



Australian Government
Attorney-General's Department

Criminal Justice Division

**PROPOSED REFORMS TO
COMMONWEALTH CHILD SEX-RELATED OFFENCES**

CONTENTS

PART 1:	INTRODUCTION.....	3
PART 2:	BACKGROUND.....	5
PART 3:	REFORMS TO THE CHILD SEX TOURISM OFFENCE REGIME.....	15
PART 4:	REFORMS TO CHILD SEX-RELATED CARRIAGE SERVICE OFFENCES.....	43
PART 5:	NEW OVERSEAS CHILD PORNOGRAPHY AND CHILD ABUSE MATERIAL OFFENCES.....	55
PART 6:	NEW CHILD SEX-RELATED POSTAL SERVICE OFFENCE REGIME.....	58
PART 7:	FORFEITURE OF CHILD PORNOGRAPHY AND CHILD ABUSE MATERIAL.....	61
PART 8:	MINOR AMENDMENTS TO ENSURE AVAILABILITY OF EXISTING LAW ENFORCEMENT POWERS.....	66
	APPENDIX.....	68

PART 1: INTRODUCTION

The sexual exploitation of children is a devastating and widespread form of criminal activity. The commercial sexual exploitation of children is recognised by the United Nations as a contemporary form of slavery¹ and by the International Labour Organisation as one of the worst forms of child labour.²

2. Australia plays a strong role in addressing the exploitation of children, both domestically, and through supporting international efforts to promote the rights of children. Australia has an extensive framework in place to prevent, investigate and prosecute all forms of child exploitation.

3. Responsibility for combating child sexual exploitation is shared between the Commonwealth, States and Territories. Traditionally, the States and Territories have been responsible for child sex-related offences occurring domestically (eg within each jurisdiction), while the Commonwealth has enacted child sex-related offences occurring across or outside Australian jurisdictions (eg where the Internet is involved or where the offence is committed overseas). This reflects areas of Commonwealth legislative power under the Constitution.

4. The Commonwealth's regimes include offences criminalising child sex tourism (sexual offences against children overseas) and using the Internet for child sex-related activity.³

5. The Federal Government is keen to ensure that there are up-to-date criminal offences that protect children from sexual exploitation. This paper sets out proposed reforms to Commonwealth child sex-related offences. The term 'child sex-related offences' refers to laws that criminalise sexual activity with children under 16 years of age, as well as dealings in child pornography and child abuse material.

Invitation to comment

6. The Government seeks views on the reforms outlined in Parts 3 to 8 of this paper, which would:

- strengthen the existing child sex tourism offence regime
- enhance the coverage of offences for using a carriage service for sexual activity with a child or for child pornography and child abuse material
- introduce new offences for dealing in child pornography and child abuse material overseas
- introduce new offences for using a postal service for child sex-related activity
- introduce a new scheme to provide for the forfeiture of child pornography and child abuse material and items containing such material, and
- make minor amendments to ensure existing law enforcement powers are available to combat Commonwealth child sex-related offences.

¹ Office of the High Commissioner for Human Rights, *Fact Sheet No. 14: Contemporary Forms of Slavery*, 1991.

² International Labour Organisation Convention No. 182 *Worst Forms of Child Labour Convention*, 1999.

³ *Crimes Act 1914* (Cth), Part IIIA and Criminal Code, Division 474.

7. The proposed reforms:

- address issues raised by law enforcement agencies regarding the Commonwealth's child sex-related offences
- reflect best practice in this area, taking into account recent reforms both domestically and internationally, in particular the recent reforms in New South Wales following a review by the New South Wales Sentencing Council⁴
- recognise the work done by the former Model Criminal Code Officers Committee (MCCOC) in its report on Sexual Offences Against the Person⁵
- take into consideration issues raised by participants of the Federal Criminal Justice Forum⁶, and
- take into consideration recent research by the Australian Institute of Criminology.⁷

⁴ New South Wales Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales: Volume 1*, August 2008.

⁵ Model Criminal Code Officers Committee, *Model Criminal Code*, 'Chapter 5: Sexual Offences Against the Person Report,' May 1999. The MCCOC report put forward model provisions in the area of sexual offences against children, seeking to promote harmonisation across Australian jurisdictions.

⁶ The Federal Criminal Justice Forum was held in Canberra on 29 September 2008 and brought together a diverse group of over 150 participants from the judiciary, the legal profession, law enforcement and government, academia, business, unions and community organisations to discuss ideas for reform in the federal criminal justice system.

⁷ Kim-Kwang Raymond Choo, Online child grooming: a literature review on the misuse of social networking sites for grooming children for sexual offences, Australian Institute of Criminology Reports, Research and Public Policy Series #130, 2009.

PART 2: BACKGROUND

International obligations

8. Australia has long recognised that the sexual exploitation of children is a global issue – one that requires considerable international cooperation. This consultation paper is set in the context of the international movement against the sexual exploitation of children.

9. Australia has been an active participant in the First, Second and Third World Congresses Against the Sexual Exploitation of Children, held in 1996, 2001 and 2008 respectively. The Declaration of the First World Congress called for the criminalisation of commercial sexual exploitation and other forms of sexual exploitation of children, condemning and penalising all those offenders involved, whether local or foreign, while ensuring that child victims are not penalised. States were urged to review, revise, implement and enforce laws.⁸ The Yokohama Global Commitment in 2001, and more recently the Rio de Janeiro Pact in 2008, repeated these calls.⁹

10. International law recognises that children need special safeguards and care, including appropriate legal protection. Australia takes seriously its international obligations to criminalise and eliminate the sexual exploitation of children and is a party to several important international conventions in this area. The conventions which Australia is a party to include:

- the *Convention on the Rights of the Child* (the CRC)
- the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (the Optional Protocol)
- the *International Labour Organisation’s Worst Forms of Child Labour Convention, 1999 (No. 182)* (ILO No. 182)
- the *United Nations Convention Against Transnational Organized Crime*
- the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*
- the *International Convention to Suppress the Slave Trade and Slavery*
- the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, and
- the *Protocol Amending the Slavery Convention*.

11. The CRC has achieved almost universal ratification and provides a comprehensive set of international legal principles for the protection and wellbeing of children. Article 34 of the CRC requires State parties to take all appropriate national, bilateral and multilateral measures to protect children from all forms of sexual exploitation and sexual abuse.

12. Reinforcing the general principles in the CRC, the Optional Protocol imposes detailed requirements on State parties regarding the commercial sexual exploitation of children. It requires State parties to criminalise the ‘offering, delivering or accepting, by whatever means, a child for the purpose of sexual exploitation of the child ... offering, obtaining, procuring or providing a child for child prostitution ... producing, distributing, disseminating, importing, exporting, offering, selling or possessing ... child pornography. This includes criminalising behaviour carried out

⁸ *Stockholm Declaration and Agenda for Action*, First World Congress Against Commercial Sexual Exploitation of Children, Stockholm, Sweden, 27-31 August 1996.

⁹ *The Yokohama Global Commitment*, Second World Congress Against Commercial Sexual Exploitation of Children, Yokohama, Japan, 17-20 December 2001. *The Rio de Janeiro Pact to Prevent and Stop Sexual Exploitation of Children and Adolescents*, Third World Congress Against Sexual Exploitation of Children and Adolescents, Rio de Janeiro, Brazil, 25-28 November 2008.

domestically or transnationally by a country’s own nationals. The Optional Protocol entered into force in Australia in February 2007.

13. Australia ratified ILO No. 182 in December 2006. The Convention requires ratifying countries to secure the prohibition and elimination of the worst forms of child labour, which include forced labour, slavery, drug trafficking, involvement in prostitution or pornography, and a range of other hazardous and exploitative activities. Under Article 3(b) of the Convention, ‘the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances’ is included as one of ‘the worst forms of child labour.’

Age of consent

14. The ‘age of consent’ is generally understood as the age at which consensual sexual activity is lawful. **Table 1** sets out Commonwealth, State and Territory ages of consent for sexual activity, and the age threshold for Commonwealth, State and Territory child pornography offences (the age of the child appearing in the material).

Table 1 - Commonwealth, State and Territory age thresholds

	Age of consent	Child pornography
CTH	16	18
NSW	16	16
VIC	16	18
QLD	16	16
WA	16	16
SA	17	16
TAS	17	18
ACT	16	18
NT	16	18

15. The Commonwealth’s age of consent is 16 years of age. State and Territory ages of consent vary from 16 to 17 years of age. The Government believes that setting the age of consent at 16 years of age strikes the appropriate balance between the need to protect vulnerable persons from sexual exploitation, and the need to allow for sexual autonomy.

16. Setting the age of consent at 16 is generally consistent with international practice. While the age of consent varies between countries, there is a trend towards a standardisation between 15 and 17 years of age.¹⁰

17. The Commonwealth, Victoria, Tasmania, the Australian Capital Territory and the Northern Territory age threshold for child pornography offences is 18 years of age. In remaining jurisdictions it is set at 16 years of age. While the age threshold for child pornography offences also varies internationally, the general trend in the sample countries compared is 18 years of age. It is common for the age of persons covered by child pornography offences to be higher than the age of consent because child pornography involves the exploitation (often for commercial purposes) of children. The type of conduct involved is more closely aligned to child prostitution. Child prostitution offences are generally directed at persons under 18 years of age.

18. In line with the majority of States and Territories, and consistent with the trend internationally, the Government proposes to retain the age threshold for child pornography offences at 18 years of age.

¹⁰ UK Home Office, *Setting the Boundaries: Reforming the law on sex offences*, Volume 1, July 2000, page 41.

Coverage of State and Territory offences

19. **Tables 2 and 3** set out existing State and Territory child sex-related offences which criminalise sexual activity with children and dealing in child pornography and child abuse material.

Table 2 – State and Territory offences directed at sexual activity with children

	sexual intercourse	sexual conduct	grooming	procuring	indecent material	child prostitution
NSW	✓	✓	✓	✓	✗	✓
VIC	✓	✓	✗	✓	✗	✓
QLD	✓	✓	✗	✓	✓	✓
WA	✓	✓	✗	✓	✓	✓
SA	✓	✓	✓	✓	✗	✓
TAS	✓	✓	✓	✓	✓	✓
ACT	✓	✓	✗	✓	✓	✓
NT	✓	✓	✗	✓	✓	✓

Table 3 – State and Territory offences directed at child pornography

	possession of child pornography	production of child pornography	distribution of child pornography
NSW	✓	✓	✓
VIC	✓	✓	✗
QLD	✓	✓	✓
WA	✓	✓	✓
SA	✓	✓	✓
TAS	✓	✓	✓
ACT	✓	✓	✓
NT	✓	✓	✓

Sexual activity with children

20. Although expressed differently, there are laws in each State and Territory which criminalise sexual intercourse and other sexual conduct (or acts of indecency) with a child (see **Table 2.1** in the **Appendix**). The maximum penalties for these offences range from three years to life imprisonment.

21. The States and Territories also criminalise behaviour that *leads* to sexual activity with a child. This allows law enforcement to intervene before actual sexual activity takes place (see **Table 2.2** in the **Appendix**). Some States criminalise ‘grooming’ a child for sexual activity, and all States and Territories criminalise ‘procuring’ a child for sexual activity.

22. The term ‘grooming’ generally refers to behaviour that is designed to make it easier for the offender to procure a child for sexual activity. For example, an offender might build a relationship of trust with the child, and then seek to sexualise that relationship (eg by encouraging romantic feelings or exposing the child to sexual concepts through pornography). The maximum penalties for grooming offences range from ten to 21 years imprisonment.

23. The term ‘procuring’ generally refers to behaviour that encourages, entices, recruits or induces a child to engage in sexual activity. For example, an offender might promise gifts or money to a child to have sex with the offender, or threaten a child with violence if they do not. The maximum penalties for procuring offences range from five to 21 years imprisonment.

24. Several States and Territories also have offences of exposing children to indecent material, such as adult pornography (see **Table 2.3** in the **Appendix**). These offences do not require proof of any subsequent intention to engage in sexual activity with the child and carry penalties ranging from five to 21 years imprisonment.

25. Although the particular type of conduct that is criminalised varies, all States and Territories have offences of child prostitution (see **Table 2.4** in the **Appendix**). All States and Territories criminalise:

- causing, inducing, or allowing a child to take part in prostitution (maximum penalties range from seven to 14 years imprisonment), and
- obtaining a benefit from child prostitution, or entering into an agreement for the provision of child prostitution (maximum penalties range from two to 15 years imprisonment).

26. Several States and Territories also have offences for deceptive recruiting of a child for commercial sexual services, with high maximum penalties of between nine and 20 years imprisonment. Other conduct that is criminalised includes, for example, allowing premises to be used for child prostitution, or allowing a child to enter or remain in a place where child prostitution occurs.

Child pornography and child abuse material

27. All States and Territories criminalise the possession, production and sale/distribution of child pornography and/or child abuse material (see **Table 3.1** in the **Appendix**). The maximum penalties for these offences range from four to 21 years imprisonment.

Coverage of existing Commonwealth offences

28. Existing Commonwealth child sex-related offences are set out in the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth). These offences criminalise child sex tourism, using a ‘carriage service’ (eg telephone or Internet) for sexual activity with a child, and using a carriage service for child pornography and child abuse material. They reflect the areas in which the Commonwealth has legislative power under the Constitution.

Child sex tourism

29. In 1994, new Commonwealth offences were enacted to target Australians who engage in the sexual abuse of children overseas (child sex tourism). These offences (set out in Part IIIA of the *Crimes Act*) have extra-territorial application and ‘travel’ with Australians wherever they go.¹¹

30. Child sex tourism is a global phenomenon, which generally refers to the sexual exploitation of children by offenders who travel away from their home in order to have sexual contact with children. Most child sex ‘tourists’ travel to a foreign country for child sex; others travel to another place within their home country.

31. Child sex tourism is a serious problem in many less developed countries. Many of these countries lack effective laws or, where laws are in place, the capacity to enforce them. Unfortunately, Australians have played a significant part in the child sex tourism industry overseas, particularly in the neighbouring Asian region.¹² Asia, particularly Southeast Asia, has long been the target of child sex tourists. It is difficult to obtain accurate statistics on how many children

¹¹ Victoria also has a child sex tourism offence, section 49A of the *Crimes Act 1958* (‘Facilitating sexual offences against children’) makes it an offence for a person to make travel arrangements, or do any other act that aids, facilitates or contributes in any way to the commission by another person of a child sex offence.

¹² M Brungs, ‘Abolishing Child Sex Tourism: Australia’s Contribution’ (2002) 8(2) *Australian Journal of Human Rights* 103.

around the world are victims of child sex tourism. This is a result of both the illegal nature of the activity (meaning it is mostly hidden or involved in organised crime) and the incorrect classification of child sex tourism as other types of activity such as sexual abuse of children, prostitution or paedophilia. However, child sex tourism is an issue of serious concern which warrants strong action by Governments.

32. The use of the phrase ‘child sex tourism’ does not mean that such conduct always involves a commercial aspect. The underlying purpose of Australia’s child sex tourism offences is to ensure that Australians cannot engage in sexual activity with children overseas that, if committed at home, would be an offence. That is, the child sex tourism offences seek to ‘replicate’ domestic offences to apply to overseas contexts.

33. The Commonwealth child sex tourism offence regime, set out in Part IIIA of the Crimes Act, prohibits a person, whilst outside Australia, from:

- engaging in sexual intercourse or sexual conduct with a child under 16 (sections 50BA and 50BC), or
- inducing a child under 16 years of age to engage in sexual intercourse or sexual conduct (sections 50BB and 50BC).

34. The regime also prohibits encouraging or benefiting from child sex tourism (sections 50DA and 50DB). These offences capture conduct such as organising a child sex tour in a foreign country and are akin to ‘child prostitution’ offences in the State and Territory context.

35. Since the enactment of the child sex tourism offences in 1994, 30 prosecutions have been commenced, with a total of 19 convictions obtained.

36. The constitutional validity of the regime has also been upheld by the High Court. In *XYZ v Commonwealth*, the High Court held that the provisions were supported by section 51(xxix) of the Constitution (which allows the Commonwealth Parliament to make laws with respect to ‘external affairs’), being laws which apply extraterritorially and which implement Australia’s international treaty obligations under the CRC. The facts of *XYZ* are set out below.

XYZ v Commonwealth (2006) 227 ALR 495

In *XYZ*, the defendant, a 58 year old male, travelled overseas with a woman (with whom he was in a relationship) and her seven year old daughter. The defendant engaged in two sexual acts with the daughter overseas. The first occurred whilst travelling in Liberia and involved sexual intercourse between the defendant and the victim. The second involved indecent acts in a shower during which the defendant was washing the victim. Both offences were video recorded by the defendant. The offences came to light when the victim’s mother questioned the victim and obtained the defendant’s video camera tape. Upon viewing the tape the mother discovered that her daughter had been sexually assaulted.

The defendant was found guilty of one offence of committing an act of indecency on a person under 16 years of age contrary to section 50BC of the Crimes Act and one offence of engaging in sexual intercourse with a person under 16 years of age contrary to section 50BA of the Crimes Act. The defendant was sentenced to a term of six years imprisonment.

Using a ‘carriage service’ for sexual activity with children

37. In 2005, new Commonwealth offences were enacted to prohibit using a ‘carriage service’ (eg telephone or the Internet) for sexual activity with children. Specifically, sections 474.26 and 474.27 of the Criminal Code make it an offence to use a carriage service to groom or procure a child for sexual activity. The maximum penalty for these offences ranges from 12 to 15 years imprisonment (for grooming offences) and 15 years imprisonment (for procuring offences).

38. These offences were introduced in response to adults exploiting the anonymity of the Internet to forge relationships with children as a first step in luring them for sexual abuse. For example, an offender uses an Internet ‘chat room’ to build a relationship with the child, and win their trust. Over time the offender may try to sexualise the relationship with the child (for example, by showing them pornographic images, or making sexually suggestive comments). Having established a rapport with the child, the offender may then use email or mobile phone text messages to set up a meeting with the child (eg for the purposes of engaging in sexual activity).

39. The Commonwealth grooming and procuring offences complement State and Territory grooming and procuring offences by targeting predatory behaviour that occurs through a carriage service. These offences allow law enforcement to intervene before a child is abused.

40. The following case study illustrates how these offences are committed by using a carriage service.

***R v Meehan*, unreported, Victorian County Court – 21 July 2006**

In *Meehan*, the defendant used mobile telephone text messages, email and Internet ‘chat’ services to form a relationship with a girl who was under 16 years of age (the girl was 14 years old at the time the offences were first committed). The girl had contacted the defendant by accidentally sending a text message to him while trying to contact another person. The defendant responded, and the two subsequently exchanged personal details via text message, which included information about the age of the girl (14 years old) and the defendant (53 years old). The defendant continued to communicate with the girl through email and Internet chat services. Initially, the contact was platonic but became sexual in nature, and the defendant told the girl he was her boyfriend. The defendant sent the girl hundreds of text and Internet messages with the intention of grooming her to engage in sexual activity. Two months from the initial text message the defendant met with the girl, touched her inappropriately and asked her to kiss him.

The defendant pleaded guilty to, and was convicted of, using a carriage service to procure a child for sexual activity. This is because the behaviour had progressed from grooming. The defendant was sentenced to two years imprisonment for offences contrary to section 474.26 of the Criminal Code.

Using a ‘carriage service’ for child pornography and child abuse material

41. In 2005, new Commonwealth offences were also enacted to prohibit using a carriage service for child pornography and child abuse material. It is an offence to use a carriage service for child pornography material/child abuse material, or to possess, produce, supply or obtain child pornography material/child abuse material for use through a carriage service (sections 474.19, 474.20, 474.22 and 474.23 of the Criminal Code).

42. ‘Child pornography material’ is defined in section 473.1 to cover a range of material including that which depicts or describes a person under 18 years of age engaged or involved in a sexual pose or sexual activity and material the dominant characteristic of which depicts for a sexual purpose the sexual organs, the anal region, or the breasts of a person under 18 years of age. ‘Child abuse material’ is also defined in section 473.1 to cover material that depicts or describes a person under 18 years of age as a victim of torture, cruelty, or physical abuse and does so in a way that reasonable persons would regard as being, in all the circumstances, offensive. The maximum penalty for all Commonwealth child pornography and child abuse material offences is 10 years imprisonment.

43. Similarly, the Commonwealth child pornography and child abuse offences were introduced in response to the increasing use by offenders of the anonymity which new technological tools such as the Internet provides. Computer technology has transformed the production of child pornography into a sophisticated global ‘cottage’ industry, facilitating the production and distribution of child pornography in the home.¹³ While previously child pornography was relatively hard to find,

¹³ Theme Paper, *Child Pornography: An International Perspective*, First World Congress against Commercial Sexual Exploitation of Children, Stockholm, Sweden, 1996, part 4.

Internet technologies such as newsgroups and chat rooms have resulted in the move of child pornography onto the Internet in a major way.¹⁴ The Internet is rapidly becoming the most important exchange medium for child pornography and allows paedophiles and other child pornography exploiters the opportunity to make contacts worldwide.

44. Similar to the Commonwealth's offences for using a carriage service for sexual activity with children, the Commonwealth's child pornography offences complement State and Territory child pornography offences. While State and Territory offence regimes deal largely with conduct occurring in 'real life,' the Commonwealth's offences ensure that offenders are also prevented from using particular carriage service networks to deal in child pornography material.

45. In a 2007 study by the International Centre for Missing and Exploited Children (ICMEC) on 'Child Pornography: Model Legislation and Global Review,' Australia was one of only five Interpol member states (out of 186) to meet all five criteria identified by ICMEC as indicative of comprehensive criminal legislation regarding child pornography.¹⁵

International practice

46. There has been extensive consideration of sexual offences internationally over the past decade. That there should be clear and coherent offences that protect the more vulnerable groups of society, such as children, from abuse and exploitation, has gained considerable support.

