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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

**CRIMES LEGISLATION AMENDMENT (ENHANCED CHILD PROTECTION FROM
PREDATORY TOURISM OFFENCES) BILL 2008**

EXPLANATORY MEMORANDUM

(Senator Cory Bernardi)

CRIMES LEGISLATION AMENDMENT (ENHANCED CHILD PROTECTION FROM PREDATORY TOURISM OFFENCES) BILL 2008

OUTLINE

The Crimes Legislation Amendment (Enhanced child protection from predatory tourism offences) Bill (the Bill) would:

- amend the definition of ‘serious and organised crime’ in the *Australian Crime Commission Act 2002* to expressly include child sex carriage service offences
- repeal Part IIIA of the *Crimes Act 1914* dealing with child sex tourism and insert these provisions into the *Criminal Code Act 1995* with some updating of the language and structure of the offences
- add a preparatory offence to capture the behaviour of people who are preparing to commit a child sex tourism offence
- add new child sex tourism offences to capture the procuring and ‘grooming’ of a child for the purposes of child sex overseas
- improve the operation of carriage service offences for grooming persons under 16 years of age for sexual activity
- add new offences that would make it illegal for Australian citizens and residents to possess, control, produce, distribute or obtain child pornography and/or abuse material while overseas, and
- address a gap in the current legislative regime by providing for the forfeiture of child pornography and child abuse material, and equipment containing such material, that is used in the commission of Commonwealth child sex offences.

FINANCIAL IMPACT STATEMENT

The amendments in this Bill have no financial impact on Government revenue.

NOTES ON CLAUSES

List of abbreviations used

ACC	Australian Crime Commission
ACC Act	<i>Australian Crime Commission Act 2002</i>
AFP	Australian Federal Police
the Bill	Crimes Legislation (Enhanced child protection from predatory tourism offences) Bill 2008
Crimes Act	<i>Crimes Act 1914</i>
Criminal Code	<i>Criminal Code Act 1995</i>

Clause 1: Short Title

Clause 1 is a formal clause which provides that the Bill will be cited as the *Crimes Legislation Amendment (Enhanced child protection from predatory tourism offences) Act 2008* when it is enacted.

Clause 2: Commencement

Clause 2 sets out when various part of the Bill commence.

Clauses 1-3 of the Bill (the short title, commencement and Schedules provisions) will commence on the day the Bill receives Royal Assent.

Item 1 of Schedule 1 of the Bill (which amends the ACC Act) will commence on Royal Assent.

Items 2-22 of Schedule 1 of the Bill will commence 28 days after Royal Assent. The purpose of delayed commencement is to allow time for those affected to become familiar with the scope of the new child sex tourism offences and offences involving child pornography material or child abuse material outside Australia.

Clause 3: Schedule(s)

This is a formal clause that enables the Schedule to amend Acts simply by including amendments under the title of the relevant Act.

SCHEDULE 1

OVERVIEW

Items 1 – 22 would:

- amend the definition of ‘serious and organised crime’ in the *Australian Crime Commission Act 2002* to expressly include child sex carriage service offences
- repeal Part IIIA of the *Crimes Act 1914* dealing with child sex tourism and insert these provisions into the *Criminal Code Act 1995* with some updating of the language and structure of the offences
- add a preparatory offence to capture the behaviour of people who are preparing to commit a child sex tourism offence
- add new child sex tourism offences to capture the procuring and ‘grooming’ of a child for the purposes of child sex overseas
- improve the operation of carriage service offences for grooming persons under 16 years of age for sexual activity
- add new offences that would make it illegal for Australian citizens and residents to possess, control, produce, distribute or obtain child pornography and/or abuse material while overseas, and
- address a gap in the current legislative regime by providing for the forfeiture of child pornography and child abuse material, and equipment containing such material, that is used in the commission of Commonwealth child sex offences.

Moving offences to Criminal Code

The child sex tourism provisions that are currently located in Part IIIA of the Crimes Act are being moved into the Criminal Code. This is in accordance with the general transfer of criminal offences from the Crimes Act to the Criminal Code and the modernisation of the drafting of offences as this is done.

The notes on clauses in this explanatory memorandum identify the corresponding Crimes Act provision (where applicable) to be replaced by the proposed Criminal Code provision. In addition, a comparative table is set out in the notes to Item 8 of the Bill.

New preparatory offences

The new preparatory offences capture the behaviour of people who are preparing to commit an offence under proposed Division 272. The offences capture a wide range of preparatory behaviour. The inclusion of an offence of this kind will enable the person to be arrested prior to a person under 16 being harmed. The offence of engaging in preparatory acts applies both inside and outside Australia and addresses a gap in the coverage of the existing child sex tourism offences.

New grooming and procuring offences

The object of the new grooming and procuring offences is to capture people who groom or procure a person under 16 with the intention that the person under 16 will engage in, or submit to sexual activity. These offences will capture the ‘grooming’ of a young person in a foreign country. The proposed amendments address a gap in legislation.

The proposed offences are modelled on existing offences in sections 474.26 and 474.27 of the Criminal Code, which deal with the use of a carriage service to procure or groom a person under 16 years of age for sexual activity. However, the new offences are not limited to conduct involving the use of a carriage service.

New offences for the possession, production, distribution or obtaining child pornography and/or child abuse material overseas

New provisions will make it an offence to possess, control, produce, distribute or obtain child pornography and/or child abuse material while overseas. The proposed offences would apply to Australian citizens or residents of Australia who may be living, travelling and/or working outside Australia. This is a gap in the current legislation highlighted by recent investigations. Such conduct is offensive and if it occurred within Australia, it would be captured by either Commonwealth or State offences depending on the circumstances. These proposed offences cover the situation where a foreign country does not have specific laws to deal with this behaviour or is unwilling or unable to prosecute.

AMENDMENTS TO THE ACC ACT

Item 1: Definition of ‘serious and organised crime’

The definition of ‘serious and organised crime’ in subsection 4(1) of the ACC Act lists the offences for which the ACC may obtain an authorisation to conduct an intelligence operation or an investigation. Paragraph 4(1)(d) of the definition allows offences to be added to that list by regulation.

On 1 December 2006, offences relating to child pornography and child abuse were added to the definition of ‘serious and organised crime’ by the *Australian Crime Commission Amendment Regulations 2006 (No 4)* (the 2006 Regulations). This allowed the ACC to conduct an intelligence operation or investigation into networks of people using a carriage service to exchange child pornography or child abuse material, or to procure or groom persons under 16 for sexual activity.

The purpose of Item 1 is to amend the definition of ‘serious and organised’ in subsection 4(1) of the ACC Act so that it reflects the changes made to that definition by the 2006 Regulations. Item 1 therefore makes no substantive changes to the law. Its purpose is to ensure that the changes already made by regulations are subjected to full Parliamentary scrutiny and become apparent on the face of the Act. Whilst it is appropriate that the list of offences for which the ACC can conduct intelligence operations or investigations can be extended by regulation, it is also appropriate for a change of this nature to be enshrined in the Act in due course.

The offences in question cover: using a carriage service to access or distribute child pornography material or child abuse material (sections 474.19 and 474.22), possessing, controlling, producing, supplying or obtaining child pornography material or child abuse material for use through a carriage service (sections 474.20 and 474.23) and using a carriage service to procure or ‘groom’ persons under 16 for sexual activity (sections 474.26 and 474.27).

AMENDMENTS TO THE CRIMES ACT

FORFEITURE OF CHILD ABUSE OR CHILD PORNOGRAPHY MATERIAL

Item 2: Part IA of the Crimes Act – forfeiture of child abuse or child pornography material

Item 2 would amend the *Crimes Act 1914* to provide a scheme for the forfeiture of child abuse and child pornography material or an article that contains such material, used in the commission of a Commonwealth child sex offence.

At present, child pornography or child sex abuse material or articles containing such material can only be forfeited after following the full process under the *Proceeds of Crime Act 2002*.

Such material is clearly inappropriate to return to the owner, so the amendments create a streamlined process for forfeiture by order of a court either immediately after a conviction or following a separate hearing.

Proposed section 10: Forfeiture of child abuse or child pornography material used in the commission of sexual offences against children.

