



Australian Government
Attorney-General's Department

Criminal Justice Division

07/14328

28 September 2007

Ms Jackie Morris
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Morris

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

I thank the Senate Legal and Constitutional Affairs Committee for the opportunity to make a submission in relation to its inquiry into the Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007 (the Bill).

The Bill enhances the existing child sex tourism offences regime in the Crimes Act, by moving the provisions to the Criminal Code in modernised form, improving the operation of the current provisions and adding new offences. The Bill also introduces new provisions with respect to dealing in child pornography or child abuse material overseas. Further, the Bill will insert new provisions providing for the forfeiture of child pornography or child abuse material, or anything containing such material, that was used in the commission of a Commonwealth child sex offence.

Attached is a detailed description of the contents of the Bill (**Attachment A**), including a comparative table of old and new provisions (**Table A**).

The action officer for this matter is Jessica Robinson who can be contacted on 02 6250 6230.

Yours sincerely

Karl Alderson
Assistant Secretary
Criminal Law Branch

Work: 02 6250 6395
Mobile: 0417 530 237

Attachment A

The Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007 (the Bill) enhances the existing child sex tourism offence regime by moving the provisions from the Crimes Act to the Criminal Code and by the addition of new offences. The Bill also introduces new offences for dealing in child pornography or child abuse material overseas and a new regime for the forfeiture of child pornography or abuse material. Lastly, the Bill makes a number of other minor amendments to the *Australian Crime Commission Act 2002* (the ACC Act), the Criminal Code, the *Surveillance Devices Act 2004* (the SD Act) and the *Telecommunications (Interception and Access) Act 1979* (the TIA Act).

1. Child Sex Tourism offences

What do the amendments to the existing Child Sex Tourism regime do?

The Bill contains amendments which will repeal the existing child sex tourism provisions located in the Crimes Act and insert them into the Criminal Code in modernised form, in a new Division 272 entitled ‘Child sex offences outside Australia’. For a detailed comparative summary, see **Table A**. New offences will also be introduced targeting:

- the conduct of people who are preparing to commit a child sex tourism offence, and
- the procuring or ‘grooming’ of a young person for the purposes of sex overseas.

The amendments will also make a number of changes to existing penalties, in order to ensure consistent penalties for like offences across the Criminal Code.

Why are the amendments needed?

The existing child sex tourism provisions capture various conduct, including:

- engaging in sexual intercourse with a child, inducing a child to have sexual intercourse with a third person and participating in acts of indecency other than sexual intercourse with a child, and
- acts done with the intention of benefiting from, or encouraging, any of these offences.

The existing benefiting and encouraging offences are targeted at child sex ‘tour’ operators, rather than the individual child sex client. The new preparatory offence would fill this gap and apply to a wide range of preparatory behaviour done by a person with the intention of preparing or planning to commit an offence involving sexual conduct with a child overseas. Such conduct could include arranging travel and making a hotel reservation in a well known child sex tourism destination, so long as the conduct could be linked to an intention to commit an offence against the child sex tourism regime. The new offence will also apply to operators with respect to preparatory conduct undertaken with the intention of benefiting from child sex tourism.

The new procuring and ‘grooming’ offences are directed at people who are actively engaging with children in ways that will make them more likely to participate in sexual activity. They address a gap in the existing regime.

The current penalty for engaging in sexual conduct with a child or inducing a child to engage in sexual conduct will increase from 12 years to 15 years imprisonment. The changes to penalties are intended to achieve consistency for like offences across the Criminal Code. Without these changes, a person who engages in conduct to procure a child for sexual conduct (but does not actually engage in sexual conduct with a child) would be subject to a higher penalty than a person who actually engages in sexual conduct with a child.

The existing defence based on a belief about age, ie a belief that the child was over 16, will also apply to the new grooming and procuring offences.

