



Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010

No. 42, 2010

An Act to amend the criminal law, and for related purposes

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010

No. 42, 2010

An Act to amend the criminal law, and for related purposes

[Assented to 14 April 2010]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010*.

Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010 No. 42, 2010

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2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	14 April 2010
2. Schedule 1	The day after this Act receives the Royal Assent.	15 April 2010
3. Schedule 2	The 28th day after this Act receives the Royal Assent.	12 May 2010

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments relating to sexual offences against children

Part 1—Amendments relating to child sex offences outside Australia

Crimes Act 1914

1 Part IIIA

Repeal the Part.

Criminal Code Act 1995

2 Subsection 7.3(8) of the *Criminal Code*

Omit “section”, substitute “Code”.

3 Paragraph 102.1(1A)(c) of the *Criminal Code*

Omit “(within the meaning of section 7.3)”.

4 After Division 271 of the *Criminal Code*

Insert:

Division 272—Child sex offences outside Australia

Subdivision A—Preliminary

272.1 Definitions

In this Division:

cause a person to engage in sexual intercourse or other sexual activity has the meaning given by section 272.2.

offence, in the case of a reference to an offence against this Division or against a particular provision of it, has a meaning affected by section 272.5.

position of trust or authority has the meaning given by subsection 272.3(1).

sexual intercourse has the meaning given by section 272.4.

272.2 When conduct causes a person to engage in sexual intercourse or other sexual activity

For the purposes of this Division, a person's conduct *causes* another person to engage in sexual intercourse or other sexual activity if it substantially contributes to the other person engaging in sexual intercourse or other sexual activity.

272.3 Meaning of *position of trust or authority*

- (1) For the purposes of this Code, a person is in a *position of trust or authority* in relation to another person if:
 - (a) the person is the other person's parent, step-parent, or grandparent; or
 - (b) the person is the other person's foster parent, guardian or carer; or
 - (c) the person is a teacher engaged in the education of the other person; or
 - (d) the person is a religious official or spiritual leader (however described) providing pastoral care or religious instruction to the other person; or
 - (e) the person is the other person's sports coach; or
 - (f) the person is a medical practitioner, nurse, psychologist, other health professional (however described), counsellor or social worker providing professional services to the other person; or
 - (g) the person is a member of a police force or police service, or a person employed or providing services in a correctional institution (however described), performing duties in relation to the other person; or
 - (h) the person:
 - (i) is an employer of the other person; or
 - (ii) has the authority to determine significant aspects of the other person's terms and conditions of employment; or

- (iii) has the authority to terminate the other person's employment (whether the other person is being paid in respect of that employment or is working in a voluntary capacity).
- (2) Without limiting who is a parent, step-parent or grandparent of a person for the purposes of this section:
- (a) a person is the **parent** of another person if the other person is a child of the person within the meaning of the *Family Law Act 1975*; and
 - (b) a de facto partner of a person's parent is the **step-parent** of the person if the de facto partner would be the person's step-parent except that he or she is not legally married to the person's parent; and
 - (c) a person (the **first person**) is the **grandparent** of another person if the first person is a parent or step-parent of a parent or step-parent of the other person.
- (3) In this section:
- de facto partner** of a person has the meaning given by the *Acts Interpretation Act 1901*.

272.4 Meaning of *sexual intercourse*

- (1) In this Code, **sexual intercourse** means:
- (a) the penetration, to any extent, of the vagina or anus of a person by any part of the body of another person; or
 - (b) the penetration, to any extent, of the vagina or anus of a person, by an object, carried out by another person; or
 - (c) fellatio; or
 - (d) cunnilingus; or
 - (e) the continuation of any activity mentioned in paragraph (a), (b), (c) or (d).
- (2) In this Code, **sexual intercourse** does not include an act of penetration that:
- (a) is carried out for a proper medical or hygienic purpose; or
 - (b) is carried out for a proper law enforcement purpose.
- (3) For the purposes of this section, **vagina** includes:
- (a) any part of a female person's genitalia; and

- (b) a surgically constructed vagina.

272.5 Meaning of offence against this Division and extension of criminal responsibility

- (1) A reference in this Division (except section 272.19, which deals with encouraging an offence against this Division) to an offence against this Division, or against a particular provision of it, includes:
- (a) a reference to:
 - (i) an offence against section 6 of the *Crimes Act 1914* (accessory after the fact); or
 - (ii) an offence against section 11.1 (attempt), 11.5 (conspiracy) or 272.19 of this Code; that relates to an offence against this Division or against that provision of it; and
 - (b) a reference to an offence against this Division, or against that provision of it, because of section 11.2 (complicity and common purpose), 11.2A (joint commission) or 11.3 (commission by proxy).
- (2) A reference in section 272.19 (encouraging offence against this Division) to an offence against this Division or against a particular provision of it does not include a reference to such an offence because of section 11.2 (complicity and common purpose) or 11.2A (joint commission).
- (3) Section 11.1 (attempt) does not apply to an offence against:
- (a) section 272.14 (procuring child to engage in sexual activity outside Australia); or
 - (b) section 272.15 (“grooming” child to engage in sexual activity outside Australia); or
 - (c) section 272.20 (preparing for or planning offence against this Division).
- (4) Section 11.4 (incitement) does not apply to an offence against this Division.
- (5) Section 11.5 (conspiracy) does not apply to an offence against section 272.19 (encouraging offence against this Division).

272.6 Who can be prosecuted for an offence committed outside Australia

A person must not be charged with an offence against this Division that the person allegedly committed wholly outside Australia unless, at the time of the offence, the person was:

- (a) an Australian citizen; or
- (b) a resident of Australia; or
- (c) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or
- (d) any other body corporate that carries on its activities principally in Australia.

272.7 Saving of other laws

This Division is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.

Subdivision B—Sexual offences against children outside Australia

272.8 Sexual intercourse with child outside Australia

Engaging in sexual intercourse with child

- (1) A person commits an offence if:
 - (a) the person engages in sexual intercourse with another person (the *child*); and
 - (b) the child is under 16; and
 - (c) the sexual intercourse is engaged in outside Australia.

Penalty: Imprisonment for 20 years.

Causing child to engage in sexual intercourse in presence of defendant

- (2) A person commits an offence if:
 - (a) the person engages in conduct in relation to another person (the *child*); and

- (b) that conduct causes the child to engage in sexual intercourse in the presence of the person; and
- (c) the child is under 16 when the sexual intercourse is engaged in; and
- (d) the sexual intercourse is engaged in outside Australia.

Penalty: Imprisonment for 20 years.

- (3) The fault element for paragraph (2)(b) is intention.
- (4) Absolute liability applies to paragraphs (1)(b) and (c) and (2)(c) and (d).

Note 1: For absolute liability, see section 6.2.

Note 2: For a defence based on belief about age, see section 272.16.

272.9 Sexual activity (other than sexual intercourse) with child outside Australia

Engaging in sexual activity with child

- (1) A person commits an offence if:
 - (a) the person engages in sexual activity (other than sexual intercourse) with another person (the *child*); and
 - (b) the child is under 16; and
 - (c) the sexual activity is engaged in outside Australia.

Penalty: Imprisonment for 15 years.

Causing child to engage in sexual activity in presence of defendant

- (2) A person commits an offence if:
 - (a) the person engages in conduct in relation to another person (the *child*); and
 - (b) that conduct causes the child to engage in sexual activity (other than sexual intercourse) in the presence of the person; and
 - (c) the child is under 16 when the sexual activity is engaged in; and
 - (d) the sexual activity is engaged in outside Australia.

Penalty: Imprisonment for 15 years.

- (3) The fault element for paragraph (2)(b) is intention.
- (4) Absolute liability applies to paragraphs (1)(b) and (c) and (2)(c) and (d).

Note: For absolute liability, see section 6.2.

Defence—child present but defendant does not intend to derive gratification

- (5) It is a defence to a prosecution for an offence against subsection (1) or (2) if:
 - (a) the conduct constituting the offence consists only of the child being in the presence of the defendant while sexual activity is engaged in; and
 - (b) the defendant proves that he or she did not intend to derive gratification from the presence of the child during that activity.

Note 1: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4.

Note 2: For a defence based on belief about age, see section 272.16.

272.10 Aggravated offence—child with mental impairment or under care, supervision or authority of defendant

- (1) A person commits an offence against this section (the *aggravated offence*) if:
 - (a) the person commits an offence (the *underlying offence*) against one of the following provisions in relation to another person (the *child*):
 - (i) subsection 272.8(1) (engaging in sexual intercourse with child outside Australia);
 - (ii) subsection 272.8(2) (causing child to engage in sexual intercourse in presence of defendant outside Australia);
 - (iii) subsection 272.9(1) (engaging in sexual activity (other than sexual intercourse) with child outside Australia);
 - (iv) subsection 272.9(2) (causing child to engage in sexual activity (other than sexual intercourse) in presence of defendant outside Australia); and
 - (b) either or both of the following apply at the time the person commits the underlying offence:

- (i) the child has a mental impairment;
- (ii) the person is in a position of trust or authority in relation to the child, or the child is otherwise under the care, supervision or authority of the person.

Penalty: Imprisonment for 25 years.

- (2) There is no fault element for the physical element described in paragraph (1)(a) other than the fault elements (however described), if any, for the underlying offence.
- (3) To avoid doubt, a person does not commit the underlying offence for the purposes of paragraph (1)(a) if the person has a defence to the underlying offence.
- (4) Absolute liability applies to subparagraph (1)(b)(i).

Note: For absolute liability, see section 6.2.

- (5) Strict liability applies to subparagraph (1)(b)(ii).

Note: For strict liability, see section 6.1.

Defence—belief that child did not have mental impairment

- (6) Subparagraph (1)(b)(i) does not apply if the defendant proves that, at the time he or she committed the underlying offence, he or she believed that the child did not have a mental impairment.

Note: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4.

- (7) In determining whether the defendant had the belief mentioned in subsection (6), the trier of fact may take into account whether the alleged belief was reasonable in the circumstances.

272.11 Persistent sexual abuse of child outside Australia

- (1) A person commits an offence against this section if the person commits an offence (the *underlying offence*) against one or more of the following provisions in relation to the same person (the *child*) on 3 or more separate occasions during any period:
 - (a) subsection 272.8(1) (engaging in sexual intercourse with child outside Australia);
 - (b) subsection 272.8(2) (causing child to engage in sexual intercourse in presence of defendant outside Australia);

- (c) subsection 272.9(1) (engaging in sexual activity (other than sexual intercourse) with child outside Australia);
- (d) subsection 272.9(2) (causing child to engage in sexual activity (other than sexual intercourse) in presence of defendant outside Australia).

Penalty: Imprisonment for 25 years.

- (2) There is no fault element for any of the physical elements described in subsection (1) other than the fault elements (however described), if any, for the underlying offence.
- (3) To avoid doubt, a person does not commit the underlying offence for the purposes of subsection (1) if the person has a defence to the underlying offence.

Offence or conduct need not be the same

- (4) For the purposes of subsection (1), it is immaterial whether the underlying offence, or the conduct constituting the underlying offence, is the same on each occasion.

