

The Senate

Legal and Constitutional Affairs Legislation Committee

Crimes Legislation Amendment (Sexual Offences Against
Children) Bill 2010 [Provisions]

March 2010

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ABBREVIATIONS

| | |
|----------------|---|
| APF | Australian Privacy Foundation |
| the Bill | Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 |
| the Code | Criminal Code 1995 |
| the Department | Attorney-General's Department |
| EM | explanatory memorandum |
| LCA | Law Council of Australia |
| MCCOC | Model Criminal Code Officers Committee |

RECOMMENDATIONS

Recommendation 1

3.58 The committee recommends that the Bill be amended 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.

Recommendation 2

3.59 Subject to the preceding recommendation, the committee recommends that the Senate pass the Bill.

CHAPTER 1

INTRODUCTION

Purpose of the Bill

1.1 On 4 February 2010, the Senate referred the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 (the Bill) for inquiry and report by 15 March 2010. On 15 March 2010, the Senate agreed to extend the reporting date to 18 March 2010.

1.2 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* to ensure there is in place a comprehensive regime of sexual offences against children, where those offences occur across or outside Australian jurisdictions (such as over the Internet or overseas).

1.3 In summary, the Bill seeks to:

- strengthen the existing child sex tourism regime;
- introduce new offences relating to child pornography, child abuse material and use of a postal service for child sex-related activity;
- enhance the coverage of offences relating to use of a carriage service for sexual activity with a child, child pornography or child abuse material;
- make minor amendments relating to existing and relevant law enforcement powers; and
- introduce a new forfeiture scheme relating to child pornography and child abuse material.

Background

1.4 The explanatory memorandum (EM) to the Bill notes that the sexual exploitation of children is a devastating and widespread form of criminal activity. In the second reading speech to the Bill, the Minister for Home Affairs, the Hon. Brendan O'Connor MP, emphasised the government's commitment to taking all necessary action to prevent harm to children from sexual exploitation. The Minister noted that Australia has obligations at both the national and international level to protect children from sexual exploitation and child abuse, arising from Australia having ratified the (1989) Convention on the Rights of the Child in 1990.¹

1 The Hon. Brendan O'Connor MP, Minister for Home Affairs, *House of Representatives Hansard*, 4 February 2010, p. 3. Under Article 34 of the Convention on the Rights of the Child signatories undertake all appropriate national, bilateral and multilateral measures to protect children from all forms of sexual exploitation and sexual abuse.

1.5 In Australia, responsibility for combating child sexual exploitation is shared between the Commonwealth and the states and territories. While the states and territories are responsible for child sex-related offences occurring domestically within their respective jurisdictions, the Commonwealth has responsibility for child sex-related offences occurring across or outside Australian jurisdictions (for example, where the Internet is involved or the offence is committed overseas). This sharing of responsibilities reflects the division powers between the Commonwealth and the states under section 51 of the Constitution.

1.6 The Minister's second reading speech states that consultation over the proposed reforms to the sexual offences against children regime has been undertaken. This process 'indicated strong support' for the measures in the Bill, including from state and territory governments, child safety commissioners, and child protection organisations such as Child Wise and Save the Children.² These groups reportedly commented that the changes would 'definitely strengthen Australia's capacity to prosecute would-be child sex offenders' and would see Australia 'again be the leaders in international best practice in relation to the legislation and policing of child sex tourism'.³

Current legislation

1.7 In 1994, the Keating Government introduced the *Crimes (Child Sex Tourism) Amendment Act 1994* (the Act) to put in place a suite of new criminal offences targeting Australians who engage in the sexual exploitation of children overseas. The legislation was not limited only to child sex tourism, but also covered a wide range of sexual offences committed overseas against children (defined as a person under the age of 16). The premise underpinning the legislation was that countries are themselves primarily responsible for sexual abuse and exploitation of children committed in their own jurisdictions. The extra-territorial application of the Act was therefore intended to fill the gap only in those cases where another country was unwilling or unable to take action.

1.8 In 2005, the Howard Government introduced the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No. 2) Act 2004*, which put in place a range of offences related to the use of a telecommunications network or carriage service,⁴ such as the Internet or a mobile phone, in relation to child pornography or child abuse material, or to procure or 'groom' a person under 16 years of age for a sexual purpose. These offences were enacted in response to the

2 The Hon. Brendan O'Connor MP, Minister for Home Affairs, *House of Representatives Hansard*, 4 February 2010, p. 3.

3 The Hon. Brendan O'Connor MP, Minister for Home Affairs, *House of Representatives Hansard*, 4 February 2010, p. 3.

4 'Carriage service' is defined in the *Telecommunications Act 1997* to mean a service for carrying communications by means of guided and/or unguided electromagnetic energy (section 7).

increasing use by offenders of new technologies such as the Internet to engage in the sexual exploitation of children.

1.9 In introducing the current Bill, the Minister stressed that the current child sexual offences regime provides an extensive framework for the prevention, investigation and prosecution of all forms of child exploitation. However, he also noted the need to update existing laws in light of the volume of overseas travel by Australians. Further, rapidly changing technologies, particularly the Internet, have made information about overseas travel more accessible, which has both fuelled the propensity of Australians to travel overseas and provided offenders with unprecedented opportunities and anonymity.⁵ The Minister commented:

This bill will implement a range of reforms to the...[existing] offence regimes to ensure that they remain effective and continue to meet the needs of law enforcement agencies in combating contemporary offending.⁶

Conduct of the inquiry

1.10 The committee advertised the inquiry in the *Australian* newspaper on 10 February 2010, and invited submissions by 19 February 2010. The committee also wrote to over 50 organisations and individuals inviting submissions. Details of the inquiry, the Bill and associated documents were placed on the committee's website.

1.11 The committee received 8 submissions, which were placed on the committee's website for ease of access by the public. These are listed at Appendix 1.

1.12 The committee held a public hearing in Canberra on 9 March 2010. Witnesses who appeared at the hearing are listed at Appendix 2. The *Hansard* transcript is available through the Internet at <http://aph.gov.au/hansard>.

Acknowledgement

1.13 The committee thanks the organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.14 Submission references in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcripts.

5 The Hon. Brendan O'Connor MP, Minister for Home Affairs, *House of Representatives Hansard*, 4 February 2010, p. 3.

6 The Hon. Brendan O'Connor MP, Minister for Home Affairs, *House of Representatives Hansard*, 4 February 2010, p. 3.

CHAPTER 2

OVERVIEW OF THE BILL

Key provisions of the Bill

- 2.1 There are two schedules to the Bill. Schedule 1 of the Bill (Item 1) will:
- repeal the existing child sex tourism offence regime in the *Crimes Act 1914* and move the provisions to the Criminal Code Act 1995 (the Criminal Code) (proposed new Divisions 272 and 273);¹
 - seek to strengthen the existing child sex tourism regime by improving the operation of existing offences for sexual intercourse or other sexual activity with a child; and by introducing new sexual activity offences directed at aggravated conduct, persistent sexual abuse and sexual activity with a young person (between 16 and 18 years of age) where the defendant is in a position of trust or authority in relation to the young person;
 - introduce new offences for Australians dealing in child pornography and child abuse material overseas, for which there are currently no offences applying extra-territorially. New offences will apply for possessing, controlling, producing, distributing or obtaining child pornography or child abuse material outside Australia; and
 - make minor consequential amendments.

2.2 Schedule 2 of the Bill will establish 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.

2.3 The main focus of this chapter is on the amended and new offences to be introduced by the Bill.

SCHEDULE 1—AMENDMENTS RELATING TO SEXUAL OFFENCES AGAINST CHILDREN

Part 1—Amendments relating to child sex offences outside Australia

2.4 New Division 272 of the Criminal Code will deal with child sex offences outside Australia (child sex tourism) and Division 273 will deal with offences involving child pornography or child abuse material outside Australia (Item 4).