47. Several countries have carried out reviews of sexual offence frameworks, including England and Wales, Scotland and South Africa. In particular, following a review of the law on sexual offences by the United Kingdom (UK) Home Office, the *Sexual Offences Act 2003* (UK) established a new legal framework for sexual offences in England and Wales.¹⁶ The Scottish Law Commission also recently carried out a review of Scotland's law on rape and other sexual offences, recommending widespread reform to Scotland's child sex offences.¹⁷

48. Australia's laws are frequently referred to internationally. The above-mentioned UK and Scottish reviews consider Australian laws on child sex offences, referring to reforms by Australian jurisdictions and to MCCOC's views on best practice.¹⁸ A recent case upholding the validity of Canada's child sex tourism laws quoted Australia's child sex tourism offence regime as precedent for the validity of extraterritorial child sex tourism offences.¹⁹ Media following the decision noted that Australia's track record in this area is impressive.²⁰ That Australia's laws have been used to guide reform internationally, indicates that Australian practice is at a minimum on par with, and in some cases goes beyond, international practice.

49. **Tables 4 and 5** set out existing child sex-related offences which criminalise sexual activity with children and dealing in child pornography and child abuse material in three overseas jurisdictions: Canada, New Zealand (NZ) and the UK. These countries reflect a sample of practice which occurs in comparable Commonwealth countries. These particular countries allow for ease of comparison, given the similar nature of their legal systems.

¹⁴ Theme Paper, *Child Pornography*, Second World Congress against Commercial Sexual Exploitation of Children, Yokohama, Japan, 2001, part 3.

¹⁵ International Centre for Missing and Exploited Children 'Child Pornography: Model Legislation and Global Review' 2007. The five criteria include legislation which: (1) exists with specific regard to child pornography; (2) provides a definition of child pornography; (3) criminalises computer-facilitated offences; (4) criminalises possession of child pornography, regardless of the intent to distribute; and (5) requires Internet Service Providers (ISPs) to report suspected child pornography to law enforcement or to some other mandated agency.

¹⁶ UK Home Office, *Setting the Boundaries: Reforming the law on sex offences*, Volume 1, July 2000.

¹⁷ Scottish Law Commission, *Report on Rape and Other Sexual Offences*, December 2007.

¹⁸ *Setting the Boundaries*, pages 66-67, *Report on Rape and Other Sexual Offences*, pages 2-3.

¹⁹ *R v Klassen* 2008 BCSC 1762.

²⁰ B. Bouzane, 'B.C court upholds child-sex tourism charges,' January 30 2009,

<<http://www.vancouversun.com/news/ruling+validates+child+tourism+charges/1236857/story.html>>

50. It is clear that the types of behaviour covered by Australia’s child sex-related offence regimes are generally consistent with, or goes beyond, coverage in comparable overseas jurisdictions.

Table 4 – International offences directed at sexual activity with children

	sexual intercourse	sexual conduct	grooming and/or procuring	indecent material	child prostitution
CAN	✓*	✓*	✓*	x	✓*
NZ	✓*	✓*	✓*	✓*	✓*
UK	✓*	✓*	✓*	x	✓*

* Applies both domestically and extraterritorially to conduct by its citizens

Table 5 – International offences directed at child pornography

	possession of child pornography	production of child pornography	distribution of child pornography
CAN	✓*	✓*	✓*
NZ	✓*	✓*	✓*
UK	✓*	✓*	✓*

* Applies both domestically and extraterritorially to conduct by its citizens

Domestic offences

51. Although expressed differently, Canada, NZ and the UK all have offences prohibiting sexual intercourse or sexual conduct with children (see **Table 4.1** in the **Appendix**). The maximum penalties for these offences range from seven years to life imprisonment.

52. Like Australia, all three jurisdictions criminalise behaviour that leads to sexual activity with a child (see **Table 4.2** in the **Appendix**). These offences, although not necessarily framed as distinct ‘procuring’ and ‘grooming’ offences as is the practice in Australia, nevertheless address comparable conduct.

53. Only NZ has a specific offence in place of exposing a child to indecent material (see **Table 4.2** in the **Appendix**).

54. All three countries criminalise conduct relating to child prostitution (see **Table 4.3** in the **Appendix**). Maximum penalties range from seven to 14 years imprisonment for causing, inducing or allowing a child to take part in prostitution, and from five to 14 years imprisonment for obtaining a benefit from, or entering into an agreement for the provision of, child prostitution.

55. All three countries criminalise the possession, production and sale/distribution of child pornography and/or child abuse material (see **Table 5.1** in the **Appendix**). The maximum penalties for these offences range from five to 14 years imprisonment.

Extraterritorial offences

56. While not necessarily labelled as ‘child sex tourism,’ it is common practice internationally to have child sex-related offences applying to conduct by a country’s citizens outside of its territory. Some 44 countries have comparable legislation.²¹ Many countries apply extraterritoriality to certain domestic child sex offences as a way of meeting international obligations relating to the criminalisation of child sex tourism.

57. All three of the overseas jurisdictions compared have child sex offences which apply extraterritorially (see **Table 6** in the **Appendix**).

58. Canada applies extraterritoriality to most of its domestic child sex offences, including sexual activity, child pornography and child prostitution offences.²²

59. NZ applies extraterritoriality to its offences of sexual activity with a child, conduct leading up to sexual activity with a child, child prostitution and possessing, producing and distributing child pornography.²³ NZ also has a specific offence of organising or promoting child sex tours (also applies domestically).²⁴

60. The UK applies extraterritoriality to all of its basic domestic child sex offences, including sexual intercourse, sexual conduct, procuring, child prostitution and child pornography offences. That is, all of the child sex-related offences which UK citizens are subject to domestically also apply to conduct by UK citizens outside of the UK.²⁵ The UK also has a specific offence of arranging or facilitating commission of a child sex offence in any part of the world.

Terminology

61. A range of terminology is relevant to current Commonwealth child sex-related offences and the proposed reforms to those offences. While the particular terms used differ between Commonwealth, State and Territory and international jurisdictions, the substance of definitions, and the conduct criminalised, is consistent. Relevant Commonwealth definitions are set out below. No substantive changes are proposed to those definitions as part of this package of reforms. The definitions would, however, move to the definition section of the Criminal Code.

62. The definition of ‘sexual intercourse’ (currently in section 50AC of the Crimes Act) is as follows.

Sexual intercourse means:

- (a) the penetration, to any extent, of the vagina or anus or a person by any part of the body of another person
- (b) the penetration, to any extent, of the vagina or anus or a person, carried out by another person by an object
- (c) fellatio
- (d) cunnilingus, or
- (e) the continuation of any activity mentioned in paragraphs (a) – (d).

Paragraphs (a) and (b) do not apply to an act of penetration if: it is carried out for a proper medical or hygienic purpose, or for a proper law enforcement purpose.

²¹ *R v Klassen* 2008 BCSC 1762, paragraph 93. This recent case in the British Columbia Supreme Court reviewed international child sex tourism legislation precedent.

²² The validity of Canada’s extraterritorial ‘child sex tourism’ laws was upheld recently in *R v Klassen* 2008 BCSC 1762.

²³ Section 144A of the *Crimes Act 1961* (NZ) prescribes these offences as offences if committed by NZ citizens outside NZ. Section 131B (meeting young person following sexual grooming) also applies to acts done by citizens both in and outside NZ. Section 145A of the *Films, Videos, and Publications Classification Act 1993* (NZ) applies extraterritoriality to its child pornography offences.

²⁴ *Crimes Act 1961* (NZ), section 144C.

²⁵ Section 72 of the *Sexual Offences Act 2003* (UK) applies extraterritoriality to a number of prescribed child sex offences (set out in Schedule 2).

63. The Commonwealth's sexual conduct offences are based on committing, submitting to, or in any way involving a child in an 'act of indecency.' It involves any act of a sexual nature aside from sexual intercourse. The definition of 'act of indecency' (currently in section 50AB of the Crimes Act) is as follows.

Act of indecency means an act that:

- (a) is of a sexual nature
- (b) involves the human body, or bodily actions or functions, and
- (c) is so unbecoming or offensive that it amounts to a gross breach of ordinary contemporary standards of decency and propriety in the Australian community.

To avoid doubt, act of indecency includes an indecent assault.

64. The term 'sexual activity' is used in the carriage service offences to refer to both sexual intercourse and sexual conduct. The definition of 'sexual activity' (currently in subsection 474.28(11) of the Criminal Code) is as follows.

Sexual activity means:

- (a) sexual intercourse
- (b) an act of indecency, or
- (c) any other activity of a sexual or indecent nature that involves the human body, or bodily actions or functions and need not involve physical contact between people.

65. Paragraph (c) is included as a general reference to sexual activity not covered by the definitions of sexual intercourse or act of indecency.

66. The definition of 'procure' (currently in subsection 474.28(11) of the Criminal Code) is set out below.

Procure a person for 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.

PART 3: REFORMS TO THE CHILD SEX TOURISM OFFENCE REGIME

67. As outlined in Part 2, the existing child sex tourism offence regime is set out in Part IIIA of the Crimes Act. It is proposed to strengthen this regime by:

- introducing new offences for steps leading up to actual sexual activity with a child, including:
 - a new offence of preparing to commit a child sex tourism offence, and
 - new offences for grooming or procuring a child for sex overseas.
- improving existing offences of sexual intercourse and sexual conduct with a child through simplifying the structure of offences and increasing the penalties for those offences
- introducing new aggravated offences where the offender is in a position of trust and/or authority or where the child victim has a cognitive impairment
- introducing a new offence of persistent sexual abuse of a child overseas
- introducing a new offence of sexual activity with a child between 16 and 18 years of age overseas where the offender is in a position of trust and/or authority, and
- reviewing the operation of existing defences.

68. It is also proposed to transfer the child sex tourism offence regime, as amended by the proposed reforms, to the Criminal Code. This is consistent with the general practice of transferring Commonwealth criminal offences enacted prior to 1995 into the Criminal Code. The provisions would be moved with some updating to language and structure to reflect the Criminal Code style of drafting.

New offences to criminalise steps leading up to child sex tourism

69. The existing child sex tourism offence regime prohibits a person (or body corporate), whilst outside Australia, from engaging in sexual intercourse or sexual conduct with a child, or inducing a child to engage in sexual intercourse or sexual conduct. However, the child sex tourism regime does not criminalise behaviour leading up to actual sexual activity with a child.

70. To address these gaps in the law, it is proposed to introduce new offences for preparing to commit a child sex tourism offence, and grooming or procuring a child for sexual activity overseas. The introduction of these new offences will allow law enforcement to intervene before a child is abused.

Preparatory offence

71. Evidence of a person's intent to travel overseas to sexually abuse children often comes to the attention of law enforcement agencies while the offender is still in Australia. The following case study is an example of this.

In a recent case, the AFP obtained evidence that Mr X had been in contact, through email, with persons in a South East Asian country about access to children for sexual purposes. Mr X purchased plane tickets to the South East Asian country and was about to leave Australia. Without any basis for arresting or charging the subject, the AFP could only rely upon liaison with the destination country, putting children at risk, as police in the destination country could not act without a complaint or call for help.

72. Advances in technology, and the expansion of the Internet, has lead to an increased incidence of ‘strategic child sex offending.’²⁶ Strategic child sex offending refers to the probability of child sex offenders becoming increasingly sophisticated in their networking activities and more able to access information about where to go, who to meet and what to ask for. As such, offenders are more easily able to organise participation in child sex tourism from home.

73. Offences involved in child sex tourism are of a particularly serious nature and result in devastating consequences for the child victims involved. A focus on prevention, rather than just addressing the conduct after the fact, will go further towards protecting children from such behaviour.

74. A recent review of legislation criminalising child sex tourism in G8 countries noted that the laws of many G8 countries allow for proactive measures to prevent the commission of acts of child sex tourism.²⁷ In cases where law enforcement has learnt that an offender has taken steps planning to travel to a known child sex tourism destination country, some G8 countries have endeavoured to stop the offender before he/she leaves the home country. For example, extensions of criminal responsibility provisions are used to criminalise the planning of a sex tour trip even if no travel has yet taken place.

75. Under Australia’s current child sex tourism offence provisions, a person who organises for others to engage in child sex tourism (eg a child sex tour operator) would be captured by the benefiting or encouraging offences. These offences are directed at capturing those who assist others to engage in child sex tourism, ie providing encouragement to another person. The following cases demonstrate the kinds of conduct in relation to which offenders have been convicted under the existing encouraging offence.

Kaye v The Queen [2004] WASCA 227

A classified advertisement was placed in the community newspaper in Perth offering the services of a ‘Thai guy, young, fit hunk’ as a personal guide for people visiting Thailand. Mr Adair responded to the ad and subsequently made contact with the defendant, inquiring about accommodation available in Thailand and the services the defendant could provide for travel around Thailand. During several meetings in Perth, the defendant offered to arrange for sexual activity to occur between Mr Adair and young boys in Thailand. These offers continued despite Mr Adair’s expressed lack of interest in such activity. The proposed trip to Thailand never eventuated, as about a week prior to the departure date, the police attended the defendant’s premises in Perth and arrested him.

The defendant was convicted of one count of offering to assist a person to engage in committing an act of indecency on a person under 16 years of age contrary to section 50DB(1) of the Commonwealth Crimes Act. The defendant was sentenced to six years imprisonment with a non-parole period of three years.

R v Ruppert, unreported, Country Court of Victoria, 19 August 1998

The offender had engaged in correspondence with a number of persons in Ghana, encouraging them to train young female children to engage in sexual acts between themselves and with other men and women. The offender pleaded guilty to the offence of encouraging a child sex tourism offence contrary to section 50DB(1) of the Commonwealth Crimes Act and was sentenced to a suspended sentence of six months imprisonment.

²⁶ Australian Institute of Criminology, *Child Sex Offence Legislation and Penalties in Asia-Pacific Countries*, June 2006, chapter 4 ‘Policy implications.’

²⁷ Paper prepared for the meeting of G8 Justice and Home Affairs Ministers, 23-25 May 2007, Munich. ‘G8 experience in the Implementation of Extraterritorial Jurisdiction for Sex Crimes Against Children,’ 18 April 2007 <http://www.bmj.bund.de/enid/0,3ab2935f7472636964092d0932353838/G8-Presidency/Meeting_of_G8_Justice_and_Home_Affairs_Ministers_1d3.html>.

76. While benefiting or encouraging offences allow police to adopt an interventionist approach, they are not specifically directed at conduct where a person is planning his or her *own* participation in child sex tourism. It is not clear that such preparatory activity would be captured by existing offences.

77. It is an offence to attempt to commit the existing child sex tourism offences (eg sexual intercourse or sexual conduct with a child). However, to be found guilty of an attempt offence, the offender's conduct must be more than merely preparatory to the commission of the offence. For example, attempt would apply where an offender travels overseas and makes contact with a person who provides a child, or with a child directly, for sexual activity with the offender, but the actual sexual abuse does not take place because the child escapes or law enforcement intervenes.

78. New grooming and procuring offences proposed below would operate where an offender has made contact with a child. Given it will not be an offence to attempt to commit a grooming or procuring offence,²⁸ under these proposed offences, law enforcement would only be able to intervene once the offender has made contact with a child. However, it will not always be the case that an offender will groom or procure a specific child before they travel overseas to engage in sexual activity with children.

79. Law enforcement should not have to wait until the offender is in the advanced stages of committing a child sex tourism offence, as this places the child under unnecessary risk. The fact that the conduct takes place overseas also causes additional complications for Australian law enforcement agencies attempting to prevent such conduct from occurring at this late stage, where the conduct is occurring in the domestic jurisdiction of a foreign country.

Proposal

80. It is proposed to introduce a specific offence of preparing to commit a child sex tourism offence. The new preparatory offence would give law enforcement the means to deal with such conduct in Australia, without the need to wait until a person has arrived in a foreign country and has committed or near-committed a child sex tourism offence. The offence would enable an offender to be arrested before any contact with a child is established.

81. The proposed new offence would apply where the defendant engages in conduct in preparation for, or planning, conduct of a kind that would constitute a child sex tourism offence.

82. For a person to be found guilty of the offence, there would need to be sufficient evidence that he or she specifically intended to commit a child sex tourism offence. It would be necessary to prove that a person intentionally undertakes an action preparatory to committing a child sex tourism offence. For example, such actions may include researching and collecting information about the child sex tourism industry in a particular destination, making contact with child sex tour operators and booking flights and accommodation. It would then be necessary to prove beyond reasonable doubt that the defendant intended to engage in a child sex tourism offence.

83. The maximum penalty for the proposed new offence would be 10 years imprisonment. While persons who attempt to commit offences are generally subject to the same penalty as if the actual offence had been carried out, the proposed preparatory offence is intended to capture behaviour at the planning stage, rather than the more advanced stage at which an offence of attempt is intended to apply.

84. Further detail on the proposed new preparatory offence, including on extensions of criminal responsibility and defences, is set out in the section on 'Elements common to new and revised child sex tourism offences,' at paragraphs 172 to 210 below.

²⁸ See section on 'Elements common to new and revised child sex tourism offences,' at paragraphs 172 to 210 below.

New grooming and procuring offences

85. While the above proposed offence is directed at preparatory activities, it is also frequently the case that offenders target specific children, for the purpose of ‘grooming’ the child to engage in sexual activity, or procuring the child for sexual activity. Grooming or procuring a child for sexual activity within Australia is an offence under State and Territory laws. Using a carriage service for such behaviour is also criminalised by specific Commonwealth offences. However, there is currently no equivalent child sex tourism offence for grooming or procuring a child for sexual activity overseas.

86. Enacting extraterritorial offences for grooming or procuring a child for sexual activity overseas would ensure comprehensive criminalisation of this kind of conduct, and place Australia on par with, and in some respects ahead, of its international counterparts. The UK and NZ both have offences in place directed at meeting a child following sexual grooming which apply anywhere in the world. The proposed offences would be broader in scope than the NZ and UK offences, in that they would cover grooming and procuring conduct separately, rather than requiring that a person engage in both to be guilty of an offence.

Grooming offence

87. The proposed new grooming offence would be based on the existing Commonwealth offence for using a carriage service to groom a child for sexual activity (section 474.27 of the Criminal Code). The proposed new offence would apply where the defendant engages in conduct with a child (under 16 years old, or someone who the defendant believes is under 16 years old) with the intention of making it easier to procure the child to engage in, or submit to:

- sexual activity with the defendant
- sexual activity with another person who is at least 18 years old (a third party), or
- sexual activity with another child in the presence of the defendant or a third party.

88. The proposed new offence would apply regardless of where, or by what means, the ‘grooming’ took place, provided the intention was to make it easier to procure the child to engage in sexual activity outside Australia.

89. The maximum penalty for the proposed new offence would be 12 years imprisonment. This is consistent with the existing Commonwealth offence of using a carriage service to groom a child for sexual activity, and also consistent with the penalties for State and Territory grooming offences, which range from 10 to 21 years imprisonment (see **Table 2.2** in the **Appendix**).

90. Further detail on the proposed new grooming offence, including definitions, the application of absolute liability, extensions of criminal responsibility and defences, is set out in the section on ‘Elements common to new and revised child sex tourism offences,’ at paragraphs 172 to 210 below.

Procuring offence

91. The proposed new procuring offence would be based on the existing Commonwealth offence for using a carriage service to procure a child for sexual activity (section 474.26 of the Criminal Code). The proposed new offence would apply where the defendant engages in conduct with a child (under 16 years old, or someone who the defendant believes is under 16 years old) with the intention of procuring the child to engage in, or submit to:

- sexual activity with the defendant
- sexual activity with another person who is at least 18 years old (a third party), or
- sexual activity with another child in the presence of the defendant or a third party.

92. The proposed new offence would apply regardless of where, or by what means, the ‘procuring’ took place, provided the intention was to procure the child to engage in sexual activity outside Australia.

93. The maximum penalty for the proposed new offence would be 15 years imprisonment. This is consistent with the existing Commonwealth offence of using a carriage service to procure a child for sexual activity, and also consistent with the penalties for State and Territory procuring offences, which range from five to 21 years imprisonment (see **Table 2.2** in the **Appendix**).

94. Further detail on the proposed new procuring offence, including definitions, the application of absolute liability, extensions of criminal responsibility and defences is set out in the section on ‘Elements common to new and revised child sex tourism offences,’ at paragraphs 172 to 210 below.

Improving the operation of existing sexual intercourse and sexual conduct offences

95. The existing child sex tourism offences in Part IIIA of the Crimes Act criminalise sexual intercourse or sexual conduct with a child through four provisions. These provisions make it an offence for the defendant to:

- have sexual intercourse with a child under 16 years of age (section 50BA)
- induce a child to engage in sexual intercourse with another person (a third party) in the presence of the defendant (section 50BB)
- engage in sexual conduct involving a child (section 50BC), and
- induce a child to be involved in sexual conduct with a third party in the presence of the defendant (section 50BD).

96. These offences only apply where the sexual intercourse or sexual conduct takes place outside Australia. Absolute liability applies to the circumstances of the offences relating to the age of the child (eg that the child is under 16 years of age) and that the sexual intercourse or sexual conduct occurred outside Australia.

97. It is proposed to improve the operation of existing sexual intercourse and sexual conduct offences by simplifying the structure of the offences, and increasing the maximum penalties that apply. In part, these changes are required as a consequence of the proposed new grooming, procuring and preparatory offences. The changes are also proposed to bring the child sex tourism offences in line with comparable Commonwealth, State and Territory offences.