Certain matters need not be proved

- (5) In proceedings for an offence against this section, it is not necessary to specify or to prove the dates or exact circumstances of the occasions on which the conduct constituting the offence against this section occurred.

Content of charge

- (6) A charge of an offence against this section:
 - (a) must specify with reasonable particularity the period during which the offence against this section occurred; and
 - (b) must describe the nature of the separate offences alleged to have been committed by the person during that period.

Trier of fact to be satisfied of certain matters

- (7) In order for the person to be found guilty of an offence against this section:
 - (a) the trier of fact must be satisfied beyond reasonable doubt that the evidence establishes at least 3 separate occasions

during the period concerned on which the person engaged in conduct constituting an offence against subsection 272.8(1) or (2) or 272.9(1) or (2), of a nature described in the charge, in relation to the child; and

- (b) the trier of fact must be so satisfied about the material facts of the 3 such occasions, although the trier of fact need not be so satisfied about the dates or the order of those occasions; and
 - (c) if the trier of fact is a jury and more than 3 such occasions are relied on as evidence of the commission of an offence against this section—all the members of the jury must be so satisfied about the same 3 incidents.
- (8) In proceedings for an offence against this section, the judge must warn the jury (if any) of the requirements of subsection (7).

Double jeopardy etc.

- (9) A person who has been convicted or acquitted of an offence against this section may not be convicted of another offence against section 272.8, 272.9 or 272.10 that is alleged to have been committed in relation to the child in the period during which the person was alleged to have committed the offence against this section.
- (10) However, subsection (9) does not prevent an alternative verdict under section 272.28.
- (11) A person who has been convicted or acquitted of an offence against section 272.8, 272.9 or 272.10 in relation to a person (the *child*) may not be convicted of an offence against this section in relation to the child if any of the occasions relied on as evidence of the commission of the offence against this section includes the conduct that constituted the offence of which the person was convicted or acquitted.

**272.12 Sexual intercourse with young person outside Australia—
defendant in position of trust or authority**

Engaging in sexual intercourse with young person

- (1) A person commits an offence if:
-

- (a) the person engages in sexual intercourse with another person (the *young person*); and
- (b) the young person is at least 16 but under 18; and
- (c) the person is in a position of trust or authority in relation to the young person; and
- (d) the sexual intercourse is engaged in outside Australia.

Penalty: Imprisonment for 10 years.

Causing young person to engage in sexual intercourse in presence of defendant

- (2) A person commits an offence if:
 - (a) the person engages in conduct in relation to another person (the *young person*); and
 - (b) that conduct causes the young person to engage in sexual intercourse in the presence of the person; and
 - (c) the young person is at least 16 but under 18 when the sexual intercourse is engaged in; and
 - (d) the person is in a position of trust or authority in relation to the young person; and
 - (e) the sexual intercourse is engaged in outside Australia.

Penalty: Imprisonment for 10 years.

- (3) The fault element for paragraph (2)(b) is intention.
- (4) Absolute liability applies to paragraphs (1)(b) and (d) and (2)(c) and (e).

Note 1: For absolute liability, see section 6.2.

Note 2: For a defence based on belief about age, see section 272.16.

- (5) Strict liability applies to paragraphs (1)(c) and (2)(d).

Note: For strict liability, see section 6.1.

272.13 Sexual activity (other than sexual intercourse) with young person outside Australia—defendant in position of trust or authority

Engaging in sexual activity with young person

- (1) A person commits an offence if:
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Schedule 1 Amendments relating to sexual offences against children
Part 1 Amendments relating to child sex offences outside Australia

- (a) the person engages in sexual activity (other than sexual intercourse) with another person (the *young person*); and
- (b) the young person is at least 16 but under 18; and
- (c) the person is in a position of trust or authority in relation to the young person; and
- (d) the sexual activity is engaged in outside Australia.

Penalty: Imprisonment for 7 years.

Causing young person to engage in sexual activity in presence of defendant

- (2) A person commits an offence if:
- (a) the person engages in conduct in relation to another person (the *young person*); and
 - (b) that conduct causes the young person to engage in sexual activity (other than sexual intercourse) in the presence of the person; and
 - (c) the young person is at least 16 but under 18 when the sexual activity is engaged in; and
 - (d) the person is in a position of trust or authority in relation to the young person; and
 - (e) the sexual activity is engaged in outside Australia.

Penalty: Imprisonment for 7 years.

- (3) The fault element for paragraph (2)(b) is intention.
- (4) Absolute liability applies to paragraphs (1)(b) and (d) and (2)(c) and (e).

Note 1: For absolute liability, see section 6.2.

Note 2: For a defence based on belief about age, see section 272.16.

- (5) Strict liability applies to paragraphs (1)(c) and (2)(d).

Note: For strict liability, see section 6.1.

Defence—young person present but defendant does not intend to derive gratification

- (6) It is a defence to a prosecution for an offence against subsection (1) or (2) if:

- (a) the conduct constituting the offence consists only of the young person being in the presence of the defendant while sexual activity is engaged in; and
- (b) the defendant proves that he or she did not intend to derive gratification from the presence of the young person during that activity.

Note 1: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4.

Note 2: For a defence based on belief about age, see section 272.16.

272.14 Procuring child to engage in sexual activity outside Australia

- (1) A person commits an offence if:
 - (a) the person engages in conduct in relation to another person (the *child*); and
 - (b) the person does so with the intention of procuring the child to engage in sexual activity (whether or not with the person) outside Australia; and
 - (c) the child is someone:
 - (i) who is under 16; or
 - (ii) who the person believes to be under 16; and
 - (d) one or more of the following apply:
 - (i) the conduct referred to in paragraph (a) occurs wholly or partly outside Australia;
 - (ii) the child is outside Australia when the conduct referred to in paragraph (a) occurs;
 - (iii) the conduct referred to in paragraph (a) occurs wholly in Australia and the child is in Australia when that conduct occurs.

Penalty: Imprisonment for 15 years.

- (2) Absolute liability applies to subparagraph (1)(c)(i) and paragraph (1)(d).

Note 1: For absolute liability, see section 6.2.

Note 2: For a defence based on belief about age, see section 272.16.

- (3) A person may be found guilty of an offence against subsection (1) even if it is impossible for the sexual activity referred to in that subsection to take place.

- (4) For the purposes of subsection (1), it does not matter that the child is a fictitious person represented to the person as a real person.

272.15 “Grooming” child to engage in sexual activity outside Australia

- (1) A person commits an offence if:
- (a) the person engages in conduct in relation to another person (the *child*); and
 - (b) the person does so with the intention of making it easier to procure the child to engage in sexual activity (whether or not with the person) outside Australia; and
 - (c) the child is someone:
 - (i) who is under 16; or
 - (ii) who the person believes to be under 16; and
 - (d) one or more of the following apply:
 - (i) the conduct referred to in paragraph (a) occurs wholly or partly outside Australia;
 - (ii) the child is outside Australia when the conduct referred to in paragraph (a) occurs;
 - (iii) the conduct referred to in paragraph (a) occurs wholly in Australia and the child is in Australia when that conduct occurs.

Penalty: Imprisonment for 12 years.

- (2) Absolute liability applies to subparagraph (1)(c)(i) and paragraph (1)(d).

Note 1: For absolute liability, see section 6.2.

Note 2: For a defence based on belief about age, see section 272.16.

- (3) A person may be found guilty of an offence against subsection (1) even if it is impossible for the sexual activity referred to in that subsection to take place.
- (4) For the purposes of subsection (1), it does not matter that the child is a fictitious person represented to the person as a real person.

272.16 Defence based on belief about age

Offences involving sexual intercourse or other sexual activity with a child—belief that child at least 16

- (1) It is a defence to a prosecution for an offence against section 272.8 or 272.9 if the defendant proves that, at the time of the sexual intercourse or sexual activity, he or she believed that the child was at least 16.

Note: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4.

Offences involving sexual intercourse or other sexual activity with young person—belief that young person at least 18

- (2) It is a defence to a prosecution for an offence against section 272.12 or 272.13 if the defendant proves that, at the time of the sexual intercourse or sexual activity, he or she believed that the young person was at least 18.

Note: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4.

Offences involving procuring or “grooming” child for sexual activity—belief that child at least 16

- (3) It is a defence to a prosecution for an offence against section 272.14 or 272.15 if the defendant proves that, at the time the defendant engaged in the conduct constituting the offence, he or she believed that the child was at least 16.

Note: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4.

Trier of fact may take into account whether belief reasonable

- (4) In determining whether the defendant had the belief mentioned in subsection (1), (2) or (3), the trier of fact may take into account whether the alleged belief was reasonable in the circumstances.

272.17 Defence based on valid and genuine marriage

Offences involving engaging in sexual intercourse or other sexual activity with child or young person

- (1) It is a defence to a prosecution for an offence against subsection 272.8(1), 272.9(1), 272.12(1) or 272.13(1) if the defendant proves that:
- (a) at the time of the sexual intercourse or sexual activity, there existed between the defendant and the child or the young person a marriage that was valid, or recognised as valid, under the law of:
 - (i) the place where the marriage was solemnised; or
 - (ii) the place where the offence was committed; or
 - (iii) the place of the defendant's residence or domicile; and
 - (b) when it was solemnised, the marriage was genuine.

Note: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4.

Offences involving procuring or "grooming" child for sexual activity

- (2) It is a defence to a prosecution for an offence against subsection 272.14(1) or 272.15(1) if the defendant proves that:
- (a) at the time he or she committed the offence, there existed between the defendant and the child a marriage that was valid, or recognised as valid, under the law of:
 - (i) the place where the marriage was solemnised; or
 - (ii) the place where the offence was committed; or
 - (iii) the place of the defendant's residence or domicile; and
 - (b) when it was solemnised, the marriage was genuine.

Note: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4.

Subdivision C—Offences of benefiting from, encouraging or preparing for sexual offences against children outside Australia

272.18 Benefiting from offence against this Division

- (1) A person commits an offence if:
- (a) the person engages in conduct; and
 - (b) the person does so with the intention of benefiting from an offence against this Division; and
 - (c) the conduct is reasonably capable of resulting in the person benefiting from such an offence.

Penalty: Imprisonment for 20 years.

- (2) Subsection (1) applies:
- (a) whether the conduct is engaged in within or outside Australia; and
 - (b) whether or not the person intends to benefit financially from an offence against this Division; and
 - (c) whether or not an offence against this Division is in fact committed.

- (3) Absolute liability applies to paragraph (1)(c).

Note: For absolute liability, see section 6.2.

272.19 Encouraging offence against this Division

- (1) A person commits an offence if:
- (a) the person engages in conduct; and
 - (b) the person does so with the intention of encouraging an offence against this Division (other than this section or section 272.20); and
 - (c) the conduct is reasonably capable of encouraging such an offence.

Penalty: Imprisonment for 20 years.