1 The explanatory memorandum (EM) advises that this is consistent with the general practice of transferring Commonwealth criminal offences enacted prior to 1995 into the Criminal Code.

Division 272—Child sex offences outside Australia

2.5 New Division 272 (Subdivision A) of the Criminal Code will contain the definition provisions currently contained in section 50AA of the *Crimes Act 1914*. Some amendments to the existing definitions, as well as new definitions, will also be included (these are discussed below where relevant).²

2.6 The offences relating to child sex offences outside Australia in new Division 272 (Subdivision B) of the Criminal Code will be based on existing Part IIIA 'Child Sex Tourism' in the *Crimes Act 1914*.

Offences directed at sexual intercourse and other sexual activity

Sexual intercourse and sexual conduct offences

2.7 Existing child sex tourism offences in Part IIIA of the *Crimes Act 1914* criminalise engaging in sexual intercourse or sexual conduct with a person under 16, or inducing a person under 16 to engage in sexual intercourse or sexual conduct in the presence of the defendant.³ The amendments are intended to simplify the structure of these offences by merging the existing offences into one offence.

2.8 The new 'sexual intercourse' offence will apply to *engaging* in sexual intercourse with a child (paragraph 272.8(1)(a))⁴ or to *causing* a child to engage in sexual intercourse in the presence of the defendant (outside Australia) (paragraph 272.8(2)(b)). The use of *causing* rather than *inducing* is intended to avoid confusion by distinguishing this offence from the new procuring offence to be inserted by the Bill. It also makes clear that the offence is directed not at inducing conduct but at the more serious conduct of actual sexual intercourse.

2.9 The maximum penalty for an offence under this section will be 20 years imprisonment (increased from 17 years under the *Crimes Act 1914*).

2.10 The current 'sexual conduct' offences will be replaced by an offence directed at 'sexual activity', which will apply to *engaging* in sexual activity with a child (paragraph 272.9(1)(a)) or *causing* a child to engage in sexual activity in the presence of the defendant (outside Australia) (paragraph 272.9(2)(b)). The new 'sexual activity' offence removes current references to specific variations of behaviour that the offence is intended to cover, and relies instead on the existing definition of *sexual activity* in the Criminal Code (Item 10) and a new extended definition of *engage in sexual activity* (Item 6). The purpose of the offence is to cover any conduct which involves a child engaging in any sexual activity (other than sexual intercourse) with, or in the presence of, the defendant outside Australia.

2 For full details see the EM, pp 11-14.

3 *Crimes Act 1914*, sections 50BA, 50BB, 50BC and 50BD.

4 All references are to proposed sections unless otherwise indicated.

2.11 Subsection 272.9(5) will make available a defence to these offences where the child was present but the defendant did not intend to derive gratification. The EM explains that this defence is intended to ensure that a person will not be captured by the offences in cases where a child happens to be present but there was no intention on the part of that person to derive gratification from the child's presence.

2.12 The maximum penalty for an offence under this section will be 15 years imprisonment (increased from 12 years under the *Crimes Act 1914*).

New aggravated offences

2.13 Section 272.10 will introduce new aggravated 'sexual intercourse' and 'sexual activity' offences.⁵ The aggravated offences will apply where the child has a mental impairment and/or the defendant 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 defendant. The new offence will rely on the existing definition of *mental impairment* in subsection 7.3(8) of the Criminal Code and on the new definition of *position of trust or authority* (Item 4). However, this aggravating factor is intended to apply more broadly than just those specific relationships that will be prescribed under the definition, and it will be for the court to determine whether the child was otherwise under the care, supervision or authority of the defendant.

2.14 A defence will be available to the defendant to the effect that, at the time the underlying offence was committed, he or she believed that the child did not have a mental impairment (subsection 272.10(6)). The defence of mistake of fact and the general defences under existing section 9.2 and Part 2.3 of the Criminal Code will also be available to a defendant.

2.15 The maximum penalty for an offence under this section will be 25 years imprisonment.

New persistent sexual abuse offence

2.16 Section 272.11 introduces a new offence of persistent sexual abuse of a child overseas. In satisfying this offence it will not be necessary to specify or prove the dates or exact circumstances of the occasions on which the offending behaviour occurred (subsection 272.11(5)). It will also be immaterial whether the underlying offence is the same on each occasion (subsection 272.11(4)). This takes into account past difficulties in presenting evidence of particular acts with sufficient precision.

2.17 The maximum penalty for an offence under this section will be 25 years imprisonment.

5 That is, subsections 272.8(1), 272.8(2), 272.9(1) and 272.9(2).

New offence of abuse of a young person where offender is in a position of trust or authority

2.18 Sections 272.12 and 272.13 will introduce new 'sexual intercourse' or other 'sexual activity' offences with a young person (a person aged between 16 and 18 years of age). Under these sections, it will be an offence to *engage* in sexual intercourse with a young person or to *cause* a young person to engage in sexual intercourse in the presence of the defendant outside Australia, where the defendant is in a *position of trust or authority* in relation to the young person.

2.19 A number of defences will be available to a defendant accused of an offence under section 272.12. The amendments include a specific defence of belief of age (section 272.16) as well as a specific defence relating to the existence of a valid and genuine marriage (section 272.17). The defence of mistake of fact and the general defences under section 9.2 and Part 2.3 of the Criminal Code, respectively, will also be available. In relation to section 272.13, the specific defences relating to belief of age and the existence of a valid and genuine marriage will be available. The general defence under Part 2.3 of the Criminal Code will also be available

2.20 The maximum penalty for an offence under these sections will be 10 years imprisonment.

New procurement offence

2.21 Section 272.14 creates an offence of procuring a child to engage in sexual activity outside Australia. The EM states that the purpose of the offence is to address gaps in the current law, which do not criminalise behaviour leading up to actual sexual activity with a child. Under section 272.14, it will be an offence to engage in conduct to procure a child to engage in sexual activity in Australia. The procuring offence is directed at the procuring (or inducing) conduct and does not require the actual sexual activity to take place.

2.22 *Sexual activity* will be defined (Item 10) 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).

2.23 A number of defences will be available to a defendant accused of an offence under this section. The amendments include a specific defence of belief of age as well as a specific defence relating to the existence of a valid and genuine marriage. The general defences under Part 2.3 of the Criminal Code will also be available.

2.24 The maximum penalty for an offence under this section will be 15 years imprisonment.

New grooming offence

2.25 The term 'grooming' generally refers to behaviour that is designed to make it easier for the offender to procure a child for sexual activity. Under section 272.15, it will be an offence to groom a child with the intention of making it easier to procure the child to engage in sexual activity outside Australia.

2.26 The EM notes that, within Australia, offences already exist for grooming a child for sexual activity or for using a carriage service for such behaviour. However, while child sex tourism offences prohibit engaging in sexual intercourse or sexual conduct with a child, or inducing a child to engage in such conduct, they do not criminalise behaviour leading up to actual sexual activity with a child. The amendment will ensure that equivalent offences are in place in relation to grooming a child for sexual activity overseas. This will 'ensure comprehensive criminalisation of this kind of conduct, and place Australia on par with its international counterparts'.⁶

2.27 *Sexual activity* will be defined as per the procurement offence at section 272.14 (see above). The grooming offence will also rely on a new definition of *engage in sexual activity*. Without limiting when a person engages in sexual activity, a person will be 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.

2.28 A number of defences will be available to a defendant accused of an offence under this section, as per the procurement offence (see above).

2.29 The maximum penalty for an offence under this section will be 12 years imprisonment.

New offences of benefiting from, encouraging or preparing to commit sexual offences against children outside Australia

2.30 New Division 272 (Subdivision C) of the Criminal Code will also insert three new offences directed at commercial child sex tour operators and preliminary conduct engaged in by child sex clients.

Benefiting from or encouraging an offence against Division 272

2.31 Under section 272.18, it will be an offence for a person to engage in conduct, whether in Australia or overseas, with the intention of benefiting from an offence against Division 272 (if the conduct is reasonably capable of resulting in that person benefiting from the offence).