Simplifying the structure of offences

98. Two changes are proposed to simplify the structure of offences. The first change involves incorporating the conduct covered by the inducing offences into the sexual intercourse and sexual conduct offences. The second change is directed at balancing the need for specificity in the sexual conduct offence against the need to comprehensively cover the full range of conduct intended to be criminalised.

Incorporating inducing offences into the sexual intercourse and conduct offences

99. Currently, the offences criminalise engaging in sexual intercourse (or sexual conduct) with a child, and *inducing* a child to engage in sexual intercourse (or sexual conduct) with a third party in the presence of the defendant. Section 50AA of the Crimes Act currently defines ‘induce’ to mean induce by threats, promises or otherwise.

100. As discussed above, it is proposed to introduce new procuring offences. The proposed definition of procuring includes to induce by threats, promises or otherwise. The new procuring offence would apply where the defendant has induced a child to engage in sexual activity with a person other than the defendant (whether or not the activity takes place in the presence of the defendant and whether or not the actual sexual activity takes place). In contrast, the existing inducing offences only cover the more serious conduct of inducing actual sexual activity in the presence of the defendant.

101. To avoid confusion, it is proposed to incorporate the existing inducing offences into the sexual intercourse and sexual conduct offences and, while retaining the conduct covered, re-phrase the offences so that they would apply where the defendant:

- engages in sexual intercourse with a child or causes a child to engage in sexual intercourse with a third party in the presence of the defendant, or
- engages in sexual conduct with a child or causes a child to engage in sexual conduct with a third party in the presence of the defendant.

102. It is appropriate to retain the conduct covered by the inducing offences as part of the sexual intercourse and conduct offences as this will ensure that more serious conduct remains subject to higher penalties than will apply to the procuring offences.

103. ‘Causes’ would cover a broad range of conduct eg any intentional behaviour which results in the child engaging in sexual intercourse or sexual conduct with a third party in the presence of the perpetrator. The offence would apply regardless of the age of the third party.

Changes to the sexual conduct offence

104. The current sexual conduct offences in sections 50BC and 50BD of the Crimes Act criminalise a broad range of activity. The offences apply where the defendant:

- commits an act of indecency on a child (under 16 years of age)
- submits to an act of indecency committed by a child
- commits an act of indecency (either on him or herself or a third party) in the presence of a child and intends to derive gratification from the child’s presence
- submits to an act of indecency committed by a third party in the presence of a child and intends to derive gratification from the child’s presence
- engages in sexual intercourse with a third party in the presence of a child and intends to derive gratification from the child’s presence

- induces a child to:
 - commit an act of indecency with a third party
 - submit to an act of indecency committed by a third party, or
 - be present while a third party commits an act of indecency (either on him or herself or on a fourth party)
 in the presence of the defendant, or
- induces a child to watch with the defendant while a third party and fourth party engage in sexual intercourse.

105. It is proposed to retain the range of criminal behaviour captured by existing sexual conduct offences while simplifying their structure. As discussed above, this would include removing the specific ‘inducing’ offence, but ensuring that the restructured offence applies where the defendant causes a child to engage in sexual conduct with a third party in the presence of the defendant.

106. There are two possible options for how the revised sexual conduct offence could be framed.

Option one

107. One option is to redraft sections 50BC and 50BD by merging the two offences. This would mean that the revised sexual conduct offence would continue to list each activity or situation in which the sexual conduct occurs.

Option two

108. Given the specificity with which particular activities and situations are currently set out in the existing sexual conduct offences, it is possible that a Court could interpret this as an exhaustive list of criminal behaviour and that conduct of a similar nature that does not fall within a particular scenario would be excluded. This could result in an offender being found not guilty of child sex tourism even where he or she had engaged in sexual activity with a child overseas. Although this is unlikely the result intended by Parliament, there is merit in clarifying the situation.

109. Accordingly, another option is to create a general offence through which sexual conduct with a child is prohibited, but the specific activities or situations are not set out within the offence. This kind of approach is common in comparable State and Territory child sex-related offences. For example, in Victoria, a person ‘must not wilfully commit, or wilfully be in any way a party to the commission of, an indecent act with or in the presence of a child’ (section 47 of the *Crimes Act 1958* (Vic)).

110. Under this second option, the revised sexual conduct offence would apply where the defendant engages in any act of indecency with a child under 16 years of age or causes a child to engage in an act of indecency. The revised offence would be expressed so that engaging in an act of indecency would include (but not be limited to):

- committing an act of indecency on a child
- submitting to an act of indecency committed by a child, or
- engaging in any other act of indecency involving or directed at a child (including where the child is present but not physically involved in the conduct).

111. Further detail on the simplified and restructured sexual intercourse/conduct offences, including on definitions, the application of absolute liability, extensions of criminal responsibility and defences is set out in the section on ‘Elements common to new and revised child sex tourism offences,’ at paragraphs 172 to 210 below.

Increasing the maximum penalties for sexual intercourse and sexual conduct offences

112. Maximum penalties for child sex-related offences vary across Australian jurisdictions. The majority of States and Territories have separate offences based on the age of the child. Offences directed at sexual activity with younger children (generally under ten to 14 years) often carry higher penalties than sexual activity with a child above this age but below the relevant age of consent.

Table 7 in the **Appendix** sets out existing Commonwealth, State and Territory sexual intercourse and sexual conduct offences and penalties by age.

In addition to setting higher penalties for conduct involving younger children, the division of child sex offences by age also allows for the setting of a ‘no defence age.’ That is, the age below which no defence will be available to the defendant. The setting of a ‘no defence age’ is discussed further in the section on ‘Defences’ at paragraph 199 below.

113. The Commonwealth’s child sex tourism offences are not divided by age, but apply to conduct with a child of any age under 16 years. At the time when the child sex tourism offence regime was introduced, it was decided not to have separate offences based on the age of the child.²⁹ While age may be relatively easy to establish within the Australian community, in many countries reliable documentary evidence on the age of the child may be difficult to obtain. Establishing the exact age of the child carries particular difficulties in proceedings under the child sex tourism offences not generally encountered in State and Territory proceedings. That is, for offences under the child sex tourism offence, the conduct occurs overseas. As such, foreign evidence must be relied upon to prove the offence.

114. Accordingly, a simple set of offences were introduced requiring the prosecution to only prove beyond reasonable doubt that the child was under 16 years of age (rather than having to prove the particular age of the child). In the child sex tourism context, the benefits of a simple structure outweigh the advantages of a more complex structure involving separate offences based on the age of the child.

115. At the same time, the Government wants to ensure that the penalties for Commonwealth child sex-related offences reflect the seriousness of the harm committed. It is generally the Commonwealth’s practice to set a single maximum penalty for an offence that is adequate to deter and punish a worst case offence. Given the Commonwealth’s offences apply to conduct against a child of any age, the maximum penalty should be adequate to punish sexual activity with a very young child.

116. The majority of State and Territory offences of sexual intercourse with a young child carry maximum penalties ranging from 20 years to life imprisonment.³⁰ The majority of State and Territory sexual conduct offences carry maximum penalties of ranging from ten to 14 years.

117. Currently, the Commonwealth’s sexual intercourse offences carry a maximum penalty of 17 years imprisonment, and the sexual conduct offences carry a maximum penalty of 12 years imprisonment.

²⁹ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report – Crimes (Child Sex Tourism) Amendment Bill 1994*, May 1994 and *Government Response to the Advisory Report on the Bill by the House of Representatives Standing Committee on Legal and Constitutional Affairs*, June 1994.

³⁰ For example, as a result of a recommendation made by the Wood report, a new aggravated offence of sexual intercourse with a child under ten years of age has been introduced in New South Wales, carrying a maximum penalty of life imprisonment.

118. It is proposed to increase the maximum penalties in the child sex tourism offence regime to 20 years imprisonment for sexual intercourse with a child, and 15 years imprisonment for sexual conduct with a child. This will ensure the offences adequately cover a worst case scenario and achieve consistency with penalty ranges of comparable State and Territory offences. Adjusting the penalties is also proposed as a consequence of the proposed introduction of new grooming, procuring and preparatory offences. These changes will ensure that the suite of child sex tourism offences carry penalties reflecting the scale of harm inflicted, and ensure consistency with other like Commonwealth child sex-related offences.

New aggravated offences

119. As noted above, it is general practice in Commonwealth criminal law to set a single maximum penalty which is adequate to punish a worse case offence. Factors of aggravation are left for the consideration of the judge at sentencing. However, there are some circumstances where the seriousness of the behaviour is so magnified that it justifies a specific aggravated offence. An aggravated offence specifies specific conduct which ought to attract a heavier penalty than that carried by the basic offence. The inclusion of aggravating factors also assists in indicating levels of seriousness where the range of behaviour covered by a given offence is broad.

120. It is proposed to insert two new aggravated offences into the child sex tourism offence regime. The proposed aggravated offences are directed at specific circumstances which reflect a higher level of culpability and which should be explicitly included as circumstances attracting a higher penalty. The new aggravated offences would apply where:

- the offender is in a position of trust and/or authority in relation to the victim, or
- the child victim has a cognitive impairment.

Offender in a position of trust and/or authority

121. The seriousness of travelling overseas to take advantage of environments lacking strong criminal offence regimes for child sex-related activity is magnified where the offender commits such offences while in a position of trust or authority, or where the victim may be under the special care or supervision of the offender. Unfortunately, this is an all too common occurrence. At the First World Congress Against the Commercial Sexual Exploitation of Children, the identity, actions and motivations of child sex exploiters were considered:

Paedophiles and preferential abusers secure sexual access to children in a number of different ways. Sometimes they seek jobs or positions which provide them with opportunities to abuse, or move to areas where they know that sexual access to children is relatively easily attained. This means that certain groups of children are at particular risk of sexual abuse. Street children and children in orphanages and local authority care are perhaps the most obvious examples of children who are vulnerable to sexual abuse by adults occupying positions of trust or authority.³¹

122. Where there is a relationship of trust between an adult and the child, or where an adult is in a particular position of authority in relation to the child, the child is particularly vulnerable to exploitation, through manipulation by threats, promises or bribes. The gravity of such conduct is widely recognised in State, Territory and international laws.

³¹ Theme Paper, *The Sex Exploiter*, First World Congress against Commercial Sexual Exploitation of Children, Stockholm, Sweden, 1996, part 2.

123. Several States and Territories have aggravated child sex offences that apply where the child is under the care, supervision or authority of the offender, and carry a higher maximum penalty (see **Table 8** below and **Table 8.1** in the **Appendix**). State and Territory position of trust offences directed at children above the age of consent are discussed separately at paragraph 153 onwards.

Table 8 – State, Territory and international aggravated child sex offences – position of trust

	Sexual Intercourse	Sexual conduct
NSW	✓	✓
VIC	✓	✗
QLD	✓	✓
WA	✓	✓
SA	✗	✗
TAS	✗	✗
ACT	✗	✗
NT	✓	✓
CAN	✗	✗
NZ	✗	✗
UK	✗	✗

124. It is well-known that cases of adults taking advantage of positions of trust to sexually exploit children occur domestically within Australia. Adults in certain positions of trust or authority are frequently the subject of criminal prosecutions for sexual offences against children, as the following case studies demonstrate.

R v Chute Australian Capital Territory Supreme Court No 61 of 2008

The defendant was a teacher at the Marist College, Canberra, during the 1980’s. Over the period from 1985 to 1989, the defendant engaged in acts of indecency with six male students, each of whom were the defendant’s students. The defendant was found guilty of 18 counts of committing an act of indecency on persons between the ages of 10 and 16 and one count of committing an act of indecency on a person of 16, contrary to section 92K(2) of the *Crimes Act 1900* (ACT). The defendant was sentenced to a total of 6 years imprisonment.

R v Liddy [2002] SASC 19

At all relevant times, the defendant was a Magistrate in South Australia. From 1983 to 1985, the defendant was also a ‘nipper’ coach at a surf life saving club at a beach in Adelaide. During this period, the defendant committed sexual offences against five boys aged eight or nine at the time, who were trainee life savers known as ‘nippers.’ While the defendant was actively involved with a very large number of boys training as nippers over some years, the defendant developed a close involvement with a small group of boys. The defendant was found guilty of six counts of unlawful sexual intercourse with a person under 12 years of age, three counts of indecent assault and one count of offering a benefit to a witness, contrary to the *Criminal Law Consolidation Act 1935* (SA). The defendant was sentenced to a total of 25 years imprisonment.

125. Unfortunately, Australians are not limited to taking advantage of positions of trust at home. Offenders may also travel to foreign countries to take up positions such as teachers, aid workers, sports coaches or church workers. Investigations by the Australian Federal Police (AFP) have revealed in numerous cases that persons responsible for sexual offences against children, or attempting to commit sexual offences against children, occupy a position of trust within the overseas community. Offenders may take advantage both of being in an environment which may not have effective criminal laws in place and of the position which they are in.

In a recent case, the AFP was involved in investigating a school teacher. The school teacher had been convicted of sexual offences against children in Australia. The individual obtained employment as a teacher with an overseas foundation. Following an investigation by police, the individual was found to be in possession of child pornography and child abuse images, and was the subject of allegations that the individual had engaged in sexual activity with the 'house boy' aged 11 years.

126. The following case studies of successful child sex tourism offence prosecutions in both Australia and Canada also illustrate the ways in which offenders may engage in such behaviour.

R v Uren, unreported, Western Australia District Court – 17 December 2007

The defendant was a high school teacher and the conductor of the school band. The defendant travelled with the school band on a tour overseas. While on a plane flight, the defendant committed an act of indecency on a 15 year old child. The defendant pleaded guilty to and was sentenced to 20 months imprisonment for engaging in sexual conduct with a child contrary to section 50BC of the Crimes Act.

Armand Huard³²

Huard, a Quebec aid worker, was convicted under Canadian law for committing sex offences against children overseas in November 2008. Huard worked in an orphanage in Haiti between December 2006 and March 2007. He pleaded guilty to ten counts of sexual touching minors or inciting minors to touch him, in relation to eight Haitian boys aged between 13 and 16 years of age. He was sentenced to three years imprisonment.

Proposal

127. It is proposed that new aggravated offences be inserted into the child sex tourism offence regime that would apply where the offender:

- commits a sexual intercourse or sexual conduct offence, and
- occupies a position of trust and/or authority.

That is, the prosecution would need to establish first that the offender committed a sexual intercourse/sexual conduct offence *and* that the circumstances of aggravation existed.

128. Strict liability would apply to the circumstance of aggravation. That is, the prosecution would need to prove beyond reasonable doubt that the offender was in a position of trust and/or authority in relation to the child, but not that the defendant knew that he/she was in such a position. The imposition of strict liability, rather than absolute liability, makes available the general defence of mistake of fact. Further detail on this issue, and on other elements common to the new offences, is set out in the section on 'Elements common to new and revised child sex tourism offences,' at paragraphs 172 to 210 below.

129. Limiting the scope of the aggravated offence to sexual intercourse and sexual conduct offences is consistent with comparable State and Territory provisions, which generally only apply such an aggravated offence to sexual intercourse/sexual conduct offences, and not offences directed at the steps leading up to the commission of such offences, such as grooming or procuring.

130. 'Position of trust and/or authority' would be defined broadly, by including a non-exhaustive list of scenarios where such a relationship could be said to exist, based on where a child may be under the special care, supervision or authority of an adult.

³² Marianne White, 'Canadian aid worker found guilty of assaulting Haitian boys,' Canwest News Service, <<http://www2.canada.com/ottawacitizen/news/story.html?id=ba814e0a-8f11-408d-b5c0-1b6af28ed000>>.

131. The aggravated offence would carry a maximum penalty of 25 years imprisonment. This maximum penalty would apply to both the sexual intercourse and the sexual conduct offences. Penalties for comparable State and Territory sexual conduct offences range from 10 years to life imprisonment (see **Table 2.1** in the **Appendix**)

Child victim has a cognitive impairment

132. A further group of persons who are particularly vulnerable to sexual exploitation are those with a cognitive (or mental) impairment. Australia ratified the *Convention on the Rights of Persons with Disabilities* on 17 July 2008, and in doing so has undertaken to take all appropriate measures to protect persons with disabilities. The Convention came into force in Australia on 16 August 2008. Article 16(1) requires that States take all appropriate legislative measures to protect persons with disabilities from all forms of exploitation, violence and abuse. In particular, Article 16(5) requires States to put in place effective legislation and policies, including child-focused legislation, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and prosecuted.

133. All States and Territories and overseas jurisdictions compared have offences that recognise persons with a cognitive or other impairment as a class of persons particularly vulnerable to sexual abuse. **Table 9** below and detailed **Table 9.1** in the **Appendix** set out existing State, Territory and overseas sex offences relating to persons with a disability.

134. The majority of jurisdictions have general offences of engaging in sexual activity with a person of any age with a cognitive impairment. These offences target sexual abuse by carers or providers of medical or therapeutic services. Two jurisdictions (New South Wales and the Northern Territory) have specific aggravated child sex offences where sexual activity occurs with a child who has a cognitive impairment.

Table 9 – State, Territory and international sex offences against persons with a disability

	Sexual activity with a person with a cognitive impairment	Specific aggravated child sex offence where child victim has a cognitive impairment
NSW	✓	✓
VIC	✓	✗
QLD	✓	✗
WA	✓	✗
SA	✓	✗
TAS	✓	✗
ACT	✗	✗
NT	✓	✓
CAN	✓	✗
NZ	✓	✗
UK	✓	✗

135. The seriousness of sexual abuse of persons, particularly children, with a cognitive impairment is widely recognised domestically and in Canada, NZ and the UK. The monitoring body under the CRC, the Committee on the Rights of the Child (the Committee), has highlighted the special vulnerability of children with disabilities to becoming victims of child prostitution and child pornography.³³ The Committee has urged Governments, in fulfilling their obligations under the Optional Protocol to the CRC, to pay particular attention to the protection of children with disabilities. Accordingly, the seriousness of such behaviour should be recognised in Australia's extraterritorial child sex offences as well as in its domestic offences.

Proposal

136. It is proposed that new aggravated offences be inserted into the child sex tourism offence regime to apply where the child victim has a cognitive impairment. Similarly, these new aggravated offences would be limited to the child sex tourism offences of sexual intercourse and sexual conduct with a child (and not preparatory offences such as grooming or procuring).

137. 'Cognitive impairment' would be defined broadly, by including a list of possible impairments, drawing on existing definitions in State and Territory provisions (particularly section 61H(1A) of the *Crimes Act 1900* (NSW) and section 50 of the *Crimes Act 1958* (Vic)). This would include where the child has:

- an intellectual disability
- a development disorder
- a neurological disorder
- dementia
- a severe mental illness, or
- a brain injury.

138. Absolute liability would apply to the fact that the child has a cognitive impairment. That is, the prosecution would need to establish the fact that the child had a cognitive impairment beyond reasonable doubt, but would not have to establish that the offender knew that the child had a cognitive impairment. To ameliorate the dramatic effect of applying absolute liability to this circumstance, a defence would be made available to the defendant, based on a belief that the child did not have a cognitive impairment.

139. The aggravated offence would carry a maximum penalty of 25 years imprisonment. This maximum penalty would apply to both the sexual intercourse and sexual conduct offences.

140. Further detail on the proposed new aggravated cognitive impairment offence, including on definitions, the application of absolute liability, extensions of criminal responsibility and defences is set out in the section on 'Elements common to new and revised child sex tourism offences,' at paragraphs 172 to 210 below.

³³ Committee on the Rights of the Child, 'The rights of children with disabilities,' General Comment No 9 (2006), para 77.

New offence of persistent sexual abuse of a child

141. In overseas jurisdictions in recent years there has been an increased understanding of the risks to children of sexual abuse, particularly from people they know. Data collected by the UN Study on Violence Against Children indicated that while some violence is unexpected and isolated, the majority of violent acts experienced by children are perpetuated by people who are part of their lives.³⁴ Violence occurs within the family unit, in schools and educational settings and in care and justice systems. Violence is likely to occur on a systematic basis.

142. In the early 1990s, there were several child sex cases before State and Territory courts involving evidence that the alleged sexual activity had occurred a number of times, but the child could not identify specifically when any one act occurred.³⁵ As a result, the defendants were acquitted. The courts referred to the unfairness to the accused when faced with allegations of repeated acts over an extended period of time, without sufficient particularity, and the defendants were acquitted.

143. However, the courts also referred to the difficulties faced by the prosecution in the need to present evidence of particular acts with sufficient precision. These difficulties include:

- the child may have been very young when the abuse commenced
- the abuse may have occurred regularly over a lengthy period of time
- there may be no clear distinction between abuse, and
- a complaint may not be made until some time after the abuse began.

144. These cases triggered the enactment by the States and Territories of offences of persistent sexual abuse, or conducting a sexual relationship, with a child. Such offences allows the prosecution to present an indictment which charges an accused with the offence of having a ‘sexual relationship’ with a child over a period of time. The incidences of abuse must be on a number of separate occasions (typically three) when particular sexual acts occurred, although it is not necessary to specify times, dates, or circumstances of the acts.

145. All States and Territories have enacted ‘persistent sexual abuse offences,’ carrying maximum penalties ranging from 20 years to life imprisonment (see **Table 10** below and **Table 10.1** in the **Appendix**).³⁶ The high penalties set for these offences reflect the particularly serious nature of the conduct, in that the offender has engaged in a persistent pattern of abuse of a child.

Table 10 – State and Territory offences of persistent sexual abuse of a child

	Persistent sexual abuse of a child
NSW	✓
VIC	✓
QLD	✓
WA	✓
SA	✓
TAS	✓
ACT	✓
NT	✓

³⁴ *Report of the independent expert for the United Nations Study on Violence against Children*, transmitted to the General Assembly on 29 August 2006, General Assembly Resolution A/61/299.

³⁵ See for example *S v The Queen* (1989) 168 CLR 266, *Podirsky v The Queen* (1990) 3 WAR 128.