- (2) Subsection (1) applies:
- (a) whether the conduct is engaged in within or outside Australia; and

- (b) whether or not an offence against this Division is in fact committed.
- (3) Absolute liability applies to paragraph (1)(c).
Note: For absolute liability, see section 6.2.
- (4) In this section, *encourage* means:
- (a) encourage, incite to, or urge, by any means whatever, (including by a written, electronic or other form of communication); or
 - (b) aid, facilitate, or contribute to, in any way whatever.

272.20 Preparing for or planning offence against this Division

Offences involving sexual intercourse or other sexual activity with child, and benefiting offence

- (1) A person commits an offence if:
- (a) the person does an act; and
 - (b) the person does so with the intention of preparing for, or planning, an offence against section 272.8, 272.9, 272.10, 272.11 or 272.18.

Penalty: Imprisonment for 10 years.

Offences involving sexual intercourse or other sexual activity with young person

- (2) A person commits an offence if:
- (a) the person does an act; and
 - (b) the person does so with the intention of preparing for, or planning, an offence against section 272.12 or 272.13.

Penalty: Imprisonment for 5 years.

- (3) Subsections (1) and (2) apply:
- (a) whether the act is done within or outside Australia; and
 - (b) whether or not an offence against a provision referred to in paragraph (1)(b) or (2)(b) is in fact committed; and
 - (c) whether or not the act is done in preparation for, or planning, a specific offence against a provision referred to in paragraph (1)(b) or (2)(b); and

- (d) whether or not the act is done in preparation for, or planning, more than one offence against a provision referred to in paragraph (1)(b) or (2)(b).

Subdivision D—Video link evidence

272.21 When court may take evidence by video link

In a proceeding for an offence against this Division, the court may, on application by a party to the proceeding, direct that a witness give evidence by video link if:

- (a) the witness will give the evidence from outside Australia; and
- (b) the witness is not a defendant in the proceeding; and
- (c) the facilities required by section 272.22 are available or can reasonably be made available; and
- (d) the court is satisfied that attendance of the witness at the court to give the evidence would:
 - (i) cause unreasonable expense or inconvenience; or
 - (ii) cause the witness psychological harm or unreasonable distress; or
 - (iii) cause the witness to become so intimidated or distressed that his or her reliability as a witness would be significantly reduced; and
- (e) the court is satisfied that it is consistent with the interests of justice that the evidence be taken by video link.

272.22 Technical requirements for video link

- (1) A witness can give evidence under a direction only if:
 - (a) the courtroom or other place in Australia where the court is sitting (the **Australian location**); and
 - (b) the place where the evidence is given (the **overseas location**);are equipped with video facilities that:
 - (c) enable appropriate persons at the Australian location to see and hear the witness give the evidence; and
 - (d) enable appropriate persons at the overseas location to see and hear appropriate persons at the Australian location.
- (2) In subsection (1):

appropriate persons means such persons as the court considers appropriate.

272.23 Application of laws about witnesses

A person who gives evidence under a direction is taken to give it at the courtroom or other place in Australia where the court is sitting.

Note: This section has effect, for example, for the purposes of laws relating to evidence, procedure, contempt of court and perjury.

272.24 Administration of oaths and affirmations

An oath or affirmation to be sworn or made by a witness who is to give evidence under a direction may be administered either:

- (a) by means of the video link, in as nearly as practicable the same way as if the witness were to give the evidence at the courtroom or other place in Australia where the court is sitting; or
- (b) as follows:
 - (i) on behalf of the court and as directed by it;
 - (ii) by a person (whether an Australian official or not) authorised by the court;
 - (iii) at the place where the witness is to give the evidence.

272.25 Expenses

A court may make such orders as are just for payment of expenses incurred in connection with giving evidence under a direction by the court under this Subdivision.

272.26 Other laws about foreign evidence not affected

This Subdivision does not prevent any other law about taking evidence of a witness outside Australia from applying for the purposes of a proceeding for an offence against this Division.

Subdivision E—Other rules about conduct of trials

272.27 Evidence relating to a person's age

- (1) For the purposes of this Division, evidence that a person was represented to the defendant as being under or of a particular age is, in the absence of evidence to the contrary, proof that the defendant believed that person to be under or of that age.
- (2) In determining for the purposes of this Division how old a person is or was at a particular time, a jury or court may treat any of the following as admissible evidence:
 - (a) the person's appearance;
 - (b) medical or other scientific opinion;
 - (c) a document that is or appears to be an official or medical record from a country outside Australia;
 - (d) a document that is or appears to be a copy of such a record.
- (3) Subsection (2) does not make any other kind of evidence inadmissible, and does not affect a prosecutor's duty to do all he or she can to adduce the best possible evidence for determining the question.
- (4) If, on a trial for an offence against this Division, evidence may be treated as admissible because of subsection (2), the court must warn the jury that it must be satisfied beyond reasonable doubt in determining the question.

272.28 Alternative verdicts

If, on a trial for an offence (the *column 1 offence*) against a provision referred to in column 1 of an item in the following table, the trier of fact:

- (a) is not satisfied that the defendant is guilty of the column 1 offence; but
- (b) is satisfied beyond reasonable doubt that he or she is guilty of an offence (the *column 2 offence*) against a provision referred to in column 2 of that item;

it may find the defendant not guilty of the column 1 offence but guilty of the column 2 offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

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Alternative verdicts

Item	Column 1	Column 2
1	subsection 272.8(1)	subsection 272.9(1)
2	subsection 272.8(2)	subsection 272.9(2)
3	subsection 272.9(1)	subsection 272.8(1)
4	subsection 272.9(2)	subsection 272.8(2)
5	subsection 272.10(1)	subsection 272.8(1), 272.8(2), 272.9(1) or 272.9(2)
6	subsection 272.11(1)	subsection 272.8(1), 272.8(2), 272.9(1), 272.9(2) or 272.10(1)
7	subsection 272.12(1)	subsection 272.13(1)
8	subsection 272.12(2)	subsection 272.13(2)
9	subsection 272.13(1)	subsection 272.12(1)
10	subsection 272.13(2)	subsection 272.12(2)

272.29 Double jeopardy

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 this Division in respect of that conduct.

272.30 Sentencing

- (1) In determining the sentence to be passed, or the order to be made, in respect of a person for an offence against Subdivision B of this Division, the court must take into account the age and maturity of the person in relation to whom the offence was committed, so far as these matters are relevant and known to the court.
- (2) The matters mentioned in subsection (1) are in addition to any other matters the court must take into account (for example, the matters mentioned in subsection 16A(2) of the *Crimes Act 1914*).

272.31 Consent to commencement of proceedings where defendant under 18

- (1) Proceedings for an offence against this Division 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.
- (2) However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, such an offence before the necessary consent has been given.

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

Subdivision A—Preliminary

273.1 Definitions

- (1) Subject to subsections (2) and (3), an expression used in this Division that is defined in Part 10.6 has the same meaning in this Division as it has in that Part.

Note: These expressions include *child abuse material* and *child pornography material*.

- (2) A reference in this Division to a person having possession or control of material includes a reference to the person:
 - (a) having possession of a computer or data storage device that holds or contains the material; or
 - (b) having possession of a document in which the material is recorded; or
 - (c) having control of material held in a computer that is in the possession of another person (whether inside or outside Australia).
- (3) A reference in this Division to a person producing, distributing or obtaining material includes a reference to the person:
 - (a) producing, distributing or obtaining material held or contained in a computer or data storage device; or
 - (b) producing, distributing or obtaining a document in which the material is recorded.

- (4) Section 473.4 applies in relation to this Division as if the reference in that section to Part 10.6 were a reference to this Division.

Note: Section 473.4 sets out matters that may be taken into account in deciding whether particular material is offensive.

273.2 Who can be prosecuted for an offence committed outside Australia

A person must not be charged with an offence against this Division that the person allegedly committed outside Australia unless, at the time of the offence, the person was:

- (a) an Australian citizen; or
- (b) a resident of Australia; or
- (c) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or
- (d) any other body corporate that carries on its activities principally in Australia.

273.2A Consent to commencement of proceedings where defendant under 18

- (1) Proceedings for an offence against this Division 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.
- (2) However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, such an offence before the necessary consent has been given.

273.3 Double jeopardy

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 this Division in respect of that conduct.

273.4 Saving of other laws

This Division is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.

Subdivision B—Offences committed overseas involving child pornography material or child abuse material

273.5 Possessing, controlling, producing, distributing or obtaining child pornography material outside Australia

- (1) A person commits an offence if:
- (a) the person:
 - (i) has possession or control of material; or
 - (ii) produces, distributes or obtains material; or
 - (iii) facilitates the production or distribution of material; and
 - (b) the material is child pornography material; and
 - (c) the conduct referred to in paragraph (a) occurs outside Australia.

Penalty: Imprisonment for 15 years.

- (2) Absolute liability applies to paragraph (1)(c).

Note: For absolute liability, see section 6.2.

273.6 Possessing, controlling, producing, distributing or obtaining child abuse material outside Australia

- (1) A person commits an offence if:
- (a) the person:
 - (i) has possession or control of material; or
 - (ii) produces, distributes or obtains material; or
 - (iii) facilitates the production or distribution of material; and
 - (b) the material is child abuse material; and
 - (c) the conduct referred to in paragraph (a) occurs outside Australia.

Penalty: Imprisonment for 15 years.

- (2) Absolute liability applies to paragraph (1)(c).

Note: For absolute liability, see section 6.2.

273.7 Aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people

- (1) A person commits an offence against this section if:
- (a) the person commits an offence against either of the following provisions on 3 or more separate occasions:
 - (i) section 273.5 (possessing etc. child pornography material outside Australia);
 - (ii) section 273.6 (possessing etc. child abuse material outside Australia); and
 - (b) the commission of each such offence involves 2 or more people.

Penalty: Imprisonment for 25 years.

- (2) There is no fault element for any of the physical elements described in paragraph (1)(a) other than the fault elements (however described), if any, for the offence against section 273.5 or 273.6.
- (3) To avoid doubt, a person does not commit an offence against section 273.5 or 273.6 for the purposes of paragraph (1)(a) if the person has a defence to that offence.

Offence or conduct need not be the same

- (4) For the purposes of subsection (1), it is immaterial whether the offence, or the conduct constituting the offence, is the same on each occasion.

Double jeopardy etc.

- (5) A person who has been convicted or acquitted of an offence (the **aggravated offence**) against this section may not be convicted of an offence against section 273.5 or 273.6 in relation to the conduct that constituted the aggravated offence.
- (6) Subsection (5) does not prevent an alternative verdict under section 273.8.
- (7) A person who has been convicted or acquitted of an offence (the **underlying offence**) against section 273.5 or 273.6 may not be

convicted of an offence against this section in relation to the conduct that constituted the underlying offence.

273.8 Alternative verdict if aggravated offence not proven

If, on a trial for an offence (the *aggravated offence*) against subsection 273.7(1), the trier of fact:

- (a) is not satisfied that the defendant is guilty of the aggravated offence; but
- (b) is satisfied beyond reasonable doubt that he or she is guilty of an offence against section 273.5 or 273.6;

it may find the defendant not guilty of the aggravated offence but guilty of the offence against section 273.5 or 273.6, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

Subdivision C—Defences

273.9 Defences to offences against this Division

- (1) A person is not criminally responsible for an offence against section 273.5 or 273.6 because of engaging in particular conduct if the conduct:

- (a) is of public benefit; and
- (b) does not extend beyond what is of public benefit.