The existing defence based on valid and genuine marriage currently applies to all existing child sex tourism offences in the Crimes Act (apart from the benefiting and encouraging offences). The amendments will have the effect that this defence will only apply to offences involving conduct between a husband and wife, and will not apply to offences involving conduct which directly involves another person. As such, the defence will apply to parts of the new grooming and procuring offences, but not those where a person other than the husband or wife is directly involved. The defence will also not apply to the new preparatory offence, in line with like offences relating to benefiting and encouraging.

Have these amendments been based on any existing precedents?

The new offences have been modelled in part on existing Commonwealth offences in the Criminal Code Act relating to the use of a carriage service (eg the Internet) for the procuring or grooming of a child for sexual activity. However the new offences reflect the broader nature of conduct related to child sex tourism, and are not limited to the online interactions which the carriage service offences target. Please see **Table A** for details of changes made.

How have the existing Crimes Act provisions been changed?

All of the existing child sex tourism provisions in the Crimes Act will be moved to the Criminal Code, in accordance with the policy that all criminal law offences should be located in the Criminal Code. The provisions have been redrafted to reflect the style of the Criminal Code.

The penalty scheme has been reviewed and altered, in order to achieve consistency both between child sex tourism offences and also with like offences across the Criminal Code. All offences relating to:

- sexual intercourse with a child will carry penalties of 17 years imprisonment
- sexual conduct (other than sexual intercourse) with a child and procuring a child will carry penalties of 15 years imprisonment, and
- grooming a child will carry penalties of 12 years imprisonment.

Changes have also been made to the two existing defences, the defence based on a belief about age and the defence based on a valid and genuine marriage. Under the existing provisions, both defences place a legal burden on the defendant. Under the new provisions, the defence based on belief about age will change from a legal burden to an evidential burden, this is appropriate as a belief as to the age of the child is not an element of the offence. The defence based on valid and genuine marriage will retain a legal burden on the defendant, and will now apply only to offences

between the husband and wife themselves, they will not apply when a person outside the marriage is directly involved in the conduct. For a more detailed summary, please see **Table A**.

2. Offences involving child pornography and child abuse material overseas

What do the new overseas child pornography and child abuse material offences do?

The Bill inserts a new Division 273 into the Criminal Code, entitled ‘Offences involving child pornography material or child abuse material outside Australia’. The proposed provisions make it an offence for Australians to possess, control, produce, distribute or obtain child pornography material or child abuse material overseas. These offences carry a maximum penalty of 10 years imprisonment.

Why are the new overseas child pornography and child abuse material offences needed?

Dealing in child pornography or child abuse material in Australia is currently outlawed by a comprehensive regime of Commonwealth, State and Territory offences. However, there is currently a gap in the law in relation to such behaviour by Australians overseas. Many countries have no specific laws addressing this behaviour, or are unable or unwilling to prosecute persons who engage in such behaviour. The new offences will prevent Australians from travelling overseas to collect, produce or distribute child pornography material in countries where such material is not illegal or where laws are not enforced.

What are the safeguards?

The new provisions contain various defences which will protect legitimate dealings in such material, for example for law enforcement purposes.

What has been the precedent for these reforms?

The new offences have been modelled on existing State and Territory offences and Commonwealth offences in the Criminal Code Act relating to the use of a carriage service (eg the Internet) for child pornography or child abuse material and related defences. For example, existing section 474.19 of the Criminal Code sets out an offence with respect to, amongst other things, the transmission or distribution of child pornography material via the Internet, carrying a penalty of 10 years imprisonment.

3. Forfeiture

What do the new forfeiture provisions do?

The Bill will insert new provisions into the Crimes Act to provide for the forfeiture of child pornography or child abuse material, or anything containing such material, that was used in the commission of a Commonwealth child sex offence.

The new provisions will require a court to make a forfeiture order either:

- automatically following a finding that a person is guilty of committing a Commonwealth child sex offence (proposed section 10), or

- on application by a constable or prosecutor where the court finds on the balance of probabilities that a Commonwealth child sex offence has been committed even though no one has been found guilty of a particular offence (proposed section 11).

In determining whether an offence has been committed on the balance of probabilities, a court is not making a finding against a person, but rather determining that the material in question should be forfeited.