Proposed section 10 requires a court to make a forfeiture order in two circumstances. The first circumstance is where a person has been found guilty of a Commonwealth child sex offence (subsection 10(1)). Subsection 10(1) applies where a person is convicted of an offence or where the prosecution succeeds in establishing a persons guilt but the Court makes an order under section 19B, which has the effect for example of the charge being dismissed or the person discharged without proceeding to conviction. The second circumstance is where on application of a constable or prosecutor, a court determines on the balance of probabilities that a Commonwealth child sex offence has been committed (subsection 10(2)).

The child sex offences to which the proposed section 10 applies are: section 474.19 (using a carriage service for child pornography material), section 474.20 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service), section 474.22 (using a carriage service for child abuse material), section 474.23 (possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service provider), section 474.26 (using a carriage service to procure persons under 16 year of age), the offences in Division 272 (sexual offences outside Australia) and the offences in Division 273 (offences involving child pornography material or child abuse material outside Australia).

In deciding whether a Commonwealth child sex offence has been committed on the balance of probabilities the court does not have to form the view that a particular person committed the offence or identify the specific offence believed to have been committed. An order under subsection 10(2) is not directed at making a finding against a person but rather at the fact that the material in question should be forfeited.

If a person is found guilty of a Commonwealth child sex offence or the court determines that such an offence has been committed on the balance of probabilities, the court must order the forfeiture of any child pornography or child abuse material and any thing capable of containing such material, such as a computer or data storage device.

The term ‘child pornography material’ has the same meaning as in section 473.1 of the Criminal Code. The definition includes material that depicts or describes a child engaged in sexual activity

in a way that reasonable persons would regard as being, in all the circumstances, offensive. The term ‘child abuse material’ has the same meaning as in section 473.1 of the Criminal Code. This definition includes material that depicts or describes a child who is a victim of torture, cruelty or physical abuse in a way that reasonable persons would regard as being, in all the circumstances, offensive.

Proposed section 11: Applications for an order for forfeiture under subsection 10(2)

Proposed section 11 sets out the procedure for applying for a forfeiture order under subsection 10(2). This section specifies who can make the application, namely a constable or prosecutor, and the appropriate court to deal with the application. An application must be supported by an affidavit addressing the matters set out in proposed subsection 10(2).

The section also imposes a requirement on the applicant to notify an owner or person with a legal right to custody or control the material or article of the application. A person may choose to attend the hearing of the application, and make representations if invited to do so by the court. However, a court may still make an order where the person notified fails to appear.

Proposed section 12: Effect of forfeiture under section 10

Proposed section 12 clarifies that upon the making of a forfeiture order, the Commonwealth becomes the rightful owner of the forfeited material or article and where it does not have possession of the material, may take possession without a warrant.

Proposed section 12 also protects forfeited material from being destroyed for at least three months following the making of the order to ensure that the material or article is not required for the purposes of any other Australian investigation or proceeding. On the expiry of three months, if the Commissioner for the Australian Federal Police is satisfied that the material is not needed for any Australian investigation or proceeding, he may destroy it or deal with it as he deems appropriate.

Proposed section 12A: Copies of articles forfeited under section 10

Proposed section 12A entitles the owner or person with a legal right to custody or control of the forfeited article a copy of material contained on the equipment or disk where the material is capable of being readily copied, and copied without incorporating the offensive material. The Commonwealth is not obliged to provide copies where the provision of the copies may risk the safety of a person or impact on an investigation or prosecution.

Proposed section 12B: Compensation for articles forfeited under section 10

Proposed section 12B makes the Commonwealth liable to pay compensation for the replacement value of electronic equipment such as a computer, or data storage device (as defined in the provision). The Commonwealth’s liability to pay compensation only extends to the owner or person with a legal right to possession of the equipment or storage device and only where that person has not been found guilty of the Commonwealth child sex offence. Liability is limited to the reasonable cost of replacing the electronic equipment and/or data storage device. Where a person does not agree with the amount of compensation offered by the Commonwealth, they may apply to a court to determine what is a ‘reasonable compensation’, in line with the standard formula for provisions of this kind.

AMENDMENTS TO THE CRIMES ACT AND CRIMINAL CODE

CHILD SEX TOURISM AND CHILD PORNOGRAPHY OVERSEAS

Item 3 to Item 7: Part IAD of the Crimes Act

Items 2 to 6 ensure that the special protections for children in proceedings for sexual offences set out in Part IAD of the Crimes Act will continue to be available in child sex tourism prosecutions notwithstanding the provisions moving to the Criminal Code. The special protections will also apply to proceedings for offences against proposed Division 273 (offences involving child pornography material or child abuse material outside Australia).

Item 8: Part IIIA of the Crimes Act

This item repeals Part IIIA of the Crimes Act. The offences within this Part are moved to the Criminal Code (see Item 9) as indicated by the table below.

Crimes Act	Criminal Code
Section 50BA	Section 272.7
Section 50BB	Section 272.8
Section 50BC	Section 272.9
Section 50BD	Section 272.10
Section 50DA	Section 272.15
Section 50DB	Section 272.16

Item 9: At the end of Chapter 8 of the Criminal Code

Item 9 inserts Divisions 272 and 273 into the Criminal Code. Division 272 deals with the child sex tourism offences and related provisions and Division 273 deals with offences involving child pornography material or child abuse material outside Australia.

Proposed Division 272 - Child sex offences outside Australia

Proposed Subdivision A - Preliminary

Proposed section 272.1: Definitions

Proposed section 272.1 moves the current definition provisions contained in section 50AA of the Crimes Act to the Criminal Code for the purpose of defining the words and expressions used in proposed Division 272:

- “act of indecency” is defined in proposed section 272.2
- “induce” means to induce by threats, promises or otherwise
- “offence” for the purpose of the Division, has the extended meaning provided in proposed section 272.4, and
- “sexual intercourse” is defined in proposed section 272.3

The definition of “vagina” is at proposed subsection 272.3(3). Current subsection 50AA(2) of the Crimes Act, which provides for the extension of criminal responsibility for offences, has been incorporated in proposed section 272.4.

Proposed section 272.2: Meaning of *act of indecency*

This proposed section is based upon section 50AB of the current Crimes Act. Proposed section 272.2 provides that, for the purpose of the Criminal Code, an act of indecency is an act of a sexual nature involving the human body, or bodily actions or functions, which is so unbecoming or offensive that it amounts to a gross breach of ordinary contemporary standards of decency and propriety in the Australian community.

The question of whether or not an act amounts to an act of indecency is a question of fact for the court to decide.

In order to avoid any doubt, proposed section 272.2 provides that the meaning of an act of indecency includes an indecent assault.

Proposed section 272.3: Meaning of *sexual intercourse*

This proposed section is based upon section 50AC of the current Crimes Act. Proposed section 272.3 defines the term “sexual intercourse”. As the definition is exhaustive, conduct of a sexual nature which does not fall within any of the conduct listed in proposed paragraphs 272.3(1)(a)-(e) will not amount to sexual intercourse for the purposes of the offences that use that term (although the conduct may amount to an act of indecency).

The definition of sexual intercourse includes the penetration of the vagina or anus of a person by any part of the body of another person, the penetration of the vagina or anus of a person, carried out by another person by an object, fellatio and cunnilingus.

Proposed subsection 272.3(2) makes it clear that acts carried out for a proper medical, hygienic or law enforcement purpose will not amount to sexual intercourse for the purposes of the definition.

Proposed subsection 272.3(3) contains the definition of “vagina” based on the definition in section 50AA of the Crimes Act.

Proposed section 272.4: Extension of criminal responsibility

Section 6 of the Crimes Act and Part 2.4 of the Criminal Code extend criminal responsibility for all Commonwealth offences and operate to automatically provide for ancillary offences such as being an accessory after the fact, attempting to commit an offence or inciting the commission of an offence.

Because proposed subdivision C provides for offences of benefiting from, encouraging or preparing to commit a child sex tourism offence, the application of the extensions of criminal responsibility in section 6 of the Crimes Act and Part 2.4 of the Criminal Code is modified.