In determining whether the person is, under this subsection, not criminally responsible for the offence, the question whether the conduct is of public benefit is a question of fact and the person's motives in engaging in the conduct are irrelevant.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3).

- (2) For the purposes of subsection (1), conduct is of public benefit if, and only if, the conduct is necessary for or of assistance in:
 - (a) enforcing a law of the Commonwealth, a State or Territory, or a foreign country; or
 - (b) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or Territory or a foreign country; or
 - (c) the administration of justice (whether within or outside Australia); or

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- (d) conducting scientific, medical or educational research.
- (3) Paragraph (2)(d) only applies if the person's conduct was, in all the circumstances, reasonable having regard to the purpose mentioned in that paragraph.
- (4) A person is not criminally responsible for an offence against section 273.5 or 273.6 if:
- (a) the person is, at the time of the offence:
 - (i) a law enforcement officer; or
 - (ii) an intelligence or security officer; or
 - (iii) an officer or employee of the government of a foreign country performing similar duties to an intelligence or security officer; and
 - (b) the person is acting in the course of his or her duties; and
 - (c) the conduct of the person is reasonable in the circumstances for the purpose of performing that duty.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3).

- (5) A person is not criminally responsible for an offence against section 273.5 or 273.6 if the person engages in the conduct in good faith for the sole purpose of:
- (a) assisting the Australian Communications and Media Authority to detect:
 - (i) prohibited content (within the meaning of Schedule 7 to the *Broadcasting Services Act 1992*); or
 - (ii) potential prohibited content (within the meaning of that Schedule);in the performance of the Authority's functions under Schedule 5 or Schedule 7 to that Act; or
 - (b) manufacturing or developing, or updating, content filtering technology (including software) in accordance with:
 - (i) a recognised alternative access-prevention arrangement (within the meaning of clause 40 of Schedule 5 to the *Broadcasting Services Act 1992*); or
 - (ii) a designated alternative access-prevention arrangement (within the meaning of clause 60 of that Schedule).

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3).

Subdivision D—Video link evidence

273.10 When court may take evidence by video link

In a proceeding for an offence against this Division, the court may, on application by a party to the proceeding, direct that a witness give evidence by video link if:

- (a) the witness will give the evidence from outside Australia; and
- (b) the witness is not a defendant in the proceeding; and
- (c) the facilities required by section 273.11 are available or can reasonably be made available; and
- (d) the court is satisfied that attendance of the witness at the court to give the evidence would:
 - (i) cause unreasonable expense or inconvenience; or
 - (ii) cause the witness psychological harm or unreasonable distress; or
 - (iii) cause the witness to become so intimidated or distressed that his or her reliability as a witness would be significantly reduced; and
- (e) the court is satisfied that it is consistent with the interests of justice that the evidence be taken by video link.

273.11 Technical requirements for video link

- (1) A witness can give evidence under a direction only if:
 - (a) the courtroom or other place in Australia where the court is sitting (the *Australian location*); and
 - (b) the place where the evidence is given (the *overseas location*);
are equipped with video facilities that:
 - (c) enable appropriate persons at the Australian location to see and hear the witness give the evidence; and
 - (d) enable appropriate persons at the overseas location to see and hear appropriate persons at the Australian location.
- (2) In subsection (1):

appropriate persons means such persons as the court considers appropriate.

273.12 Application of laws about witnesses

A person who gives evidence under a direction is taken to give it at the courtroom or other place in Australia where the court is sitting.

Note: This section has effect, for example, for the purposes of laws relating to evidence, procedure, contempt of court and perjury.

273.13 Administration of oaths and affirmations

An oath or affirmation to be sworn or made by a witness who is to give evidence under a direction may be administered either:

- (a) by means of the video link, in as nearly as practicable the same way as if the witness were to give the evidence at the courtroom or other place in Australia where the court is sitting; or
- (b) as follows:
 - (i) on behalf of the court and as directed by it;
 - (ii) by a person (whether an Australian official or not) authorised by the court;
 - (iii) at the place where the witness is to give the evidence.

273.14 Expenses

A court may make such orders as are just for payment of expenses incurred in connection with giving evidence under a direction by the court under this Subdivision.

273.15 Other laws about foreign evidence not affected

This Subdivision does not prevent any other law about taking evidence of a witness outside Australia from applying for the purposes of a proceeding for an offence against this Division.

5 Dictionary in the *Criminal Code*

Insert:

cause a person to engage in sexual intercourse or other sexual activity has the meaning given by section 272.2.

6 Dictionary in the *Criminal Code*

Insert:

engage in sexual activity: without limiting when a person engages in sexual activity, a person is taken to ***engage in sexual activity*** if the person is in the presence of another person (including by a means of communication that allows the person to see or hear the other person) while the other person engages in sexual activity.

7 Dictionary in the *Criminal Code*

Insert:

mental impairment has the meaning given by subsection 7.3(8).

8 Dictionary in the *Criminal Code*

Insert:

position of trust or authority has the meaning given by subsection 272.3(1).

9 Dictionary in the *Criminal Code*

Insert:

procure a person to engage in sexual activity includes:

- (a) encourage, entice or recruit the person to engage in that activity; or
- (b) induce the person (whether by threats, promises or otherwise) to engage in that activity.

10 Dictionary in the *Criminal Code*

Insert:

sexual activity means:

- (a) sexual intercourse; or
- (b) any other activity 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).

Note: See also the definition of ***engage in sexual activity***.

11 Dictionary in the *Criminal Code*

Insert:

sexual intercourse has the meaning given by section 272.4.

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

Criminal Code Act 1995

12 At the end of Division 470 of the *Criminal Code*

Add:

470.4 Meaning of expressions used in Subdivisions B and C of Division 471

- (1) Subject to subsections (2) and (3), an expression used in Subdivision B or C of Division 471 that is defined in Part 10.6 has the same meaning in that Subdivision as it has in that Part.

Note: These expressions include *child abuse material* and *child pornography material*.

- (2) A reference in Subdivision B or C of Division 471 to a person having possession or control of material includes a reference to the person:
- (a) having possession of a computer or data storage device that holds or contains the material; or
 - (b) having possession of a document in which the material is recorded; or
 - (c) having control of material held in a computer that is in the possession of another person (whether inside or outside Australia).
- (3) A reference in Subdivision B or C of Division 471 to a person producing, supplying or obtaining material includes a reference to the person:
- (a) producing, supplying or obtaining material held or contained in a computer or data storage device; or
 - (b) producing, supplying or obtaining a document in which the material is recorded.

- (4) Section 473.4 applies in relation to Subdivisions B and C of Division 471 as if the reference in that section to Part 10.6 were a reference to those Subdivisions.

Note: Section 473.4 sets out matters that may be taken into account in deciding whether particular material is offensive.

13 Before section 471.1 of the *Criminal Code*

Insert:

Subdivision A—General postal offences

14 At the end of Division 471 of the *Criminal Code*

Add:

Subdivision B—Offences relating to use of postal or similar service for child pornography material or child abuse material

471.16 Using a postal or similar service for child pornography material

- (1) A person commits an offence if:
- (a) the person causes an article to be carried by a postal or similar service; and
 - (b) the article is, or contains, child pornography material.

Penalty: Imprisonment for 15 years.

- (2) A person commits an offence if:
- (a) the person requests another person to cause an article to be carried by a postal or similar service; and
 - (b) the article is, or contains, child pornography material.

Penalty: Imprisonment for 15 years.

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

- (1) A person commits an offence if:
- (a) the person:

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- (i) has possession or control of material; or
- (ii) produces, supplies or obtains material; and
- (b) the material is child pornography material; and
- (c) the person has that possession or control, or engages in that production, supply or obtaining, with the intention that the material be used:
 - (i) by that person; or
 - (ii) by another person;in committing an offence against section 471.16 (using a postal or similar service for child pornography material).

Penalty: Imprisonment for 15 years.

- (2) A person may be found guilty of an offence against subsection (1) even if committing the offence against section 471.16 (using a postal or similar service for child pornography material) is impossible.
- (3) It is not an offence to attempt to commit an offence against subsection (1).

471.18 Defences in respect of child pornography material

- (1) A person is not criminally responsible for an offence against section 471.16 (using a postal or similar service for child pornography material) or 471.17 (possessing etc. child pornography material for use through a postal or similar service) because of engaging in particular conduct if the conduct:
 - (a) is of public benefit; and
 - (b) does not extend beyond what is of public benefit.

In determining whether the person is, under this subsection, not criminally responsible for the offence, the question whether the conduct is of public benefit is a question of fact and the person's motives in engaging in the conduct are irrelevant.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3).

- (2) For the purposes of subsection (1), conduct is of public benefit if, and only if, the conduct is necessary for or of assistance in:
 - (a) enforcing a law of the Commonwealth, a State or a Territory;or

- (b) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory; or
 - (c) the administration of justice; or
 - (d) conducting scientific, medical or educational research that has been approved by the Minister in writing for the purposes of this section.
- (3) A person is not criminally responsible for an offence against section 471.16 (using a postal or similar service for child pornography material) or 471.17 (possessing etc. child pornography material for use through a postal or similar service) if:
- (a) the person is, at the time of the offence, a law enforcement officer, or an intelligence or security officer, acting in the course of his or her duties; and
 - (b) the conduct of the person is reasonable in the circumstances for the purpose of performing that duty.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3).

471.19 Using a postal or similar service for child abuse material

- (1) A person commits an offence if:
- (a) the person causes an article to be carried by a postal or similar service; and
 - (b) the article is, or contains, child abuse material.

Penalty: Imprisonment for 15 years.

- (2) A person commits an offence if:
- (a) the person requests another person to cause an article to be carried by a postal or similar service; and
 - (b) the article is, or contains, child abuse material.

Penalty: Imprisonment for 15 years.

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

- (1) A person commits an offence if:
- (a) the person:

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- (i) has possession or control of material; or
- (ii) produces, supplies or obtains material; and
- (b) the material is child abuse material; and
- (c) the person has that possession or control, or engages in that production, supply or obtaining, with the intention that the material be used:
 - (i) by that person; or
 - (ii) by another person;in committing an offence against section 471.19 (using a postal or similar service for child abuse material).

Penalty: Imprisonment for 15 years.

- (2) A person may be found guilty of an offence against subsection (1) even if committing the offence against section 471.19 (using a postal or similar service for child abuse material) is impossible.
- (3) It is not an offence to attempt to commit an offence against subsection (1).

471.21 Defences in respect of child abuse material

- (1) A person is not criminally responsible for an offence against section 471.19 (using a postal or similar service for child abuse material) or 471.20 (possessing etc. child abuse material for use through a postal or similar service) because of engaging in particular conduct if the conduct:
 - (a) is of public benefit; and
 - (b) does not extend beyond what is of public benefit.