6 EM, p. 11.

2.32 Section 272.19 is similar to section 272.18⁷ but proscribes acts or omissions performed with the intention of 'encouraging' an offence under Division 272 (if the act or omission is reasonably capable of encouraging such conduct).

2.33 The maximum penalty for an offence under either of these sections will be 20 years imprisonment (increased from 17 years under the *Crimes Act 1914*). The EM explains that the increased penalties are intended to mirror the maximum penalties for the most serious substantive child sex tourism offences – the sexual intercourse offence and sexual conduct offences – which will be raised to 17 and 20 years imprisonment respectively.⁸

New preparatory offence

2.34 Under section 272.20, it will be an offence to prepare for or plan an offence relating to sexual intercourse or other sexual activity with a child (subsection 270.20(1)).⁹ It will also be an offence to prepare or plan for an offence relating to sexual abuse of a young person (that is, a person aged between 16 and 18 years of age) outside Australia where the defendant is in a position of trust or authority in relation to the young person (subsection 270.20(2)).¹⁰

2.35 The EM states that this new offence is necessary because it is unclear whether the existing 'benefiting' and 'encouraging' offences in sections 272.18 and 272.19 – which would apply to, for example, a child sex tour operator – would apply to preparatory activity where a person was planning their own participation in child sex tourism. The new offence is intended to allow law enforcement agencies to intervene at an earlier stage where there is evidence of a person's intent to travel overseas to sexually abuse children.

2.36 The maximum penalty for an offence under this section will be 10 years imprisonment, or five years in the case of preparing or planning an offence against sections 272.12 or 272.13 (relating to a young person).

Consent to proceedings where the defendant is under 18 years of age

2.37 Section 272.31 will provide that proceedings for an offence against Division 272 must not be commenced without the consent of the Attorney-General if the defendant was under 18 at the time he or she allegedly engaged in the conduct constituting the offence.

7 These offences are based on sections 50DA and 50DB of the *Crimes Act 1914*.

8 EM, p. 38.

9 That is, an offence against sections 272.8, 272.9, 272.10, 272.11 and 272.18.

10 That is, an offence against sections 272.12 and 272.13.

2.38 The EM explains that this will enshrine in legislation a direction of the Attorney-General that was issued in 1994 under section 8 of the *Director of Public Prosecutions Act 1983*.¹¹

Division 273—Offences involving child pornography material or child abuse material outside Australia

2.39 The EM explains that the possession, production or distribution of child pornography or child abuse material within Australia, or unlawfully importing such material into Australia, is currently criminalised by Commonwealth, state and territory laws. However, these existing offences do not have extra-territorial effect, and many countries either do not have comparable laws or are unwilling or unable to enforce them. Accordingly, new Division 273 (Subdivision B) of the Criminal Code will contain a number of offences directed at dealing in child pornography and child abuse material overseas. It will also include an aggravated offence, which will apply where an offence involves conduct on three or more occasions and involving two or more persons.¹²

New offence for possessing, controlling, producing, distributing or obtaining child pornography or child abuse material outside Australia

2.40 Under sections 273.5 and 273.6, it will be an offence for a person to possess, control, produce, distribute or obtain child pornography or child abuse material, or to facilitate the production or distribution of such material, while that person is outside Australia. *Child pornography material* is defined in the existing definitions section of the Criminal Code. The definition includes material that depicts or describes a child engaged in sexual activity in a way that reasonable persons would regard as being, in all the circumstances, offensive.

2.41 The maximum penalty for an offence under these sections will be 15 years imprisonment.

New aggravated offence for conduct on three or more occasions and involving more than one person

2.42 Section 273.7 will introduce a new aggravated offence that will apply if a person commits an offence against sections 273.5 or 273.6 (the underlying offences) in circumstances where the defendant has committed an underlying offence on three or more separate occasions and the commission of these offences involved two or more persons. The EM notes that the purpose of the provision is to target criminal networks engaged in offences involving child pornography and/or child abuse material.¹³

11 EM, p. 44.

12 EM, p. 2.

13 EM, p. 49.

2.43 The maximum penalty for an offence under this section will be 25 years imprisonment. The EM notes that this higher maximum penalty is justified by the additional or aggravating elements of the offence.¹⁴

Defences

2.44 Section 273.9 (Division 273, Subdivision C) will set out the defences to the offences in Subdivision B.¹⁵ These are intended to protect people who have legitimate reasons for possessing, controlling, producing, distributing or obtaining child pornography material or child abuse material. The defences include circumstances where:

- a defendant can point to evidence to suggest that his or her conduct is of public benefit and does not go beyond what is of public benefit (subsection 273.9(1));
- the person is at the time of the offence a law enforcement officer, an intelligence or security officer, or an officer or employee of the government of a foreign country performing similar duties to an intelligence or security officer and acting reasonably in the course of their duties; and
- the person engages in the conduct in good faith for the sole purpose of assisting the Australian Communications and Media Authority to:
 - detect prohibited, or potentially prohibited, content in the performance of the Authority's functions; or
 - manufacture, develop or update content filtering technology (including software) in accordance with a recognised alternative access-prevention arrangement or a designated alternative access-prevention arrangement.

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

2.45 Part 2 of Schedule 1 will introduce a number of offences which criminalise the use of a postal or similar service for child sex-related activity. The offences will mirror relevant carriage service offences (as amended by Schedule 1) and ensure that such activity is criminalised consistently, regardless of the means through which it is committed. A range of amendments are made to existing Division 474, which sets out a number of telecommunications offences relating to the use of a carriage service for criminal activity. Section 470.4 will insert a number of definitions for the purposes of new Subdivisions B and C of Division 471. These are discussed below as relevant.¹⁶

14 EM, p. 48.

15 That is, sections 273.5, 273.6 and 273.7.

16 For full details see EM, p. 59; and the Bill, pp 34-35.

New offences relating to use of postal or similar service for child pornography material or child abuse material

2.46 Item 14 of the Bill will insert new Subdivision B into the Criminal Code, relating to use of a postal or similar service for child pornography material or child abuse material.

Using a postal or similar service for child pornography or child abuse material

2.47 Under sections 471.16 and 471.19, it will be an offence to use a postal or similar service for child pornography or child abuse material and to cause or request any such material to be carried by any such service. The EM states that 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.¹⁷

2.48 The maximum penalty for an offence under these sections will be 15 years imprisonment.

Possessing, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service

2.49 Under subsection 471.17(1), it will be an offence for a person to possess, control, produce, supply or obtain child pornography material with the intention that the material will be used by that person, or another person, in committing an offence against section 471.16 (using a postal or similar service for child pornography material).

2.50 The maximum penalty for an offence under this section will be 15 years imprisonment.

Defences in respect of child pornography material

2.51 Section 471.18 will set out the defences to an offence against the postal service offences involving child pornography material.¹⁸ These defences will apply where the conduct said to constitute the offence is of public benefit. Conduct that is considered to be of public benefit includes situations where the conduct is necessary for enforcing, or monitoring compliance with, a Commonwealth, state or territory law, for the administration of justice, or for conducting scientific, medical or educational research approved by the Minister. Subsection 471.18(2) will provide an exhaustive list of conduct that is of public benefit.

17 EM, p. 60.

18 That is, sections 471.16 and 471.17.

2.52 The section also includes a defence for law enforcement, intelligence or security officers acting in the course of duty.¹⁹

Possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service

2.53 Under subsection 471.20(1), it will be an offence for a person to possess, control, produce, supply or obtain child abuse material with the intention that the material will be used by that person, or another person, in committing an offence against section 471.19 (using a postal or similar service for child abuse material).

2.54 The maximum penalty for an offence under this section will be 15 years imprisonment.

Defences in respect of child abuse material

2.55 The defences to postal service offences involving child abuse material will operate as per those set out above in relation to child pornography material.