For example, proposed subsection 272.4(3) bars the operation of section 11.1 of the Criminal Code because liability for attempt is incompatible with the procuring and grooming offences in proposed sections 272.11 and 272.13. The incompatibility arises from the fact that the proposed offences are themselves a preparatory crime – they are committed in the preparation of actual sexual abuse. An

equivalent provision is contained in subsection 474.28(10) which provides that it is not an attempt to commit a procuring or grooming offence using a carriage service in sections 474.26 and 474.27. Similarly, proposed subsection 272.4(3) also bars the operation of section 11.1 in relation to the preparatory offence in proposed section 272.19.

In another example, proposed subsection 272.4(4) bars the operation of section 11.4 of the Criminal Code in relation to proposed section 272.16 which provides for an offence of encouraging the commission of an offence. As the definition of encouraging includes inciting, the application of section 11.4 is not necessary.

Proposed section 272.5: Who can be prosecuted for an offence committed overseas

This proposed section is based upon section 50AD of the current Crimes Act. This proposed section defines the persons who may be prosecuted under Division 272 for offences committed outside Australia. They are persons who, at the time of the offence, are:

- Australian citizens
- residents of Australia
- a body corporate under Australian law, or
- a body corporate that carries on its activities principally in Australia.

The purpose of this section is to avoid extending the reach of the laws to matters not properly the subject of Australian law enforcement activity.

Proposed section 272.6: Saving of other laws

This proposed section, based upon section 50GA of the Crimes Act, makes it clear that Division 272 does not limit or exclude the operation of any other law of the Commonwealth or any law of a State or Territory.

Proposed Subdivision B - Sexual offences against children overseas

Proposed section 272.7: Sexual intercourse with person under 16

This proposed section is based upon section 50BA of the current Crimes Act. The proposed section makes it an offence for an Australian citizen or resident to engage in sexual intercourse (as defined in proposed section 272.3) with a person under the age of 16 years, whilst outside Australia.

The maximum penalty for the offence is 17 years imprisonment which is the same maximum penalty that applies to section 50BA of the current Crimes Act.

In this offence, absolute liability applies to the location of the conduct and the fact that the person is under 16. This means that the prosecution only needs to prove that the conduct occurred outside Australia, and not that the defendant intended, or was reckless, to that fact. Similarly, it means that the prosecution only needs to prove that the person is under 16 and not that the defendant intended, or was reckless to that fact. The use of absolute liability for this offence mirrors the use of absolute liability for the offence in section 50BA of the current Crimes Act.

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

The application of absolute liability to the fact that the person is under 16 is appropriate because the crime of child sex is so serious that the onus is on a person having sexual intercourse to be confident that the other person is over 16 years of age. Furthermore, a defence based on belief about age is available in proposed section 272.13.

Proposed section 272.8: Inducing person under 16 to engage in sexual intercourse

This proposed section is based upon section 50BB of the current Crimes Act. The proposed section makes it an offence for a person to induce a person under 16 to engage in sexual intercourse (as defined in proposed section 272.3) with a third person, in the presence of the first person whilst outside Australia. For an offence to be committed under this provision the person under 16 must actually engage in sexual intercourse with the third person. The maximum penalty for the offence is 17 years imprisonment which is the same maximum penalty that applies to section 50BB of the current Crimes Act.

Absolute liability applies to the proposed offence in section 272.8 in the same way, and for the same reasons, as outlined above in proposed section 272.7. The use of absolute liability in proposed section 272.8 mirrors the use of absolute liability in section 50BB of the current Crimes Act. The defence based on belief about age in proposed section 272.13 also applies to proposed section 272.8.

Proposed section 272.9: Sexual conduct involving person under 16

This proposed section is based upon section 50BC of the current Crimes Act. This proposed section makes it an offence for an Australian citizen or resident, whilst outside Australia, to:

- commit an act of indecency on a person who is under 16
- submit to an act of indecency committed by a person who is under 16
- commit an act of indecency in the presence of a person who is under 16 with the intention of deriving gratification from the latter's presence during the act
- submit to an act of indecency by another person that is committed in the presence of a person who is under 16 with the intention of deriving gratification from the latter's presence during the act; or
- engage in sexual intercourse with another person in the presence of a person who is under 16 with the intention of deriving gratification from the latter's presence during intercourse.

An "act of indecency" is defined in proposed section 272.2.

The penalty for all of the offences in proposed section 272.9 is 15 years imprisonment. The maximum penalty for the sexual conduct offences in Part IIIA of the Crimes Act is 12 years imprisonment.

The child sex offence scheme in Part IIIA of the Crimes Act provides a distinction between the maximum penalty for sexual intercourse with a child (17 years) and sexual conduct with a child (12 years). The child sex offence scheme in proposed Division 272 also provides a distinction between the maximum penalty for sexual intercourse with a child (17 years), sexual conduct with a child (15 years), procuring a child for sexual activity (15 years) and grooming a child for sexual activity (12 years).

The penalty for sexual conduct with a child has been increased from 15 years imprisonment to reflect the seriousness of the offence and to ensure consistency with penalties for existing offences of a similar kind or seriousness. For example, the maximum penalty for using a carriage service for procuring a child for sexual activity in section 474.26 of the Criminal Code is 15 years imprisonment.

In the offences for proposed section 272.9, absolute liability applies to the location of the conduct, the fact that the person is under 16, and, with the exception of the offence in proposed subsection 272.9(5), the physical element of circumstance that the act of indecency is, in fact, an act of indecency. This means that the prosecution only needs to prove that the conduct occurred outside Australia, and not that the defendant intended, or was reckless, as to that fact. Similarly, it means that the prosecution only needs to prove that the person is under 16 and not that the defendant intended, or was reckless as to that fact. The use of absolute liability in proposed section 272.8 mirrors the use of absolute liability in section 50BC of the current Crimes Act.

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

The application of absolute liability to the fact that the person is under 16 is appropriate because the crime of sexual conduct with a child is so serious that the onus is on a person engaging in sexual conduct to be confident that the other person is over 16 years of age. Furthermore, a defence based on belief about age is available in proposed section 272.13.

The application of absolute liability to the physical element of circumstance that the act of indecency referred to in proposed subsections (1), (2), (3) and (4) is appropriate as an act of indecency, as defined in section 272.2, is determined by reference to ordinary contemporary standards of decency and propriety in the Australian community rather the intention, knowledge, recklessness or negligence of the alleged offender.

A person should not escape liability because they view as acceptable sexual conduct with a child that the community would view as a gross breach of standards of decency and propriety. While the prosecution will need to establish that the person intended to commit an act, the question of whether the act was accompanied by the circumstance that it was an act of indecency is one of fact to be determined by the court by reference to community standards.

Proposed section 272.10: Inducing person under 16 to be involved in sexual conduct

This proposed section is based upon section 50BD of the current Crimes Act. Proposed subsection 272.10(1) makes it an offence for a person to induce a person under the age of 16 years to:

- commit an act of indecency, outside Australia and in his/her presence, but not upon him or her

- submit to an act of indecency outside Australia and in his/her presence, but which is not committed by or upon him or her, or
- to be present while a third person commits an act of indecency outside Australia and in his or her presence, but which is not committed upon him or her.

The maximum penalty for the offence is 15 years imprisonment. The maximum penalty has been increased from 12 to 15 years for the reasons outlined in relation to proposed section 272.9.

Proposed subsection 272.10(2) makes it an offence for a person to induce a person under 16 to be present while a third person engages in sexual intercourse with a fourth person outside Australia and in the presence of the first person. The maximum penalty for the offence is 15 years imprisonment.

In these offences, absolute liability applies to the location of the conduct, the fact that the person is under 16, and, for the proposed offence in subsection 272.10(1), the physical element of circumstance that the act of indecency is, in fact, an act of indecency.

Absolute liability applies to the offence in proposed section 272.10 in the same way, and for the same reasons, as outlined above in proposed section 272.9. The use of absolute liability in proposed section 272.9 mirrors the use of absolute liability in section 50BD of the current Crimes Act. The defence based on belief about age in proposed section 272.13 also applies to proposed section 272.10.

Proposed section 272.11: Engaging in conduct to procure persons under 16 years of age

These new proposed offences capture the procuring of a person under 16 for sexual activity outside Australia. The intention of the offences is to capture people who procure a person under 16 with the intention that the person under 16 will engage in sexual activity. These proposed amendments address a gap in the current legislation.