Forfeiture orders will apply to an article containing the offensive material as well as the material itself because, if the material is held on a computer or data storage device, it may be possible to recover material after it has been deleted from the computer or device. Once material is forfeited it becomes the property of the Commonwealth and a constable can seize the material without warrant.

Why are forfeiture orders needed?

Currently child abuse and child pornography material and articles containing such material can only be forfeited in limited circumstances and by following the full process under the *Proceeds of Crime Act 2002*. In all other cases the material must be returned to the owner.

It is clearly inappropriate that such material be returned irrespective of whether a person has been found guilty of committing a criminal offence. Furthermore, retention of the material may constitute an offence against State and Territory legislation, namely possession of child pornography or child abuse material.

What are the safeguards?

The amendments contain appropriate safeguards to ensure procedural fairness and appropriate recompense to innocent owners of forfeited articles.

First, a constable or prosecutor who applies to the court for a forfeiture order to be made on the balance of probabilities that a child sex offence has been committed, will be required to notify the owner of the application (proposed subsection 11(3)).

Second, an owner of a forfeited article is entitled, where possible, to receive a copy of any non-offensive material contained in the article (proposed section 12A).

Third, if the article is electronic equipment such as a computer or a data storage device, the owner is also entitled to compensation for the reasonable cost of replacing the electronic equipment or device, unless the owner is also the person who has been found guilty of committing the child sex offence (proposed section 12B).

Finally, the provisions provide that forfeited material must not be destroyed for at least three months following the making of an order to ensure that the material is not needed for any other proceeding or investigation, which could include an appeal of a conviction (proposed subsection 12(3)).

4. Other minor amendments

The Bill amends the ACC Act, to include existing telecommunications offences in the Criminal Code relating to the use of a carriage service for child pornography and child abuse material in the definition of 'serious and organised crime'. In 2006, these offences were added to the definition of

‘serious and organised crime’ by the *Australian Crime Commission Amendment Regulations 2006 (No 4)* (the 2006 Regulations). This allowed the ACC to conduct an intelligence operation or investigation into networks of people using a carriage service to exchange child pornography or child abuse material, or to procure or groom persons under 16 for sexual activity. The current amendment will amend the definition in subsection 4(1) of the ACC Act so that it reflects the changes made to the definition by the 2006 Regulations. The amendment makes no substantive changes to the law.

The Bill contains amendments to the existing carriage service grooming offences in the Criminal Code. The existing offence requires that a person use a carriage service to transmit a communication to a second person and *the communication includes material that is indecent*. The requirement that the material is indecent will be removed, as it limits the type of communications that are captured. Grooming activity may involve the transmission of indecent material – such as pornography – but is just as likely to include communications that are designed to build trust with the perpetrator or invoke romantic feelings in the person under 16 years of age.

The Bill makes changes to the SD Act. The SD Act currently refers to the existing child sex tourism provisions in the Crimes Act, with respect to the emergency authorisation for the use of a surveillance device where there is a risk of loss of evidence in relation to the investigation of certain offences. The amendments will replace these references with the new child sex tourism provisions in the Criminal Code and also insert references to the new overseas child pornography offences to make emergency authorisations also available where there is a risk of loss of evidence in relation to an overseas child pornography offence.

The TIA Act will also be amended in relation to the issuing of telecommunications interception warrants. Such warrants may only be issued to further the investigation of a serious offence. The definition of ‘serious offence’ currently includes a reference to the existing child sex tourism provisions in Part IIIA of the Crimes Act. This will be replaced with a reference to the new child sex tourism provisions in the Criminal Code and also the new overseas child pornography offences, in order to ensure that telecommunications interception warrants may be issued in relation to the new child sex tourism and overseas child pornography offences. As a result of these amendments, telecommunications interception warrants will be available for the investigation of a child sex tourism offence or overseas child pornography offence without any further requirement that the offence have an element of organisation or planning. This is different to the current position in which such warrants are only available for the investigation of a child sex tourism offence in Part IIIA of the Crimes Act where the offence involves, amongst other things, two or more offenders and substantial planning and organisation.