Aggravated offence involving conduct on three or more occasions and two or more people

2.56 Subsection 471.22(1) will insert a new aggravated offence that will apply if a person commits an offence against sections 471.16, 471.17, 471.18, 471.19 and 471.20 (the underlying offences), in circumstances where the defendant has committed an underlying offence on three or more separate occasions and the commission of these offences involved two or more persons.

2.57 Subsection 471.22(5) will provide that a person who has been convicted or acquitted of an aggravated offence will not be able to be convicted of an offence against sections 471.16, 471.17, 471.18, 471.19 or 471.20 for the same conduct that constituted the aggravated offence.

2.58 The maximum penalty for an offence under this section will be 25 years imprisonment.²⁰

New offences relating to use of a postal or similar service involving sexual activity with a person under 16

2.59 New Subdivision C of existing Division 471 of the Criminal Code will introduce three new offences directed at the use of postal or similar services for offences involving sexual activity with a person under 16. The new offences will mirror existing and new carriage service offences.

19 EM, p. 63.

20 EM, p. 69.

Using a postal or similar service to procure or to groom persons under 16 years of age

2.60 Under sections 471.24 and 471.25, it will be an offence to use a postal or similar service to procure or to groom a person under 16 to engage in sexual activity. The EM states that the purpose of these offences is to give law enforcement authorities the means to deal with preparatory conduct and enable a person to be arrested before any physical harm occurs to the child.

2.61 The grooming offence will apply where a person engages in conduct using a postal or similar service with the intention of making it easier to procure the child ('grooming' the child) to participate in certain activities. Subsection 471.25(3) will create an offence 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.

2.62 A specific 'belief about age' defence is available to this offence.

2.63 The maximum penalty for the procurement offence will be 15 years imprisonment. The maximum penalty for the grooming offence will be 12 years imprisonment, or 15 years imprisonment for the offence created by subsection 471.25(3).

Using a postal or similar service to send indecent material to persons under 16 years of age

2.64 Section 471.26 will criminalise the use of a postal service to send indecent material to a person under 16 years of age. The EM states that the purpose of this offence is to address situations where the offender sends indecent material to a child with no further intent to groom or procure the child for sexual activity. This offence will mirror the comparable carriage-service offence to be introduced by section 474.27A to ensure that child sex-related activity is criminalised consistently, regardless of the means through which it is committed (for example, through the Internet or the post).

2.65 The maximum penalty for an offence under this section will be seven years imprisonment.

Defences to offences against Subdivision C (offences relating to use of a postal or similar service involving sexual activity with a person under 16)

2.66 Section 471.29 will provide a defence based on a belief about age where, at the time the defendant caused the article to be carried, the defendant believed that the person was, for example, 16 or over.²¹

21 EM, p. 79.

Offences relating to the use of a carriage service for child pornography material or child abuse material

2.67 Item 19 of the Bill will insert a new subdivision and heading into existing Division 474 of the Criminal Code: 'Subdivision D—Offences relating to the use of a carriage service for child pornography material or child abuse material'. Existing offences in sections 474.19 – 474.24 will be included in new Subdivision D and have their penalties increased, and a new aggravated offence will be created.

Increasing penalties

2.68 Item 21, 23, 25 and 27 of the Bill will increase the penalty for the existing offences to be moved into new Subdivision D of Division 274, which relate to controlling, producing, supplying or obtaining child pornography or child abuse material for use through a carriage service. The maximum penalty for these offences will be increased from 10 to 15 years imprisonment. The EM states that this is appropriate in light of the scale of contemporary offending and will ensure that the maximum penalty reflects the 'worst case scenario'.²²

New aggravated offence for conduct involving three or more occasions and two or more people

2.69 Subsection 474.24A(1) will insert an aggravated offence that will apply if a person commits an offence against sections 474.19, 474.20, 474.22 or 474.23 (the underlying offences) in circumstances where the defendant has committed an underlying offence on three or more separate occasions and the commission of these offences involved two or more persons.

2.70 This offence will contain the same arrangements for double jeopardy as are proposed for the aggravated offence involving conduct on three or more occasions and two or more people in relation to child pornography and child abuse material (see above).

2.71 The maximum penalty for an offence under this section will be 25 years imprisonment.

Offences relating to the use of a carriage service involving sexual activity with a person under 16

2.72 Item 29 of the Bill will insert a new subdivision and heading into existing Division 474 of the Criminal Code: 'Subdivision F—Offences relating to the use of carriage service involving sexual activity with person under 16'. Existing offences in sections 474.26 – 474.29 will be included in new Subdivision F, along with two new offences.

New offence for using a carriage service for sexual activity with person under 16 years of age

2.73 Under subsection 474.25A(1), it will be an offence to use a carriage service for sexual activity with a child under the age of 16 years, or to cause a child to engage in sexual activity with another person of at least 18 years of age (subsection 474.25A(2)). The EM states that the purpose of this offence is to ensure that engaging in sexual activity with a child online is criminalised in a comparable way to equivalent 'real life' activity.

2.74 A number of defences will be available to a defendant accused of an offence under this section. The amendments include a specific defence of belief of age (subsection 474.29(1)) as well as a specific defence of not intending to derive gratification (subsection 425.25A(4)). The general defences under Part 2.3 of the Criminal Code will also be available.

2.75 The maximum penalty for an offence under this section will be 15 years imprisonment.

New aggravated offence—child with mental impairment or under care, supervision or authority of defendant

2.76 Section 474.25B will introduce a new aggravated offence that will apply if a person commits an offence against subsections 474.25A(1) or 474.25A(2), in circumstances where the child has a mental impairment and/or is under the care, supervision or authority of the person. The new offence will rely on the definition of *position of trust or authority* to be inserted into the Criminal Code by Item 4, which will prescribe the categories of relationships that would constitute a position of trust or authority, such as a parent, guardian or carer, or the teacher or employer of a person. However, this aggravating factor is intended to apply more broadly than just those specific relationships that will be prescribed, and it will be for the court to determine whether the child was otherwise under the care, supervision or authority of the person.

2.77 A defence to this offence will be available where a defendant can show that he or she believed that the child did not have a mental impairment (subsection 474.29(3)). The general defences under Part 2.3 of the Criminal Code, and the defence of 'mistake of fact' under existing section 9.2 will also be available to a defendant charged with this offence.

2.78 The maximum penalty for an offence under this section will be 25 years imprisonment.²³

23 EM, p. 89.

Using a carriage service to transmit indecent communication to person under 16 years of age

2.79 Under subsection 474.27A(1), it will be an offence for a person 18 years or over to use a carriage service to transmit an indecent communication to a person who is, or who the sender believes to be, under 16 years of age.

2.80 A specific 'belief about age' defence is available to this offence (subsection 474.29(5)). The general defences under Part 2.3 of the Criminal Code will also be available to a person accused of an offence under this section.

2.81 The maximum penalty for an offence under this section will be seven years imprisonment.

Offences relating to the use of a carriage service for suicide related material

2.82 Subdivision C of Division 474 currently includes a range of offences related to the use of telecommunications. Item 57 of the Bill will divide Subdivision C into several separate subdivisions to better reflect the conduct involved in those offences. This item will insert a new heading to provide that existing sections 474.29A (relating to use of a carriage service for suicide related material) and 474.29B (relating to possessing, controlling, producing, supplying or obtaining suicide-related material for use through a carriage service) will now be contained in Subdivision General—'Offences relating to use of a carriage service for suicide related material'.²⁴

Part 3—Consequential amendments

2.83 Existing child sex offences are referred to in a number of Acts in order to allow the exercise of certain law enforcement powers for the investigation of such offences. Minor technical amendments are required to include updated references to existing and new child sex tourism and other child sex offence provisions to reflect the changes made by the Bill.

2.84 Part 3 of Schedule 1 of the Bill will make 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*.²⁵

24 EM, p. 103.

25 For full details see EM, pp 106-129; and the Bill, pp 63-73.

SCHEDULE 2—FORFEITURE OF CHILD SEX MATERIAL

2.85 Schedule 2 provides for 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. Once forfeited, such items will become the property of the Commonwealth.