The proposed offences are modelled on existing offences in section 474.26 of the Criminal Code, which deal with the use of a carriage service to procure a person under 16 for sexual activity, but are not limited to conduct involving the use of a carriage service.

The maximum penalty for these offences is 15 years imprisonment. This penalty is based upon the current offences in section 474.26 for using a carriage service to procure a child for sexual activity.

Example: P1 comes face-to-face with P2, a person under 16, and tries to procure P2 to engage in sexual intercourse outside Australia, for example, by offering P2 money.

The definition of ‘procure’ currently contained in subsection 474.28(11) of the Criminal Code will be moved to the Dictionary of the Criminal Code by Items 12 and 14 of this Schedule. Accordingly, the definition will apply to offences in this proposed Division. This definition, which is not exhaustive, provides that procuring a person in relation to sexual activity includes to encourage, entice or recruit the person in relation to that activity or to induce the person (whether by threats, promises or otherwise) in relation to that activity.

The definition of ‘sexual activity’ currently contained in subsection 474.28(1) will be moved to the Dictionary of the Criminal Code by Items 12 and 15 of this Schedule. Accordingly, the definition will apply to offences in this proposed Division. This definition, which is exhaustive, provides that

sexual activity means sexual intercourse, an act of indecency or any other activity of a sexual or indecent nature that involves the human body, or bodily actions or functions (whether or not that activity involves physical contact between people).

Proposed subsection 272.12(1) covers a range of scenarios including where the defendant intends to procure a person under 16 to engage in sexual activity with the defendant and where the defendant intends to procure the person under 16 to submit to sexual activity committed by the defendant. It also covers situations where the defendant is intending to procure the person under 16 to be present while the defendant engages in, or submits to, sexual activity in front of the person under 16.

The conduct captured by proposed subparagraph 272.11(1)(b)(ii) would include where the person under 16 is present while the defendant commits an act of indecency (either on themselves or on a third person), submits to an act of indecency (committed by a third person) or has sexual intercourse with a third person.

Example: P1 is in Australia and sends an e-mail to P2, a person under 16, who is in a foreign country. The e-mail tries to persuade P2 to engage in sexual intercourse with P1 at a future date, for example by offering them money. P1 can be found guilty of the offence even though sexual intercourse did not actually occur.

Example: P1 comes face-to-face with P2, a person under 16 and tries to persuade P2 to be present with P1 at a future date while P1 has sexual intercourse with another person, for example by offering P2 money. P1 can be found guilty of the offence even though the sexual activity did not actually occur.

Proposed subsection 272.11(2) operates in the same way as the proposed offence in 272.11(1) subject to one key difference: the defendant engages in conduct with the intention of procuring the person under 16 to engage in sexual activity with *another person* (rather than the defendant). It also covers situations where the defendant is intending to procure the person under 16 to be present while *another person* engages in, or submits to, sexual activity in front of the person under 16.

The conduct captured by proposed subparagraph 272.11(2)(b)(ii) would include where the person under 16 is present while a person (other than the defendant) commits an act of indecency (either on themselves or on a fourth person), submits to an act of indecency (committed by a fourth person) or has sexual intercourse with a fourth person.

Example: P1 meets P2, a person under 16, in a foreign country. P1 tries to persuade P2 to engage in sex with P1's friend.

Example: P1 engages in correspondence with P2, a person under 16, with the intention of procuring P2 to watch P1's friend have sex with a fourth person.

The offending conduct can take place in a range of geographical circumstances, including when the defendant is in Australia and the person under 16 is overseas, when the defendant is overseas and the person under 16 is overseas, or when both the defendant and the person under 16 are in Australia. The sexual activity must be intended to occur outside Australia, but proposed subsection 272.11(4) makes it clear that it does not matter if the sexual intercourse took place or if it is impossible to ever take place.

Proposed subsection 272.11(5) stipulates that it is not necessary that the person under 16 actually exist. This is to capture investigations where law enforcement officers assume the identity of a

fictitious person under 16 and interact with potential predatory adults. This offence allows law enforcement officers to arrest the predatory adult before they have an opportunity to sexually abuse a person under 16.

In these offences, absolute liability applies to the location of the conduct and the fact that the person is under 16. This means that the prosecution only needs to prove that the conduct occurred outside Australia, and not that the defendant intended, or was reckless, to that fact. Similarly, it means that the prosecution only needs to prove that the person is under 16 and not that the defendant intended, or was reckless to that fact.

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

The use of absolute liability in relation to the fact that the person is under 16 mirrors the use of absolute liability in relation to the offence of using a carriage service to procure a child for sexual activity (see sections 474.26 and 474.28(1) of the Criminal Code) and is consistent with the use of absolute liability in the child sex tourism offences (both in Part IIIA of the Crimes Act and in proposed Division 272 of the Criminal Code). A defence based on belief about age is available in proposed section 272.13.

Proposed section 272.12: Engaging in conduct to “groom” persons under 16 years of age

This proposed offence is similar to proposed section 272.11, but relates to the *grooming* of persons under 16 rather than the procurement. The proposed offence captures the grooming of a young person with the intention of making it easier to procure them into engaging in sexual activity outside Australia. Grooming can include a range of conduct that makes it easier to procure a person for sexual activity including through building trust with a person under 16 and taking steps to desensitise the person to the thought of engaging in sexual activity with adults. For example the person may expose the person under 16 to pornographic images or encourage romantic feelings in them. These proposed provisions address a gap in the current legislation.

The proposed offences are modelled on existing offences in section 474.27 of the Criminal Code, which deal with the use of a carriage service to groom a person under 16 for sexual activity, but are not limited to conduct involving the use of a carriage service.

The maximum penalty for these offences is 12 years imprisonment. This penalty is based upon the current offences in section 474.27 for using a carriage service to groom a child for sexual activity.

The definition of sexual activity currently contained in subsection 474.28(1) will be moved to the Dictionary of the Criminal Code by Items 12 and 15 of this Schedule.

Example: P1 comes face-to-face with P2, a person under 16, and tries to make it easier to procure P2 to engage in sexual intercourse by exposing them to pornographic images depicting children engaging in sexual acts with adults.

Example: P1 comes face-to-face with P2, a person under 16, and tries to make it easier to procure P2 to engage in an act of indecency by exposing them to pornographic images depicting children engaging in sexual acts with adults.

Proposed subsection 272.12(1) deals with situations where the defendant engages in conduct to make it easier to procure a person under 16 to engage in sexual activity with the defendant or submit to sexual activity committed by the defendant. It also covers situations where the defendant engages in conduct to make it easier to procure a person under 16 to be present while the defendant engages in, or submits to, sexual activity in front of the person under 16.

The conduct captured by proposed subparagraph 272.12(1)(b)(ii) is similar to that captured by proposed subparagraph 272.11(1)(b)(ii).

Example: P1 is in Australia and befriends P2, a person under 16 who is in a foreign country. P1 tries to convince P2 via e-mail and telephone conversations that P2 has romantic feelings for P1. P1 does so with the intention that P2 will have sexual intercourse with P2 outside Australia at some future date. P1 can be found guilty of the offence even though the sexual intercourse did not actually occur.

Example: P1 comes face-to-face with P2, a person under 16, and tries to make it easier to procure P2 to engage in an act of indecency by exposing them to pornographic images depicting children engaging in sexual acts with adults.

Proposed subsection 272.12(2) operates in the same way as the proposed offence in 272.13(1) subject to one key difference: the first person engages in conduct with the intention of making it easier to procure the person under 16 to engage in sexual activity with *another person* (rather than the defendant).

The conduct captured by proposed subparagraph 272.12(2)(b)(ii) is similar to that captured by proposed subparagraph 272.11(2)(b)(ii).

Example: P1 engages in correspondence with P2, a person under 16 with the intention of making it easier to procure P2 to watch P1's friend have sex with a fourth person.

The offending conduct can take place in a range of geographical circumstances, including when the defendant is in Australia and the person under 16 is overseas, when the defendant is overseas and the person under 16 is overseas, or when both the defendant and the person under 16 are in Australia. The proposed sexual intercourse must occur outside Australia, but proposed subsection 272.12(4) makes it clear that it does not matter if the sexual intercourse took place or if it is impossible to ever take place.