In determining whether the person is, under this subsection, not criminally responsible for the offence, the question whether the conduct is of public benefit is a question of fact and the person's motives in engaging in the conduct are irrelevant.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3).

- (2) For the purposes of subsection (1), conduct is of public benefit if, and only if, the conduct is necessary for or of assistance in:
 - (a) enforcing a law of the Commonwealth, a State or a Territory;or

- (b) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory; or
 - (c) the administration of justice; or
 - (d) conducting scientific, medical or educational research that has been approved by the Minister in writing for the purposes of this section.
- (3) A person is not criminally responsible for an offence against section 471.19 (using a postal or similar service for child abuse material) or 471.20 (possessing etc. child abuse material for use through a postal or similar service) if:
- (a) the person is, at the time of the offence, a law enforcement officer, or an intelligence or security officer, acting in the course of his or her duties; and
 - (b) the conduct of the person is reasonable in the circumstances for the purpose of performing that duty.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3).

471.22 Aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people

- (1) A person commits an offence against this section if:
- (a) the person commits an offence against one or more of the following provisions on 3 or more separate occasions:
 - (i) section 471.16 (using a postal or similar service for child pornography material);
 - (ii) section 471.17 (possessing etc. child pornography material for use through a postal or similar service);
 - (iii) section 471.19 (using a postal or similar service for child abuse material);
 - (iv) section 471.20 (possessing etc. child abuse material for use through a postal or similar service); and
 - (b) the commission of each such offence involves 2 or more people.

Penalty: Imprisonment for 25 years.

- (2) There is no fault element for any of the physical elements described in paragraph (1)(a) other than the fault elements

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(however described), if any, for the offence against section 471.16, 471.17, 471.19 or 471.20.

- (3) To avoid doubt, a person does not commit an offence against section 471.16, 471.17, 471.19 or 471.20 for the purposes of paragraph (1)(a) if the person has a defence to that offence.

Offence or conduct need not be the same

- (4) For the purposes of subsection (1), it is immaterial whether the offence, or the conduct constituting the offence, is the same on each occasion.

Double jeopardy etc.

- (5) A person who has been convicted or acquitted of an offence (the **aggravated offence**) against this section may not be convicted of an offence against section 471.16, 471.17, 471.19 or 471.20 in relation to the conduct that constituted the aggravated offence.
- (6) Subsection (5) does not prevent an alternative verdict under section 471.23.
- (7) A person who has been convicted or acquitted of an offence (the **underlying offence**) against section 471.16, 471.17, 471.19 or 471.20 may not be convicted of an offence against this section in relation to the conduct that constituted the underlying offence.

471.23 Alternative verdict if aggravated offence not proven

If, on a trial for an offence (the **aggravated offence**) against subsection 471.22(1), the trier of fact:

- (a) is not satisfied that the defendant is guilty of the aggravated offence; but
- (b) is satisfied beyond reasonable doubt that he or she is guilty of an offence (the **underlying offence**) against section 471.16, 471.17, 471.19 or 471.20;

it may find the defendant not guilty of the aggravated offence but guilty of the underlying offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

**Subdivision C—Offences relating to use of postal or similar
service involving sexual activity with person under 16**

471.24 Using a postal or similar service to procure persons under 16

- (1) A person (the *sender*) commits an offence if:
- (a) the sender causes an article to be carried by a postal or similar service to another person (the *recipient*); and
 - (b) the sender does this with the intention of procuring the recipient to engage in sexual activity with the sender; and
 - (c) the recipient is someone who is, or who the sender believes to be, under 16; and
 - (d) the sender is at least 18.

Penalty: Imprisonment for 15 years.

- (2) A person (the *sender*) commits an offence if:
- (a) the sender causes an article to be carried by a postal or similar service to another person (the *recipient*); and
 - (b) the sender does this with the intention of procuring the recipient to engage in sexual activity with another person (the *participant*); and
 - (c) the recipient is someone who is, or who the sender believes to be, under 16; and
 - (d) the participant is someone who is, or who the sender believes to be, at least 18.

Penalty: Imprisonment for 15 years.

- (3) A person (the *sender*) commits an offence if:
- (a) the sender causes an article to be carried by a postal or similar service to another person (the *recipient*); and
 - (b) the sender does this with the intention of procuring the recipient to engage in sexual activity with another person; and
 - (c) the recipient is someone who is, or who the sender believes to be, under 16; and
 - (d) the other person referred to in paragraph (b) is someone who is, or who the sender believes to be, under 18; and
 - (e) the sender intends that the sexual activity referred to in paragraph (b) will take place in the presence of:

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- (i) the sender; or
- (ii) another person (the *participant*) who is, or who the sender believes to be, at least 18.

Penalty: Imprisonment for 15 years.

471.25 Using a postal or similar service to “groom” persons under 16

- (1) A person (the *sender*) commits an offence if:
- (a) the sender causes an article to be carried by a postal or similar service to another person (the *recipient*); and
 - (b) the sender does this with the intention of making it easier to procure the recipient to engage in sexual activity with the sender; and
 - (c) the recipient is someone who is, or who the sender believes to be, under 16; and
 - (d) the sender is at least 18.

Penalty: Imprisonment for 12 years.

- (2) A person (the *sender*) commits an offence if:
- (a) the sender causes an article to be carried by a postal or similar service to another person (the *recipient*); and
 - (b) the sender does this with the intention of making it easier to procure the recipient to engage in sexual activity with another person (the *participant*); and
 - (c) the recipient is someone who is, or who the sender believes to be, under 16; and
 - (d) the participant is someone who is, or who the sender believes to be, at least 18.

Penalty: Imprisonment for 12 years.

- (3) A person (the *sender*) commits an offence if:
- (a) the sender causes an article to be carried by a postal or similar service to another person (the *recipient*); and
 - (b) the sender does this with the intention of making it easier to procure the recipient to engage in sexual activity with another person; and

- (c) the recipient is someone who is, or who the sender believes to be, under 16; and
- (d) the other person referred to in paragraph (b) is someone who is, or who the sender believes to be, under 18; and
- (e) the sender intends that the sexual activity referred to in paragraph (b) will take place in the presence of:
 - (i) the sender; or
 - (ii) another person (the *participant*) who is, or who the sender believes to be, at least 18.

Penalty: Imprisonment for 15 years.

471.26 Using a postal or similar service to send indecent material to person under 16

- (1) A person (the *sender*) commits an offence if:
 - (a) the sender causes an article to be carried by a postal or similar service to another person (the *recipient*); and
 - (b) the article is, or contains, material that is indecent; and
 - (c) the recipient is someone who is, or who the sender believes to be, under 16; and
 - (d) the sender is at least 18.

Penalty: Imprisonment for 7 years.

- (2) In a prosecution for an offence against subsection (1), whether material is indecent is a matter for the trier of fact.
- (3) In this section:

indecent means indecent according to the standards of ordinary people.

471.27 Age-related provisions relating to offences against this Subdivision

Application of absolute liability

- (1) For the purposes of an offence against this Subdivision, absolute liability applies to the physical element of circumstance of the offence that the recipient is someone who is under 16.

Note 1: For absolute liability, see section 6.2.

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Note 2: For a defence based on belief about age, see section 471.29.

- (2) For the purposes of an offence against subsection 471.24(2) or (3) or 471.25(2) or (3), absolute liability applies to the physical element of circumstance of the offence that the participant is at least 18.

Note 1: For absolute liability, see section 6.2.

Note 2: For a defence based on belief about age, see section 471.29.

Proof of belief about age—evidence of representation

- (3) For the purposes of this Subdivision, evidence that the recipient was represented to the sender as being under or of a particular age is, in the absence of evidence to the contrary, proof that the sender believed the recipient to be under or of that age.
- (4) For the purposes of sections 471.24 and 471.25, evidence that the participant was represented to the sender as being:
- (a) at least 18; or
 - (b) over or of a particular age;
- is, in the absence of evidence to the contrary, proof that the sender believed the participant to be at least 18 or over or of that particular age.

Determining age—admissible evidence

- (5) In determining for the purposes of this Subdivision how old a person is or was at a particular time, a jury or court may treat any of the following as admissible evidence:
- (a) the person's appearance;
 - (b) medical or other scientific opinion;
 - (c) a document that is or appears to be an official or medical record from a country outside Australia;
 - (d) a document that is or appears to be a copy of such a record.
- (6) Subsection (5) does not make any other kind of evidence inadmissible, and does not affect a prosecutor's duty to do all he or she can to adduce the best possible evidence for determining the question.
- (7) If, on a trial for an offence against this Subdivision, evidence may be treated as admissible because of subsection (5), the court must
-

warn the jury that it must be satisfied beyond reasonable doubt in determining the question.

471.28 Other provisions relating to offences against this Subdivision

Impossibility of sexual activity taking place

- (1) A person may be found guilty of an offence against section 471.24 or 471.25 even if it is impossible for the sexual activity referred to in that section to take place.

Fictitious recipient

- (2) For the purposes of an offence against this Subdivision, it does not matter that the recipient to whom the sender believes the sender is causing an article to be carried is a fictitious person represented to the sender as a real person.

Attempt not offence

- (3) It is not an offence to attempt to commit an offence against section 471.24 or 471.25.

471.29 Defences to offences against this Subdivision

Belief that recipient at least 16

- (1) It is a defence to a prosecution for an offence against this Subdivision if the defendant proves that, at the time he or she caused the article to be carried, the defendant believed that the recipient was at least 16.

Note: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4.

Offences involving procuring or “grooming” child for sexual activity with other participant—belief that participant under 18

- (2) It is a defence to a prosecution for an offence against subsection 471.24(2) or (3) or 471.25(2) or (3) if the defendant proves that, at the time he or she caused the article to be carried, the defendant believed that the participant was under 18.

Note: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4.

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Trier of fact may take into account whether belief reasonable

- (3) In determining whether the defendant had the belief mentioned in subsection (1) or (2), the trier of fact may take into account whether the alleged belief was reasonable in the circumstances.

Subdivision D—Miscellaneous

471.30 Geographical jurisdiction

Section 15.1 (extended geographical jurisdiction—category A) applies to an offence against Subdivision B or C of this Division.

471.31 Definition of *carry by post* does not apply

To avoid doubt, the definition of *carry by post* in section 470.1 does not apply in relation to Subdivision B or C of this Division.

15 Section 473.1 of the *Criminal Code*

Insert:

use, a carriage service, has a meaning affected by section 473.5.

16 At the end of Division 473 of the *Criminal Code*

Add:

473.5 Use of a carriage service

For the purposes of this Part, a person is taken not to use a carriage service by engaging in particular conduct if:

- (a) the person is a carrier and, in engaging in that conduct, is acting solely in the person's capacity as a carrier; or
 - (b) the person is a carriage service provider and, in engaging in that conduct, is acting solely in the person's capacity as a carriage service provider; or
 - (c) the person is an internet service provider and, in engaging in that conduct, is acting solely in the person's capacity as an internet service provider; or
 - (d) the person is an internet content host and, in engaging in that conduct, is acting solely in the person's capacity as an internet content host.
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**17 Subdivision C of Division 474 of the *Criminal Code*
(heading)**

Repeal the heading, substitute:

**Subdivision C—General offences relating to use of
telecommunications**

18 Section 474.13 of the *Criminal Code*

Repeal the section.