Table A

Comparison of existing Crimes Act provisions and proposed new Criminal Code provisions

*Note – ‘Unchanged’ means either no change at all or no substantive change (minor technical changes may have been made)

	Existing provisions (Crimes Act unless otherwise specified)	Proposed new Criminal Code provisions in the Bill
Preliminary	50AA – General – definitions	272.1 – Definitions: <ul style="list-style-type: none"> • provisions regarding extension of criminal responsibility moved to separate section (272.4 – see below) • Definition of ‘vagina’ removed and inserted in 272.3 (definition of sexual intercourse – see below) • Definition of ‘Australia’ removed • All other definitions retained.
	50AB – Meaning of <i>act of indecency</i>	272.2 – Meaning of <i>act of indecency</i> – unchanged
	50AC – Meaning of <i>sexual intercourse</i>	272.3 – Meaning of <i>sexual intercourse</i> – now includes the definition of ‘vagina’ from s 50AA.
	50AA(2) - General	272.4 – Extension of criminal responsibility <ul style="list-style-type: none"> • All general provisions regarding extension of criminal responsibility apply to all of Division 272 – Child sex offences outside Australia, with some exceptions: • Excludes application of s11.2 (complicity) of the Criminal Code to s272.16 • Excludes application of 11.1 (attempt) to s 272.11, 272.12, 272.17 • Excludes application of s 11.4 (incitement) to any offences in Division 272
	50AD – Who can be prosecuted for an offence committed overseas	272.5 – Who can be prosecuted for an offence committed overseas – substantially unchanged.
	50GA – Saving of other laws	272.6 – Saving of other laws – makes clear that these provisions don’t limit or exclude the operation of any other Commonwealth, State or Territory

		laws. Unchanged.
Child Sex Tourism offences	50BA – Sexual intercourse with child under 16 – 17 years imprisonment	272.7 – Sexual intercourse with person under 16 - Penalty: 17 years imprisonment – substantially unchanged.
	50BB – Inducing child under 16 to engage in sexual intercourse with a third person – 17 years imprisonment	272.8 – Inducing person under 16 to engage in sexual intercourse with a third person – Penalty: 17 years imprisonment – substantially unchanged.
	50BC – Sexual conduct involving child under 16 – 12 years imprisonment	272.9 – Sexual conduct involving person under 16 – Penalty: 15 years imprisonment <ul style="list-style-type: none"> • substantially unchanged, • penalty increased from 12 to 15 years.
	50BD – Inducing child under 16 to be involved in sexual conduct – 12 years imprisonment	272.10 – Inducing person under 16 to be involved in sexual conduct – 15 years imprisonment <ul style="list-style-type: none"> • same substance, different format, • penalty increased from 12 to 15 years.
	Nil. However proposed new provision is modelled on an existing Criminal Code carriage service offence - 474.26 – Using a carriage service to procure persons under 16 years of age – Penalty: 15 years imprisonment.	272.11 – Engaging in conduct to procure persons under 16 years of age – Penalty: 15 years imprisonment <ul style="list-style-type: none"> • Subsection 1 <ul style="list-style-type: none"> ○ First person procures second person (child) to engage in or submit to sexual activity with the first person, or ○ First person procures second person to be present while first person engages in sexual activity (either by him/herself or with others) • Subsection 2 <ul style="list-style-type: none"> ○ First person procures second person (child) to engage in or submit to sexual activity with a third person, or ○ First person procures second person (child) to be present with the first person while a third person engages in or submits to sexual activity with other people
Nil. However proposed new provision is modelled on an existing Criminal	272.12 – Engaging in conduct to “groom” persons under 16 years of age – outside Australia – 12 years imprisonment	