Subsection 272.12(5) stipulates that it is not necessary that the person under 16 actually exist. This is to capture investigations where law enforcement officers assume the identity of a fictitious person under 16 and interact with potential predatory adults. This offence allows law enforcement officers to arrest the predatory adult before they have an opportunity to sexually abuse a person under 16.

In these offences, absolute liability applies to the location of the conduct and the fact that the person is under 16. This means that the prosecution only needs to prove that the conduct occurred outside Australia, and not that the defendant intended, or was reckless, to that fact. Similarly, it means that the prosecution only needs to prove that the person is under 16 and not that the defendant intended, or was reckless to that fact.

The application of absolute liability is appropriate because the issue of whether the person intended to engage in the conduct in Australia or overseas is not central to their culpability. It is appropriate

to penalise a person for such conduct irrespective of their knowledge or intention as to where the conduct occurs.

The use of absolute liability in relation to the fact that the person is under 16 mirrors the use of absolute liability in relation to the offence of using a carriage service to groom a child for sexual activity (see sections 474.27 and 474.28(1) of the Criminal Code) and is consistent with the use of absolute liability in the child sex tourism offences (both in Part IIIA of the Crimes Act and in proposed Division 272 of the Criminal Code). A defence based on belief about age is available in proposed section 272.13.

Proposed section 272.13: Defence based on belief about age

This proposed section is based upon sections 50CA and 50CD of the current Crimes Act subject to one key difference: the defendant now carries an evidential burden rather than a legal burden. This means that the defendant must adduce or point to evidence that suggests a reasonable possibility that the matter exists or does not exist (see section 13.3 of the Criminal Code). An evidential burden is appropriate as belief as to the age of the child is not an element of the offence. Further, as the belief is a subjective one held by the defendant (and therefore more likely to be within the knowledge of the defendant), it is not unreasonable to place an evidential onus on the defendant in respect of the defence.

Proposed subsection 272.13(1) provides a defence to offences committed under proposed sections 272.7, 272.8, 272.9, or 272.10. The defence applies if, at the time of the sexual intercourse or act of indecency, the defendant believed that the person who was under 16, was actually 16 or over.

Proposed subsection 272.13(2) provides a defence to offences committed under sections 272.11 or 272.12. The defence applies if, at the time of the conduct, the defendant believed that the person, who was under 16, was actually 16 or over, and if the conduct constituting the offence was consensual.

In order to establish the defences contained in this section, it will not be necessary for the defendant to prove that his or her mistaken belief as to the child's age was reasonable in the circumstances. However, proposed subsection 272.13(3) provides that the jury may take reasonableness into account when determining whether the defendant held the claimed belief.

Proposed section 272.14: Defence based on valid and genuine marriage

This proposed section is based upon sections 50CB and 50CC of the current Crimes Act with one modification: the defence based on valid and genuine marriage will no longer be available where a person outside the marital relationship is directly involved (such as in proposed sections 272.8 and 272.10 which deal with inducing a person under 16 to engage in sexual intercourse or sexual conduct with a third person.)

Proposed subsection 272.14(1) provides a defence to offences under proposed sections 272.7, and 272.9 where:

- at the time of the sexual intercourse or act of indecency a marriage existed between the person under 16 and the defendant which was valid, or recognisable as valid, under the law of the country:
 - where the marriage was solemnised

- where the offence was allegedly committed, or
- of the defendant's residence or domicile, and
- the marriage was genuine at the time it was entered into, and
- the conduct constituting the offence was consensual.

The requirement that marriage be genuine at the time it was entered into is intended to prevent the use of a sham or fictitious marriage as a defence.

Proposed subsection 272.14(2) establishes a similar defence for conduct constituting an offence against subsections 272.11(1) and 272.12(1).

A defendant bears a legal burden in establishing these defences and, accordingly, must establish the elements of the defences on the balance of probabilities (see section 13.4 and 13.5 of the Criminal Code). This is the same as the burden for the defence in section 50CB established by current section 50CC of the Crimes Act, despite a note attached to section 50CB that indicates only an evidential burden applies.

A legal burden is appropriate as the child's marital status is not an element of the offence and the matter required to be proved (that there was a genuine marriage and that it was valid in a foreign country) are matters peculiarly within the knowledge of the defendant.

Proposed Subdivision C- Offences of benefiting from, encouraging or preparing to commit sexual offences against children overseas

Proposed section 272.15: Benefiting from offence against this Division

This proposed section is based upon section 50DA of the current Crimes Act. The proposed section creates an offence specifically directed at the organisers and promoters of child sex tourism.

This provision makes it an offence for a person to perform an act or make an omission, whether in Australia or overseas, with the intention of benefiting, whether financially or otherwise, from conduct of a kind that would constitute an offence under the Division and the conduct is reasonably capable of resulting in the person benefiting from conduct of a kind that would constitute an offence against the Division. The maximum penalty for the offence is 17 years which is the same as the penalty for the offence in section 50DA.

An offence is committed against proposed section 272.15 as soon as the person performs the relevant act (or omission). It is irrelevant whether the conduct, which would constitute the other offence under this proposed Division, occurs or has occurred.

The fault element (intention) must be proven under proposed paragraph 272.15(1)(b).

To the physical element of circumstance – that the conduct is reasonably capable of resulting in the person benefiting from conduct of a kind that would constitute an offence against this Division – is an objective fact that must be proven under proposed paragraph 272.15(1)(c). The application of absolute liability to the circumstance in proposed paragraph 272.15(1)(c) is only used in a technical sense to avoid confusion between paragraphs (b) and (c). This is appropriate as this circumstance is

established by reference to an objective standard that does not relate to culpability (for example, that the defendant intended, knew, was reckless or negligent that the circumstance existed).

Proposed section 272.16: Encouraging offence against this Division

This proposed section is based upon section 50DB of the current Crimes Act.

Proposed section 272.16 is in similar terms to proposed section 272.15 but proscribes acts (or omissions) performed with the intention of ‘encouraging’ conduct of a kind that would constitute an offence under this Division (other than an offence under this section) if the act (or omission) is reasonably capable of encouraging such conduct. The maximum penalty for the offence is 17 years which is the same as the penalty for the offence in section 50DB.

Proposed subsection 272.16(4) defines the term ‘encourage’ for the purposes of this provision, to mean to encourage, incite to, or urge, by any means whatever (including by written, electronic or other form of communication) or to aid, facilitate or contribute to, in any way whatever. This is an exhaustive definition for the purposes of the proposed section.

Absolute liability applies to the physical element of circumstance in the same way, and for the same reasons, as set out above in relation to proposed section 272.15.

Proposed section 272.17: Preparing to commit offence against this Division

This proposed amendment creates offences to capture the behaviour of people who are preparing to commit a child sex offence against proposed sections 272.7 to 272.10 and section 272.15. This proposed offence would capture a wide range of preparatory behaviour.

Example: P1 books an airline ticket and accommodation to travel outside Australia with the intention of planning to engage in sexual intercourse with a person who is under 16 while outside Australia.

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

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

These provisions attract a maximum penalty of 15 years and 17 years imprisonment. These penalties are based upon the maximum penalties for the offences for which it is an offence to prepare to commit (for example, the maximum penalty for sexual intercourse with a child is 17 years imprisonment and accordingly the maximum penalty for preparing to commit an offence of sexual intercourse with a child is also 17 years imprisonment).

Proposed Subdivision D- Video Link Evidence

This proposed subdivision allows the use of video evidence in relation to child sex offences committed outside Australia. Proposed subdivision D is the same as Division 5 of Part IIIA of the Crimes Act with only some minor drafting and referencing changes. The substance of the provisions remains the same.

Proposed section 272.20: When court may take evidence by video link

This proposed section is based upon section 50EA (when the court may take evidence by video link) and 50EB (motion of parties) of the Crimes Act: it allows a witness to give evidence by video link on application of a party to the proceedings if:

- the witness is willing to give evidence from outside Australia
- he or she is not a defendant in the proceedings
- the facilities for taking such evidence (in accordance with the requirements of proposed section 272.21) are or can reasonably be made available
- the court is satisfied that the witness's attendance in Australia would:
 - cause unreasonable expense or inconvenience, or
 - cause the witness psychological harm or unreasonable distress, or
 - cause the witness to become so intimidated or distressed that his/her reliability as a witness would be significantly reduced, and
- the court is satisfied that it is consistent with the interests of justice for the evidence to be taken by video link.

