

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter briefly outlines the main provisions of the Bill.

New child sex tourism offences

2.2 The Bill proposes to create the following new child sex tourism offences:

- offences to capture the 'grooming' and procuring of a child for the purposes of child sex overseas (proposed sections 272.11 and 272.12);
- preparatory offences to capture the behaviour of people who are preparing to commit a child sex tourism offence (proposed section 272.17); and
- offences to make it illegal for Australians to possess, control, produce, distribute or obtain child pornography while overseas (Division 273).

2.3 These proposed new offences are discussed in further detail below.

'Grooming' and procuring offences

2.4 The Bill proposes new offences relating to 'grooming' and procuring persons under 16 years of age. The Explanatory Memorandum (EM) states that these proposed provisions address a gap in the existing legislation, and that:

The object of the new grooming and procuring offences is to capture people who groom or procure a person under 16 with the intention that the person under 16 will engage in, or submit to sexual activity. These offences will capture the 'grooming' of a young person in a foreign country.¹

2.5 The EM further explains that these proposed offences are modelled on existing offences in sections 474.26 and 474.27 of the Criminal Code, which deal with the use of a carriage service to procure or groom a person under 16 for sexual activity. However, the new offences are not limited to conduct involving the use of a carriage service.²

2.6 Proposed section 272.11 creates offences of engaging in conduct to procure persons under 16 for sexual activity outside Australia. The EM gives an example of a situation where a defendant tries to procure a person under 16 to engage in sexual intercourse outside Australia, for example, by offering that person money.³

1 p. 4.

2 pp 12-14.

3 p. 12.

2.7 The definitions of 'procure' and 'sexual activity' are broad and are currently contained in subsection 474.28(11) of the Criminal Code. The Bill would move these definitions into the Dictionary of the Criminal Code. The maximum penalty for these offences is 15 years imprisonment.

2.8 Proposed section 272.12 sets out offences for the 'grooming' of persons under 16 with the intention of making it easier to procure them for sexual activity outside Australia. The EM explains that 'grooming' can include 'a range of conduct that makes it easier to procure a person for sexual activity including through building trust with a person under 16 and taking steps to desensitise the person to the thought of engaging in sexual activity with adults'.⁴ The maximum penalty for these offences is 12 years imprisonment.

2.9 Both the grooming and procuring offences are designed to capture a range of conduct, and the EM gives several examples of relevant conduct that might be covered.⁵ The offences are also designed to capture conduct which takes place in a range of geographical circumstances – including, for example, where the defendant is in Australia and the person under 16 is overseas, provided the sexual activity is intended to occur outside Australia.⁶

2.10 In these offences, absolute liability applies to the fact that the person is under 16. This mirrors the use of absolute liability in the existing offences of using a carriage service to procure or groom a child for sexual activity in sections 474.26 and 474.27 of the Criminal Code.⁷ Absolute liability also applies with respect to the location of the conduct, and the EM states that:

The application of absolute liability is appropriate because the issue of whether the person intended to engage in the conduct in Australia or overseas is not central to their culpability. It is appropriate to penalise a person for such conduct irrespective of their knowledge or intention as to where the conduct occurs.⁸

2.11 Proposed subsection 272.13(2) provides a defence for these offences based on belief about age. The defence applies if, at the time of the conduct, the defendant believed that the person, who was under 16, was actually 16 or over.⁹ In addition, proposed subsection 272.14(2) provides for a defence where there was a valid and genuine marriage between the defendant and the person who was under 16. However this defence does not apply to the offences under proposed subsections 272.11(2) and 272.12(2) which involve a third person outside the marital relationship.

4 p. 14.

5 at pp 12-15.

6 See further EM, pp 13-15.

7 See further EM, pp 14-15.

8 p. 15.