	<p>Code carriage service offence - 474.27 – Using a carriage service to “groom” persons under 16 years of age – Penalty: 12 years imprisonment</p>	<ul style="list-style-type: none"> • Subsection 1 <ul style="list-style-type: none"> ○ First person makes it easier to procure second person (child) to engage in or submit to sexual activity with the first person, or ○ First person makes it easier to procure second person to watch while first person engages in sexual activity (either by him/herself or with others) • Subsection 2 <ul style="list-style-type: none"> ○ First person makes it easier to procure second person (child) to engage in or submit to sexual activity with a third person, or ○ First person makes it easier to procure second person (child) to be present with the first person while a third person engages in or submits to sexual activity with other people
	<p>50CA – Defence based on belief about age – applies to all offences from 50AA to 50BD above</p>	<p>272.13 – Defence based on belief about age</p> <ul style="list-style-type: none"> • Applies to s 272.7 to 272.12 inclusively • includes subsection duplicating existing 50CD allowing jury to consider reasonableness of alleged belief. • Changed from a legal burden to the defendant now bearing an evidential burden (was legal despite the note re evidential burden in existing 50CA – see 50CC)
	<p>50CB – Defence based on valid and genuine marriage – applies to all offences from 50AA to 50BD above</p>	<p>272.14 – Defence based on valid and genuine marriage – will now only apply to:</p> <ul style="list-style-type: none"> • 272.7 (sexual intercourse with a person under 16), • 272.9 (sexual conduct involving person under 16), • 272.11(1) (procuring, only ss(1), not ss(2)), and • 272.12(11) (grooming, only ss(1), not ss(2)). • No longer available where a person outside marriage directly

		<p>involved – eg will not apply to ss 272.11(2)</p> <ul style="list-style-type: none"> • Legal burden on defendant unchanged (was legal despite the note re evidential burden in existing 50CB – see 50CC)
	50CC – Defence must be proved on balance of probabilities	<p>Nil.</p> <ul style="list-style-type: none"> • No longer had any separate provision, but now spelt out within defences themselves. • Belief about age defence changed to an evidential burden, marriage defence is a legal burden.
	50CD – Jury may consider reasonableness of alleged belief	Has been included in actual defence provision 272.13 above.
Offences of benefiting from, encouraging or preparing to commit sexual offences against children overseas	50DA – Benefiting from offence against this Part – 17 years imprisonment	<p>272.15 – Benefiting from offence against this Division – 17 years imprisonment –</p> <ul style="list-style-type: none"> • existing ss(1B) removed (ss(1B) addressed lack of need to prove that the defendant knew that conduct would be an offence against the Part.
	50DB – Encouraging offence against this Part – 17 years imprisonment	<p>272.16 – Encouraging offence against this Division – 17 years imprisonment – now includes 272.19 (new preparatory offence below) as an offence which it does not apply to, in addition to 272.18. Format also different, including changing examples from a subsection to a note and removing one example.</p>
	Nil.	<p>272.17 – Preparing to commit offence against this Division</p> <ul style="list-style-type: none"> • Preparing to commit offences addressing sexual intercourse or benefitting – 17 years imprisonment • Preparing to commit offences addressing sexual conduct – 15 years imprisonment
Video link evidence	50EA – When court may take evidence by video link	272.18 - When court may take evidence by video link – altered to include existing 50EB (directions regarding the giving of evidence by video link can only be made on application by a party to the proceedings)
	50EB – Motion of parties	Has been included in 282.18 above.