2.86 The EM notes that there is currently no specific Commonwealth scheme for dealing with material or equipment that is seized by law enforcement agencies in the course of investigations, such as child pornography and child abuse material contained in photos, DVDs, computers or other electronic equipment. This means that in cases where no person is convicted of an offence, either because no prosecution is commenced or a defendant is acquitted, the seized items must be returned. In cases where a defendant is convicted, an application must be made for the forfeiture of the material under the *Proceeds of Crime Act 2002*, which 'is a lengthy process and one ill-suited for dealing with child pornography and child abuse material'.²⁶

2.87 Accordingly, the proposed scheme is intended to allow law enforcement agencies to be able to deal appropriately with such material or equipment, regardless of whether criminal proceedings subsequently occur.

2.88 The proposed Commonwealth forfeiture scheme for child sex material will comprise two approaches: administrative forfeiture and court-ordered forfeiture.²⁷

26 EM, p. 114.

27 For full details see EM, pp 114-129.

CHAPTER 3

KEY ISSUES

3.1 All of the submissions received by the committee were generally supportive of the amended and new sexual offences against children as proposed in the Bill. However, a number of issues were identified by submitters and witnesses. These were related to:

- the new preparatory offence (proposed section 272.20);
- the offence of causing a child to engage in sexual activity outside Australia (proposed section 272.9);
- the offence of persistent sexual abuse of a child outside Australia – double jeopardy (proposed section 272.11);
- sexual intercourse or activity with a young person – position of trust or authority (proposed section 272.12);
- issues relating to the practice of 'sexting';
- the requirement for the Attorney-General to give consent to commence proceedings against defendants under 18 years of age (proposed section 272.31); and
- defence provisions – valid and genuine marriage (proposed section 272.17) (including the issue of consent).

New preparatory offence

3.2 As outlined in Chapter 2, proposed section 272.20 of the Bill will create a new offence for preparing or planning an offence relating to sexual intercourse or other sexual activity with a child outside Australia (subsection 270.20(1)). It will also be an offence to prepare or plan for an offence relating to sexual abuse of a young person (that is, a person aged between 16 and 18 years of age) outside Australia, where the defendant is in a position of trust or authority in relation to the young person (subsection 270.20(2)).

3.3 The explanatory memorandum (EM) to the Bill explains that the purpose of this offence is to 'prohibit preliminary steps being taken by a person who wishes to participate in child sex tourism and to allow intervention prior to the child [or young person] being harmed'.¹ The EM offers the following justification for the new offence:

Under the existing child sex tourism offence regime, a person who organises for others to engage in child sex tourism (eg as a child sex tour operator) would be captured by the [existing] benefiting and encouraging offences. While these offences allow police to adopt an interventionist

¹ EM, p. 39.

approach, they are not specifically directed at conduct where a person is planning his or her own participation in child sex tourism. It is not clear that such preparatory activity would be captured by existing offences.

...Evidence of a person's intent to travel overseas to sexually abuse children often comes to the attention of law enforcement agencies while the offender is still in Australia. Law enforcement should not have to wait until the offender is in the advanced stages of committing a child sex tourism offence to take action, as this places the child under unnecessary risk.²

3.4 The EM to the Bill notes that, in order to prove the proposed offence, it would not be necessary to prove that the person intended to commit a specific offence: it would be sufficient for the prosecution to prove that the particular conduct was related to a general intent to commit an offence. The EM states:

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.³

Concerns about the new preparatory offence

3.5 The Law Council of Australia (LCA) expressed significant criticisms about the proposed new preparatory offence. While the LCA was supportive of efforts 'to ensure Australia's laws allow for a robust approach to combating child sex tourism', it was concerned that, by specifically targeting purely preparatory acts, proposed section 272.20 'unnecessarily extends established principles of criminal responsibility'.⁴ In general terms, the LCA expressed the view that:

...[it] does not support the introduction of offence provisions which criminalise very nascent intentions which have only been advanced in the most preliminary way and are several steps from being realised—and may, in fact, be abandoned well before they are ever acted upon and realised.⁵

3.6 The LCA submission noted that the Criminal Code 1995 (the Criminal Code) presently contains so-called inchoate or extended liability offences, which may already capture cases where an offender has formed the requisite criminal intention to commit an offence, but the offence is not ultimately completed and no harm is caused. These include, for example, complicity, common purpose and conspiracy offences.⁶ However, in relation to the proposed preparatory offence, the LCA argued:

2 EM, p. 11.

3 EM, p. 41.

4 Law Council of Australia, *Submission 8*, p. 8.

5 Ms Helen Donovan, Law Council of Australia, *Proof Committee Hansard*, 9 March 2010, p. 6.

6 Law Council of Australia, *Submission 8*, p. 9.

The proposed new offence...[goes] much further than existing extension of liability offences by criminalising preliminary acts which, although undertaken in contemplation of criminal conduct of some kind, can not be connected to any clear intent to commit a specific criminal act.⁷

3.7 The LCA argued that the new offence would for this reason represent a 'clear departure' from the established principles of criminal law, since:

...[the criminal law has] traditionally been reluctant to penalise the unrealised private intentions of a person which have only been advanced in a preliminary way, particularly where those intentions have not yet crystallised into a specific criminal intent. This reluctance to attach criminal liability to purely preparatory conduct stems from the notion that a person can plan for conduct then change his or her mind before the plan is implemented.⁸

3.8 The LCA also rejected the justification put forward in the EM for the new preparatory offence (see above at paragraph 3.3), arguing that the existing legislative regime in respect of child sexual offences was 'extensive'. In addition to the available inchoate offences, the proposed legislative regime, even without the preparatory offences, would provide 'sufficient scope to allow police to adopt a preventative approach to child sex tourism'.⁹ That is:

[Such a regime would allow]...police to intervene and charge a person in any circumstance where he or she has interacted with another with the intention of aiding, facilitating, encouraging or contributing to (either as a participant or as an operator) the commission of a sexual offence against a child overseas.¹⁰

3.9 For the reasons set out above, the LCA opposed the introduction of the new preparatory offence. Alternatively, the LCA called for the new offence 'to be narrowly defined so that it only captures conduct of...[a] more advanced and direct nature'. The LCA submission explained:

In that way, the likelihood of innocent and legitimate conduct erroneously becoming the subject of charge and prosecution would be decreased. Likewise, the likelihood of malevolent but nascent private intentions, which are yet to result in any harm and are still several significant steps from being realised, would also be avoided.¹¹

7 Law Council of Australia, *Submission 8*, p. 8.

8 Law Council of Australia, *Submission 8*, p. 8.

9 Law Council of Australia, *Submission 8*, pp 8, 9.

10 Law Council of Australia, *Submission 8*, p. 9.

11 Law Council of Australia, *Submission 8*, p. 10.

Department response

3.10 In response to the concerns raised by the LCA, the Attorney-General's Department (the Department) advised that the new preparatory offence was justified in the context of technological developments which had facilitated the activities of child sex offenders:

The rationale for this offence is that advances in technology and the expansion of the internet have resulted in offenders becoming increasingly sophisticated in their networking activities and they are able to plan child sex tourism activities. This evidence often comes to the attention of law enforcement authorities before the person departs Australia. The intention of including this offence is to allow law enforcement authorities in Australia to intervene at an earlier stage and deal with that issue before the person leaves for overseas. We think the offence is appropriate.¹²

3.11 While the Department acknowledged that the proposed offence would operate more broadly than offences targeting more specific actions, it stressed that the offence was sufficiently constrained in terms of its potential application:

[The Department considers the offence to be]...appropriately focused because it requires a proof of intention that the person is actually preparing or planning a child sex tourism offence, which means that innocuous research would never ground a prosecution for this offence—you would need some actual proof that the person was intending to go on and engage in the child sex tourism offence.¹³

Offence of causing a child to engage in sexual activity

3.12 As noted in Chapter 2, the Bill seeks to simplify the existing child sex tourism offences in Part IIIA of the *Crimes Act 1914*, which relate to inducing a person under 16 to engage in sexual intercourse or sexual conduct in the presence of the defendant (outside Australia). The existing sexual conduct offences will be replaced by an offence directed at *sexual activity*, which will apply to engaging in sexual activity with a child (paragraph 272.9(1)(a)) or causing a child to engage in sexual activity in the presence of the defendant (paragraph 272.9(2)(b)).