19 After section 474.18 of the *Criminal Code*

Insert:

**Subdivision D—Offences relating to use of carriage service for
child pornography material or child abuse material**

20 Paragraph 474.19(1)(a) of the *Criminal Code*

Repeal the paragraph, substitute:

- (a) the person:
 - (i) accesses material; or
 - (ii) causes material to be transmitted to himself or herself;
or
 - (iii) transmits, makes available, publishes, distributes,
advertises or promotes material; or
 - (iv) solicits material; and
- (aa) the person does so using a carriage service; and

21 Subsection 474.19(1) of the *Criminal Code* (penalty)

Omit “10”, substitute “15”.

22 After subsection 474.19(2) of the *Criminal Code*

Insert:

(2A) Absolute liability applies to paragraph (1)(aa).

Note: For absolute liability, see section 6.2.

23 Subsection 474.20(1) of the *Criminal Code* (penalty)

Omit “10”, substitute “15”.

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24 Paragraph 474.22(1)(a) of the *Criminal Code*

Repeal the paragraph, substitute:

- (a) the person:
 - (i) accesses material; or
 - (ii) causes material to be transmitted to himself or herself;
or
 - (iii) transmits, makes available, publishes, distributes, advertises or promotes material; or
 - (iv) solicits material; and
- (aa) the person does so using a carriage service; and

25 Subsection 474.22(1) of the *Criminal Code* (penalty)

Omit “10”, substitute “15”.

26 After subsection 474.22(2) of the *Criminal Code*

Insert:

(2A) Absolute liability applies to paragraph (1)(aa).

Note: For absolute liability, see section 6.2.

27 Subsection 474.23(1) of the *Criminal Code* (penalty)

Omit “10”, substitute “15”.

28 After section 474.24 of the *Criminal Code*

Insert:

474.24A Aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people

- (1) A person commits an offence against this section if:
 - (a) the person commits an offence against one or more of the following provisions on 3 or more separate occasions:
 - (i) section 474.19 (using a carriage service for child pornography material);
 - (ii) section 474.20 (possessing etc. child pornography material for use through a carriage service);
 - (iii) section 474.22 (using a carriage service for child abuse material);

- (iv) section 474.23 (possessing etc. child abuse material for use through a carriage service); and
- (b) the commission of each such offence involves 2 or more people.

Penalty: Imprisonment for 25 years.

- (2) There is no fault element for any of the physical elements described in paragraph (1)(a) other than the fault elements (however described), if any, for the offence against section 474.19, 474.20, 474.22 or 474.23.
- (3) To avoid doubt, a person does not commit an offence against section 474.19, 474.20, 474.22 or 474.23 for the purposes of paragraph (1)(a) if the person has a defence to that offence.

Offence or conduct need not be the same

- (4) For the purposes of subsection (1), it is immaterial whether the offence, or the conduct constituting the offence, is the same on each occasion.

Double jeopardy etc.

- (5) A person who has been convicted or acquitted of an offence (the **aggravated offence**) against this section may not be convicted of an offence against section 474.19, 474.20, 474.22 or 474.23 in relation to the conduct that constituted the aggravated offence.
- (6) Subsection (5) does not prevent an alternative verdict under section 474.24B.
- (7) A person who has been convicted or acquitted of an offence (the **underlying offence**) against section 474.19, 474.20, 474.22 or 474.23 may not be convicted of an offence against this section in relation to the conduct that constituted the underlying offence.

474.24B Alternative verdict if aggravated offence not proven

If, on a trial for an offence (the **aggravated offence**) against subsection 474.24A(1), the trier of fact:

- (a) is not satisfied that the defendant is guilty of the aggravated offence; but

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(b) is satisfied beyond reasonable doubt that he or she is guilty of an offence (the *underlying offence*) against section 474.19, 474.20, 474.22 or 474.23;

it may find the defendant not guilty of the aggravated offence but guilty of the underlying offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

474.24C Consent to commencement of proceedings where defendant under 18

- (1) Proceedings for an offence against this Subdivision 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.
- (2) However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, such an offence before the necessary consent has been given.

Subdivision E—Offence relating to obligations of internet service providers and internet content hosts

29 After section 474.25 of the *Criminal Code*

Insert:

Subdivision F—Offences relating to use of carriage service involving sexual activity with person under 16

474.25A Using a carriage service for sexual activity with person under 16 years of age

Engaging in sexual activity with child using a carriage service

- (1) A person commits an offence if:
 - (a) the person engages in sexual activity with another person (the *child*) using a carriage service; and
 - (b) the child is under 16 years of age; and
 - (c) the person is at least 18 years of age.

Penalty: Imprisonment for 15 years.

Causing child to engage in sexual activity with another person

- (2) A person (the **defendant**) commits an offence if:
- (a) the defendant engages in conduct in relation to another person (the **child**); and
 - (b) that conduct causes the child to engage in sexual activity with another person (the **participant**) using a carriage service; and
 - (c) the child is under 16 years of age when the sexual activity is engaged in; and
 - (d) the participant is at least 18 years of age when the sexual activity is engaged in.

Penalty: Imprisonment for 15 years.

- (3) The fault element for paragraph (2)(b) is intention.

Defence—child present but defendant does not intend to derive gratification

- (4) It is a defence to a prosecution for an offence against subsection (1) or (2) if:
- (a) the conduct constituting the offence consists only of the child being in the presence of a person while sexual activity is engaged in; and
 - (b) the defendant proves that he or she did not intend to derive gratification from the presence of the child during that activity.

Note 1: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4.

Note 2: For other defences relating to this offence, see section 474.29.

474.25B Aggravated offence—child with mental impairment or under care, supervision or authority of defendant

- (1) A person commits an offence against this section if:
- (a) the person commits an offence against either of the following provisions in relation to another person (the **child**):
 - (i) subsection 474.25A(1) (engaging in sexual activity with child using a carriage service);
 - (ii) subsection 474.25A(2) (causing child to engage in sexual activity with another person); and

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(b) either or both of the following apply at the time the person commits the offence:

- (i) the child has a mental impairment;
- (ii) the person is in a position of trust or authority in relation to the child, or the child is otherwise under the care, supervision or authority of the person.

Penalty: Imprisonment for 25 years.

- (2) To avoid doubt, a person does not commit the offence against subsection 474.25A(1 or (2) for the purposes of paragraph (1)(a) if the person has a defence to that offence.

Alternative verdicts

- (3) If, on a trial for an offence (the **aggravated offence**) against subsection (1), the trier of fact:

(a) is not satisfied that the defendant is guilty of the aggravated offence; but

(b) is satisfied beyond reasonable doubt that he or she is guilty of an offence (the **underlying offence**) against subsection 474.25A(1) or (2);

it may find the defendant not guilty of the aggravated offence but guilty of the underlying offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

30 Paragraph 474.26(1)(b) of the *Criminal Code*

Omit “, or submit to,”.

31 Paragraph 474.26(2)(b) of the *Criminal Code*

Omit “, or submit to, sexual activity with another person”, substitute “sexual activity with another person (the *participant*)”.

32 Paragraph 474.26(2)(d) of the *Criminal Code*

Omit “the other person referred to in paragraph (b)”, substitute “the participant”.

33 Paragraph 474.26(3)(b) of the *Criminal Code*

Omit “, or submit to,”.

34 Subparagraph 474.26(3)(e)(ii) of the *Criminal Code*

After “person”, insert “(the *participant*)”.

35 Paragraph 474.27(1)(b) of the *Criminal Code*

Repeal the paragraph.

36 Paragraph 474.27(1)(c) of the *Criminal Code*

Omit “, or submit to,”.

37 Paragraph 474.27(2)(b) of the *Criminal Code*

Repeal the paragraph.

38 Paragraph 474.27(2)(c) of the *Criminal Code*

Omit “, or submit to, sexual activity with another person”, substitute “sexual activity with another person (the *participant*)”.

39 Paragraph 474.27(2)(e) of the *Criminal Code*

Omit “the other person referred to in paragraph (c)”, substitute “the participant”.

40 Paragraph 474.27(3)(b) of the *Criminal Code*

Repeal the paragraph.

41 Paragraph 474.27(3)(c) of the *Criminal Code*

Omit “, or submit to,”.

42 Subparagraph 474.27(3)(f)(ii) of the *Criminal Code*

After “person”, insert “(the *participant*)”.

43 Subsections 474.27(4) and (5) of the *Criminal Code*

Repeal the subsections.

44 After section 474.27 of the *Criminal Code*

Insert:

474.27A Using a carriage service to transmit indecent communication to person under 16 years of age

(1) A person (the *sender*) commits an offence if:

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- (a) the sender uses a carriage service to transmit a communication to another person (the *recipient*); and
- (b) the communication includes material that is indecent; and
- (c) the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
- (d) the sender is at least 18 years of age.

Penalty: Imprisonment for 7 years.

(2) In a prosecution for an offence against subsection (1), whether material is indecent is a matter for the trier of fact.

(3) In this section:

indecent means indecent according to the standards of ordinary people.

45 Subsection 474.28(1) of the *Criminal Code*

Repeal the subsection (not including the notes), substitute:

Age-related issues—application of absolute liability

- (1) For the purposes of an offence against this Subdivision, absolute liability applies to the physical element of circumstance of the offence that:
 - (a) in the case of an offence against section 474.25A—the child is under 16 years of age; and
 - (b) in the case of an offence against section 474.26, 474.27 or 474.27A—the recipient is someone who is under 16 years of age.

Note: The heading to section 474.28 of the *Criminal Code* is altered by omitting “sections 474.26 and 474.27” and substituting “this Subdivision”.

46 Subsection 474.28(2) of the *Criminal Code*

Before “474.26(2) or (3) or 474.27(2) or (3)”, insert “474.25A(2),”.

47 Subsection 474.28(2) of the *Criminal Code*

Omit “the other person referred to in paragraph 474.26(2)(b) or (3)(e) or 474.27(2)(c) or (3)(f)”, substitute “the participant”.

48 Subsection 474.28(3) of the *Criminal Code*

Omit “474.26 and 474.27”, substitute “474.26, 474.27 and 474.27A”.

Note: The following heading to subsection 474.28(3) of the *Criminal Code* is inserted “*Proof of belief about age—evidence of representation*”.

49 Subsection 474.28(4) of the *Criminal Code*

Omit “sections 474.26 and 474.27, evidence that the other person referred to in paragraph 474.26(2)(b) or (3)(e) or 474.27(2)(c) or (3)(f)”, substitute “sections 474.25A, 474.26 and 474.27, evidence that the participant”.

50 Subsection 474.28(4) of the *Criminal Code*

Omit “other person” (second occurring), substitute “participant”.

51 Subsection 474.28(5) of the *Criminal Code*

Omit “sections 474.26 and 474.27”, substitute “this Subdivision”.

Note: The following heading to subsection 474.28(5) of the *Criminal Code* is inserted “*Determining age—admissible evidence*”.