As the provisions dealing with child sex offences committed outside Australia are international in nature it is likely that witnesses will be living outside of Australia. To maximise the ability of the courts to obtain relevant witness evidence it is important that the evidence can be obtained by video link, so that witnesses are not precluded from giving their evidence due to cost or other matters that arise due to the international nature of the crime.

Proposed section 272.21: Technical requirements for video link

This proposed section is based upon current section 50EC of the Crimes Act. This provision relates to the requirement in proposed paragraph 272.20(c) and provides that video link evidence is not to be given unless the place where the court is sitting and the place where the evidence is to be given are each equipped with video facilities to enable the persons whom the court considers appropriate to see and hear each other via the video-link.

Proposed section 272.22: Application of laws about witnesses

This proposed section is based upon current section 50ED of the Crimes Act: it provides that a witness who gives video link evidence is taken to be giving it at the place where the court is sitting.

The proposed note in this section makes it clear that the effect of proposed section 272.22 is to apply local Australian law to the giving of evidence by video link, including laws relating to the rules of evidence, procedure, contempt of court and perjury.

Proposed section 272.23: Administration of oaths and affirmations

Proposed section 272.23 is based upon current section 50EE of the Crimes Act: it provides for the oath or affirmation to be administered either by the Australian court over the video link or by an authorised person at the place where the witness is to give evidence on behalf of the court. If the oath or affirmation is administered at the place where the witness is to give evidence, it is done on behalf of the Australian court and at the court's direction.

Proposed section 272.24: Expenses

Proposed section 272.24 is based upon current section 50EF of the Crimes Act: it authorises the court to make orders for the payment of expenses incurred in connection with the giving of evidence by video link. This would allow the court to obtain evidence it thinks will be useful for the case, when the other country will not or cannot fund the exercise.

Proposed section 272.25: Other laws about foreign evidence not affected

Proposed section 272.25 is based upon current section 50EG of the Crimes Act: it expressly preserves the operation of other laws relating to the taking of evidence from overseas witnesses for the purposes of proceedings concerning offences against this proposed Division.

Proposed Subdivision E- Other rules about conduct of trials

This proposed subdivision stipulates other rules about the conduct of trials in relation to child sex offences committed outside Australia. Proposed Subdivision E is the same as Division 6 of Part IIIA of the Crimes Act with only some minor drafting and referencing changes. The substance of the provisions remains the same.

Proposed section 272.26: Certain material taken to be evidence of age

Proposed section 272.26 is based upon current section 50FA of the Crimes Act: it provides that, in determining for the purposes of the Division whether a person is or was at a particular time under 16, or how old a person is or was at a particular time, a jury or court may have regard to, as evidence, the appearance of the person, medical or other scientific opinion and documents being or purporting to be official or medical records of a foreign country or copies of such records. This is to allow the court to consider a variety of sources of evidence when, for example, definitive evidence such as a genuine birth certificate of the victim is not available.

In order to avoid any doubt, proposed subsection 272.26(2) provides that the proposed section does not:

- make any other kind of evidence inadmissible, or
- relieve the prosecution authorities from the duty of making every effort to obtain the best evidence of age of the person.

Proposed subsection 272.26(3) provides that where proposed subsection 272.26(1) is relied upon, the court must warn the jury that it must be satisfied beyond reasonable doubt that the person in question:

- is, or was at a particular time, under 16, or
- is, or was at a particular time, of a particular age.

Proposed section 272.27: Alternative verdicts

Proposed section 272.27 is based upon current section 50FB of the Crimes Act: it allows the jury to return alternative verdicts in certain cases where it is satisfied that the accused is not guilty of the offence charged but is guilty of another offence under the proposed Division.

Proposed subsection 272.27 provides that, if the defendant is on trial for an offence against proposed section 272.7 (sexual intercourse with person under 16) and the jury is not satisfied that the defendant is guilty of an offence against that section, but is satisfied that he or she is guilty of an offence against proposed section 272.9 (sexual conduct involving person under 16), it may find the defendant guilty of the offence against section 272.9 instead.

Proposed subsection 272.27(2) provides that if the defendant is on trial for an offence against proposed section 272.8 (inducing person under 16 to engage in sexual intercourse) and the jury is not satisfied that the defendant is guilty of an offence against that section, but is satisfied that he or she is guilty of an offence against subsection 272.10(1) (inducing person under 16 to be involved in sexual conduct), it may find the defendant guilty of the offence against subsection 272.10(1) instead.

Proposed section 272.28: Double jeopardy

Proposed section 272.28 is based upon section 50FC of the Crimes Act: it makes it clear that a person is not liable to prosecution for an offence against this Division for conduct for which he or she has already been convicted or acquitted in another country for offences against the law of that country.

Proposed section 272.29: Sentencing

Proposed section 272.29 is based upon section 50FD of the Crimes Act. Proposed subsection 272.29(1) provides that in sentencing a person convicted of an offence against Subdivision B (sexual offences against children overseas), the court must take into account the age and maturity of the person in relation to whom the offence was committed, where these matters are relevant and known to the court.

The intention behind this provision is to allow the court to consider the unique circumstances of any case.

Example A: P1, is a mature 15 year old who has been in a long term relationship with P2 who has just turned 18 and they have sexual intercourse outside Australia.

Example B: P1 is 11 years old and P2 is 60 years old. P2 engages in sexual intercourse with P1 outside Australia.

‘Example A’ and ‘Example B’ are very different situations and the court is to consider differences of situation to the extent that they are relevant and known to the court. It is not intended that the sexual history of the victim be taken into account when considering their maturity.

To avoid any doubt proposed subsection 279.29(2) provides that the matters listed in proposed subsection 272.29(1) are in addition to any other matters which the court must take into account when sentencing, such as those listed in section 16A(2) of the Crimes Act.

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

The conduct of possessing, producing or distributing ‘child pornography material’ or ‘child abuse material’ within Australia is criminalised by virtue of either Commonwealth or State offences depending on the circumstances. The purpose of proposed Division 273 is to add new child pornography offences to allow prosecution, under Australian law, of Australians who engage in such conduct overseas, in practice to deal with circumstances where the foreign country does not have specific laws to deal with this behaviour or is unwilling or unable to prosecute. This addresses a gap in the current legislation highlighted by recent investigations. Many of the proposed sections mirror existing carriage service child pornography and child abuse material offences in Part 10.6 (Telecommunications Services) of the Criminal Code.

Subdivision A – Preliminary

Proposed section 273.1: Definitions

This provision inserts a number of definitions for the purposes of Division 273. Subsection 273.1(1) provides that, except for the definitions in subsections 273.1(2) (definition of a person ‘having possession or control of material’) and 273.1(3) (definition of a person ‘producing, distributing or obtaining material’), the definitions in Part 10.6 of the Criminal Code, which relate to telecommunications offences, also apply to Division 273.

For the purposes of the proposed new offences in Subdivision B, proposed subsection 273.1(2) gives an inclusive definition of the phrase ‘having possession or control of material’, and proposed subsection 273.1(3) gives an inclusive definition of the phrase ‘producing, distributing, or obtaining material’. Those definitions are based on the definitions in section 473.2 of the Criminal Code (‘having possession or control of data or material that is in the form of data’).

Proposed section 273.2: Who can be prosecuted for an offence committed overseas

This proposed section defines the persons who may be prosecuted under Division 273 for offences committed outside Australia. They are persons who, at the time of the relevant act or omission, are:

- Australian citizens
- residents of Australia
- a body corporate under Australian law, or
- a body corporate whose activities are carried on principally in Australia.

Proposed section 273.3: Double jeopardy

This provision makes it clear that a person is not liable to prosecution for an offence against this Division for conduct for which he or she has already been convicted or acquitted in another country for offences against the law of that country.

Proposed section 273.4: Saving of other laws

This provision expressly preserves the operation of other laws relating to offences involving child pornography material or child abuse material outside Australia.

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

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

Proposed section 273.5 makes it an offence for Australians to possess, control, produce, distribute or obtain ‘child pornography material’ while overseas. This offence carries a maximum penalty of 10 years imprisonment. The length of this penalty is based upon penalties for similar conduct within Australia.