³⁶ It appears that comparable overseas jurisdictions do not have persistent sexual abuse offences.

146. The following case study demonstrates the application of a domestic offence of persistent sexual abuse of a child.

R v Fitzgerald [2004] NSWCCA 5

The defendant was in a relationship with the victim's mother for ten years and stayed at her home on a regular basis. During that time he assumed the role of step-father to the victim. Between 25 November 2001 when the victim was aged 14 years and nine months and 17 June 2002 by which time she was 15 years and four months, the defendant is said to have committed on her seven sexual offences. The defendant pleaded guilty and was convicted under the NSW offence of persistent sexual abuse of a child under section 66EA of the *Crimes Act 1900* (NSW). He was sentenced to a period of six years and nine months imprisonment.

Proposal

147. Just as other 'domestic' sexual offences are committed by Australians overseas, it is not inconceivable that Australians may commit persistent sexual abuse of children overseas. It is inappropriate that such behaviour be criminalised 'at home' but not 'abroad.' Therefore, it is proposed that a new child sex tourism offence of persistent sexual abuse of a child under 16 years be inserted into the child sex tourism regime.

148. The proposed new offence would have extraterritorial jurisdiction and apply to conduct committed outside Australia by a person who is an Australian citizen or resident. This will allow for the prosecution of an Australian for conducting a sexual relationship with a child overseas.

149. The new offence would be directed at sexual activity, covering both sexual intercourse and sexual conduct.

150. In its report on sexual offences against the person, MCCOC supported the enactment of special offences in this area. At the same time, MCCOC recommended that offences should be framed in a way that provides adequate safeguards to the accused. MCCOC put forward a model provision, recommending that the offence include the following elements:

- unlawful conduct on three or more occasions
- that it be unnecessary to specify or prove the dates or exact circumstances, but that it be necessary to specify with reasonable particularity the period when the offences occurred and the nature of the offences, and
- a maximum penalty of 25 years imprisonment.³⁷

151. It is proposed that the new offence would adopt the elements recommended by MCCOC, and carry a maximum penalty of 25 years imprisonment.

152. Further detail on the proposed new persistent sexual abuse offence, including on definitions, the application of absolute liability, extensions of criminal responsibility and defences is set out in the section on 'Elements common to new and revised child sex tourism offences,' at paragraphs 172 to 210 below.

³⁷ MCCOC, Model Criminal Code 'Report: Chapter 5 Sexual Offences Against the Person,' May 1999, pp 133–141.

New offence where child victim between 16 and 18 and offender in a position of trust and/or authority

153. The enactment of specific child sex-related offences reflects the broader rationale that there are certain vulnerable groups in society who need special protection. The Scottish Law Commission, in a recent review of sexual offences, examined this rationale further. According to the Commission, the need for specific sexual offence regimes is based on the ‘protective principle.’ This principle involves two assertions. Firstly, that sex with young children is wrong – young children lack any capacity to either give or withhold consent. Secondly, that persons who are vulnerable to sexual exploitation should be protected. This may apply to older children whose capacity to consent is not fully lacking but is in some way underdeveloped, or who may be subject to influence.³⁸

154. As discussed at paragraphs 14 – 18 above, the Commonwealth’s age of consent is 16. The setting of an age of consent, the age below which any sexual activity is unlawful, attempts to strike a balance between the need for protection and the need to allow for sexual autonomy. However, it is widely recognised that there are certain specific relationships where the potential for imbalance of power is so significant that a higher age of consent should apply to sexual contact between persons within those relationships. That is, where one party is under 18 years of age but over the age of consent.

155. It is common, both in Australian States and Territories, and in overseas jurisdictions compared, to have offences criminalising sexual activity between a person over 18 years old (the offender) and a person aged between 16 to 18 years old (the victim) where the offender is in a position of trust and/or authority over the victim (see **Table 11** below and **Table 11.1** in the **Appendix**).

156. The enactment of such an offence is supported by the MCCOC, which included such an offence as part of the Model Criminal Code.³⁹

Table 11 – State, Territory and international offences directed at a child under 18 where offender in a position of trust

	Sexual activity with a child under 18 where offender in a position of trust and/or authority
NSW	✓
VIC	✓
QLD	✗
WA	✓
SA	✓
TAS	✗
ACT	✗
NT	✓
CAN	✓
NZ	✓
UK	✓

³⁸ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, January 2006, Part 5 and *Report on Rape and Other Sexual Offences*, December 2007, Part 4.

³⁹ MCCOC, Model Criminal Code ‘Report: Chapter 5 Sexual Offences Against the Person,’ May 1999, pp 165-173.

157. Protecting children up to the age of 18 years from sexual abuse within a relationship of dependence is also common internationally. For example, in the UK, an inter-departmental group was set up to identify possible additional safeguards to prevent unsuitable people from working with children. The group considered measures which may be necessary to protect 16-17 year olds who may be vulnerable to abuse by those in a position of trust. The group recommended that new criminal offences be introduced to protect those who may be particularly vulnerable or where the relationship of trust is particularly strong. Following this recommendation, the UK introduced its suite of offences directed at adults engaging in sexual activity with a person under 18 in relation to which they are in a position of trust.⁴⁰ Both Canada and NZ also have similar offences.

158. Those States and Territories which have such offences generally list the specific relationships at which the offence is directed (eg step-parent, guardian, teacher). This approach seems to be followed in New Zealand and the UK, while Canada lists certain factors that a judge may consider in determining whether a relationship exists that is exploitative of the young person.

159. Maximum penalties for States and Territory offences range from four to 10 years imprisonment, and comparable Canadian, NZ and UK offences range from three to 10 years imprisonment. Importantly, both Canada and the UK apply extraterritoriality to these offences.

160. An example of a successful prosecution under an existing State offence where the offender was in a position of trust in relation to the 16 year old child victim is set out below.

Inceni v Davis [2008] NTSC 44

In *Inceni v Davis*, the defendant was a tutor to the victim. The defendant then arranged a meeting at a lake with the victim, where he committed an act of indecency on the victim, a 16 year old child. The defendant pleaded guilty and was sentenced and was sentenced to nine months imprisonment, suspended for a period of 12 months for committing gross indecency involving child over 16 years under special care contrary to section 128 (2) of the *Criminal Code* (NT).

161. As noted above, it is common for offenders to travel overseas to take up positions of trust within the overseas community (see paragraphs 124 – 126). Offenders may take advantage both of being in an environment which may not have effective criminal laws in place and of the position which they are in. Given the widely supported view that 16 or 17 year olds subject to a relationship of trust may also be vulnerable to sexual exploitation, it is proposed that the child sex tourism offence regime should address this issue.

Proposal

162. It is proposed that a new offence be inserted into the child sex tourism regime criminalising sexual activity with a child aged between 16 and 18 years old where the offender is in a position of trust and/or authority. The offence would apply to both sexual intercourse and sexual conduct.

163. MCCOC recommended that such offences should be limited to those who are, at the time of the offence, in a direct relationship of care, supervision or authority.⁴¹ Given the offence extends criminal behaviour beyond the usual age of consent, it is desirable that the classes of persons who may commit this offence are clearly and explicitly stated. This ensures that the defining line between what is lawful and what is criminal behaviour is clearly and easily ascertainable.

⁴⁰ Explanatory Notes to *Sexual Offences (Amendment) Act 2000* (UK).

⁴¹ MCCOC, Model Criminal Code 'Report: Chapter 5 Sexual Offences Against the Person,' May 1999, pp 165-173.

164. As a result, unlike the proposed aggravated position of trust offence above (where position of trust and/or authority would be defined broadly), the relationships to which the offence would apply would be specifically prescribed and would include: parents, step parents, foster parents, adoptive parents, legal guardians, legal custodians, school teachers, religious instructors, health professionals (including psychiatrists), counsellors, police and correctional officers. It is proposed to ensure that all common relationships of trust and/or authority are comprehensively covered. Further consideration of the definitions of terms such as 'parent' etc would also occur at the drafting stage.

165. It is proposed that strict liability would apply to the circumstance that a position of trust existed. That is, the prosecution would need to prove beyond reasonable doubt that the offender was in a position of trust and/or authority in relation to the child, but not that the defendant knew that he/she was in such a position. The imposition of strict liability, rather than absolute liability, makes available the general defence of mistake of fact. Further detail on this issue, and on other elements common to the new offences, is set out in the section on 'Elements common to new and revised child sex tourism offences,' at paragraphs 172 to 210 below.

166. In line with comparable State, Territory and international offences, and the Model Criminal Code offence, the new offence would carry maximum penalties of 10 years imprisonment for sexual intercourse and five years imprisonment for sexual conduct.

Benefiting and encouraging offences

167. The existing benefiting offence (section 50DA of the Crimes Act) makes it an offence for a person to engage in behaviour, whether in Australia or overseas, with the intention of benefiting (financially or otherwise), from conduct which would be an offence against any of the child sex tourism offences. The offence is specifically directed at the organisers and promoters of child sex tourism. As the existing benefiting offence applies to any facilitation of child prostitution overseas, it is not proposed to introduce a separate Commonwealth 'child prostitution' offence.

168. The existing encouraging offence (section 50DB of the Crimes Act) makes it an offence for a person to engage in behaviour, whether in Australia or overseas, with the intention of encouraging conduct of a kind that would constitute a child sex tourism offence. This offence is also directed at organisers and promoters of child sex tourism. An example might be where a person advertises an offer to assist another person to travel outside Australia in order to engage in child sex tourism.

169. It is proposed to raise the existing maximum penalty for both of these offences from 17 years imprisonment to 20 years imprisonment. The maximum penalty for these two offences is intended to mirror the maximum penalties of the most serious substantive child sex tourism offences. Given it is proposed to increase the maximum penalty for the sexual intercourse offence from 17 years to 20 years imprisonment (see paragraphs 112 to 118 above), it is appropriate that the benefiting and encouraging offences also carry a maximum penalty of 20 years imprisonment.

170. The application of the benefiting and encouraging offences would be extended to all of the proposed new child sex tourism offences, with one exception. The encouraging offence will not apply to the proposed new preparatory offence. The preparatory offence is directed at conduct at a preliminary stage and while it is appropriate to criminalise the conduct of a person who is directly encouraging an offence it is too far removed to criminalise encouraging a person to engage in preparatory conduct.

171. The general defences set out in Part 2.3 of the Criminal Code would continue to be available for the benefiting and encouraging offences. Absolute liability would continue to apply to the elements of the offences relating to whether the conduct is reasonably capable of encouraging conduct of a kind, or is reasonably capable of resulting in the person benefiting from conduct of a kind, that would constitute a child sex tourism offence.

Elements common to new and revised child sex tourism offences

172. Elements common to some, or all, of the proposed new or revised child sex tourism offences are set out here for ease of reference. For completeness, **Table 12** below indicates elements for the complete child sex tourism regime, as amended by this proposal. Common elements include definitions of ‘presence,’ the application of strict or absolute liability, extensions of criminal responsibility and defences.

173. The approach to the common elements of the proposed new and modified offences detailed below is consistent with the current sexual intercourse and sexual conduct offences in Part IIIA of the Crimes Act and the Commonwealth grooming and procuring offences as set out in section 474.28 of the Criminal Code.

Preparing, benefiting and encouraging offences

174. The proposed new preparing offence, and the existing benefiting and encouraging offences are not included in Table 12 as they are offences of preparing for, benefiting from or encouraging conduct of a kind that would constitute one of the substantive offences included in the table.

175. The extensions of criminal responsibility for the benefiting offence include attempt, complicity and common purpose, innocent agency and conspiracy, as set out in Part 2.4 of the Criminal Code. The extensions of criminal responsibility for the encouraging offence are limited to attempt and innocent agency. It is not appropriate to criminalise conspiring to encourage, or aiding, abetting, counselling or procuring (complicity and common purpose) the encouragement of a child sex tourism offence. It is proposed that complicity and common purpose, innocent agency and conspiracy apply to the new preparatory offence. It is not appropriate to apply attempt to the preparatory offence, as the preparatory offence is already directed at conduct at a preliminary stage.

176. The general defences in Part 2.3 of the Criminal Code apply to the existing benefiting and encouraging offences. It is proposed that these general defences would also apply to the new preparatory offence.

Table 12 – Elements common to the child sex tourism offences

Offence	Presence requirement	Absolute liability - age	Absolute liability - jurisdiction	Absolute/Strict liability - other	Extensions of criminal responsibility*	CST Defences	
						Basic#	Additional
SUBSTANTIVE OFFENCES							
Grooming (new)	✓	✓	✓	N/A	✓ (Comb A)	✓	✗
Procuring (new)	✓	✓	✓	N/A	✓ (Comb A)	✓	✗
Sexual intercourse (revised)	✓	✓	✓	N/A	✓ (Comb B)	✓	✗
Sexual conduct (revised) (either option)	✓	✓	✓	N/A	✓ (Comb B)	✓	✗
Persistent sexual abuse (new)	N/A	✓	✓	✓ (AL would apply to fact that abuse occurred on 3 or more occasions)	✓ (Comb B)	✓	✗
16-18 trust (new)	✓	✓	✓	✓ (SL would apply to existence of a position of trust)	✓ (Comb B)	✓	✗
AGGRAVATED OFFENCES[^]							
Aggravated SI/SC – trust (new)	N/A	N/A	N/A	✓ (SL would apply to existence of a position of trust)	✓ (Comb B)	✓	✓
Aggravated SI/SC – cognitive impairment (new)	N/A	N/A	N/A	✓ (AL would apply to fact that child cognitively impaired)	✓ (Comb B)	✓	✓

* Combination A = complicity and common purpose, innocent agency and conspiracy.

Combination B = attempt, complicity and common purpose, innocent agency and conspiracy.

Includes both general Criminal Code defences in Part 2.3 of the Criminal Code and two specific child sex tourism defences (age and marriage).

[^] The two aggravated offences only apply where the substantive offence (either sexual intercourse or sexual conduct) has been proved. This table only indicates elements that are particular to the aggravated offence.

‘Presence’ requirement

177. Any reference in existing/revised and proposed child sex tourism offence provisions to being in the ‘presence’ of the offender or another person would be expressed to apply to both physical and non-physical presence (eg virtual presence). For example, the proposed new child sex tourism procuring offence would apply where the defendant encourages:

- the child to go to a hotel room in a foreign country and commit an act of indecency (eg masturbate) while the defendant is in the same hotel room and watches the child masturbate (eg physically present), or
- the child in a foreign country to masturbate in front of a web cam while the defendant watches online (eg virtually present).

178. The ‘presence requirement’ is discussed further in the context of proposed reforms to Commonwealth offences for using a carriage service to groom or procure a child for sexual activity (see paragraphs 264 to 268 below).

Absolute and strict liability

179. Absolute liability is defined in section 6.2 of the Criminal Code. If an offence specifies that absolute liability applies to an offence as a whole, or particular elements of an offence, it follows that there are no fault elements for any of the physical elements of the offence, or for the particular physical element specified. That is, the prosecution is not required to prove that the offender knew or was reckless or negligent in relation to the offence or particular element of the offence.

180. Strict liability is defined in section 6.1 of the Criminal Code. Similar to absolute liability, the application of strict liability means that there are no fault elements for any of the physical elements of the offence, or for the particular physical element specified. However, unlike absolute liability, the defence of mistake of fact is available. Defined in section 9.2 of the Criminal Code, the mistake of fact defence absolves a person from criminal responsibility if the person is under a mistaken, but reasonable, belief about the facts constituting the physical element.

Age

181. Absolute liability would apply to the circumstances of revised and proposed offences relating to the age of the child (eg that the child is under 16 years of age). This means, for example, that the prosecution would need to prove, beyond reasonable doubt, that the child was under 16 years of age, but would not have to prove that the offender knew the age of the child (or was reckless or negligent to that fact). The imposition of absolute liability here is considered appropriate given the intended deterrent effect of the child sex-related offences and given that a specific ‘belief about age’ defence would continue to be available for relevant revised and proposed new offences (see paragraphs 197 onwards).

182. In determining how old a person is or was at a particular time, a jury or court will be able to consider, among other things: the person’s appearance, medical or other scientific opinion, a document that is or appears to be an official or medical record from a country outside Australia, and a document that is or appears to be a copy of such a record. Evidence that the victim was represented to the offender as being under or of a particular age would be, in the absence of the contrary, proof that the offender believed the victim to be under or of that age.

183. The proposed new grooming and procuring offences would also apply where the offender believes that the child is under 16 years of age, and it would not matter that the 'child' is in fact a fictitious person represented to the offender as a real child. This is to enable law enforcement to conduct covert investigations by assuming the identity of a 'child,' interacting with potential predatory adults, and arresting the offender before they have an opportunity to sexually abuse a real child outside Australia.

Jurisdiction

184. It is proposed that absolute liability would apply to the circumstance of the revised and proposed offences that the relevant conduct occurred, or was to occur, outside Australia. For example, in the proposed procuring offence, absolute liability would attach to the element that the child was being procured for sexual activity outside Australia (regardless of where the procuring occurred). Applying absolute liability to the circumstance that the sexual activity was to occur outside Australia is considered appropriate because the element is a jurisdictional element rather than one going to the essence of the offence.

Position of trust relationship

185. The proposed new aggravated child sex offence involving a position of trust, and new offence directed at children between 16 and 18, would require proof by the prosecution of the existence of a relationship involving a position of trust and/or authority.

186. It is proposed that strict liability apply to the circumstance that the offender was in a position of trust and/or authority. This would mean that the prosecution would be required to prove that such a relationship existed, but would not be required to prove that the offender knew that he/she was in that position in relation to the child. This is appropriate given it would be very unlikely that an offender was not aware that he or she was the child's teacher, doctor, sports coach etc. Accordingly it is not proposed to allow for a specific belief defence in relation to the existence of a position of trust. However, the application of strict, rather than absolute, liability will make available the general mistake of fact defence in section 9.2 of the Criminal Code.

Cognitive impairment

187. It is proposed that absolute liability would apply to the aggravated circumstance that the child has a cognitive impairment. That is, the prosecution would need to establish the fact that the child had a cognitive impairment beyond reasonable doubt, but would not have to establish that the offender knew that the child had a cognitive impairment. To ameliorate the dramatic effect of applying absolute liability to this circumstance, a defence would be made available to the defendant, based on a belief that the child did not have a cognitive impairment. See section on 'Defences' at paragraphs 194 – 210 below.

Persistent abuse

188. It is proposed that absolute liability would apply to the circumstance of the offence that the unlawful conduct occurred on three or more occasions. The number of times that the abuse occurred is not an element going to the essence of the offence. If the prosecution proves beyond reasonable doubt that the offender intentionally engaged in sexual activity with the child victim three or more times, the offender's knowledge as to the number of times this occurred is not relevant.

Extensions of criminal responsibility

189. Part 2.4 of the Criminal Code sets out the extensions of criminal responsibility, including attempt, complicity and common purpose, innocent agency, incitement and conspiracy. The provisions operate to extend criminal liability for all offences.

190. Consistent with the existing sexual intercourse and sexual conduct offences, attempt would apply to the new aggravated, persistent sexual abuse offence and 16 – 18 position of trust offences. However, it would not be an offence to attempt to commit the proposed new preparatory, grooming or procuring offences. Liability for attempt is incompatible with the proposed preparatory, grooming and procuring offences, in that they are a kind of preparatory crime, committed in preparation of actual sexual abuse.

191. Complicity and common purpose, innocent agency and conspiracy would apply to all of the proposed new child sex tourism offences, consistent with existing offences.

192. It is proposed that incitement would not apply to the new offences, consistent with the existing offences. This is appropriate because the existing substantive offence of encouraging a child sex tourism offence applies to all of the child sex tourism offences (and will apply to all the new offences, except for the preparatory offence). The definition of encouraging includes to ‘encourage, incite to, or urge by any means.’ Further, the encouraging offence carries a higher penalty than the general inciting offence, reflecting the seriousness of the conduct.

Alternative verdicts

193. It is proposed to insert a provision into the child sex tourism offence regime applying to the aggravated offences providing that the trier of fact may, if not satisfied that the defendant is guilty of a particular offence, but is satisfied beyond reasonable doubt that the defendant is guilty of another offence within the child sex tourism offence regime, find the defendant not guilty of the prosecuted offence but guilty of the alternative offence.

Defences

194. The child sex tourism offence regime is subject to the general defences set out in Part 2.3 of the Criminal Code (including for example mental impairment, mistake of fact, duress, self-defence). However, these general defences are not available in relation to specific elements of child sex tourism offences for which absolute liability applies (eg that the child was under 16 years of age and that the conduct occurred outside Australia).

195. Accordingly, the current sexual intercourse and sexual conduct offences in Part IIIA of the Crimes Act are also subject to two specific defences – the belief about age defence and the defence based on the existence of a valid and genuine marriage. These two specific defences are not available for the benefiting or encouraging offences.

196. **Table 13** and detailed **Table 13.1** in the Appendix set out existing defences applying to the child sex tourism offences. This table also includes detail on a further defence (relating to the age of the offender) not currently included in the child sex tourism provisions. This defence is discussed at paragraph 229 below.

Table 13 – State, Territory and international defences to child sex offences

	Belief about age	Marriage	Age of offender
CTH	✓	✓	✗
NSW	✗*	✗	✗
VIC	✓	✓	✓
QLD	✓	✗	✗
WA	✓	✓	✓
SA	✓	✗	✓
TAS	✓	✓	✓
ACT	✓	✗	✓
NT	✓	✓	✗
CAN	✓	✓	✓
NZ	✓	✓	✗
UK	✓	✓^	✗

* No statutory defence, however common law defence of mistake of fact applies (*CTM v The Queen* [2008] HCA 25).