3.13 The LCA was concerned about the potential breadth of the proposed offence for causing a child to engage in sexual activity in the presence of the defendant. It noted that the new offence would remove an element of the current inducing offence: that the defendant 'intended to derive sexual gratification from the presence of the child'.¹⁴ This element has been translated into a defence which would require a

12 Ms Sarah Chidgey, Attorney-General's Department, *Proof Committee Hansard*, 9 March 2010, p. 10.

13 Ms Sarah Chidgey, Attorney-General's Department, *Proof Committee Hansard*, 9 March 2010, p. 10.

14 Ms Helen Donovan, Law Council of Australia, *Proof Committee Hansard*, 9 March 2010, p. 8.

defendant to establish that he or she did not intend to derive sexual gratification from the presence of the child (subsection 272.9(5)).¹⁵

3.14 The LCA argued that the new offence had the potential 'to cover a wide range of innocent conduct'.¹⁶ For example, the offence could be committed where:

...a family was sleeping in the same hotel room while on holiday overseas and the parents engaged in consensual kissing or groping which happened to be observed by their children. Other examples abound, such as circumstances where a group of young people are on an overseas excursion together and sharing a dormitory [and two] of the friends engage in consensual sexual activity while another friend aged under 16 is awake in the room.¹⁷

3.15 Further, the LCA was not convinced that the proposed 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.¹⁸

3.16 Given the seriousness of allegations of child sexual abuse, the LCA argued that the proposed offence should retain the element that the defendant 'intended to derive sexual gratification from the presence of a child' (as opposed to being relevant only as a defence).¹⁹ It contended that such an approach was appropriate because this issue is 'central to the question of culpability for the offence'.²⁰

3.17 Alternatively, the LCA called for the proposed defence regarding the absence of intent to derive sexual gratification to be amended 'to place an evidentiary rather than a legal burden on the defendant'.²¹

3.18 This alternative recommendation was underpinned by the LCA's criticism of the proposed defence, whereby the defendant has the legal burden to prove (on the balance of probabilities) an absence of intent to derive sexual gratification from the presence of the child. The EM states that this is appropriate because:

15 Ms Helen Donovan, Law Council of Australia, *Proof Committee Hansard*, 9 March 2010, p. 8.

16 Law Council of Australia, *Submission 8*, p. 12. The LCA's arguments on this issue were also identified as relevant to subsection 272.12(6), which creates a similar offence for causing a young person to engage in sexual activity in the presence of the defendant, where the defendant is in a position of trust or authority.

17 Law Council of Australia, *Submission 8*, p. 12.

18 Law Council of Australia, *Submission 8*, p. 12.

19 Law Council of Australia, *Submission 8*, p. 12.

20 Law Council of Australia, *Submission 8*, p. 13.

21 In simple terms, a legal burden would require the defendant to prove the issue (that is, lack of intent to derive sexual gratification) on the balance of probabilities. An evidential burden would require the defendant to put forward enough evidence to allow the issue to be examined by the court. The prosecution would then have to disprove that evidence (beyond reasonable doubt).

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

3.19 The LCA contended that, while such reasoning may be appropriate in cases where a defendant's belief about a certain state of affairs is in question, it was not appropriate in cases where the question is whether or not the defendant possessed a requisite state of intention.²³

Department response

3.20 In response to the LCA's particular concerns about the offence at paragraph 272.9(2)(b), the Department advised that it considers the offence is appropriately constructed. The element regarding the defendant's intention to derive sexual gratification has not been included in the new offence because of difficulties in establishing this element in prosecutions for the equivalent current offence (that is, the inducing offence that is to be replaced by the new offence). A representative of the Department explained further:

The Commonwealth Director of Public Prosecutions [has] advised...[the Department] that it had proven to be an extremely problematic element of the offence because, for the prosecution to try and prove the state of mind of a defendant was very difficult. It is much easier for a defendant to disprove that.²⁴

3.21 Further, the Department considers that it is appropriate, in the context of the offence, to require the defendant to establish his or her state of mind as to the absence of intent:

It is the department's view that, where there is sufficient evidence for that evidence and you can demonstrate that a defendant has caused a child to engage in sexual activity, it is appropriate that demonstrating that there was no intention of deriving gratification rests on the defendant because that knowledge is wholly within their mental state.²⁵

22 EM, p. 20.

23 Law Council of Australia, *Submission 8*, p. 13.

24 Ms Sarah Chidgey, Attorney-General's Department, *Proof Committee Hansard*, 9 March 2010, p. 10.

25 Ms Sarah Chidgey, Attorney-General's Department, *Proof Committee Hansard*, 9 March 2010, p. 10.

Offence of persistent sexual abuse of a child – double jeopardy

3.22 Proposed section 272.11 will create an offence where a person commits one or more child sex tourism offences (the underlying offences) against a child outside Australia on three or more separate occasions during any period. The offences that will constitute an underlying offence for the purposes of subsection 272.11(1) include the 'engaging in sexual intercourse' and 'engaging in sexual activity' offences in proposed sections 272.8 and 272.9.

3.23 To prove the offence proposed in section 272.11, the prosecution would need to prove beyond reasonable doubt that the defendant committed an underlying offence in relation to the same child, and that such an offence was committed on three or more separate occasions during any period. The prosecution would be required to establish beyond reasonable doubt all of the elements constituting the relevant underlying offence.

3.24 Given the reliance of the offence proposed in section 272.11 on the underlying offences, that section provides explicit protection against 'double jeopardy'.²⁶ The EM explains:

Subsection 272.11(11) will prevent a person who has been convicted or acquitted of an underlying offence from being convicted of an offence...if any of the occasions relied on as evidence [of] the commission of this offence include the conduct that constituted the offence [of] which the person was convicted or acquitted...²⁷

3.25 However, the LCA expressed concern that the proposed protection against double jeopardy would not prevent a defendant from being tried for an offence under section 272.11, where one of the underlying offences relates to an offence of which he or she was convicted or acquitted in a foreign jurisdiction:

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

However, the Law Council's concern is that given that the offence provision in s272.11 is directed at a course of conduct, essentially the carrying on of a sexually abusive relationship, a prior conviction or acquittal in a foreign jurisdiction for a single act may not be regarded as relating to the same conduct as that targeted by s272.11. As a result, proposed section 272.29 may not apply.²⁸

26 In simple terms, double jeopardy is the prosecution of a defendant for an offence for which he or she has already been tried and convicted or acquitted.

27 EM, p. 26.

28 Law Council of Australia, *Submission 8*, p. 14.

Department response

3.26 In response to this concern, the Department confirmed:

...that the general overseas double jeopardy provision operates in exactly the same way as the specific provisions in the persistent sexual abuse offence. So we are confident that double jeopardy also works in relation to overseas convictions in that respect.²⁹

Sexual intercourse or activity with a young person – position of trust or authority

3.27 As noted in Chapter 2, the Bill provides that it will be an offence to engage in sexual intercourse with a young person (subsection 272.12(1)) or to cause a young person to engage in sexual intercourse in the presence of the defendant (subsection 272.12(2)) outside Australia, where the defendant is in a position of trust or authority in relation to the young person.