The term ‘child pornography material’ has the same meaning as in section 473.1 (definitions) of the Criminal Code (see proposed subsection 273.1(1)). The definition includes material that depicts or describes a child engaged in sexual activity in a way that reasonable persons would regard as being, in all the circumstances, offensive.

Absolute liability applies to circumstance that the conduct occurs outside Australia. This means that the prosecution only needs to prove that the conduct occurred outside Australia, and not that the defendant intended, or was reckless, as to that fact. The application of absolute liability is appropriate because the issue of whether the person intended to engage in the conduct in Australia or overseas is not central to their culpability. It is appropriate to penalise a person for such conduct irrespective of their knowledge or intention as to where the conduct occurs. The use of absolute liability in these circumstances is consistent with the use of absolute liability in the offences against proposed Division 272 and the offences for using a carriage service to procure or groom a child for sexual activity in Division 474 of the Criminal Code.

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

Proposed section 273.6 makes it an offence for Australians to possess, control, produce, distribute or obtain ‘child abuse material’ while overseas. This offence carries a maximum penalty of 10 years imprisonment. The length of this penalty is based upon penalties for similar conduct within Australia.

The term ‘child abuse material’ has the same meaning as in section 473.1 (definitions) of the Criminal Code (see proposed subsection 273.1(1)). This definition includes material that depicts or describes a child who is a victim of torture, cruelty or physical abuse in a way that reasonable persons would regard as being, in all the circumstances, offensive.

Absolute liability applies to the offence in proposed section 273.6 in the same way, and for the same reasons, as outlined above in proposed section 273.5.

Subdivision C – Defences

Proposed section 273.7 sets out the circumstances in which a person is not criminally responsible for an offence in proposed Subdivision B. These defences are modelled on the defences in sections 474.21 (defences in respect of child pornography material) and 474.24 (defences in respect of child abuse material) of the Criminal Code and will protect people who have legitimate reasons for possessing, controlling, producing, distributing or obtaining child pornography material or child abuse material. Minor changes have been made to those defences to make them appropriate for offences which will occur outside Australia. For example, subsection 272.7(1) sets out a defence of engaging in conduct for public benefit. Subsection 272.7(2) sets out an exhaustive list of circumstances when conduct will be of public benefit, including enforcing, monitoring compliance with or investigating a contravention of a law of the Commonwealth or a State or Territory. The defence now includes reference to a law of a foreign country in addition to Commonwealth, State and Territory laws.

Most of the defences in proposed section 272.7 are similar in application to the general defence of lawful authority in section 10.5 of the Criminal Code. However, that defence is not specific to the circumstances covered by these defences and does not sufficiently cover all the types of people that would be legitimately entitled to a defence for the proposed child pornography material offences.

The defendant bears the evidential burden of pointing to evidence which supports the defences outlined below. It will generally be much easier for a defendant, rather than the prosecution, to produce evidence showing that the circumstances to which the defences apply do in fact exist.

Proposed section 273.7: Defences to offences against this Division

Proposed subsection 273.7(1) provides a defence against proposed section 273.5 (possessing, controlling, producing, distributing or obtaining child pornography material outside Australia) and proposed section 273.6 (possessing, controlling, producing, distributing or obtaining child abuse material outside Australia) to a defendant who can point to evidence to suggest that their conduct is of public benefit and does not go beyond what is of public benefit. The test is an objective one, meaning the motives or intentions of the person who engaged in the conduct are not relevant and would not be considered in determining whether the conduct is in fact of public benefit.

Proposed subsection 273.7(2) provides an exhaustive list of conduct that is of public benefit. If a person engages in conduct that meets one of the four criteria in proposed subsection 273.7(2) it will be considered to be ‘of public benefit’ for the purposes of proposed subsection 273.7(1) so long as the conduct does not go beyond what is of the public benefit. It will be a question of fact, to be determined by the arbiter of fact, as to whether the conduct meets one of the four criteria and therefore is of public benefit. It will also be a question of fact as to whether the conduct extends beyond what is of public benefit.

Proposed paragraph 273.7(2)(a) covers conduct that is necessary or of assistance in enforcing a law of the Commonwealth, a State or a Territory or a foreign country. This defence would have very limited application and is targeted at persons who may be required to engage in the offending conduct as part of their duties in connection with law enforcement, but who are not covered by the defence for law enforcement officers in subsection 273.4(4)(a).

Example: P1, an Australian criminologist working in a foreign country assists law enforcement agencies in the identification of victims of child abuse.

Proposed paragraph 273.7(2)(b) covers conduct that is necessary or of assistance in monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory, or foreign country. This defence is targeted at officers of government agencies involved in monitoring and investigative activity related to regulatory schemes that they administer.

Proposed paragraph 273.7(2)(c) covers conduct that is necessary or of assistance in the administration of justice (whether within or outside Australia). This defence is targeted at persons involved in, or persons who through their work are required to assist another person involved in, court proceedings brought to enforce criminal offences related to child pornography or child abuse material. The types of people covered by the defence would include judicial officers, or other officers, of a court hearing the proceedings, legal representatives of a party to the proceedings, and witnesses in the proceedings.

Proposed paragraph 273.7(2)(d) covers conduct that is necessary or of assistance in conducting scientific, medical or educational research. This defence will ensure that legitimate research dealing with child pornography can be undertaken. However, this would cover only a limited range of conduct and proposed subsection 273.7(3) stipulates that paragraph 273.7(2)(d) only applies if the person's conduct was reasonable.

Proposed subsection 273.7(4) provides a defence for law enforcement officers, intelligence or security officers and an officer or employee of the government of a foreign country performing similar duties to an intelligence or security officer, acting in the course of their duties where their conduct is reasonable in the circumstances for the purpose of performing that duty. 'Law enforcement officer' and 'intelligence or security officer' are defined in Part 10.6 of the Criminal Code.

Example: P1, a law enforcement officer who is working in a foreign country sends an email containing child pornography to colleagues as part of an investigation. This would ordinarily be covered by the defence. However, if P1 intentionally included amongst the email recipients a friend who had no involvement in the investigation, the officer may not be covered by this defence.

Proposed subsection 273.7(5) provides a defence for persons who engage in the offending conduct in *good faith* for purposes related to the operation of the Online Content Co-Regulatory Scheme (the Scheme) under Schedules 5 and 7 of the *Broadcasting Services Act 1992*.

Paragraph 273.7(5)(a) provides a defence for persons who engage in the offending conduct for the *sole purpose* of assisting the Australian Communications and Media Authority (ACMA) to detect prohibited content or potential prohibited content in the performance of its functions under the Scheme.

Example: P1, an Australian working in a foreign country for an Australian body corporate, makes a complaint about an Australian website to ACMA under the Scheme by emailing an attachment containing child pornography material that they accessed on the website. P1, whose only reason for transmitting such material is to assist the ACMA in its functions under the Scheme, would not be liable for that conduct.

Paragraph 273.7(5)(b) provides a defence for persons involved in the manufacturing, developing or updating of content filtering technology (including software) in accordance with a ‘recognised alternative access-prevention arrangement’ or ‘designated alternative access-prevention arrangement’. These terms are defined in clauses 40 and 60 of Schedule 5 of the Broadcasting Services Act, respectively. Under the Scheme, these access prevention arrangements involve the development of filtering software and filtered carriage services designed to block prohibited content. These are to be updated in accordance with notices issued by ACMA providing details of internet sites that contain prohibited content. In updating their filters, software manufacturers and internet service providers that offer filtered carriage services may need to access sites that contain prohibited content. The defence could apply to a company that produced filtering software overseas principally for the Australian market.

Proposed Subdivision D – Video link Evidence

This proposed subdivision allows the use of video evidence in relation to offences involving child pornography or child abuse material outside Australia. These provisions are identical to those included in proposed Division 272 (Child sex offences outside Australia) detailed above. As with the provisions in proposed Division 272, these provisions mirror existing Crimes Act child sex tourism provisions. Minor alterations have been made, consisting of changes to form however the substance of the provisions remains the same.