^ Limited to position of trust offences

Belief about age

197. The first defence is a defence based on a belief about age. That is, that at the time of the conduct constituting the offence, the defendant believed that the person was 16 years of age or over. The ‘belief about age’ defence is available to ameliorate the dramatic effect of applying absolute liability to the circumstance of the offences that the child was under 16 years of age. The jury may take into account whether the alleged belief was reasonable in the circumstances.

198. Comparable State and Territory child sex offences are also subject to a ‘belief about age’ defence (see **Tables 13** and **13.1**). The majority of States and Territories only allow this defence in relation to offences directed at older children.

199. As described in paragraph 112 onwards, the majority of States and Territories have separate offences based on the age of the child. As well as providing for a higher penalty for sexual activity with younger children, offences based on age in State and Territory child sex offences also reflect the ‘no defence age,’ under which certain defences are not made available to the defendant. For example in proceedings involving a ten year old child, it is not reasonable to allow a defendant to argue that he/she believed the child was over 16 years of age.

200. Such a defence is also provided for in overseas jurisdictions compared. Canada, NZ and the UK apply the defence both to domestic offences and to extraterritorial child sex-related offences. Similar to State and Territory offences, these jurisdictions generally only allow the defence in relation to offences committed against older children.

201. For the reasons set out above (see paragraphs 112 onwards), the Commonwealth’s child sex tourism offences adopt a simple structure and are not divided by age. As a consequence, available defences are applicable to conduct involving a child of any age. While the defence based on a belief about age is available to the defendant in all cases, it is unlikely that a jury would accept as reasonable a belief on the part of a defendant that a very young child was over 16 years of age.

202. The ‘belief about age’ defence would also apply to the proposed grooming and procuring child sex tourism offences. This is consistent with the approach taken for existing Commonwealth offences for using a carriage service to groom or procure a child for sexual activity (section 474.29 of the Criminal Code).

203. The ‘belief about age’ defence would also apply to the proposed aggravated offences, the 16-18 position of trust offence and persistent sexual abuse offence. It is not proposed that the defence be available for the new preparatory offence, for the same reasons why it is not applicable to the benefiting and encouraging offences. That is, because these offences deal with conduct at a more preliminary stage or are one step removed from the actual sexual abuse of a specific child.

Valid and genuine marriage

204. The second defence is a defence which applies where the defendant establishes that a valid and genuine marriage existed between the defendant and the person under 16.

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

206. While some States and Territories allow for a ‘marriage defence’ to child sex offences, the majority do not (see Table 8). However, the provision of such a defence is common practice internationally. Canada, NZ and the UK all provide for a defence of marriage both to domestic offences and its extraterritorial child sex-related offences. Similar to the belief about age defence, these are generally only applicable to offences committed against older children.

207. Again, while the marriage defence is available to defendants under Australia’s provisions regardless of the age of the child victim, it is unlikely that a defendant will succeed in proving that he/she had a valid and *genuine* marriage where a very young child is involved.

208. It is proposed to retain this defence for existing (and revised) sexual intercourse and sexual conduct offences and extend its application to the new grooming and procuring offences, aggravated offences, 16-18 position of trust offence and persistent sexual abuse offence.

209. Similarly to the belief about age defence, the defence would continue not to be available for the benefiting or encouraging offences, and would not be available for the proposed new preparatory offences.

Additional proposed defence

210. As described at paragraph 187 above, it is proposed to insert a new defence applying to the aggravated offence of where the child has a cognitive impairment, based on a belief that the child did not have a cognitive impairment. This is appropriate given the fact that the child has a cognitive impairment may not always be within the knowledge of the offender.

Reviewing the operation of defences

211. While it is proposed to retain the existing defences of belief about age or valid and genuine marriage, there are a number of issues in relation to the defences which require further consideration or clarification.

Burden of proof

212. Currently, under section 50CC of the Crimes Act, despite a Note to the contrary, the defendant carries a legal burden to prove the ‘belief of age’ or ‘valid and genuine marriage’ defence on the balance of probabilities.

213. Generally, defences place an *evidential* burden on the defendant, in that the defendant bears the burden of adducing or pointing to evidence which suggests a reasonable possibility that the defence is made out. The prosecution must then refute the defence beyond reasonable doubt. This is consistent with the principle that the prosecution must prove each element of an offence beyond reasonable doubt.

214. However, in limited circumstances it is appropriate to place a *legal* burden on the defendant, which reverses the onus of proof by requiring that the defendant bear the burden of establishing the defence on the balance of probabilities. This may be appropriate where a matter is peculiarly within the defendant’s knowledge and not available to the prosecution.

215. For the ‘belief about age’ defence, the defendant is required to prove a subjective belief about the age of the child and it is appropriate that the defendant bear the burden of proof in relation to his or her subjective belief. This is also consistent with comparable belief about age defences in most State and Territory child sex offence provisions (see **Table 13.1** in the **Appendix**). Accordingly, it is proposed to retain the legal burden on the defendant for the belief about age defence.

216. A legal burden should also continue to be placed on the defendant in relation to the marriage defence, as the existence of a valid and genuine marriage between the defendant and the child is a matter peculiarly within the defendant’s knowledge. Further, the proposed new defences relating to belief about the nature of the relationship (position of trust/authority) and cognitive impairment, would also place a legal burden on the defendant.

Non-consensual sexual activity

217. During a past review of the child sex tourism offence regime,⁴² the Senate Standing Committee on Legal and Constitutional Affairs recommended that the ‘belief about age’ defence and the ‘marriage defence’ should only be available in circumstances where the alleged sexual activity was consensual. Inclusion of an element of consent in both defences would mean that a defendant would have to prove both a belief that the person was over 16 (or that a valid and genuine marriage existed) *and* that the activity was consensual. It is not clear whether the recommendation intended the defendant to establish that the sexual activity was in fact consensual, or whether the defendant would need to establish a belief that the activity was consensual.

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

⁴² Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007.

219. The Committee's recommendation was based on a suggestion from the Law Council of Australia (LCA). The LCA noted that, while lack of consent is appropriately not a matter that the prosecution ought to prove for a child sex tourism offence, the issue of consent should become relevant where a defendant seeks to rely on either the defence of belief about age or valid and genuine marriage. In particular, the LCA was concerned that, for example, a belief that the person was over 16 years of age 'could absolve a defendant of criminal liability for engaging in non-consensual sexual activity with a person under 16.'⁴³

220. Lack of consent is not an element of State or Territory child sex offences. Generally speaking, consent is also not included in State or Territory defences to child sex offences. However, in at least two jurisdictions consent is relevant to child sex offences: Victoria and the Australian Capital Territory.

221. Under section 45 of the *Crimes Act 1958* (Vic), consent is not relevant to the offence of child sex unless the defendant establishes a defence of belief about age. Once consent becomes relevant, the prosecution must prove a lack of consent in order to obtain a conviction. Allocating the burden of proof in this way is consistent with the prosecution having to prove a lack of consent for general offences of sexual activity without consent.

222. Under section 55 of the *Crimes Act 1900* (ACT), an element of consent is included in both defences which apply to offences of child sex, the belief about age defence and a defence based on the age of the offender (see paragraphs 229 onwards for a general description of the defence based on the age of the offender). For both of these defences, the defendant bears the legal burden, including in relation to proving that the person consented to the sexual intercourse.

223. It is not clear on the face of material accompanying the amendments which inserted these provisions how they reconcile with the general principle that consent is not relevant to child sex offences.

224. In relation to conduct occurring domestically, where a defendant establishes a defence to a child sex offence (for example because of a belief about age), there remains open the option of prosecuting the defendant with a more general offence of sexual activity without consent. This is because offences of sexual intercourse without consent are available regardless of the age of the alleged victim.

225. The option of prosecuting the defendant for an alternative offence of sexual activity without consent is not available in the child sex tourism context. This is because the child sex tourism regime does not include a general offence of sexual intercourse without consent. Reliance would need to be placed on the domestic law of the country in which the offence took place.

226. The seriousness of this issue is recognised. That is, criminal responsibility for non-consensual sexual activity should not be avoided simply because the defendant establishes a belief about age or valid and genuine marriage and there is no alternative offence with which the defendant could be tried.

⁴³ Law Council of Australia Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007.

227. However, the inclusion of consent as part of the defence to child sex tourism offences is at odds with the general principle that consent is not relevant to child sex offences. The inclusion of consent as part of the defence could also lead to the cross-examination of a child victim as to the issue of consent, causing possible trauma to the child. There is also the risk that including consent as part of the defence could confuse the issue at trial, with the unintended consequence that consent is mistakenly thought to be an element of the offence as well.

228. In the absence of a clear way to reconcile the general principles that consent is not relevant to child sex offences, it is not proposed to include consent as an element which must be proven for the defence to be made out.

Age of offender

229. During the past Senate Committee review, a question was also raised as to whether a new defence should be enacted to apply where the defendant is no more than a specified number of years older than the alleged victim and the sexual activity is consensual. Such a defence could potentially aid in distinguishing between sexual behaviour involving an adult sexual predator and a young person under 16 years of age and sexual behaviour between two young persons. As there is no requirement in the child sex tourism provisions that the offender be at least 18 years of age, there is a risk that a person under 18 years of age engaging in consensual sexual activity with another young person could be guilty of the offence.

230. A defence of this nature exists in a number of State and Territory jurisdictions (see **Tables 13 and 13.1**). In relation to those other countries compared, only Canada has a limited defence relating to the age of the offender.

231. Following the introduction of the child sex tourism offence regime in 1994, the Attorney-General issued a direction under section 8 of the *Director of Public Prosecutions Act 1983* (Commonwealth) that proceedings for alleged offences against the child sex tourism regime should not be instituted against a person under 18 years of age without the consent of the Attorney-General. This direction is still in place.

232. Although the average age of offenders that have been convicted under the child sex tourism provisions is 54 years old (the youngest convicted so far has been 40 years old), it is considered that there should be flexibility to prosecute persons under the age of 18 years of age who sexually exploit children overseas. As such, it is not proposed to introduce a new defence of this nature.

233. However, it is proposed that the Attorney-General's direction be enshrined in legislation, by providing that, where the alleged offender was under 18 years of age at the time of the alleged child sex tourism offence, proceedings cannot commence without the written consent of the Attorney-General. This will reinforce the existing safeguard in place against inappropriate prosecution of a person under 18 years of age where the 'perpetrator' and the 'victim' are of similar age.

PART 4: REFORMS TO CHILD SEX-RELATED CARRIAGE SERVICE OFFENCES

234. As described in Part 1, the Commonwealth has offences directed at the use of a carriage service (eg the Internet or telephone) for child pornography or child abuse material. These provisions, working along side State and Territory laws, have been endorsed internationally as comprehensively criminalising conduct relating to child pornography.⁴⁴

235. In addition, the Commonwealth also has offences for using a carriage service for sexual activity with a child. The existing offences address the use of a carriage service for the steps leading up to sexual activity with children, by criminalising the grooming or procuring of a child for sexual activity.

236. It is proposed to enhance the carriage service offences to ensure that Internet-related child sexual exploitation is comprehensively covered. This will be achieved by:

- extending the coverage of child pornography offences including by introducing new aggravated offences
- improving the operation of the existing grooming and procuring offences, and
- introducing new offences of:
 - using a carriage service for indecent communications with a child, and
 - using a carriage service for sexual activity with a child (including aggravated offences where the offender is in a position of trust and/or authority or where the child victim has a cognitive impairment).

Extending the coverage of child pornography and child abuse material offences

237. It is widely accepted that child pornography and child abuse images are more than just pictures. The production of such images requires the abuse of actual child victims. A commentary on child pornography compiled for the purposes of the Second World Congress Against the Sexual Exploitation of Children stated that:

[C]hild pornography is both a crime in and of itself, and it is also a picture of a crime scene. ... Child pornography amplifies and broadcasts the original act of abuse that it depicts. In doing so, it can substantially aggravate the original offence. Child pornography is at once both a form of child abuse and also a representation of it.⁴⁵

238. Offences directed at possession and distribution should recognise the sexual exploitation which such images represent. Dealing in child pornography or abuse material fuels market demand, thereby increasing the incidence of actual abuse of children. It reflects varying scales of harm involving the initial abuse of the child (from images taken of an unknowing child playing naked on the beach, to images of serious rape/torture) and varying scales of harm relating to the subsequent exploitation (from private access within the home to large-scale commercial exploitation).

239. Accordingly, the Government wants to ensure that the Commonwealth's child pornography and child abuse material offence regimes reflect contemporary offending. It is proposed to improve the operation of existing offences by clarifying and extending the types of conduct criminalised, and increasing maximum penalties. It is also proposed to introduce a new aggravated offence directed at child pornography networks.

⁴⁴ International Centre for Missing and Exploited Children, *Child Pornography: Model Legislation and Global Review* 2007.

⁴⁵ Theme Paper, *Child Pornography*, Second World Congress Against Commercial Sexual Exploitation of Children, Yokohama, Japan, 2001, p 14.

Clarifying and extending conduct criminalised by existing offences

240. The scope of the existing offence provisions relating to using a carriage service for child pornography and/or child abuse material (sections 474.19 and 474.22 of the Criminal Code) is intended to cover the range of activities that a person can engage in when using applications such as the Internet, email and other online applications. Activities currently criminalised include accessing, transmitting (or causing material to be transmitted), making available, publishing or otherwise distributing child pornography or child abuse material.

Clarifying the definition of ‘making available’

241. It is proposed to clarify that the existing offence of ‘making available’ child pornography or abuse material covers behaviour such as advertising or promoting such material. This will ensure that persons advertising or promoting child pornography or abuse material will be captured, even if they do not engage in transmitting or making available actual child pornography or abuse material. It is also proposed to clarify that ‘making available’ covers new online technologies such as peer to peer sharing and sending hyperlinks to child pornography or child abuse material.

Inserting new category of ‘soliciting’

242. It is proposed to insert a new category into both sections 474.19 and 474.22, of using a carriage service to solicit child pornography or child abuse material. Again, this will ensure that persons asking for or requesting child pornography or abuse material would be captured, even if no actual material is sent to them.

Increasing the maximum penalties for child pornography and abuse material offences

243. Given the exploitative nature of child pornography and child abuse material, the Government is keen to ensure that maximum penalties for such offences reflect the seriousness of the conduct.

244. The arrival of the Internet opened a new and hugely expanding market for child pornography. For example, in 1995 an Inspector of the Greater Manchester Obscene Publications Squad in the UK was involved in seizing a total of 12 child pornographic images, all in the form of photographs or videos. In 1999, the Inspector seized 41,000 child pornographic images and all except three were on computers, with almost all of the images concerned originating on the Internet.⁴⁶ The Commonwealth’s Internet offences were enacted in 2005 to address this problem.

245. It is evident that the Internet is creating ever greater demands for new material of ever greater levels of depravity and corruption. The Internet is being used to access and distribute child pornography on a massive global scale; offending has become pervasive and widespread. As a result, offending behaviour is becoming increasingly destructive. Children, in addition to being victims of the initial abuse required for the production of the material, are exploited on a massive scale through the repeated distribution of the image, or images, throughout international networks.

246. Maximum penalties set by the Government are intended to reflect a worst case scenario. They are also intended to indicate to the courts the Government’s position on the level of seriousness which it believes the particular conduct involves. Accordingly, it is proposed to increase the maximum penalties for using a carriage service for child pornography or child abuse material, or possessing such material for use through a carriage service, from 10 years imprisonment to 15 years imprisonment.

247. Comparable State and Territory child pornography offences generally carry penalties ranging from four to 12 years imprisonment (see **Table 3.1** in the **Appendix**). However, the Commonwealth’s offences are specifically directed at Internet offending which, for reasons discussed above, can be particularly pervasive and destructive.

⁴⁶ Theme Paper, *Child Pornography*, Second World Congress Against Commercial Sexual Exploitation of Children, Yokohama, Japan, 2001, p 17.

248. Increasing these penalties will also bring them in line with penalties for the child sex tourism offences (increased as proposed above – see paragraphs 112 to 118 above), the carriage service grooming and procuring offences and the new carriage service offences proposed at paragraphs 272 to 289 below.

New aggravated offences relating to child pornography networks

249. As discussed above, the advent of the Internet has created limitless opportunities for viewing and dealing in child pornography, and has also created opportunities for offenders to link up with other like-minded individuals. It was identified at the Second World Congress, and re-iterated at the Third, that the Internet has generated a new class of users of child pornography and has allowed the development of organised, technologically sophisticated rings of child sexual abusers.⁴⁷ There is also evidence that organised crime groups may be starting to involve themselves in child pornography.⁴⁸

250. An example is the network uncovered by the Queensland Police Service's Child Sexual Crimes Investigation Task Force 'Argos,' during an international law enforcement operation codenamed 'Operation Achilles.' The operation resulted in prosecutions of multiple persons in several countries.

Operation Achilles

Operation Achilles involved a Queensland Police led international operation into the trafficking, distribution and access of child pornography images, commencing in January 2006 and closing in February 2008. The operation commenced after information was received from New Zealand Police and involved Queensland Police covertly infiltrating the online operation, suspected of trading and distributing particularly violent child exploitation images. The closure of the operation resulted in the execution of warrants and arrests of offenders in Australia, Germany, the UK and the US.

Then Detective Acting Superintendent Cameron Harsley said the operation was large scale and highly complex.

This network was highly organised and used sophisticated technology in the large volume of transfer of child exploitation images across its membership. The group used file encryption techniques to transfer and share illegal images and videos across internet newsgroups.⁴⁹

Reports suggest that 12 Americans have been convicted in the US for their activities as part of this group. The defendants were all convicted of offences under the US Code of involving a child exploitation enterprise. Specific conduct included; conspiracy to advertise, transport, ship, receive and possess child pornography; advertising child pornography; transporting child pornography and receiving child pornography. Sentences received ranged from 13 years to life imprisonment.

Prosecutions also resulted in Australia. In one example, Derek Richard Mara was convicted of three offences under the Commonwealth's carriage service child pornography offences, of accessing, transmitting and causing to be transmitted child pornography material. Mara was also convicted of one Queensland offence, of indecent treatment of children under subsection 210(1) of the Queensland Criminal Code.⁵⁰

The court found Mara to be one of the four founding members of the group, known as the 'core.' The sentencing judge referred to the level of sophistication of the use of the Internet in this case and stated the following.

It can be said that the operation of this group of which you were a core member was highly sophisticated. It traded in a large quantity of child exploitation material. It employed a very sophisticated security system. It went to great lengths to protect the identity of those who were members of it ... I consider your conduct to be very serious and warranting a condign punishment.⁵¹

Mara was sentenced to six years imprisonment, with a non-parole period of 32 months in relation to the charges under the Commonwealth offences, and six months for the charge under the Queensland offence, to be served concurrently.

⁴⁷ Theme Paper, *Child Pornography*, Second World Congress Against Commercial Sexual Exploitation of Children, Yokohama, Japan, 2001, p 17. Theme paper, *Child Pornography and Sexual Exploitation of Children Online*, Third World Congress Against Sexual Exploitation of Children and Adolescents, Rio de Janeiro, Brazil, 2008, p 6.

⁴⁸ Theme Paper, *Child Pornography*, Second World Congress, p 17.

⁴⁹ Media release, *QLD Police Child Sex Crimes Taskforce's investigation results in US conviction*, 16 January 2009, <<http://www.police.qld.gov.au/News+and+Alerts/Media+Releases/2009/01/Achilles.htm>>.

⁵⁰ Case of Derek Richard Mara, Townsville District Court, Unreported, sentenced 5 March 2009.

⁵¹ Derek Richard Mara, Sentencing Remarks, Durward DCJ, 5 March 2009, pp 12 – 14.

251. The US has in place a specific offence directed at criminal activities as a member of a child exploitation enterprise. Subsection 2252A(g) of the US Code⁵² makes it an offence for a person to engage in multiple child sexual exploitation offences (including child pornography or actual sexual activity with children offences) constituting three or more separate incidents, involving more than one victim, where the offence is committed in concert with three or more persons. The offence carries a minimum penalty of 20 years imprisonment and a maximum penalty of life imprisonment.

252. Given the contemporary nature of offending, it is proposed that an offence directed at similar conduct be introduced into the Commonwealth's carriage service child pornography offence regime. The enactment of such an offence would reflect the increasingly sophisticated nature of the use of the Internet by child pornography networks. It would also reflect the increased levels of harm to child victims resulting from the demand created by such large-scale networks.

253. The offence would be in the form of an aggravated offence applying to the existing child pornography and child abuse material offences in sections 474.19 to 474.24 of the Criminal Code (the predicate offences). That is, the use of a carriage service to access, transmit, cause to be transmitted, make available, publish or otherwise distribute child pornography or child abuse material, or possession of such material for use through a carriage service.

254. The offence would apply where a person had been found guilty of one or more of the predicate offences, and two additional aggravating factors can be proved. That is, where the conduct giving rise to the offence occurs on three or more separate occasions, and involves two or more persons.

255. The offence would be directed at child pornography networks such as those infiltrated by Operation Achilles. The requirement that the offence involve two or more persons reflects common practice relating to how many people constitute a criminal group, in definitions of organised crime both within Australia and internationally. It would not be required that the other persons involved be arrested or prosecuted in relation to the conduct, only that there is sufficient evidence that the network involved more than one person.

256. In the same way that absolute liability applies to the circumstance of the proposed new persistent sexual abuse that the unlawful conduct occurred on three or more occasions (see paragraph 188 above), absolute liability will apply to the circumstance that the conduct occurs on three or more separate occasions.

257. The maximum penalty for the proposed new aggravated offences would be 25 years imprisonment.

258. Further detail on the proposed new offence, including on definitions, the application of absolute liability, extensions of criminal responsibility and defences, is set out below in the 'Elements common to new offences' section in paragraphs 290 to 305 below.