3.28 The LCA was concerned that the proposed offence goes beyond the scope of, and has the potential to capture a broader range of sexual interactions than, similar provisions in other Australian jurisdictions. The committee was advised that, in these jurisdictions, the offence is limited to 'sexual intercourse', 'indecent act' or an 'act of gross indecency'. In contrast, the proposed offence:

...would cover any 'sexual activity' between the young person and the offender...[because the] definition of 'sexual activity' is very broad, encompassing any activity of a sexual nature whether or not that activity involves physical contact between people. It has the potential to capture, for example, a consensual act of kissing or groping and would also cover circumstances where a young person sees or hears a sexual activity between other persons.³⁰

3.29 Further, the LCA submitted that the proposed offence would cover a broader range of relationships than has been proposed for such offences by the Model Criminal Code Officers Committee (MCCOC), when it recommended that offences of this type should be created.³¹ The offence would extend the class of persons falling under the definition of 'position of trust and authority' to include sports coaches and employers, or those persons who have the authority to determine significant aspects of a young person's employment (paragraphs 272.3(1)(e) and (h)). The LCA noted that this broader definition, coupled with the broad meaning given to 'sexual activity', means that the offence could capture 'a range of consensual sexual contact involving young persons in circumstances that may not necessarily suggest an abuse of trust or authority by the defendant'. For example:

29 Ms Sarah Chidgey, Attorney-General's Department, *Proof Committee Hansard*, 9 March 2010, p. 10.

30 Law Council of Australia, *Submission 8*, p. 15.

31 Law Council of Australia, *Submission 8*, p. 15.

...a 17 year old and a 19 year old could form a consensual sexual relationship in Australia and then travel together overseas. While overseas, the 19 year old attains a position of trust or authority over the 17 year old by becoming his or her sports coach. If sexual activity such as kissing or groping continues, this type of relationship may now be captured by the proposed offence...³²

Department response

3.30 In response to these concerns, the Department noted that, in terms of the potential scope of the offence, 'there is scope for law enforcement and prosecution agencies...to determine where it is appropriate to take action in the public interest'.³³

3.31 Further, the Department advised that it has considered state offences in formulating the offence and has 'very much followed existing models'. It observed, for example, that both New South Wales and Victoria have between them included individuals such as sports coaches and employers in the scope of similar offences.³⁴

Issues relating to the practice of 'sexting'

3.32 The Australian Privacy Foundation (APF) expressed concern about the potential impacts of the Bill, and the child sexual offences regime more broadly, in relation to 'sexting'. Sexting could be defined as:

...electronic communication of non-professional images or videos portraying one or more persons in a state of nudity or otherwise in a sexual manner.³⁵

3.33 The APF suggested that the practice of sexting was relatively commonplace amongst teenagers:

A study carried out by *Girlfriend Magazine* showed that 40% of the 588 Australian teenage girls that participated in the study had been asked to send a naked or seminaked image of themselves over the Internet. Studies overseas give similar results. In the US, a study involving 653 teenagers found that 20% had engaged in sexting.³⁶

32 Law Council of Australia, *Submission 8*, p. 16.

33 Ms Sarah Chidgey, Attorney-General's Department, *Proof Committee Hansard*, 9 March 2010, p. 10-11.

34 Ms Sarah Chidgey, Attorney-General's Department, *Proof Committee Hansard*, 9 March 2010, p. 10.

35 Dr Dan Svantesson, Australian Privacy Foundation, *Proof Committee Hansard*, 9 March 2010, p. 2.

36 Australian Privacy Foundation, *Submission 5*, p. 3.

3.34 The APF submitted that there were 'serious risks' that some of the proposed and existing child pornography offences could apply to young people involved in the practice of sexting:

Let us imagine we have a 15-year-old girl meeting an 18-year-old boy. They start dating and after a few months perhaps the girl, on her own initiative, sends an image of herself in the nude to the 18-year-old boy. She might also ask him to do the same for her and let us say that he complies with that. In that scenario, which does not seem to be entirely uncommon, both the boy and the girl could be convicted of child pornography offences of various kinds both under the existing law and under the new crimes introduced through the bill.³⁷

3.35 The APF therefore considered that the child sexual offences regime should take account of sexting as a common practice among young people, in order to avoid criminalising or stigmatising young people as child sex offenders:

The key task in relation to the bill would be to find some sort of exception, defence or something along those lines excluding sexting from child pornography offences while at the same time avoiding creating some sort of a loophole that can be used by serious child pornography offenders.³⁸

3.36 While the APF acknowledged that the prosecution of young people in relation to such offences would depend on the discretion of police and prosecuting authorities, it preferred an approach that relies on the availability of appropriate defences or definitions to ensure that sexting is not captured 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.³⁹

Attorney-General's consent to commence proceedings against defendant under 18 years of age

3.37 As noted in Chapter 2, the Bill provides that proceedings for an offence against Division 272 must not be commenced without the consent of the Attorney-General, if the defendant was under 18 at the time he or she allegedly engaged in the conduct constituting the offence.

3.38 The EM explains that the child sex tourism regime does not require that an offender is over 18 years of age. The absence of any such limit is considered desirable as it provides flexibility to prosecute persons under the age of 18 years of age who

37 Dr Dan Svantesson, Australian Privacy Foundation, *Proof Committee Hansard*, 9 March 2010, p. 2.

38 Dr Dan Svantesson, Australian Privacy Foundation, *Proof Committee Hansard*, 9 March 2010, p. 2.

39 Dr Roger Clarke, Australian Privacy Foundation, *Proof Committee Hansard*, 9 March 2010, p. 3.

sexually exploit children overseas.⁴⁰ However, in 1994, the Attorney-General issued a direction that proceedings for alleged offences against the child sex tourism regime should not be instituted against a person under 18 years of age without the consent of the Attorney-General. The Bill will enshrine this direction in the Criminal Code in order to 'reinforce the existing safeguard in place against inappropriate prosecution of a person under 18 years of age where the perpetrator and the victim are of similar age'.⁴¹

3.39 The LCA advised that it welcomes this proposal:

...[It] provides some safeguard against the inappropriate use of this legislation to criminalise sexual conduct between young people of similar age, as opposed to sexual conduct involving a sexual predator and a child.⁴²

3.40 However, the LCA also called for this requirement to be extended to cover proceedings against Division 273 (relating to child pornography and child abuse material). The LCA observed, for example, that a wide range of material able to be distributed by young people through mobile phones and social networking sites could be captured by the broad definition of 'child pornography material' in the Criminal Code:

...the Law Council would submit that the Attorney-General's consent requirement should perhaps be extended to a number of other child sex offence provisions as some sort of safeguard against the misapplication of those provisions to behaviour which some of us may regard as socially undesirable or harmful but which is not predatory or exploitative of children and therefore is not the sort of behaviour that is sought to be targeted by this bill and broader legislation.⁴³

Defence provisions

Valid and genuine marriage (including the issue of consent)

3.41 The Bill makes available to a number of offences a defence based on valid and genuine marriage (proposed section 272.17). The EM provides the following justification for the defence:

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

40 EM, p. 45.

41 EM, p. 44.

42 Law Council of Australia, *Submission 8*, p. 17.

43 Ms Helen Donovan, Co-Director, Law Council of Australia, *Proof Committee Hansard*, 9 March 2010, p. 6.

the laws of the country in which they were in, may be subject to criminal charges under the Australian child sex tourism offence regime.⁴⁴

3.42 The LCA questioned whether the defence relating to valid and genuine marriage 'is consistent with the broader rationale behind the Bill'. As Ms Donovan explained at the public hearing:

...some provision needs to be made to plug the gap where the sexual activity which is the subject of the charges is non-consensual, or there is evidence that it is non-consensual or forced, but the defendant is able to escape conviction because he or she has successfully made out a defence of mistaken belief as to age or valid and genuine marriage.⁴⁵

3.43 Ms Donovan submitted further:

...the rationale behind the legislation...is that, regardless of what the law in other jurisdictions may say and what protections it may or may not offer, either on paper or in practice, Australia has an obligation to protect children under the age of 16 from harm. Our submission would be that the justification for the retention of the defence does not actually explain how marriage changes the nature of behaviour which is sexually exploitative or predatory into something different.⁴⁶

3.44 The Department advised that, in relation to child sex offences, the issue of consent is not generally considered as relevant:

Consent is not an element of child sex offences. Inherent in the setting of an age of consent is the idea that persons under a certain age do not have the capacity to consent to sexual activity. Therefore, consent is generally thought to be irrelevant to offences involving sexual activity with persons under the age of consent.⁴⁷

3.45 However, the LCA called for the issue of consent to be made a relevant fact in relation to the available defences of 'belief in age' or 'valid and genuine marriage' (the statutory defences). Specifically, the LCA submitted that the issue of consent should become relevant:

...where a defendant seeks to rely on one of the statutory defence provisions. That is, the Law Council believes that a defendant should only be able to rely on the defence of belief in age or the defence of valid or genuine marriage, if the sexual conduct which is the subject of the charge was consensual.⁴⁸

44 EM, p. 37.

45 *Proof Committee Hansard*, 9 March 2010, p. 6.