	50EC – Technical requirements for video link	272.19 – Technical requirements for video link – minor change replacing ‘point’ with ‘location’.
	50ED – Application of laws about witnesses	272.20 – Application of laws about witnesses – minor change transferring ss(2) to a note.
	50EE – Administration of oaths and affirmations	272.21 – Administration of oaths and affirmations – unchanged.
	50EF – Expenses	272.22 – Expenses – unchanged
	50EG – Other laws about foreign evidence not affected	272.23 – Other laws about foreign evidence not affected – unchanged.
Other rules about conduct of trials	50FA – Certain material taken to be evidence of age	272.24 – Certain material taken to be evidence of age <ul style="list-style-type: none"> ss(1) added – evidence that a person was represented to the defendant as being of a particular age, in the absence of evidence to the contrary, is proof that the D believed that person to be of that age.
	50FB – Alternative verdicts	272.25 – Alternative verdicts – unchanged.
	50FC – Double jeopardy	272.26 – Double jeopardy – unchanged.
	50FD – Sentencing – factors to take into account	272.27 – Sentencing – unchanged.
	50GA – Saving of other laws	Moved up to subdivision of preliminary provisions as new 272.6 (see above).
Offences involving child pornography material and child abuse material outside Australia	Nil.	273.1 – Definitions.
	Nil.	273.2 – Who can be prosecuted for an offence committed overseas.
	Nil.	273.3 – Double jeopardy.
	Nil.	273.4 – Saving of other laws <ul style="list-style-type: none"> Division does not exclude or limit operation of other laws.
	Nil. However there are two comparable existing carriage service offences in the Criminal Code: 474.19 – using a carriage service for child pornography material – 10 years imprisonment <ul style="list-style-type: none"> Accessing, causing to be transmitted, transmitting, making available, publishing, otherwise distributing such material 	273.5 – Possessing, controlling, producing, distributing or obtaining child pornography material outside Australia – 10 years imprisonment.

	<p>474.20 – possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service – 10 years imprisonment</p> <ul style="list-style-type: none"> • Preparatory offence 	
	<p>Nil.</p> <p>However there are two comparable existing carriage service offences in the Criminal Code:</p> <p>474.22 – Using a carriage service for child abuse material – 10 years imprisonment</p> <ul style="list-style-type: none"> • Accessing, causing to be transmitted, transmitting, making available, publishing, otherwise distributing such material <p>474.23 - possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service – 10 years imprisonment</p> <ul style="list-style-type: none"> • Preparatory offence 	<p>273.6 - Possessing, controlling, producing, distributing or obtaining child abuse material outside Australia – 10 years imprisonment.</p>
	<p>Nil.</p> <p>However proposed new provision is modelled on existing Criminal Code carriage service defence provisions:</p> <p>474.21 – Defences in respect of child pornography material and 474.24 – Defences in respect of child abuse material</p> <ul style="list-style-type: none"> • Public benefit • Conduct necessary for law enforcement activity • Involvement in ACMA complaint/investigation 	<p>273.7 – Defences to offences against this Division</p> <ol style="list-style-type: none"> (1) Public benefit (2) Exhaustive circumstances when conduct is of public benefit <ul style="list-style-type: none"> • Includes reference to enforcing the laws of a foreign country as well as Australia. • Allows ‘conducting scientific, medical or educational research’ (without existing requirement that research be approved by Minister) (3) New subsection stating that ss2(d) only applies if persons conduct reasonable in all the circumstances (4) Conduct carried out in course of duties as a law enforcement, intelligence or security officer <ul style="list-style-type: none"> • Includes reference to an equivalent officer of the

		<p>government of a foreign country</p> <p>(5) Involvement in ACMA complaint/investigation</p>
Nil. But based on existing 50EA of the Crimes Act		<p>273.8 – When court may take evidence by video link</p> <ul style="list-style-type: none"> • minor change as detailed in equivalent new provision in 272.18 above.
Nil. But based on existing 50EC of the Crimes Act.		<p>273.9 – Technical requirements for video link</p> <ul style="list-style-type: none"> • minor change as detailed in equivalent provision in 272.19 above.
Nil. But based on existing 50ED of the Crimes Act.		<p>273.10 – Application of laws about witnesses –</p> <ul style="list-style-type: none"> • minor change as detailed in equivalent provision in 272.20 above.
Nil. But based on existing 50EE of the Crimes Act.		<p>273.11 – Administration of oaths and affirmations – unchanged.</p>
Nil. But based on existing 50EF of the Crimes Act.		<p>273.12 – Expenses – Orders regarding expenses incurred in the giving of evidence – unchanged.</p>
Nil. But based on existing 50EG of the Crimes Act.		<p>273.13 Other laws about foreign evidence not affected</p> <ul style="list-style-type: none"> • Subdivision does not exclude foreign laws regarding evidence • Unchanged.