52 Subsection 474.28(7) of the *Criminal Code*

Omit “sections 474.26 and 474.27”, substitute “a provision of this Subdivision”.

53 After subsection 474.28(7) of the *Criminal Code*

Insert:

Issues relating to aggravated offence involving sexual activity

(7A) For the purposes of an offence against subsection 474.25B(1):

- (a) there is no fault element for the physical element described in paragraph (a) of that subsection other than the fault elements (however described), if any, for the underlying offence; and
- (b) absolute liability applies to the physical element of circumstance of the offence that the child has a mental impairment; and
- (c) strict liability applies to the physical element of circumstance of the offence that 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.

Note 1: For absolute liability, see section 6.2.

Note 2: For strict liability, see section 6.1.

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Note 3: For a defence based on belief that the child did not have a mental impairment, see section 474.29.

54 Subsection 474.28(9) of the *Criminal Code*

Omit “474.26 and 474.27”, substitute “474.26, 474.27 and 474.27A”.

55 Subsection 474.28(11) of the *Criminal Code*

Repeal the subsection.

56 Section 474.29 of the *Criminal Code*

Repeal the section, substitute:

474.29 Defences to offences against this Subdivision

Offences involving sexual activity—belief that child at least 16 years of age

- (1) It is a defence to a prosecution for an offence against section 474.25A if the defendant proves that, at the time the sexual activity was engaged in, he or she believed that the child was at least 16 years of age.

Note: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4.

Offences involving sexual activity with other participant—belief that participant under 18 years of age

- (2) It is a defence to a prosecution for an offence against subsection 474.25A(2) if the defendant proves that, at the time the sexual activity was engaged in, he or she believed that the participant was under 18 years of age.

Note: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4.

Aggravated offence involving sexual activity—belief that child did not have mental impairment

- (3) It is a defence to a prosecution for an offence against subsection 474.25B(1) (as that subsection applies because of subparagraph 474.25B(1)(b)(i)) if the defendant proves that, at the time the defendant committed the offence, he or she believed that the child did not have a mental impairment.

Note: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4.

Offences involving procuring or “grooming” person for sexual activity with other participant—belief that participant under 18 years of age

- (4) It is a defence to a prosecution for an offence against subsection 474.26(2) or (3) or 474.27(2) or (3) if the defendant proves that, at the time the communication was transmitted, he or she believed that the participant was under 18 years of age.

Note: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4.

Offences involving transmission of communication—belief that recipient at least 16 years of age

- (5) It is a defence to a prosecution for an offence against section 474.26, 474.27 or 474.27A if the defendant proves that, at the time the communication was transmitted, he or she believed that the recipient was at least 16 years of age.

Note: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4.

Trier of fact may take into account whether belief reasonable

- (6) In determining whether the defendant had the belief mentioned in one of the preceding subsections of this section, the trier of fact may take into account whether the alleged belief was reasonable in the circumstances.

57 After section 474.29 of the *Criminal Code*

Insert:

Subdivision G—Offences relating to use of carriage service for suicide related material

58 Section 474.30 of the *Criminal Code*

Repeal the section.

59 Before section 475.1 of the *Criminal Code*

Insert:

475.1A Defences for NRS employees and emergency call persons

- (1) A person is not criminally responsible for an offence against a provision of Subdivision C, D, E, F or G of Division 474 in relation to particular conduct if the person:
 - (a) is an employee of an NRS provider; and
 - (b) engages in the conduct in good faith in the course of the person's duties as such an employee.
- (2) A person is not criminally responsible for an offence against a provision of Subdivision C, D, E, F or G of Division 474 in relation to particular conduct if the person:
 - (a) is an emergency call person; and
 - (b) engages in the conduct in good faith in the course of the person's duties as such an emergency call person.

475.1B Provisions relating to element of offence that particular conduct was engaged in using a carriage service

Presumption that conduct engaged in using carriage service

- (1) If:
 - (a) a physical element of an offence against Subdivision C, D, E or F of Division 474 consists of a person using a carriage service to engage in particular conduct; and
 - (b) the prosecution proves beyond reasonable doubt that the person engaged in that particular conduct;then it is presumed, unless the person proves to the contrary, that the person used a carriage service to engage in that conduct.

Note: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4.

Absolute liability applies to physical element of offence that carriage service was used

- (2) If:
 - (a) a physical element of an offence against Subdivision C, D, E or F of Division 474 consists of a person using a carriage service to engage in particular conduct; and
 - (b) the prosecution proves beyond reasonable doubt that the person intended to engage in that particular conduct;

then absolute liability applies to the physical element of the offence that a carriage service was used to engage in that particular conduct.

Note: For absolute liability, see section 6.2.

60 Dictionary in the *Criminal Code*

Insert:

make available, in relation to material, includes, but is not limited to, describing how to obtain access, or describing methods that are likely to facilitate access, to material (for example: by setting out the name of a website, an IP address, a URL, a password, or the name of a newsgroup).

Part 3—Consequential amendments

Australian Crime Commission Act 2002

61 Subsection 4(1) (paragraph (d) of the definition of *serious and organised crime*)

After “*Proceeds of Crime Act 2002*,” insert “an offence against Subdivision B or C of Division 471, or D or F of Division 474, of the *Criminal Code*,”.

Crimes Act 1914

62 Paragraph 15GE(2)(v)

Omit “child sex tourism”, substitute “a sexual offence against a person who is under 18 outside Australia”.

63 Subsection 15GE(3)

Repeal the subsection, substitute:

- (3) Without limiting subsections (1) and (2), an offence against one of the following provisions of the *Criminal Code* is a ***serious Commonwealth offence*** for the purposes of this Part:
- (a) Part 5.3 (Terrorism);
 - (b) Subdivision B of Division 471 (Use of postal or similar service for child pornography material or child abuse material);
 - (c) Subdivision C of Division 471 (Use of postal or similar service involving sexual activity with person under 16);
 - (d) Subdivision D of Division 474 (Use of carriage service for child pornography material or child abuse material);
 - (e) Subdivision F of Division 474 (Use of carriage service involving sexual activity with person under 16).

64 Application

The amendments made by items 62 and 63 apply in relation to a controlled operation authorised on or after the commencement of this item, whether the offence was committed before, on or after that commencement.

65 Paragraph 15Y(1)(a)

Repeal the paragraph.

66 After paragraph 15Y(1)(caa)

Insert:

- (cab) an offence against Division 272 of the *Criminal Code* (child sex offences outside Australia); or
- (cac) an offence against Division 273 of the *Criminal Code* (offences involving child pornography material or child abuse material outside Australia); or

67 Paragraph 15Y(1)(ca)

Repeal the paragraph, substitute:

- (ca) an offence against Subdivision B or C of Division 471 of the *Criminal Code* (offences relating to use of postal or similar service involving sexual activity with person under 16); or
- (cba) an offence against Subdivision D or F of Division 474 of the *Criminal Code* (offences relating to use of carriage service involving sexual activity with person under 16); or

68 Paragraph 15Y(1)(e)

Omit “paragraph (a), (b), (c), (caa) or (d)”, substitute “one of the preceding paragraphs of this subsection”.

69 Paragraph 15Y(1)(f)

Omit “paragraph (a), (b), (c), (caa), (d) or (e)”, substitute “one of the preceding paragraphs of this subsection”.

70 Section 15YT

Repeal the section, substitute:

**15YT Video link evidence provisions relating to child sex offences
outside Australia unaffected**

Nothing in this Part affects the operation of:

- (a) Subdivision D of Division 272 of the *Criminal Code* (child sex offences outside Australia—video link evidence); or
- (b) Subdivision D of Division 273 of the *Criminal Code* (offences involving child pornography material or child abuse material outside Australia—video link evidence).

71 Application

Despite the amendments made by items 65, 68, 69 and 70, sections 15Y and 15YT of the *Crimes Act 1914*, as in force immediately before the commencement of this item, continue to apply in relation to an offence against Part IIIA of that Act, as in force before that commencement.

Surveillance Devices Act 2004

72 Subparagraph 30(1)(a)(iii)

Repeal the subparagraph.

73 Subparagraph 30(1)(a)(viii)

Omit “or 270”, substitute “, 270, 272 or 273”.

74 Application

Despite the amendment made by item 72, subparagraph 30(1)(a)(iii) of the *Surveillance Devices Act 2004*, as in force immediately before the commencement of this item, continues to apply in relation to an offence against Part IIIA of the *Crimes Act 1914*, as in force at any time before that commencement.

Telecommunications (Interception and Access) Act 1979

75 Subsection 5D(2A)

Repeal the subsection.

76 Subparagraph 5D(3)(d)(xi)

Omit “(including an offence against Part IIIA of the *Crimes Act 1914*)”.

77 Subsection 5D(3B)

Repeal the subsection, substitute:

Sexual offences against children and offences involving child pornography

- (3B) An offence is also a serious offence if:
- (a) it is an offence against Division 272 or 273, Subdivision B or C of Division 471, or Subdivision D or F of Division 474, of the *Criminal Code*; or
 - (b) the particular conduct constituting the offence otherwise involved, involves or would involve:
 - (i) the production, publication, possession, supply or sale of, or other dealing in, child pornography; or
 - (ii) consenting to or procuring the employment of a child, or employing a child, in connection with child pornography.

78 Application

- (1) Subject to subitems (2) and (3), subsection 5D(3B) of the *Telecommunications (Interception and Access) Act 1979*, as in force on and after the commencement of this item, applies in relation to an offence committed on or after that commencement.
- (2) Subsection 5D(3B) of the *Telecommunications (Interception and Access) Act 1979*, as in force on and after the commencement of this item, applies in relation to:
 - (a) an offence against section 474.19, 474.20, 474.22, 474.23, 474.26 or 474.27 of the *Criminal Code*; or
 - (b) an offence referred to in paragraph (b) of that subsection;whether the offence was committed before, on or after that commencement.
- (3) Paragraph 5D(3B)(a) of the *Telecommunications (Interception and Access) Act 1979*, as in force on and after the commencement of this item, is taken to include a reference to an offence against Part IIIA of the *Crimes Act 1914*, as in force at any time before that commencement.

Schedule 2—Forfeiture of child sex material

Crimes Act 1914

1 Subsection 3(1)

Insert:

child abuse material has the same meaning as in Part 10.6 of the *Criminal Code*.

2 Subsection 3(1)

Insert:

child pornography material has the same meaning as in Part 10.6 of the *Criminal Code*.

3 Subsection 3(1)

Insert:

Commonwealth child sex offence means:

- (a) an offence against any of the following provisions of the *Criminal Code*:
 - (i) Division 272 (Child sex offences outside Australia);
 - (ii) Division 273 (Offences involving child pornography material or child abuse material outside Australia);
 - (iii) Subdivisions B and C of Division 471 (which create offences relating to use of postal or similar services in connection with child pornography material, child abuse material and sexual activity involving children);
 - (iv) Subdivisions D and F of Division 474 (which create offences relating to use of telecommunications in connection with child pornography material, child abuse material and sexual activity involving children); or
- (b) an offence against section 11.1, 11.4 or 11.5 of the *Criminal Code* that relates to an offence described in paragraph (a) of this definition; or

- (c) an offence against a provision described in paragraph (a) of this definition that is taken to have been committed because of section 11.2, 11.2A or 11.3 of the *Criminal Code*.