⁵² US Code, Title 18, Part 1, Chapter 110, ss 2252A(g).

Improving the operation of existing grooming and procuring offences

Grooming offence – removing the requirement that material be indecent

259. To establish a ‘grooming’ offence under section 474.27 of the Criminal Code, the prosecution must prove the following elements:

- (i) that the defendant is at least 18 years old
- (ii) that the defendant used a carriage service to transmit a communication to the recipient
- (iii) that the recipient is a child under 16 years old, or someone who the defendant believes is under 16 years old
- (iv) that the communication includes material that is indecent according to the standards of ordinary people, and
- (v) that the defendant sent the communication with the intention of making it easier to procure the recipient to engage in or submit to sexual activity (either with the defendant or another adult, or with another child in the presence of the defendant or another person who is at least 18 years old).

260. It is proposed that the fourth element (that the communication includes material that is indecent) be removed.

261. The practice of grooming encompasses a wide range of activity designed to build a relationship with the child for the purposes of later sexually exploiting that child. The content of communications between an offender and a child may not always be indecent, and in any case may not start out as indecent. As illustrated in *Meehan*, the offender started the grooming process through platonic and innocent exchanges.⁵³ The grooming process may also move to invoking romantic feelings in the child for the offender, before trying to sexualise the relationship.

262. The purpose of grooming offences is to criminalise behaviour that leads to sexual activity with a child, allowing law enforcement to intervene before actual sexual activity takes place. Law enforcement should not have to wait until the child is subjected to indecent material (eg images of pornography or sexually explicit conversations) before taking action.

263. Even by removing the requirement that the communications include material is indecent, a person cannot be prosecuted for a grooming offence unless the communication was made with the *intention* of making it easier to procure the recipient to engage in or submit to sexual activity. The prosecution must show that the communications were of a nature that would suggest the offender wanted to engage in sexual activity with the child. Genuinely innocent communications between an adult and a child would not be captured by the amended grooming offence.

⁵³ See paragraph 40 above for a description of this case.

Grooming and procuring offences – clarifying the ‘presence’ requirement

264. An element of both the grooming and procuring offences in sections 474.26 and 474.27 of the Criminal Code is that the defendant (who is a person at least 18 years of age) communicates with a child under 16 years of age (or person the defendant believes to be a child under 16 years of age) with the intention of grooming or procuring the child to engage in or submit to sexual activity either with:

- (i) the defendant
- (ii) another adult
- (iii) another child in the presence of the defendant, or
- (iv) another child in the presence of another person who is at least 18 years old.

265. The grooming and procuring offences were inserted in the Criminal Code by the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004. The Explanatory Memorandum to the Bill noted the importance of the ‘presence requirement’ in (iii) and (iv):

The presence requirement is important. If an adult sender facilitates a meeting between two children for the purposes of sexual activity, and that activity occurs in private between those two children, then these proposed federal offences should not apply. Sexual activity between children in these circumstances should remain a matter to be regulated by the States and Territories. If the sexual activity is recorded by the adult sender or another person, then the act of recording would satisfy the presence requirement ...

266. Changing technology means that it is now possible for offenders to engage in sexual activities using the Internet, without ever being in the physical presence of the child victim. For example, an offender may use the Internet to groom or procure a child to perform a sexual activity via web cam. Or the offender may email a child asking him or her to masturbate in front of a web camera, while the offender (or another adult) watches over the Internet.

267. To remove any doubt, it is proposed to clarify that ‘presence’ includes both physical and non-physical presence (eg virtual presence). This is consistent with the original intention behind the offences, as indicated by the Explanatory Memorandum.

268. This approach is also consistent with the current definition of ‘sexual activity’ (in section 464.28 of the Criminal Code) which provides that such activity *need not involve physical contact between people*.

Grooming and procuring offences – modifying the application of defences

269. Section 474.29 of the Criminal Code provides for a defence to the offences of grooming and procuring, based on a belief about the age of the child. The ‘belief about age’ defence is explained in more detail at paragraph 197 onwards. Currently, a defendant bears an evidential burden of proof in relation to this defence.

270. The equivalent ‘belief about age’ defence in the child sex tourism offence regime places a legal burden on the defendant to prove a belief about age on the balance of probabilities. It is proposed above that this legal burden be retained (see paragraphs 212 to 216). A legal burden is appropriate where the matter is peculiarly within the defendant’s knowledge. The belief about age defence requires proof of a subjective belief about the age of the child and it is appropriate that the defendant bear the burden of proof in relation to this belief.

271. It is proposed that the burden of proof for the belief about age defence in the child sex tourism offence regime, and the carriage service offence regime, should be consistent. Further, for the reasons set out above, that this burden should be a legal burden on the defendant. Accordingly, it is proposed to change the burden placed on the defendant in relation to the grooming and procuring belief about age defence from an evidential to a legal burden.

New offences

Using a carriage service for indecent communications with a child

272. It is proposed to create a new Commonwealth offence for using a carriage service for indecent communications with a child.

273. A number of States and Territories have offences which criminalise exposing children to pornographic or indecent material (see **Table 2** and detailed **Table 2.3** in the **Appendix**). The offences in three of these jurisdictions are limited to exposing children through electronic communications (Queensland, Western Australia and the Australian Capital Territory). The remaining two are much broader – the Tasmanian offence covers exposure by any means of communication, while Northern Territory offence covers exposure by any means. The maximum penalties for these offences range from five to 21 years imprisonment.

274. Internationally, NZ also has an offence of exhibiting or displaying an objectionable publication to any person under the age of 18 years. This offence carries a maximum penalty of ten years imprisonment.

275. In relation to existing Commonwealth law, there is a general offence of using a carriage service in a way that is menacing, harassing or offensive (section 474.17 of the Criminal Code). It is possible that this offence would capture indecent communications with a child. However, the offence only carries a maximum penalty of three years imprisonment. While this is appropriate given the breadth of the offence and the range of behaviour that it is intended to capture (being directed at persons of any age), the penalty is not considered to appropriately reflect the gravity of sending indecent communications to a child.

276. There are also existing Commonwealth offences that criminalise using a carriage service for certain, but not all, indecent communications with a child. Sections 474.19 and 474.22 of the Criminal Code make it an offence to use a carriage service for child pornography or child abuse material. This offence would cover situations in which the offender emails child pornography or child abuse material to a child (as the offences apply regardless of the age of recipient).

277. It would also be an offence to use a carriage service to send communications (including communications that contain indecent material) to a child, with the intention of grooming or procuring that child for sexual activity (sections 474.26 and 474.27 of the Criminal Code). This would cover situations in which the offender emails indecent material (such as adult pornography) to a child, with the intention of grooming or procuring the child for sexual activity. However, the grooming and procuring offences do not address situations in which the offender emails adult pornography to a child with *no further intent* to groom or procure the child for sexual activity.

278. It is proposed to fill this gap by creating a specific Commonwealth offence of using a carriage service for indecent communications with a child. The proposed new offence would apply where the defendant is at least 18 years old, and

- (i) the defendant uses a carriage service to transmit a communication to the recipient
- (ii) the recipient is a child under 16 years old (or someone who the defendant believes is under 16 years old), and
- (iii) the communication includes material that is indecent according to the standards of ordinary people (it would be left open to the Court to determine whether the material was in fact indecent).

279. The maximum penalty for the proposed new offence would be seven years imprisonment.

280. Further detail on the proposed new offence, including on definitions, the application of absolute liability, extensions of criminal responsibility and defences, is set out below in the 'Elements common to new offences' section in paragraphs 290 to 305 below.

Using a carriage service for sexual activity with a child

281. Commonwealth grooming and procuring offences were enacted in response to the increasing use of technology by offenders as part of steps leading up to real life meetings with child victims. At the time, it was considered that where the offender took the relationship offline and met up with the child in 'real life,' State and Territory offences would apply if sexual activity with the child took place.

282. However, changes in technology means that offenders can commit sexual offences against children without meeting up in 'real life.' For example, an offender may expose his or her genitalia to a web cam while a child watches online (the modern day equivalent of a 'flasher'). Another example might be that the offender masturbates in front of a web cam while a child watches online. In both examples, the sexual activity is occurring between the offender and the child, even though it takes place online.

283. Currently, there is no specific Commonwealth offence for using a carriage service for sexual activity with a child. There are also no existing State or Territory offences directed at the use of a carriage service for such activity. It is proposed to address this gap by enacting a new offence of using a carriage service for sexual activity with a child.

284. The proposed offence would apply where the defendant is at least 18 years old, and

- (i) the defendant uses a carriage service to commit an act of indecency in the presence of a child under 16 years of age, or
- (ii) the defendant causes a child to commit an act of indecency (including with another person) using a carriage service either:
 - a. in the presence of the defendant, or
 - b. in the presence of another person who is at least 18 years old (the third party).

285. The maximum penalty for the proposed new offence would be 15 years imprisonment. This would ensure consistency with the like offence directed at sexual conduct (in real life) in the child sex tourism offence regime, in relation to which it is proposed above to increase the maximum penalty from 12 to 15 years imprisonment.

286. Further detail on definitions, the application of absolute liability, extensions of criminal responsibility and defences is set out below in the elements common to new offences section in paragraphs 290 to 305 below.

287. Consistent with the proposed changes to the grooming and procuring offences described above, the ‘presence requirement’ would be defined to clearly capture non-physical (eg virtual presence). The proposed new offence is intended to capture the use of a carriage service for sexual activity in ‘real-time.’ Examples would include:

- (i) where an offender masturbates in front of a web cam and the child watches online
- (ii) where an offender causes a child to masturbate in front of a web cam and a third party watches online,
- (iii) where an offender causes a child to have sexual intercourse with another person (either an adult or child) in front of a web cam and the offender or a third party watches online.

288. The proposed new offence is not intended to capture sexual activity that does not occur in ‘real-time.’ Such activity is more appropriately captured by other offences, as illustrated by the following example scenarios.

<p><i>Example 1</i> – An offender films him or herself masturbating, and emails the film to a child. The offender would be committing either:</p> <ul style="list-style-type: none">(i) the new proposed offence of using a carriage service for indecent communications with a child, or(ii) if the offender sent the film to the child with the intention of grooming or procuring that child for sexual activity, a grooming or procuring offence under section 474.26 or 474.27 of the Criminal Code. <p><i>Example 2</i> – An offender causes a child to take indecent photographs of him or herself and email them to the offender. The offender would be committing either:</p> <ul style="list-style-type: none">(i) a State or Territory offence of making child pornography(ii) an offence under section 474.19 of the Criminal Code of using a carriage service for child pornography material(iii) the new proposed offence of using a carriage service for indecent communications with a child, or(iv) a procuring offence under section 474.26 of the Criminal Code (this is because the recording of the sexual activity satisfies the ‘presence requirement’). <p><i>Example 3</i> – An offender emails a child and asks them to film themselves having sexual intercourse with another person (either an adult or a child). The offender would be committing either:</p> <ul style="list-style-type: none">(i) a State or Territory offence of making child pornography, or(ii) a procuring offence under section 474.26 of the Criminal Code (this is because the recording of the sexual activity satisfies the ‘presence requirement’).

New aggravated offences where the offender is in a position of trust and/or authority or the child victim has a cognitive impairment

289. For the same reasons discussed above in the child sex tourism context (at paragraph 119 onwards), it is proposed to introduce new aggravated offences where an offender commits the proposed new offence of using a carriage service for sexual activity with a child and the offender is in a position of trust and/or authority with the victim, or the victim has a cognitive impairment. The proposed new aggravated offence would operate along the same lines as the aggravated offences for relevant child sex tourism offences and carry a maximum penalty of 25 years imprisonment.

Elements common to new offences

290. Elements common to some, or all, of the proposed new or revised carriage service offences are set out here for ease of reference. For completeness, **Table 14** below indicates elements for the complete carriage service offence regime relating to child pornography and child abuse material and sexual activity with children, as amended by this proposal.

291. The approach to the common elements of the proposed new aggravated child pornography network offence is consistent with those applying to the existing child pornography and child abuse material offences set out in sections 474.19 to 474.24. The approach to the common elements of the proposed new and modified offences detailed below is consistent with the existing procuring and grooming offences as set out in section 474.28 of the Criminal Code.

Table 14 – Elements common to the carriage service child sex-related offences

Offence	Presence requirement	Absolute liability - age	Absolute/Strict liability - other	Extensions of criminal responsibility*	Defences	
					Basic#	Additional
SUBSTANTIVE OFFENCES						
Child pornography and child abuse material	N/A	N/A	N/A	✓ (Comb B)	✓+	✓
Procuring	✓	✓	N/A	✓ (Comb A)	✓	✗
Grooming	✓	✓	N/A	✓ (Comb A)	✓	✗
Indecent communications	N/A	✓	N/A	✓ (Comb B)	✓	✗
Sexual activity	✓	✓	N/A	✓ (Comb B)	✓	✗
AGGRAVATED OFFENCES**						
Child pornography network	N/A	N/A	✓	✓ (Comb B)	✓+	✓
Sexual activity (trust)	N/A	N/A	✓	✓ (Comb B)	✓	✗
Sexual activity (cognitive impairment)	N/A	N/A	✓	✓ (Comb B)	✓	✓

* Combination A = complicity and common purpose, innocent agency, incitement, conspiracy

Combination B = attempt, complicity and common purpose, innocent agency, incitement and conspiracy

Defences in Part 2.3 of the Criminal Code and belief about age

+ Defences in Part 2.3 of the Criminal Code but not belief about age

** Aggravated offences only apply where substantive offences (child pornography and child abuse material offences) have been proved. This table only indicates elements that are particular to the aggravated offence.

Presence requirement

292. The ‘presence requirement’ is described in detail in relation to the existing grooming and procuring carriage service offences at paragraphs 264 to 268 above. Any reference to being in the presence of the offender or another person in the new carriage services offences would be expressed to apply to both physical and non-physical presence (eg virtual presence).

Absolute and strict liability

293. The operation of absolute liability to certain elements of the offences is described above in the common elements section of Part 3 on the reforms to child sex tourism offences, and applies in the same way for the carriage service offences.

Age

294. Absolute liability would apply to the circumstances of the offences relating to the age of the child (eg that the child is under 16 years of age), and would operate in the same way as with the child sex tourism offences, described in paragraphs 181 to 183 above.

295. As with the existing carriage service procuring and grooming offences, the proposed new indecent material offence would also apply where the offender believes that the child is under 16 years of age, and it would not matter that the ‘child’ is in fact a fictitious person represented to the offender as a real child. As described above, this is to enable law enforcement to conduct covert investigations by assuming the identity of a ‘child,’ interacting with potential predatory adults, and arresting the offender before they have an opportunity to sexually abuse a real child outside Australia. However, as the proposed new offence of using a carriage service for sexual activity is targeted at actual sexual activity (rather than steps leading up to sexual activity), it will only apply where there is a real child who is under 16 years of age.

Aggravated circumstances

296. It is proposed that absolute liability would apply to the circumstances of the offence that the conduct giving rise to the offence occurs on three or more separate occasions. If the prosecution proves beyond reasonable doubt that the offender intentionally engaged in the relevant conduct on three or more separate occasions, the offenders knowledge as to the number of times this occurred is not relevant. This is consistent with the approach to a similar element in the proposed new child sex tourism offence of persistent sexual abuse of a child (see paragraph 189 above).

297. For the same reasons detailed above for the aggravated child sex tourism offences at paragraphs 186 to 188, absolute liability will apply to the aggravated circumstance that the child has a cognitive impairment, and strict liability will apply to the aggravated circumstance that the offender was in a position of trust and/or authority. In relation to the aggravated cognitive impairment offence, this includes making available a defence based on where the offender believed that the child did not have a cognitive impairment.

Extensions of criminal responsibility

298. The full range of extensions of criminal responsibility are available to existing child pornography and child abuse material offences. Accordingly, they will all also be available in relation to the proposed new aggravated offence involving child pornography networks.

299. Under the existing procuring and grooming carriage service offences, only attempt is excluded from applying. This is appropriate given the procuring and grooming offences are already preparatory type crimes, committed in preparation of actual sexual abuse. The remaining extensions apply (complicity and common purpose, innocent agency, incitement and conspiracy).

300. It is proposed that all of the available extensions of criminal responsibility apply to the new indecent communications and sexual activity offences. Given these are not offences directed at preliminary type conduct like the procuring and grooming offences, it is appropriate to apply attempt to the proposed new offences.

Alternative verdicts

301. It is proposed to insert a provision into the child sex tourism offence regime applying to the aggravated offences providing that the trier of fact may, if not satisfied that the defendant is guilty of a particular offence, but is satisfied beyond reasonable doubt that the defendant is guilty of another offence within the child sex tourism offence regime, find the defendant not guilty of the prosecuted offence but guilty of the alternative offence.

Defences

302. In relation to the existing child pornography and child abuse material carriage service offences, the general defences in Part 2.3 of the Criminal Code apply. However, additional defences are also made available (see sections 474.21 and 474.24). These include where a person was acting in the public benefit, for example, their conduct was necessary for enforcing the law or conducting approved scientific, medical or educational research. Other defences cover persons acting in an official law enforcement, intelligence, security or regulatory capacity.

303. Defences to existing carriage service sexual activity offences operate in the same way as described for the child sex tourism offences in the common elements section of Part 3. The child sex carriage service offences are also subject to the general defences set out in Part 2.3 of the Criminal Code. However, these defences are not available in relation to specific elements of the carriage service child sex offences.

304. Absolute liability applies to the age related circumstances of the existing procuring and grooming offences ie that the child is under 16, or that another person involved is over 18. However, a belief about age defence is made available to defendants. It is proposed that this defence also be made available for the new indecent communications and sexual activity carriage service offences.

305. To rely on the defence, the defendant would need to establish that he or she believed that the recipient of the indecent material, or the person with whom he or she engaged in sexual activity, was not under 16 years of age. Reflecting the proposed change to the defence regarding burden of proof detailed above in paragraphs 269 to 271, the defendant would carry a legal burden in relation to the defence. In determining whether the defendant held the belief, the jury would be able to take into account whether the alleged belief was reasonable in the circumstances.

PART 5: NEW OVERSEAS CHILD PORNOGRAPHY AND CHILD ABUSE MATERIAL OFFENCES

Background

306. Australia is not immune from problems with child pornography and child abuse material. In 2004, as a result of Operation Auxin – a joint AFP and State police operation – 191 Australians were arrested and charged with child pornography offences. In June this year, Operation Centurion – an Interpol investigation involving 170 countries – led to more than 100 Australians being charged with accessing child pornography online. The AFP continues to work closely with its international partners to combat the sexual exploitation of children across the globe.

307. As described in Part 1, there are Commonwealth, State and Territory offences in place to address dealing in child pornography and child abuse material within Australia and through the Internet.

308. However, unlike the child sex tourism offences, existing child pornography and child abuse material offences do not travel with Australians wherever they go. Similar to the situation for child sex tourism, many countries do not have effective laws against child pornography and child abuse material, or are unwilling or unable to enforce them. This means that an Australian could travel overseas and make or purchase child pornography or child abuse material and escape punishment, even though the very same behaviour, if committed at home or through the Internet, would be a serious criminal offence.

309. It has been recognised that one source of child pornography distribution worldwide is child sex tourists.⁵⁴ Involvement in dealings in child pornography and child abuse material can be intimately connected with the behaviour captured by the child sex tourism offence regime.

310. A recent review of international and national laws to combat the sexual exploitation of children noted that criminalising both the extraterritorial production of sexually explicit images of children, and child sex tourism, is particularly important, as recent experience suggests that the two crimes are often related.⁵⁵ The likely links between child pornography and the sexual exploitation of children can be summarised in three main points.

311. Firstly, the creation, distribution and possession of child pornography and child abuse material fuels demand, and increases the market for the sexual and other exploitation of children. The production of child pornography requires a child to be victimised: sexual and other offences are often committed against real children in order to create photographic and video images of child pornography and child abuse activity.⁵⁶ Creators of child pornography may travel overseas in order to exploit children in countries where there are inadequate child sex-related offences.

312. Secondly, there are links between the possession of child pornography and the commission of sexual offences against children. It is not necessarily the case that every person in possession of child pornography is also involved in sexually abusing children. There is also a lack of empirical research in this area. However, there is widespread support for the view that it is likely that the two may be connected.⁵⁷

⁵⁴ Theme Paper, *Child Pornography: An International Perspective*, First World Congress against Commercial Sexual Exploitation of Children, Stockholm, Sweden, 1996, part 4.

⁵⁵ Theme Paper 2, *Legal Frameworks and Enforcement*, Fully revised draft October 12 2008, Third World Congress Against Sexual Exploitation of Children, Rio de Janeiro, Brazil, 2008, p 50.

⁵⁶ K Lanning, *Child Molesters: A Behavioural Analysis*, 1992, p 25.

⁵⁷ K Lanning *Child Molesters: A Behavioural Analysis*. C O'Connor and V Petraitis, 'Investigating Paedophiles' (1999) 53(4) *Australian Police Journal*, p 225. A.B. Patterson, 'Child Pornography in an Australian Context – The Problem, the Legislation and the Offenders' (2004) 58(4) *Australian Police Journal* 58(4), p 183. Theme Paper, *Child Pornography: An International Perspective*, First World Congress against Commercial Sexual Exploitation of

313. The experience of law enforcement agents is that, in a significant number of cases, arrested child molesters are also in possession of child pornography. On the basis that possession of child pornography may be an indicator that a person is also committing sexual offences against children, investigative strategies can be adopted where following the train of child pornography can be an effective method of uncovering child sexual abuse.⁵⁸ As a result, the investigation of dealings in child pornography outside Australia can also lead to evidence of offences of sexual activity with children (either committed within or outside Australia).

