ensure that existing law enforcement powers are available to combat all Commonwealth child sex offences in the Code.

### Schedule 2 Forfeiture of child sex material

Schedule 2 of the Bill provides a specific scheme in the *Crimes Act 1914* for the forfeiture of child pornography and child abuse material that is related to a Commonwealth child sex offence. The Explanatory Memorandum explains that:

Currently, there is no specific Commonwealth scheme for dealing with such material or equipment. In cases where no person is convicted of an offence (either because no prosecution is commenced or a prosecution is commenced but results in an acquittal) the seized items must be returned. The return of child pornography and child abuse material, or items containing such material, is clearly inappropriate, and risks subjecting the owner to prosecution for State and Territory possession of child pornography offences.

In cases where a person is convicted of an offence, an application must currently be made for the forfeiture of the material under the *Proceeds of Crime Act 2002*. This is a lengthy process and one ill-suited for dealing with child pornography and child abuse material.<sup>39</sup>

The proposed scheme will have both administrative forfeiture (notice scheme) and court-ordered forfeiture. The scheme will apply to all child pornography or child abuse material seized or otherwise obtained by a Commonwealth, State or Territory police officer, where he or she believes on reasonable grounds that the material or article was derived from or used in connection with the commission of a Commonwealth child sex offence. Under the scheme, an officer will have the power to issue a notice for the forfeiture of the material or article.<sup>40</sup> In this context then, a computer, a mobile phone or DVD that has child pornography content may be forfeited where there is an identifiable person being in possession of that item. If an item is forfeited that is not connected with a Commonwealth child sex offence, then compensation is payable to the person who owns that item.

For court-ordered forfeiture, the court will be required to order the forfeiture of all child pornography or child abuse material, or articles containing such material, that it is satisfied were derived from or used in connection with the commission of a Commonwealth child

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39. Explanatory Memorandum, p. 114.

40. Explanatory Memorandum, p. 115.

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sex offence, in respect of which a person is or has been convicted, or that the court is satisfied (on the balance of probabilities) has been committed.<sup>41</sup>

**Item 8** will insert a new **Part IE**, entitled Forfeiture of child pornography material and child abuse material. **Proposed new subsection 23ZB(1)** will outline the forfeiture scheme, applicable if a constable reasonably believes that the forfeitable thing is derived from, or was used in connection with, the commission of a Commonwealth child sex offence. The constable may issue a notice (**proposed subsection 23ZB(2)**) which must fulfil the content requirements under **proposed subsection 23ZB(3)**. Persons who are issued a forfeiture notice have the capacity to object (in writing) within 30 days of the giving of the notice (**proposed subparagraph 23ZB(3)(c)**).

The Bill provides for a person to make a written request to the head of the police force (and includes the constable who issued the notice). If the request is for the person to be given a copy of parts of the thing, or of data contained in the thing that are readily identifiable (and are not child abuse material), the head of the police force must comply with the request. The head of the police force is permitted not to comply with the request if he or she reasonably believes that to do so might endanger the safety of anyone or prejudice an investigation or prosecution (**proposed section 23ZC**).

**Division 3** outlines the court-ordered forfeiture procedure. The DPP must apply to the court. The court must be satisfied that a Commonwealth child sex offence has been committed or that a person is or has been convicted of a Commonwealth child sex offence (by the court or another court). If so satisfied, the court must order the forfeiture to the Commonwealth of things that are derived from, or used in connection with the commission of the offence and have not already become property of the Commonwealth (**proposed section 23ZD**). This section also outlines that interim orders can be made and that the court may make compensation orders.

**Division 4** outlines general provisions relating to the forfeiture of property under this Part, including compensation arrangements if property is forfeited when a person had a right to possess it or had property in the thing (such as a CD in a computer) immediately before the forfeiture (**proposed section 23ZF**).

The Senate Legal and Constitutional Affairs Committee has made no comments on this Schedule and it would appear that this forfeiture scheme is widely accepted as necessary and appropriate to implement.

## Concluding comments

This Bill enhances the current child sex legislative regime to keep pace with technology and to correspond with society's expectations of having serious penalties for these types of

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41. Explanatory Memorandum, p. 116.

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offences. The Bill fills in legislative gaps where there were potential vulnerabilities for children who were somehow involved in a sexual act or abuse outside of Australia.

While ‘in complex areas like this, good law is challenging to formulate especially when it is prepared in a highly charged context’, this Bill is preceded by a comprehensive discussion paper and extensive public consultation. It is indeed possible that the Bill meets the challenge of making good law in this area. However, legislative change is not the only factor in protecting children from harm online:

While a legislative approach is useful to keep children safe in the online environment, it is unlikely that law enforcement alone can cause a noticeable reduction in the online child-grooming statistics, making non-legislative responses crucial in improving internet safety for children. Non-legislative responses include major social networking sites working proactively with law enforcement agencies to protect children against sexual offenders online, and the development of software to locate and identify perpetrators and the distributors of child abuse materials.<sup>42</sup>

At the time of publication of this Digest, social networking site Facebook announced the launch of a site to obtain information and report Facebook pages that are used for sex offenders and terrorism activity. This is a positive step to complement the child sex legislative regimes across the world.<sup>43</sup>

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42. Australian Institute of Criminology, Submission No.4 to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010*, March 2010: [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/crimessexualoffences/submissions.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/crimessexualoffences/submissions.htm), p. 2.

43. ‘Facebook moves to oust sex pests and criminals’, Sydney Morning Herald, 15 April 2010: <http://www.smh.com.au/technology/facebook-moves-to-oust-sex-pests-and-criminals-20100414-se5s.html>

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