Note: Part IE also applies as if offences against certain other provisions in force before the commencement of that Part were Commonwealth child sex offences: see Schedule 2 to the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010*.

4 Subsection 3(1)

Insert:

data includes:

- (a) information in any form; and
- (b) any program (or part of a program).

5 Subsection 3(1)

Insert:

data storage device means a thing containing, or designed to contain, data for use by a computer.

6 Subsection 3C(1) (definition of *data*)

Repeal the definition.

7 Subsection 3C(1) (definition of *data storage device*)

Repeal the definition.

8 After Part ID

Insert:

Part IE—Forfeiture of child pornography material and child abuse material

Division 1—Things this Part applies to

23ZA Application

This Part applies to a thing (the *forfeitable thing*) that is:

- (a) child abuse material; or
- (b) child pornography material; or

- (c) any of the following that contains child abuse material or child pornography material:
 - (i) a computer;
 - (ii) a data storage device;
 - (iii) another piece of electronic equipment.

Division 2—Forfeiture by operation of law after notice is given

23ZB Forfeiture of material by operation of law

Application

- (1) This section applies if a constable reasonably believes that the forfeitable thing is derived from, or was used in connection with, the commission of a Commonwealth child sex offence.

Power to give forfeiture notice

- (2) The constable may give a notice (the *forfeiture notice*) described in subsection (3) to:
 - (a) a person who owns the forfeitable thing (either alone or with other persons); or
 - (b) if the constable is unable, after reasonable inquiry, to identify such a person:
 - (i) the person who possesses the thing; or
 - (ii) if the thing has been seized under a law of the Commonwealth, a State, a Territory or a foreign country—the person who would possess it apart from that seizure.

Content of forfeiture notice

- (3) The forfeiture notice is a notice that:
 - (a) identifies the forfeitable thing; and
 - (b) states the constable's belief that the thing is derived from, or was used in connection with, the commission of a Commonwealth child sex offence; and
 - (c) states that the thing will be forfeited to the Commonwealth 30 days after the notice is given, unless any of the following persons object to the forfeiture by written notice given before
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the end of that period to the head of the police force that includes the constable:

- (i) a person who owns the thing (either alone or with other persons);
 - (ii) a person who has a right to possess the thing; and
- (d) explains the circumstances in which, under section 23ZC, a person may be given a copy of parts of the thing, or of data contained in the thing, on request to the head of the police force made within 30 days after the notice is given; and
- (e) explains the effect of forfeiture of the thing; and
- (f) explains the circumstances in which compensation is payable in connection with forfeiture of the thing; and
- (g) requests a person claiming compensation for forfeiture of the thing to notify the head of the police force of the claim.

Giving copy of forfeiture notice to others affected

- (4) If the constable gives the forfeiture notice to a person described in subsection (2), the constable may also give a copy of the notice to anyone whom the constable reasonably believes will be directly or indirectly affected by the proposed forfeiture of the forfeitable thing.

Effect of giving forfeiture notice

- (5) If there is not an objection described in paragraph (3)(c), the forfeitable thing is forfeited to the Commonwealth (by force of this subsection) at the end of the period described in that paragraph.
- (6) If there is an objection described in paragraph (3)(c) but the head of the police force that includes the constable considers that the forfeitable thing should be forfeited to the Commonwealth despite the objection:
- (a) the head of the police force must instruct the Director of Public Prosecutions to apply for an order under section 23ZD for the forfeiture of the thing; and
 - (b) the Director must make the application.

Objection or lack of one does not affect prosecution

- (7) Evidence of the fact that a person described in paragraph (3)(c) objected or did not object as described in that paragraph is not
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admissible against the person in a prosecution of the person for a Commonwealth child sex offence.

23ZC Providing copies of innocuous parts of material to be forfeited

- (1) This section applies if:
 - (a) the forfeitable thing is identified in a forfeiture notice given by a constable; and
 - (b) less than 30 days after the notice is given, a person who was given the notice or who would be directly or indirectly affected by the proposed forfeiture of the thing gives a written request to the head of the police force that includes the constable; and
 - (c) the request is for the person to be given a copy of parts of the thing, or of data contained in the thing, that:
 - (i) are specified in the request clearly enough to enable the parts or data to be identified readily; and
 - (ii) are not child abuse material or child pornography material.
- (2) The head of the police force must comply with the request if he or she is satisfied that it is reasonably practicable to do so.
- (3) However, the head of the police force need not comply with the request if he or she reasonably believes:
 - (a) that to do so might endanger the safety of anyone or prejudice an investigation or prosecution; or
 - (b) that possession by the person of the copy could constitute an offence against a law of the Commonwealth, a State or a Territory.
- (4) If:
 - (a) the head of the police force complies with the request; and
 - (b) a court convicts the person of a Commonwealth child sex offence and is satisfied on the balance of probabilities that the forfeitable thing is derived from, or was used in connection with, the commission of the offence;the court may order the person to pay the Commonwealth, State or Territory whose police force incurred costs in complying with the request those costs.

Division 3—Forfeiture by court order on application

23ZD Forfeiture of material by court order on application

Court to order forfeiture on application if offence committed

- (1) If, on application by the Director of Public Prosecutions to a court of a State or Territory, the court is satisfied that a Commonwealth child sex offence has been committed or that a person is or has been convicted of a Commonwealth child sex offence (by the court or another court), the court must order the forfeiture to the Commonwealth of all the things that the court is satisfied:
- (a) are forfeitable things derived from, or used in connection with, the commission of the offence; and
 - (b) have not already become property of the Commonwealth.

Note 1: It does not matter whether the Director of Public Prosecutions makes the application on his or her own initiative or because of section 23ZB.

Note 2: It does not matter whether the court is satisfied in the course of criminal proceedings or civil proceedings that the Commonwealth child sex offence has been committed.

Notice of application

- (2) The Director of Public Prosecutions must give written notice of the application to anyone:
- (a) who claims to own, or have a right to possess, a thing covered by the application; or
 - (b) whom the Director reasonably believes would be directly or indirectly affected by the proposed forfeiture.

Interim orders

- (3) At any time after the application is made to the court, it may make any interim orders it considers appropriate (such as orders relating to the delivery or retention of things pending the court's decision on the application, and orders relating to the making and provision of copies of things).

Circumstances that do not prevent court ordering forfeiture

- (4) An order under subsection (1):
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- (a) may be made even if a person entitled to be given notice of the application fails to appear at the hearing of the application; and
- (b) need not be based on a finding as to the commission of a particular Commonwealth child sex offence; and
- (c) can be based on a finding that some such offence was committed; and
- (d) need not be based on a finding that a particular person committed a Commonwealth child sex offence.

Court may order compensation for forfeiture

- (5) The court may order the Commonwealth to pay a specified reasonable amount of compensation to a person who owns, has a right to possess or has other property in a thing whose forfeiture the court orders if the thing is a computer, data storage device or other electronic equipment and the court is satisfied that:
 - (a) the person has appeared at the hearing of the application; and
 - (b) the person did not commit, is not and has not been convicted (by the court or another court) of, and has not been found by another court in civil proceedings to have committed, the Commonwealth child sex offence; and
 - (c) the person is not the subject of proceedings in another court relating to the Commonwealth child sex offence and has not been the subject of such proceedings in connection with which an appeal may still be lodged as of right; and
 - (d) the person is not the subject of an investigation into a Commonwealth child sex offence of which the thing provides evidence.

Standard of proof for forfeiture and compensation orders

- (6) The standard of proof for subsections (1) and (5) is the balance of probabilities.

Division 4—Provisions relating to forfeiture under this Part generally

23ZE Effect of forfeiture under this Part

- (1) This section applies if a thing is forfeited to the Commonwealth under this Part.
- (2) When the thing is forfeited it becomes the property of the Commonwealth.
- (3) A constable may, without warrant, seize the thing.
- (4) The Commissioner may deal with the thing in any way he or she considers appropriate (including by destroying the thing).
- (5) However, if the thing is in the custody of a constable who is a member of a police force of a State or Territory, the head of the police force may deal with the thing in any way he or she considers appropriate (including by destroying the thing).
- (6) Subsections (3), (4) and (5) have effect despite section 9.

23ZF Compensation for forfeiture of electronic equipment etc.

- (1) This section applies to a person if:
 - (a) a thing that is a computer, data storage device or other electronic equipment is forfeited under this Part; and
 - (b) the person owned, had a right to possess or had other property in the thing immediately before the forfeiture.
- (2) The Commonwealth is liable to pay the person a reasonable amount of compensation for the forfeiture.
- (3) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in a court of competent jurisdiction of a State or Territory for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.
- (4) However, the court is not to determine an amount of compensation for the person while:

- (a) the person is the subject of an investigation into a Commonwealth child sex offence of which the thing provides evidence; or
 - (b) the person is the subject of proceedings (other than those under subsection (3)) relating to a Commonwealth child sex offence from which the thing was allegedly derived or in connection with which the thing was allegedly used; or
 - (c) an appeal may be lodged as of right in relation to proceedings covered by paragraph (b).
- (5) Subsection (2) does not apply if the person is or has been convicted of, or found by a court in civil proceedings (including proceedings under subsection (3)) to have committed, a Commonwealth child sex offence to which the forfeiture relates.

23ZG Delegation by head of police force

The head of a police force (including the Commissioner) may, by writing, delegate to a constable who is a member of the force all or any of the head's powers, functions and duties under this Part.

9 Application of Part IE of the *Crimes Act 1914*

- (1) Part IE of the *Crimes Act 1914* applies in relation to Commonwealth child sex offences, whether the conduct constituting the offences occurred before, on or after the commencement of that Part.
- (2) Part IE of the *Crimes Act 1914* also applies in relation to the following offences constituted by conduct that occurred before the commencement of that Part as if they were Commonwealth child sex offences:
 - (a) an offence against former Part IIIA of the *Crimes Act 1914* (which was about child sex tourism);
 - (b) an offence against section 474.19, 474.20, 474.22, 474.23, 474.26 or 474.27 of the *Criminal Code* as in force before the commencement of Schedule 1 to this Act;
 - (c) an offence against section 11.1, 11.4 or 11.5 of the *Criminal Code* relating to an offence described in paragraph (a) or (b) of this subitem;
 - (d) an offence against a provision described in paragraph (a) or (b) of this subitem taken to have been committed because of section 11.2, 11.2A or 11.3 of the *Criminal Code*;

- (e) an offence against former Part IIIA of the *Crimes Act 1914* taken to have been committed because of former section 5 of that Act;
 - (f) an offence against former section 7, 7A or 86 of the *Crimes Act 1914* relating to an offence against former Part IIIA of that Act.
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*[Minister's second reading speech made in—
House of Representatives on 4 February 2010
Senate on 10 March 2010]*

(20/10)

Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010 No. 42, 2010

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