314. Thirdly, child pornography material can itself be used to perpetuate the sexual exploitation of children.⁵⁹ Child pornography can be used to stimulate offenders, to fuel their fantasies and legitimise their sexual deviancy. Offenders also use such material to lower a child's inhibitions to assist in the seduction of a child and encourage a reluctant child to freely participate. Pictorial records of the offending can also be used to blackmail the child to keep silent about the activity.

315. The following case studies illustrate the connection between child pornography and the commission of sexual offences against children, such as child sex tourism offences.

***R v Wicks* [2005] NSWCCA 409**

The defendant was initially identified as being involved in child pornography through Operation Auxin. Search warrants executed on the defendant's home uncovered images of child pornography as well as documents indicating that the defendant had travelled to Thailand in 2003. While in Thailand, the defendant had paid young boys to engage in sexual activities with him, and induced them to engage in sexual activities with each other. There was evidence that he had travelled to Thailand for that specific purpose. The defendant had video taped his activities with the boys and expert evidence established that the age of the boys varied between 12 and 15 years of age.

The defendant was convicted of child sex tourism offences under the Crimes Act. In particular, the defendant was sentenced to five years imprisonment for having sexual intercourse with a child (contrary to section 50BA of the Crimes Act), five years imprisonment for inducing a child to engage in sexual intercourse (contrary to section 50BB of the Crimes Act) and three years imprisonment for inducing a child to engage in sexual conduct (contrary to section 50BD of the Crimes Act), to be served concurrently.

***R v Holmes*, unreported, New South Wales District Court – 19 May 2006**

The defendant was one of the first people prosecuted under section 474.27 of the Criminal Code for using a carriage service to groom a child for sexual activity. The defendant was also convicted of offences for dealing in child pornography. Following intelligence about an online paedophile network, police intercepted an email from the defendant's email address which contained images of child pornography. A search warrant executed on the defendant's home uncovered images of child pornography. Evidence, obtained from the defendant's computer, also revealed 'chat logs' (logs of written communications conducted over the Internet) that were of a sexually explicit nature with a person that the defendant believed was an 11 year old girl living in the UK. The chat logs also revealed that the defendant had attempted to meet up with the girl in London.

The defendant pleaded guilty to, and was convicted of, child sex-related offences under the Criminal Code. In particular, the defendant was sentenced to one year and eight months for possessing child pornography, two years imprisonment for using a carriage service to transmit pornography, a four year good behaviour bond for importing child pornography, and two years and nine months imprisonment for grooming.

Children, part 6. Theme Paper, *Child Pornography and Sexual Exploitation of Children Online*, Third World Congress Against Sexual Exploitation of Children, part 2.6.

⁵⁸ Parliamentary Joint Committee on the National Crime Authority, *Organised Criminal Paedophile Activity*, 1995, Parliament of the Commonwealth of Australia, paragraph 3.44.

⁵⁹ Theme Paper, *Child Pornography: An International Perspective*, First World Congress against Commercial Sexual Exploitation of Children, part 5, Parliamentary Joint Committee on the National Crime Authority, *Organised Criminal Paedophile Activity*, paragraph 3.46.

316. Article 3 of the Optional Protocol to the CRC requires that State parties criminalise ‘producing, distributing, disseminating, importing, exporting, offering, selling or possessing ... child pornography.’ The Optional Protocol also requires that State parties take such measures as may be necessary to establish its jurisdiction over these offences when the alleged offender is a national of that State. Criminalising such activity by Australians overseas would be consistent with Australia’s obligations under the Optional Protocol.

317. In addition to these international obligations, international practice supports the introduction of extraterritorial child pornography offences. Canada, NZ and the UK all have extraterritorial offences for the possession, production and distribution of child pornography material by its citizens outside of its territory (see **Table 6** in the **Appendix**).

Proposal

318. It is proposed to introduce new Commonwealth offences into the Criminal Code to criminalise dealing in child pornography and child abuse material overseas. The proposed new offences will complement the child sex tourism offence regime and result in the comprehensive coverage of child sex-related criminal behaviour by Australians overseas.

319. It is proposed that the new overseas child pornography offences would target Australians who possess, control, produce, distribute or obtain child pornography or child abuse material overseas. They would also include aggravated offences targeted at involvement in child pornography networks, reflecting the domestic offence it is proposed be enacted (see paragraphs 249 to 258).

320. The proposed new offences would have extraterritorial jurisdiction and apply to conduct committed outside Australia by a person who is an Australian citizen or resident, or by a body corporate that is incorporated by or under Australian law or that carries on its activities principally in Australia.

321. The proposed new offences would rely on the existing definitions of child pornography and child abuse material in sections 473.1 and 472.4 of the Criminal Code.

322. The maximum penalty for the new offences of dealing in child pornography and child abuse material overseas would be 15 years imprisonment. This will be consistent with existing Commonwealth offences for using a carriage service for child pornography and child abuse material (sections 474.19 and 474.22 of the Criminal Code) as amended by the proposed reforms. The maximum penalty for the aggravated offences involving child pornography networks would be 25 years imprisonment. This is consistent with the penalty for the proposed new domestic offence.

323. Absolute liability would apply to the circumstance of the offence that the relevant conduct occurred outside Australia. This is appropriate given this is a jurisdictional element rather than an element going to the essence of the offence.

324. It would be a defence to the new offences of dealing in child pornography and child abuse material overseas if the person was acting in the public benefit, for example, their conduct was necessary for enforcing the law or conducting approved scientific, medical or educational research. Other defences could cover persons acting in an official law enforcement, intelligence, security or regulatory capacity.

325. These defences would be modelled on the defences to existing Commonwealth offences for using a carriage service for child pornography and child abuse material (sections 474.21 and 474.24 of the Criminal Code).

PART 6: NEW CHILD SEX-RELATED POSTAL SERVICE OFFENCE REGIME

Background

326. The Commonwealth also has responsibility for offences relating to the use of postal services. Division 471 of the Criminal Code sets out the postal service offence regime. The offence regime applies to the use of a postal or similar service, which is defined at section 470.1 to include the traditional post, courier services and any other like service.

327. As with the carriage service offence regime (in Divisions 473 and 474 of the Criminal Code), there is a general offence of using a postal or similar service to menace, harass or cause offence (section 471.12 of the Criminal Code). This offence is intended to capture a broad range of activity and carries a maximum penalty of two years imprisonment.

328. Unlike the carriage service offence regime, however, there are no specific offences for the use of the post for child pornography or child abuse material, or other child sex-related purposes. While such behaviour would be captured by the existing general offence described above, the offender would only be subject to a maximum penalty of two years imprisonment. This is considered anomalous as a person engaging in such conduct using a carriage service would, depending on the activity, be subject to a maximum penalty of between 10 and 15 years imprisonment.

329. In 2007, Senator the Hon Joe Ludwig introduced a Private Member's Bill⁶⁰ which sought to introduce specific offences for using a postal service for sending child pornography and child abuse material, with maximum penalties of 10 years imprisonment. The purpose of the Bill was to ensure consistent treatment of dealings in child pornography and child abuse material whether using the Internet or the post.

330. Given the Commonwealth is responsible for offences relating to postal services, there are no State and Territory precedents in this area. Internationally, Canada, NZ and the UK all have general offences of using the post for indecent material comparable to Australia's offence in section 471.12 described above (see **Table 15** in the **Appendix**). Neither Canada, NZ nor the UK have specific child sex-related postal offences.

331. Despite the advantages which the advent of the Internet has brought child sex offenders, there is evidence that dealings in customary forms of child pornography are still common. Commentary prepared for the Second World Congress in 2001 stated that, according to reports by the US Customs and Postal Inspection Service, 'much of the child pornography it seizes still contains or is linked to home-made videos and many pornographers continue to rely heavily on the postal services to exchange video tapes and computer disks.'⁶¹

Proposal

332. It is proposed to introduce a comprehensive offence regime criminalising using a postal or similar service for child sex-related activity, building on those measures proposed in Senator Ludwig's Private Member's Bill. The proposed offences and penalties would mirror relevant carriage service offences (as amended by the proposed reforms). This would ensure that child sex-related activity is criminalised consistently, regardless of the means through which it is committed (eg through the Internet or the post).

⁶⁰ Criminal Code Amendment (Anti-Child Abuse and Pornography Materials) Bill 2007.

⁶¹ Theme Paper, *Child Pornography*, Second World Congress Against Sexual Exploitation of Children and Adolescents, Yokohama, Japan, 2001, p 18.

333. The proposed suite of child sex-related postal offences, and proposed maximum penalties for each offence, is set out below. The maximum penalties reflect penalties for comparable carriage service offences, as amended by the proposals.

a	using a postal or similar service for child pornography material	15 years imprisonment
b	possessing, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service	15 years imprisonment
c	using a postal or similar service for child abuse material	15 years imprisonment
d	possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service	15 years imprisonment
e	aggravated child pornography or abuse material postal service offences involving child pornography networks	25 years imprisonment
f	using a postal or similar service to send indecent material to a child (who is or the offender believes to be, under 16 years of age)	7 years imprisonment
g	using a postal or similar service to groom a child (who is or the offender believes to be, under 16 years of age)	12 years imprisonment
h	using a postal or similar service to procure a child (who is or the offender believes to be, under 16 years of age) for sexual activity	15 years imprisonment

334. For the offences at (a) to (e), directed at child pornography and child abuse material, a defence would apply where the conduct is of public benefit. This includes situations where the conduct is necessary for enforcing, or monitoring compliance with, a Commonwealth, State or Territory law, for the administration of justice, or for conducting scientific, medical or educational research approved by the Minister. A defence would also apply for law enforcement, intelligence or security officers acting in the course of duty. This is consistent with existing Commonwealth offences for using a carriage service for child pornography and child abuse material carriage (sections 474.21 and 474.24 of the Criminal Code).

335. For the offences at (f) to (h) which involve conduct relating to a child (eg sending indecent material, grooming or procuring a child), absolute liability would apply to the circumstances of the offences relating to the age of the child (eg that the child is under 16 years of age).

336. Absolute liability is defined in section 6.2 of the Criminal Code. This means that the prosecution would need to establish age beyond reasonable doubt, but would not have to establish that the offender knew the age of the child or third party (or was reckless or negligent to that fact). The imposition of absolute liability is considered appropriate given the intended deterrent effect of the child sex-related offences and that a specific ‘belief about age’ defence that would be available to the proposed new offences for using a postal service for child sex-related activity (see paragraph 202).

337. In determining how old a person is or was at a particular time, a jury or court will be able to consider, among other things: the person’s appearance, medical or other scientific opinion, a document that is or appears to be an official or medical record from a country outside Australia, and a document that is or appears to be a copy of such a record. Evidence that the victim was represented to the offender as being under or of a particular age would be, in the absence of the contrary, proof that the offender believed the victim to be under or of that age.

338. The proposed new grooming and procuring offences would also apply where the offender believes that the child is under 16 years of age, and it would not matter that the 'child' is in fact a fictitious person represented to the offender as a real child. This is to enable law enforcement to conduct covert investigations by assuming the identity of a 'child,' interacting with potential predatory adults, and arresting the offender before they have an opportunity to sexually abuse a real child.

339. The approach to the issues described above is consistent with existing and proposed new Commonwealth offences for using a carriage service for child sex-related activity.

340. The offences at (f) to (h) would also be subject to a 'belief about age defence.' To rely on the defence, the defendant must establish that he or she believed that the person to whom he or she sent indecent material, or was grooming or procuring for sexual activity, was not under 16 years of age. The defendant would carry an evidential burden in relation to the defence. The 'belief about age' defence is available to ameliorate the dramatic effect of applying absolute liability to the circumstance of the offences that the child was under 16 years of age. In determining whether the defendant held the belief, the jury would be able to take into account whether the alleged belief was reasonable in the circumstances. This is consistent with existing and proposed new Commonwealth offences for using a carriage service for child sex-related activity.

PART 7: FORFEITURE OF CHILD PORNOGRAPHY AND CHILD ABUSE MATERIAL

Background

341. In the course of investigations, law enforcement agencies may seize child pornography and child abuse material in forms such as photos or DVDs, or computers or other electronic equipment containing such material. It is important to ensure that law enforcement agencies are able to deal appropriately with such material or equipment, regardless of whether criminal proceedings subsequently occur.

342. Currently, there is no specific Commonwealth scheme for the forfeiture of child pornography or child abuse material, or equipment containing such material, seized during an investigation into a Commonwealth criminal offence. The existing remedies available to law enforcement in relation to seized child pornography and child abuse material in relation to three possible scenarios are set out in **Table 16**.

Table 16 – Available Commonwealth remedies for seized child pornography and child abuse material

Scenario	Available remedy
No prosecution is commenced, eg due to insufficient evidence.	Material or equipment containing such material must be returned to the owner.
A prosecution is commenced but the person is acquitted.	Material or equipment containing such material must be returned to the owner.
A prosecution is commenced and person is convicted.	Application for the forfeiture of the material under the <i>Proceeds of Crime Act 2002</i> .

343. In cases where no person is convicted of an offence (either because no prosecution is commenced or a prosecution is commenced but results in an acquittal) the seized items must be returned. The return of child pornography and child abuse material or items containing such material is inappropriate, and risks the owner being subject to State and Territory possession of child pornography offences.

344. In cases where a conviction for an offence is obtained, application must be made for the forfeiture of the material under the *Proceeds of Crime Act 2002*. This is a lengthy process and one ill-suited for dealing with child pornography and child abuse material.

345. Several States and Territories have specific schemes for the forfeiture of child pornography and child abuse material. Others have general forfeiture schemes applicable to all offences contained in the relevant Act. Overseas jurisdictions also have provisions which allow for the forfeiture of such material. See **Table 17** below and detailed **Table 17.1** in the Appendix for comparable State, Territory and international forfeiture schemes.

Table 17 – State, Territory and international forfeiture schemes

	Post-conviction	Acquittal	On application to court
NSW	x	x	x
VIC	✓	✓	✓
QLD	✓	✓	x
WA	✓	x	✓
SA	x	x	x
TAS	✓	✓	x
ACT	x	x	x
NT	✓	x	x
CAN	✓	x	✓
NZ	✓	x	x
UK	✓	x	✓

346. Existing State, Territory and international forfeiture schemes fall into three broad categories. The first type of scheme in Table 17 (post-conviction) allows for an order by the court for the forfeiture of child pornography and child abuse material following a conviction of a person for a relevant child sex offence. The second type of scheme (acquittal) allows for an order by the court for the forfeiture of child pornography and child abuse material where a prosecution for an offence is commenced but the defendant is acquitted. The third type of scheme (on application to court) allows for the application to the Court for the forfeiture of seized material as a distinct action, separate to any prosecution which may or may not have occurred. The availability of one, two or all three types of forfeiture varies between comparable State, Territory and international schemes.

347. The third category (on application to the court) addresses situations for example where a prosecution has not commenced. This may be due to a lack of evidence against any particular person, or where the owner’s involvement is innocent. For example, the owner may run an Internet café, in which an unidentified customer has used a computer to download child pornography, and the computer is subsequently seized by law enforcement agents.

348. In all three categories, once forfeited, the material, or equipment containing such material, becomes the property of the Crown.

Proposal

349. It is proposed to provide for a specific scheme in the Crimes Act for the forfeiture of child pornography and child abuse material, or articles containing such material, lawfully seized during investigations into Commonwealth offences. Such items would become the property of the Commonwealth.

350. The proposed scheme would apply to an article containing the offensive material (such as a computer), as well as to the material itself. It is important that computers or other data storage devices containing the material are forfeited, as it may be possible to continue to recover material even after it has been deleted from the device.

351. The scheme would allow for the forfeiture of material or articles containing material via a notice scheme administered by the Australian Federal Police (AFP), or by the court in the case of a dispute.

352. The scheme would apply to all child pornography or abuse material, or articles containing such material, lawfully seized by the AFP. That is, material or articles seized on the basis that an AFP officer believes on reasonable grounds to be evidential material in relation to an offence.

353. If the offence to which the material relates is a Commonwealth child sex offence, the AFP would have the power to issue a notice for the forfeiture of the material or article.

354. 'Commonwealth child sex offence' would be defined to include the child sex tourism offence regime and offences for using a carriage service for child sex-related activity (as amended by the proposed reforms), the proposed new offences for using a postal service for child sex-related activity, and the proposed new offences of dealing in child pornography or child abuse material overseas.

355. The notice scheme would involve the following process.

(i) Issue of a notice

Following the lawful seizure of child pornography or abuse material, or articles containing such material, an AFP officer may issue a forfeiture notice to the owner or person in possession of the material or article.

The notice must be served on the owner of the material or article, or, if the owner cannot be identified after reasonable inquiry, on the person in whose possession or under whose control the material or article was at the time of seizure.

(ii) Content of the notice

The notice must be in writing and must:

- identify the material or article containing the material which has been seized
- state that the issuing officer has reasonable grounds to believe that the material or article was used in or connected with the commission of a Commonwealth child sex offence
- state that the material or article will be forfeited to the Crown unless the owner of the thing or the person who had possession or control of the thing objects to the forfeiture and notifies the AFP within 30 days
- state that if the person does not object to the forfeiture of the material or article, but wishes to request copies of any lawful material contained within the material or article, the person must notify the AFP within 30 days
- state that if the person does not object to the forfeiture of the material or article, but wishes to claim reasonable compensation for the cost of replacing any electronic equipment or data storage device, the person must notify the AFP within 30 days, and
- state that the recipient must notify the AFP of any other persons who may be the rightful owner or who may have a claim over the material or article.

(iii) Forfeiture if no claim is made

If no claim for the goods is received within the specified time frame, the goods will be taken to be forfeited to the Crown and may be destroyed or otherwise dealt with by the AFP in any manner which the AFP thinks fit. This would include the retention of the material or article:

- as long as it is required for evidential purposes, or
- for research, intelligence, training or victim identification purposes.

(iv) Dealing with a claim

If there is an objection to the forfeiture of the item or material, and the matter cannot be resolved between the parties, the matter should be resolved by the court on application by a constable or prosecutor. See paragraphs 357 to 363 below for further detail on forfeiture by the court.

If there is no objection to the forfeiture of the material or item, but the person requests copies of legitimate material, the AFP must provide copies of any lawful material to the person to the extent that it is reasonably practicable to do so.

356. A provision will be included in the scheme stating that an objection, or lack of an objection, to a forfeiture notice should not be taken to be an admission by that person of any liability in relation to an offence, and cannot be used as evidence against the person in proceedings for an offence.

357. Disputed forfeiture proceedings must be dealt with by the court. The court would be able to make a forfeiture order in relation to child pornography or child abuse material (or articles containing such material) in one of two instances:

1. following a conviction of a person for committing a Commonwealth child sex offence, or
2. on application to the court by a constable or prosecutor where the court finds on the balance of probabilities that a Commonwealth child sex offence has been committed

where the material or article was used in the commission of the offence.

358. The first instance would apply where a court has convicted a person of a Commonwealth child sex offence (or has made an order under section 19B of the Crimes Act in relation to a person charged with such an offence). The court would be required to order the forfeiture of any child pornography or child abuse material (within the meaning of sections 473.1 and 473.4 of the Criminal Code), or articles containing such material, involved in the commission of the offence.

359. Under the second instance, the court would need to make a finding of whether, on the balance of probabilities, a Commonwealth child sex offence has been committed, even though no one has been found guilty of a particular offence. In determining whether an offence has been committed on the balance of probabilities, a court would not be making a finding against any person, but rather determining that the material in question should be forfeited.

360. Following the making of such a finding, the court would be required to order the forfeiture of any child pornography or child abuse material (within the meaning of sections 473.1 and 473.4 of the Criminal Code), or articles containing such material, involved in the commission of the offence.

361. A prosecutor who makes an application to the court for the forfeiture of material or articles must give written notice of the application to any person who claims ownership of, or right of custody or control over, the material or article, or any person who the applicant reasonably believes may have ownership of, or right of custody or control over, the material or article. A court may still make a forfeiture order if a person who is given notice fails to appear at the hearing of the application.

362. In both instances, the court would be able to make an order that the material or items containing such material be forfeited to the Crown and may be destroyed or dealt with by the AFP in any manner which the AFP thinks fit. This would include the retention of the material for as long as it is required for evidential, research, intelligence, training or victim identification purposes.

363. The court would also be able to make any interim orders that it considers appropriate, pending the decision of the court on the application.

Compensation

364. To ensure that there are adequate safeguards for innocent owners, provision would be made in the scheme for compensation relating to forfeited articles. If there is no objection to the forfeiture of the material or item, but the article is electronic equipment, such as a computer or other data storage device and the person claims compensation, the Commonwealth would be liable to pay the owner or any other party entitled to compensation the reasonable cost of replacing the equipment.

365. If this matter cannot be resolved between the parties, the matter should be resolved by the court on application by a constable or prosecutor. The owner or any other person in possession or control of the material or article must be notified in writing by the constable or prosecutor of any application to the court.

366. Certain persons will be precluded from compensation, including where the person is:

- the subject of the investigation or prosecution in relation to a Commonwealth child sex offence
- the person who has been found guilty of committing a child sex offence, or
- a person whom the court found, on the balance of probabilities, to have committed a Commonwealth child sex offence.

PART 8: MINOR AMENDMENTS TO ENSURE AVAILABILITY OF EXISTING LAW ENFORCEMENT POWERS

367. Existing child sex-related offences are referred to in a number of Acts in order to allow the exercise of certain law enforcement powers for the investigation of such offences. Minor technical amendments will be required to replace references to existing child sex tourism and other child sex-related offence provisions (as amended by the proposed reforms). This will ensure that law enforcement agencies are able to use the existing powers for relevant Commonwealth child sex-related offences.