Proposed section 273.8: When court may take evidence by video link

Proposed section 273.8 allows a witness to give evidence by video link on application of a party to the proceedings if:

- the witness is willing to give evidence from outside Australia
- he or she is not a defendant in the proceedings
- the facilities for taking such evidence (in accordance with the requirements of proposed section 273.9) are or can reasonably be made available
- the court is satisfied that the witness’s attendance in Australia would:
 - cause unreasonable expense or inconvenience, or
 - cause the witness psychological harm or unreasonable distress, or
 - cause the witness to become so intimidated or distressed that his/her reliability as a witness would be significantly reduced, and
- the court is satisfied that it is consistent with the interests of justice for the evidence to be taken by video link.

As the provisions dealing with offences involving child pornography material or child abuse material outside Australia are international in nature it is likely that witnesses may be living outside of Australia. To maximise the ability of the courts to obtain relevant witness evidence it is important that the evidence can be obtained by video link, so that witnesses are not precluded from giving their evidence due to cost or others matters arising from the international nature of the crime.

Proposed section 273.9: Technical requirements for video link

This proposed section relates to the requirement in proposed paragraph 273.8(c) (that facilities are available) and provides that video link evidence is not to be given unless the place where the court is sitting and the place where the evidence is to be given are each equipped with video facilities to enable persons whom the court considers appropriate to see and hear each other via the video link.

Proposed section 273.10: Application of laws about witnesses

Proposed section 273.10 provides that a witness who gives video link evidence is taken to be giving it at the place where the court is sitting.

The proposed note in this section makes it clear that the effect of proposed section 273.10 is to apply local Australian law to the giving of evidence by video link, including laws relating to the rules of evidence, procedure, contempt of court and perjury.

Proposed section 273.11: Administration of oaths and affirmations

This proposed section provides for the oath or affirmation to be administered either by the Australian court over the video link or by an authorised person at the place where the witness is to give evidence on behalf of the court. If the oath or affirmation is administered at the place where the witness is to give evidence, it is done on behalf of the Australian court and at the court's direction.

Proposed section 273.12: Expenses

This proposed section authorises the court to make orders for the payment of expenses incurred in connection with the giving of evidence by video link. This will allow the court to obtain evidence it thinks will be useful for the case, when the other country will not fund the exercise.

Proposed section 273.13: Other laws about foreign evidence not affected

This proposed section expressly preserves the operation of other laws relating to the taking of evidence from overseas witnesses for the purposes of proceedings concerning offences against this proposed Division.

Item 10 and Item 11: Division 474 of the Criminal Code

Section 474.27 of the Criminal Code makes it an offence to use a carriage service to 'groom' a person under the age of 16 years for sexual activity. Currently, an element of the grooming offences in section 474.27 is that a person uses a carriage service to transmit a communication to a second person and the *communication includes material that is indecent*. Subsection 474.27(5) states that *indecent* means 'indecent according to the standards of ordinary people'.

The requirement that the communication include material that is indecent limits the type of communications that are captured by the grooming offences. Grooming activity may involve the transmission of indecent material – such as pornography – but is just as likely to include communications that are designed to build trust with the perpetrator or invoke romantic feelings in the person under 16 years of age.

Items 10 and 11 amend section 474 to ensure that these offences operate as effectively as possible to capture persons who groom children for sexual intercourse or indecent conduct by removing the

requirement that the communication must include material that is indecent. This will also make the offences consistent with the proposed grooming offences in the child sex tourism offences.

Item 12: Repealing subsection 474.28(11) of the Criminal Code

Subsection 474.28(11) of the Criminal Code contains definitions of ‘procure’ and ‘sexual activity’. It is proposed that these definitions be contained in the Dictionary of the Criminal Code because the terms are now applied in multiple Divisions in the Criminal Code.

Item 13: Dictionary in the Criminal Code

‘Act of indecency’ will be defined in proposed section 272.2. In order to make the dictionary in the Criminal Code as thorough as possible ‘act of indecency’ will be defined in the dictionary to have the same meaning given by section 272.2 of the Criminal Code.

Item 14: Dictionary in the Criminal Code

This item inserts the definition of ‘procure’ contained in subsection 474.28(11) of the Criminal Code, which is to be repealed by Item 12, in the dictionary in the Criminal Code. ‘Procure’ will be defined in the context of procuring a person, in relation to sexual activity to include, encouraging, enticing or recruiting a person in relation to that activity; or inducing the person (whether by threats, promises or otherwise) in relation to that activity. The definition is not exhaustive.

The definition has not been changed from its current definition in section 474.28 of the Criminal Code. However, the term is now used in multiple Divisions in the Criminal Code, and consequently needs to be contained in the Dictionary.

Item 15: Dictionary in the Criminal Code

‘Sexual activity’ will be defined in the dictionary of the Criminal Code to mean sexual intercourse, an act of indecency or any other activity of a sexual or incidental nature that involves the human body, or bodily activities or functions, this does not require physical contact between two people.

Both ‘sexual intercourse’ and ‘act of indecency’ are defined in the dictionary in the Criminal Code. These definitions cross-reference definitions in proposed sections 272.2 and 272.3 respectively (see Items 13 and 16 of this Schedule).

The definition of ‘sexual activity’ currently contained in section 474.28 of the Criminal Code, which is repealed by Item 12 of this Schedule, refers to sections 50AC and 50AB of the Crimes Act, which will be repealed by Item 8 of this Schedule.

Item 16: Dictionary in the Criminal Code

‘Sexual intercourse’ is to be defined in proposed section 272.3 (meaning of sexual intercourse). In order to make the dictionary in the Criminal Code as thorough as possible ‘sexual intercourse’ will be defined in the dictionary to have the same meaning given by section 272.3 of the Criminal Code.

Item 17: Subparagraph 30(1)(a)(iii) of the Surveillance Devices Act 2004

Subparagraph 30(1)(a)(iii) of the *Surveillance Devices Act 2004* refers to an offence against Part IIIA of the Crimes Act. As Part IIIA will not exist when the Crimes Legislation Amendment

(Enhanced child protection from predatory tourism offences) Act 2008 commences, the subparagraph will become redundant and therefore is being repealed and replaced (see Item 18).

Item 18: Subparagraph 30(1)(a)(viii) of the Surveillance Devices Act 2005

Subparagraph 30(1)(a)(viii) of the Surveillance Devices Act will be amended to refer to the new Divisions 272 (child sex tourism offences) and 273 (dealings in child pornography overseas) of the Criminal Code. This will enable a law enforcement officer to apply for an emergency authorisation for the use of a surveillance device where there is a risk of loss of evidence in relation to the investigation of an offence against proposed Divisions 272 and 273 of the Criminal Code.

Items 19 to Item 22: Amendments to the Telecommunications (Interception and Access) Act 1979

Section 5D of the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) defines 'serious offence' for the purposes of the TIA Act. Telecommunications interception warrants may only be issued to further the investigation of a serious offence. To ensure that telecommunications interception warrants may be issued in relation to the new child sex tourism and dealings in child pornography material overseas, it is necessary to include references to new Divisions 272 and 273 of the Criminal Code in section 5D of the TIA Act.

Subparagraph 5D(3)(d)(xi) currently refers to the child sex tourism offences in Part IIIA of the Crimes Act. As these offences are being repealed, it is necessary to repeal references to Part IIIA as a consequential amendment (see Item 20).

As a result of the changes made by Item 22, telecommunications interception warrants will be available for the investigation of a child sex tourism offence or overseas child pornography offence without any further requirement that the offence have an element of organisation or planning. This is different to the current position in which such warrants are only available for the investigation of a child sex tourism offence in Part IIIA of the Crimes Act where the offence involves, amongst other things, two or more offenders and substantial planning and organisation.

The Telecommunications (Interception and Access) Amendment Bill 2008 (the TIA Bill), which was passed by both Houses of Parliament in May 2008, amended the Telecommunications (Interception and Access) Act 1979 (the TIA Act) to ensure that all offences involving the production, publication, possession, supply or sale of child pornography and consenting to or procuring the employment of a child in connection with child pornography are serious offences, regardless of their term of imprisonment (currently these types of offences are only serious offences if they are punishable by imprisonment for at least seven years). Items 19, 21 and 22 of the Bill mirror these amendments to the TIA Act to ensure that all child pornography amendments are located together in the TIA Act.