46 Ms Helen Donovan, Law Council of Australia, *Proof Committee Hansard*, 9 March 2010, p. 9.

47 Attorney-General's Department, *Answer to question on notice*, 11 March 2010, p. 2.

48 Law Council of Australia, *Submission 8*, p. 20.

3.46 The LCA was concerned that, without an element going to consent:

...a belief that the person was over 16 or the existence of a valid and genuine marriage could absolve a defendant of criminal liability for engaging in nonconsensual sexual activity with a person under 16.⁴⁹

3.47 The LCA submission stated that it was particularly important to amend the statutory offence provisions in this way because:

...unlike under domestic state and territory law, the option is not available under the Criminal Code to charge an offender with the more general offence of sexual intercourse without consent (thus rendering both age and marital status and any belief in relation thereto irrelevant). This is because the child sex tourism regime does not include a general offence of sexual intercourse without consent. Reliance would need to be placed on the law of the country where the offending took place.⁵⁰

Department response

3.48 In response to the concerns raised by the LCA, the Department reiterated that it was not appropriate that consent be included as an element of child sex offences:

Consent is not an element of child sex offences. Inherent in the setting of an age of consent is the idea that persons under a certain age do not have the capacity to consent to sexual activity. Therefore, consent is generally thought to be irrelevant to offences involving sexual activity with persons under the age of consent.⁵¹

3.49 The Department advised that the inclusion of consent as an element of child sex offences would lead to the cross-examination of a child victim on the issue of consent in prosecutions for child sex offences. Such an outcome would be likely to confuse the issues at trial as well as cause possible trauma to child victims, which would be an 'unacceptable result'.⁵²

3.50 Further, the Department acknowledged that 'prosecuting the defendant for an alternative Australian offence of sexual activity without consent is not available in the child sex tourism context'. This means that offences such as rape fall 'outside the intended scope of the child sex tourism regime', and would have to be prosecuted under the laws of the country in which the conduct occurs.⁵³

49 Law Council of Australia, *Submission 8*, p. 20.

50 Law Council of Australia, *Submission 8*, p. 20.

51 Attorney-General's Department, *Answer to question on notice*, 11 March 2010, p. 2.

52 Attorney-General's Department, *Answer to question on notice*, 11 March 2010, p. 2.

53 Attorney-General's Department, *Answer to question on notice*, 11 March 2010, p. 2.

Committee view

3.51 The committee notes the unanimous support among submitters and witnesses for a strong and comprehensive regime of laws to address child sex tourism and, indeed, child sex crimes more broadly. The evidence to the inquiry indicated that the offences being introduced by the Bill will serve to strengthen and improve Australia's laws in this area, by introducing new offences and simplifying and enhancing the coverage of existing offences.

3.52 The committee notes concerns in relation to the potentially broad scope and application of the proposed new offence for preparing or planning sexual intercourse or other sexual activity with a child. However, the committee is satisfied that this offence will capture only preparatory activities that are informed by a substantial intent to commit a sexual offence against a child, and will not be readily applied to legitimate or innocent conduct. Further, the committee agrees that the serious nature and consequences of child sex offences justify the creation of a preparatory offence that can enable law enforcement authorities to apprehend offenders before children are exposed to significant threat of harm or sexual abuse. The need for this type of offence would also appear to be greater as technological developments facilitate the potential for sex offenders to organise and undertake their criminal activities.

3.53 The committee notes also particular concerns that were raised in relation to the potentially broad scope and application of the proposed new offence for causing a child to engage in sexual activity in the presence of the defendant. The committee accepts that past difficulties in prosecuting the equivalent current offence justify the proposed form of the new offence, particularly in light of the seriousness of the criminal conduct that it addresses. Further, the proposed defence, in conjunction with the appropriate exercise of discretion by police and prosecuting authorities, should ensure that the provision does not capture behaviour that is not connected to an intention to commit a child sexual offence.

3.54 Similarly, the committee heard concerns in relation to the aggravated offence for engaging in sexual intercourse with a young person, or to cause a young person to engage in sexual intercourse, where the defendant is in a position of trust or authority. However, the committee is satisfied that the proposed offence does not appear significantly broader than similar existing offences in terms of its scope and application. Further, the committee is reassured that the discretion of police and prosecuting authorities will ensure that the provision does not give rise to unmeritorious prosecutions.

3.55 In a similar vein, the committee notes that police and prosecutorial discretion is an important element of ensuring that the new and existing child sex offences will not operate to unduly capture young people who may be involved or participate in the practice of 'sexting'. While the committee acknowledges that the practice may be undesirable, it agrees with arguments 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.

3.56 In light of the evidence provided in relation to sexting, the committee is inclined to favour calls for the discretion of the Attorney-General to be extended in relation to prosecutions of people under 18 years of age for child sex offences. 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).

3.57 Finally, the committee notes the recommendations of the LCA concerning the statutory defences to be made available under the child sex offence regime, and particularly its arguments that an element of consent should be included in the defences relating to 'belief in age' and 'valid and genuine marriage'. In 2007, the committee was persuaded to support this recommendation by legitimate concerns underpinning the issue.⁵⁴ However, having considered the matter afresh, and with the benefit of further evidence from the Department, the committee accepts the rationale that the element of consent is not appropriate in the context of the child sex offence regime.

Recommendation 1

3.58 The committee recommends that the Bill be amended 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.

Recommendation 2

3.59 Subject to the preceding recommendation, the committee recommends that the Senate pass the Bill.

**Senator Trish Crossin
Chair**

54 Senate Legal and Constitutional Affairs Committee, *Inquiry into Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007[Provisions]*, October 2007, p. 21.

APPENDIX 1

SUBMISSIONS RECEIVED

| Submission Number | Submitter |
|--------------------------|-------------------------------------|
| 1 | Civil Liberties Australia |
| 2 | Victoria Police |
| 3 | ACT Policing |
| 4 | Australian Institute of Criminology |
| 5 | Australian Privacy Foundation |
| 6 | CrimTrac Agency |
| 7 | South Australia Policing |
| 8 | Law Council of Australia |

ADDITIONAL INFORMATION RECEIVED

- 1 Answers to Questions on Notice provided by Attorney-General's Department on 11 March 2010

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, 9 March 2010

CHIDGEY, Ms Sarah, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department

CLARKE, Dr Roger, Chair, Australian Privacy Foundation

DONOVAN, Ms Helen, Co-Director, Criminal Law and Human Rights, Law Council of Australia

MOULDS, Ms Sarah, Senior Policy Lawyer, Law Council of Australia

ORANGE, Ms Kate, Senior Legal Officer, Criminal Law and Law Enforcement Branch, Attorney-General's Department

SVANTESSON, Dr Dan Jerker Borje, Vice-chair, Australian Privacy Foundation

TAYLOR, Commander Stephanie, Manager, High Tech Investigations and Business Delivery, Australian Federal Police

WHOWELL, Mr Peter, Manager, Government Relations, Australian Federal Police