Australian Crime Commission Act 2002

368. The *Australian Crime Commission Act 2002* (the ACC Act) enables the Australian Crime Commission (the ACC) to conduct intelligence operations or investigations into 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 investigation. Paragraph 4(1)(d) of the definition of ‘serious and organised crime’ allows offences to be added to that list by regulation.

369. In 2006, the existing Commonwealth offences for using a carriage service for child sex-related activity were added to the definition of serious and organised crime by the *Australian Crime Commission Regulations 2006 (No 4)* (the 2006 Regulations). Since this time, the ACC has been able to conduct intelligence operations or investigations into networks of people using a carriage service to exchange child pornography or child abuse material, or to procure or groom children for sexual activity.

370. Amendments are proposed to expressly include the child sex-related carriage service offences (including the proposed new carriage service offences) in the definition of serious and organised crime in subsection 4(1) of the ACC Act. This would ensure that the changes already made by the 2006 Regulations are expressly enshrined in the ACC Act itself. Amendments are also proposed to include the proposed new child sex-related postal offences in the definition in subsection 4(1) of the ACC Act, to allow the ACC to exercise the same functions in relation to child sex-related postal offences as for the child sex-related carriage service offences.

Surveillance Devices Act 2004

371. Under the *Surveillance Devices Act 2004* (the SD Act), an emergency authorisation for the use of a surveillance device can be made where there is a risk of loss of evidence in relation to certain offences. Currently, the existing child sex tourism offences in Part IIIA of the Crimes Act are listed as offences for which this can occur.

372. It is proposed to amend the SD Act to replace references to the current child sex tourism provisions in the Crimes Act with references to the proposed new child sex tourism offences in the Criminal Code. It is also proposed to insert references to the proposed new Criminal Code overseas child pornography and child abuse material offences, to allow the making of emergency authorisations in relation to these proposed new offences.

Telecommunications (Interception and Access) Act 1979

373. Under the *Telecommunications (Interception and Access) Act 1979* (the TIA Act), telecommunications interception (TI) warrants may only be issued to further the investigation of a serious offence. What constitutes a ‘serious offence’ is defined in section 5D of the TIA Act. Section 5D currently contains references to the existing Commonwealth offences for using a carriage service for child sex-related activity (subsection 5D(2A)), the existing child sex tourism offences in the Crimes Act (subsection 5D(3)(d)(xi)) and offences relating to child pornography (subsection 5D(3B)). Two changes are proposed to section 5D.

374. First, it is proposed to replace existing references with references to the proposed new provisions to ensure that the:

- new offences for indecent communications with a child and using a carriage service for sexual activity with a child are included
- reference to child sex tourism offences in the Crimes Act is replaced with references to the child sex tourism provisions in the Criminal Code, and
- new offences of using a postal service for child sex-related activity are included.

375. Second, under subsection 5D(3) of the TIA Act, a TI warrant is only available for the investigation of a child sex tourism offence where the offence involves, among other things, two or more offenders and substantial planning and organisation. It is proposed to remove this additional requirement, by including a standalone reference to the child sex tourism provisions in a separate subsection under section 5D. This is consistent with other Commonwealth child sex offences currently listed under section 5D. This would ensure that law enforcement has the same investigative tools available for investigating child sex tourism offences as are available for investigating other Commonwealth child sex-related offences. It also reflects the significantly serious nature of child sex tourism offences, which warrant the use of covert powers whether they are perpetrated by single or multiple offenders.

APPENDIX

Table 2.1 – State and Territory sexual intercourse / sexual conduct offences

	Legislation	Sexual intercourse			Sexual conduct		
		Section	Penalty*		Section	Penalty*	
			Type 1^	Type 2#		Type 1^	Type 2#
NSW	<i>Crimes Act 1900</i>	66A – 66D	25	10 – 16	61N	2	2
VIC	<i>Crimes Act 1958</i>	45	25	10	47	10	10
QLD	<i>Criminal Code Act 1899</i>	215	life	14	210	20	14
WA	<i>Criminal Code</i>	320, 321	20	14	320, 321	10	7
SA	<i>Criminal Law Consolidation Act 1935</i>	49	life	10	58	3-5	3 – 5
TAS	<i>Criminal Code Act 1924</i>	124	21	21	125B	21	21
ACT	<i>Crimes Act 1900</i>	55	17	14	61	12	10
NT	<i>Criminal Code Act</i>	127	25	16	127	25	16

* Maximum years imprisonment.

^ Generally where child victim under 10-12 years of age

Where child victim under 16/17.

Table 2.2 – State and Territory grooming and procuring offences

	Legislation	Grooming		Procuring	
		Section	Penalty*	Section	Penalty*
NSW	<i>Crimes Act 1900</i>	66EB(3)	10 – 12	66EB(2)	12 – 15
VIC	<i>Crimes Act 1958</i>	Nil	Nil	58	10
QLD	<i>Criminal Code Act 1899</i>	Nil	Nil	210, 217	14 – 20
				218A(1)(a)**	5 – 10
WA	<i>Criminal Code</i>	Nil	Nil	320, 321	7– 20
				204B**	5 – 10
SA	<i>Criminal Law Consolidation Act 1935</i>	63B(3)	10 – 12	63B(3)	10 – 12
TAS	<i>Criminal Code Act 1924</i>	125D(1)	21	125C	21
ACT	<i>Crimes Act 1900</i>	Nil	Nil	66**	5 – 10
NT	<i>Criminal Code Act</i>	Nil	Nil	132	10 – 14

* Maximum years imprisonment.

** Specific Internet offence.

Table 2.3 – State and Territory offences for exposing a child to indecent material[†]

	Legislation	Exposing a child to indecent material	
		Section	Penalty*
NSW	<i>Crimes Act 1900</i>	Nil	N/A
VIC	<i>Crimes Act 1958</i>	Nil	N/A
QLD	<i>Criminal Code Act 1899</i>	210(1)(e)	14 – 20
		218A(1)(b)**	5 – 10
WA	<i>Criminal Code</i>	204B**	5 – 10
SA	<i>Criminal Law Consolidation Act 1935</i>	Nil	N/A
TAS	<i>Criminal Code Act 1924</i>	125D(3)	21
ACT	<i>Crimes Act 1900</i>	66(2)**	5
NT	<i>Criminal Code Act</i>	132(2)(e)	10 – 14

* Maximum years imprisonment.

** Specific Internet offence.

Table 2.4 – State and Territory child prostitution offences

	Legislation	Causing, inducing or allowing a child to take part in prostitution		Obtaining benefit from child prostitution		Entering into an agreement for provision of child prostitution		Deceptive recruiting of a child for commercial sexual services*	
		Section	Penalty*	Section	Penalty*	Section	Penalty*	Section	Penalty*
NSW	<i>Crimes Act 1900</i>	91D	10/14	91E	10/14	Nil	N/A	Nil	N/A
VIC	<i>Prostitution Control Act 1994</i>	5	10	6	15	7	15	Nil	N/A
QLD	<i>Criminal Code Act 1899</i>	229G	14	229H	3/5/7	Nil	N/A	Nil	N/A
WA	<i>Prostitution Act 2000</i>	16	14	17	14	18	14	Nil	N/A
	<i>Criminal Code Act 1913</i>	Nil	N/A	Nil	N/A	Nil	N/A	331	20
SA	<i>Criminal Law Consolidation Act 1935</i>	68	9/life	68	2/5	68	2/5	67	12
TAS	<i>Criminal Code Act 1924</i>	9(1)	15	9(2)	15	Nil	N/A	Nil	N/A
ACT	<i>Prostitution Act 1992</i>	20	10/15	21	7	Nil	N/A	Nil	N/A
	<i>Crimes Act 1900</i>	Nil	N/A	Nil	N/A	Nil	N/A	81	9
NT	<i>Prostitution Regulation Act</i>	13, 14	7/14	15	7/14	16	7/14	Nil	N/A
	<i>Criminal Code Act</i>	Nil	N/A	Nil	N/A	Nil	N/A	202D	15

* Maximum years imprisonment. Penalties differ according to the age of the child.

Table 3.1 – State and Territory child pornography and child abuse material

	Legislation	Possession		Production		Sale/distribution	
		Section	Penalty*	Section	Penalty*	Section	Penalty*
NSW	<i>Crimes Act 1900</i>	91H	10	91H	10	91H	10
VIC	<i>Crimes Act 1958</i>	70	5	68	10	Nil	Nil
QLD	<i>Criminal Code Act 1899</i>	228D	5	228B	10	228C	10
WA	<i>Classification (Publications, Films & Computer Games) Enforcement Act</i>	60(4)	5	Nil	Nil	60(1)	5 – 7
	<i>Criminal Code</i>	Nil	Nil	320(6), 321(6)	4 – 10	Nil	Nil
SA	<i>Criminal Law Consolidation Act 1935</i>	63A	5 – 10	639(a)	10 – 12	63(b)	10 – 12
TAS	<i>Criminal Code Act 1924</i>	130C	21	130, 130A	21	130B	21
ACT	<i>Crimes Act 1900</i>	65	5	64A	12	64A	12
NT	<i>Criminal Code Act</i>	125B	10	125B	10	125B	10

* Maximum years imprisonment.

Table 4.1 – International sexual intercourse and sexual conduct offences

	Legislation	Sexual intercourse			Sexual conduct		
		Section	Penalty*		Section	Penalty*	
			Type 1^	Type 2#		Type 1^	Type 2#
CAN	<i>Criminal Code 1985</i>	151	-	10	151	-	10
NZ	<i>Crimes Act 1961</i>	132, 134	14	10	132, 134	10	7
UK	<i>Sexual Offences Act 2003</i>	5, 6, 8, 9, 10	Life	14	7, 11, 12	14	10

* Maximum years imprisonment.

^ Generally where child victim under 10-13 years of age.

Where the child victim under 16.

Table 4.2 – International grooming and procuring and exposing to indecent material offences

	Legislation	Offences directed at grooming and/or procuring		Indecent material	
		Section	Penalty*	Section	Penalty*
CAN	<i>Criminal Code 1985</i>	152, 172.1#	10	Nil	N/A
NZ	<i>Crimes Act 1961</i>	131B	7	Nil	N/A
	<i>Films, Videos and Publications Classification Act 1993</i>	Nil	N/A	127	10
UK	<i>Sexual Offences Act 2003</i>	15	10	Nil	N/A

* Maximum years imprisonment.

Limited to grooming through the use of a computer.

Table 4.3 – International child prostitution offences

	Legislation	Causing, inducing or allowing a child to take part in prostitution		Obtaining benefit from child prostitution		Entering into an agreement for provision of child prostitution		Deceptive recruiting of a child for commercial sexual services	
		Section	Penalty*	Section	Penalty*	Section	Penalty*	Section	Penalty*
CAN	<i>Criminal Code 1985</i>	212	14	212	14	212	5	Nil	N/A
NZ	<i>Prostitution Reform Act 2003</i>	20	7	21	7	22	7	Nil	N/A
UK	<i>Sexual Offences Act 2003</i>	48,49,50	14	Nil	N/A	47	14/life	Nil	N/A

*Maximum years imprisonment.

Table 5.1 – International child pornography and child abuse material offences

	Legislation	Possession		Production		Sale/distribution	
		Section	Penalty*	Section	Penalty*	Section	Penalty*
CAN	<i>Criminal Code 1985</i>	163.1	5	163.1	10	163.1	10
NZ	<i>Films, Videos and Publications Classification Act 1993</i>	131A	5	124	10	124	10
UK	<i>Protection of Children Act 1978</i>	1	10	1	10	1	10
	<i>Criminal Justice Act 1988</i>	160	5	Nil	N/A	Nil	N/A
	<i>Sexual Offences Act 2003</i>	N/A	Nil	48,49,50	14	Nil	N/A

* Maximum years imprisonment.

Table 6 – International extra-territorial child sex-related offences

	Legislation	General extra-territorial provision	Specific offences prescribed under general offence	
CAN	<i>Criminal Code 1985</i>	7(4.1)	151, 152	sexual intercourse, conduct
			153, 155	position of trust, incest
			163.1	child pornography
			212(4)	child prostitution
NZ	<i>Crimes Act 1961</i>	144A	132(1), (2), 134(1), (2)	sexual intercourse
			132(3), 134(3)	sexual conduct
			23(1)	child prostitution (<i>Prostitution Reform Act 2003</i>)
		131B	Specific grooming/procuring offence of meeting a child following sexual grooming – applies to conduct anywhere.	
	144C	organising or promoting child sex tours		
	<i>Films, Videos, and Publications Classification Act 1993</i>	145A	124(1), 123	child pornography
127			showing objectionable material to a child	
UK	<i>Sexual Offences Act 2003</i>	72	5-15	sexual intercourse, conduct, grooming and procuring (including facilitation of these offences)
			16-29	position of trust, incest
			47-50	child prostitution and child pornography
			1	child pornography (<i>Protection of Children Act 1978</i>)

Table 7 – Commonwealth, State and Territory child sex offences by age

	Legislation	Sexual intercourse		Sexual conduct/act of indecency/indecent dealing	
		Age	Penalty*	Age	Penalty*
CTH	<i>Crimes Act 1914</i>	under 16	17	under 16	12
NSW	<i>Crimes Act 1900</i>	under 10	25	under 10	7**
		10 – under 14	16	under 16	2**
		14 – under 16	10		
VIC	<i>Crimes Act 1958</i>	under 10	25	under 16	10
		under 16	10		
QLD	<i>Criminal Code Act 1899</i>	under 12	life	under 12	20
		12 – under 16	14	12 – under 16	14
WA	<i>Criminal Code</i>	under 13	20	under 13	10
		13 – under 16	14	13 – under 16	7
SA	<i>Criminal Law Consolidation Act 1935</i>	under 14	life	under 14	10
		under 17	10	14+	8
				under 16	3 – 5#
TAS	<i>Criminal Code Act 1924</i>	under 17	21	under 17	21
ACT	<i>Crimes Act 1900</i>	under 10	17	under 10	12
		under 16	14	under 16	10
NT	<i>Criminal Code Act</i>	under 10	25^	under 10	14
		under 16	16^	under 16	10

* Maximum years imprisonment (basic offence, aggravated penalties not included)

** Applies for an act of indecency. Higher penalties apply for indecent assault (7 – 10 years)

Penalty for offence of gross indecency

^ Also applies for offence of gross indecency

Table 8.1 – State, Territory and international aggravated child sex offences – position of trust

	Legislation	Sexual intercourse		Sexual conduct	
		Section	Penalty*	Section	Penalty*
NSW	<i>Crimes Act 1900</i>	66C	12 – 20	61M	7
VIC	<i>Crimes Act 1958</i>	45	15	N/A**	N/A
QLD	<i>Criminal Code Act 1899</i>	215	Life	210	20
WA	<i>Criminal Code</i>	320, 321	20	320, 321	10
SA	<i>Criminal Law Consolidation Act 1935</i>	49	10	N/A**	N/A
TAS	<i>Criminal Code Act 1924</i>	Nil	N/A	Nil	N/A
ACT	<i>Crimes Act 1900</i>	Nil	N/A	Nil	N/A
NT	<i>Criminal Code Act</i>	127	20	127	20
CAN	<i>Criminal Code 1985</i>	Nil	N/A	Nil	N/A
NZ	<i>Crimes Act 1961</i>	Nil	N/A	Nil	N/A
UK	<i>Sexual Offences Act 2003</i>	Nil	N/A	Nil	N/A

* Maximum years imprisonment.

** Act provides for sexual conduct offence but not aggravated sexual conduct offence.

^ As they apply to children under 18, seem to be more directed at offences against children above age of consent but below 18. However do apply to children of any age.

Limited to a dependant family member.

Table 9.1 – State, Territory and international sex offences against persons with a disability

	Legislation	Sexual activity with a person with a cognitive impairment		Specific aggravated child sex offence where child victim has a cognitive impairment	
		Section	Penalty*	Section	Penalty*
NSW	<i>Crimes Act 1900</i>	66F	10	66A, 66C	12 – life**
VIC	<i>Crimes Act 1958</i>	51,52	10	Nil	N/A
QLD	<i>Criminal Code Act 1899</i>	216(1)	14	Nil	N/A
WA	<i>Criminal Code</i>	330(2)	14 (20^)	Nil	N/A
SA	<i>Criminal Law Consolidation Act 1935</i>	49(6)	10	Nil	N/A
TAS	<i>Criminal Code Act 1924</i>	126(1)	21	Nil	N/A
ACT	<i>Crimes Act 1900</i>	Nil	N/A	Nil	N/A
NT	<i>Criminal Code Act</i>	130	8 (20^^)	127(2)	20
CAN	<i>Criminal Code 1985</i>	153.1	5	Nil	N/A
NZ	<i>Crimes Act 1961</i>	138	5^^ - 10#	Nil	N/A
UK	<i>Sexual Offences Act 2003</i>	30-33	14^^ - life#	Nil	N/A

* Maximum years imprisonment

** Maximum penalty varies depending on age of child

^ Aggravated offence

^^ Sexual conduct

Sexual intercourse

Table 10.1 – State, Territory and international offences of persistent sexual abuse of a child

	Legislation	Section	Penalty*
NSW	<i>Crimes Act 1900</i>	66EA	25
VIC	<i>Crimes Act 1958</i>	47A	25
QLD	<i>Criminal Code Act 1899</i>	229B	life
WA	<i>Criminal Code</i>	321A	20
SA	<i>Criminal Law Consolidation Act 1935</i>	50	life
TAS	<i>Criminal Code Act 1924</i>	125A	21
ACT	<i>Crimes Act 1900</i>	56	7 – life**
NT	<i>Criminal Code Act</i>	131A	7 – life**
CAN	<i>Criminal Code 1985</i>	Nil	N/A
NZ	<i>Crimes Act 1961</i>	Nil	N/A
UK	<i>Sexual Offences Act 2003</i>	Nil	N/A

* Maximum years imprisonment.

** Penalty depends on the nature of the offence committed.

Table 11.1 – State, Territory and international position of trust offences applying to child under 18

	Legislation	Sexual activity with child under 18	
		Section	Penalty*
NSW	<i>Crimes Act 1900</i>	73	4 – 8
VIC	<i>Crimes Act 1958</i>	48	10
QLD	<i>Criminal Code Act 1899</i>	Nil	N/A
WA	<i>Criminal Code</i>	322	5 – 10
SA	<i>Criminal Law Consolidation Act 1935</i>	49	10
TAS	<i>Criminal Code Act 1924</i>	Nil	N/A
ACT	<i>Crimes Act 1900</i>	Nil	N/A
NT	<i>Criminal Code Act</i>	128	4 – 8
CAN	<i>Criminal Code 1985</i>	153	10
NZ	<i>Crimes Act 1961</i>	131	3 – 7
UK	<i>Sexual Offences Act 2003</i>	16-19	5

* Maximum years imprisonment.

Table 13.1 – State, Territory and international defences to child sex offences

		Belief about age	Burden	Marriage	Burden	Age of offender	Burden
NSW	<i>Crimes Act 1900</i>	Nil*	E	Nil	N/A	Nil	N/A
VIC	<i>Crimes Act 1958</i>	45(4), 47(2)	L	45(3)	L	45(4)(b)	L
QLD	<i>Criminal Code Act 1899</i>	210(5), 215(5)	L	Nil	N/A	Nil	N/A
WA	<i>Criminal Code</i>	321(9)	L	321(10)	L	321(9)	L
SA	<i>Criminal Law Consolidation Act 1935</i>	49(4)	L	49(8)	N/A	49(4)	L
TAS	<i>Criminal Code Act 1924</i>	124(2), 125B(2)	L	125A^	E	124(3)	E
ACT	<i>Crimes Act 1900</i>	55(3), 61(3)	L	Nil	N/A	55(3), 61(3)	L
NT	<i>Criminal Code Act</i>	127(4), 132(5)	L	128(4)#	L	Nil	N/A
CAN	<i>Criminal Code 1985</i>	150.1 (4)	E	150.1 (2.1)	E	150.1	E
NZ	<i>Crimes Act 1961</i>	134A	L	134	E	Nil	N/A
UK	<i>Sexual Offences Act 2003</i>	9-19**	E	23^^	L	Nil	N/A

* No statutory defence, however common law defence of mistake of fact applies (*CTM v The Queen* [2008] HCA 25).

^ Limited to offence of maintaining a sexual relationship with a child.

Limited to offences against children over 16 under special care.

** An element of the offences that D did not reasonably believe that the child was 16 or over.

^^ Limited to position of trust offences.

Table 15 – International postal offences

	Legislation	Section	Penalty
CAN	<i>Criminal Code 1985</i>	168	2 years imprisonment
NZ	<i>Postal Services Act 1998</i>	22	Fine of \$5000
UK	<i>Postal Services Act 2000</i>	85	12 months imprisonment

Table 17.1 – State, Territory and international forfeiture schemes

	Legislation	Section
NSW	<i>Crimes Act 1900</i>	Nil
VIC	<i>Crimes Act 1958</i>	70AA
QLD	<i>Criminal Code Act 1899</i>	228G
WA	<i>Classification (Publications, Films & Computer Games) Enforcement Act 1996</i>	117
	<i>Criminal Code</i>	731*
SA	<i>Criminal Law Consolidation Act 1935</i>	Nil
TAS	<i>Criminal Code Act 1924</i>	130F
ACT	<i>Crimes Act 1900</i>	Nil
NT	<i>Criminal Code Act</i>	125B(6)
CAN	<i>Criminal Code 1985</i>	164, 164.1, 164.2
NZ	<i>Crimes Act 1961</i>	216L^
	<i>Films, Videos, and Publications Classification Act 1993</i>	136
UK	<i>Protection of Children Act 1978</i>	5

* General forfeiture scheme (not a specific scheme directed at child pornography).

^ Covers 'intimate visual recordings' – is broader than just child pornography.