9 EM, p. 16. This defence is based on sections 50CA and 50CD of the current Crimes Act.

Preparatory offences

2.12 Proposed section 217.17 creates offences which aim to capture the behaviour of people who are preparing to commit a child sex offence under proposed Division 272. The EM explains that these proposed offences would capture a wide range of preparatory behaviour. The EM gives the example of a person who:

...books an airline ticket and accommodation to travel outside Australia with the intention of planning to engage in sexual intercourse with a person who is under 16 while outside Australia.¹⁰

2.13 The EM explains that 'the inclusion of an offence of this kind will enable the person to be arrested prior to a person under 16 being harmed.' The EM further states that the offence of engaging in preparatory acts applies both inside and outside Australia, and addresses a gap in the coverage of the existing child sex tourism offences. In particular, the EM states that 'there is nothing in the current offence provisions which clearly prohibits any preliminary steps being taken by a person who wishes to participate in a child sex tour.'¹¹

2.14 The proposed preparatory offences would attract maximum penalties of 15 years and 17 years imprisonment, which are also the maximum penalties for the offences for which it is an offence to prepare to commit.¹²

Offences involving child pornography or child abuse material overseas

2.15 Proposed Division 273 would make it an offence for Australians¹³ to possess, control, produce, distribute or obtain child pornography or child abuse material while overseas. The EM explains that these proposed offences are designed to:

...deal with circumstances where the foreign country does not have specific laws to deal with this behaviour or is unwilling or unable to prosecute. This addresses a gap in the current legislation highlighted by recent investigations.¹⁴

2.16 The EM further states that many of the provisions in proposed Division 273 mirror existing carriage service child pornography and child abuse material offences in Part 10.6 (Telecommunications Services) of the Criminal Code.¹⁵

10 p. 18.

11 p. 18.

12 EM, p. 18.

13 This includes Australian citizens, Australian residents, and any body corporate that is incorporated in Australia, or carries on activities principally in Australia: proposed section 273.2.

14 p. 21.

15 p. 21.

2.17 The proposed offences are set out in proposed sections 273.5 and 273.6 and carry maximum penalties of 10 years imprisonment. Absolute liability applies to the circumstance that the conduct occurs outside Australia (proposed subsections 273.5(2) and 273.6(2)). On the use of absolute liability, the EM states that:

The application of absolute liability is appropriate because the issue of whether the person intended to engage in the conduct in Australia or overseas is not central to their culpability. It is appropriate to penalise a person for such conduct irrespective of their knowledge or intention as to where the conduct occurs.¹⁶

2.18 Proposed section 273.7 provides a number of defences to the offences in Division 273, such as where the conduct was engaged in for the purposes of:

- law enforcement, intelligence or security officers performing their duties (subsection 273.7(4)); or
- assisting the Australian Communications and Media Authority to detect prohibited content (subsection 273.7(5)).

2.19 Subsections 273.7(1) and 273.7(2) provide a defence where the conduct is of 'public benefit' in that it is conduct necessary for, or of assistance in:

- enforcing a law;
- monitoring compliance with or investigating contravention of laws;
- the administration of justice; or
- conducting scientific, medical or educational research.

Other provisions

2.20 The Bill also proposes to:

- repeal Part IIIA of the Crimes Act and move relevant child sex tourism offences to the Criminal Code;
- improve existing 'grooming' offences in the Criminal Code;
- provide a regime for the forfeiture of child pornography and child abuse material; and
- amend the definition of 'serious organised crime' in the *Australian Crime Commission Act 2002*.

2.21 These measures are outlined in further detail below.

Moving offences to the Criminal Code

2.22 In addition to the proposed new offences outlined above, the Bill proposes to repeal Part IIIA of the Crimes Act, which deals with child sex tourism. The Bill proposes to move these provisions into the Criminal Code with 'some updating of the language and structure of the offences'.¹⁷ The EM states that 'this is in accordance with the general transfer of criminal offences from the Crimes Act to the Criminal Code and the modernisation of the drafting of offences as this is done'.¹⁸

2.23 The Bill does propose some substantive changes to these offences, including an increase in the maximum penalty from 12 to 15 years imprisonment for sexual conduct offences involving a person under 16 and for the offence of inducing a person under 16 to be involved in sexual conduct.¹⁹ The EM explains that:

The penalty for sexual conduct with a child has been increased [to] 15 years imprisonment to reflect the seriousness of the offence and to ensure consistency with penalties for existing offences of a similar kind or seriousness. For example, the maximum penalty for using a carriage service for procuring a child for sexual activity in section 474.26 of the Criminal Code is 15 years imprisonment.²⁰

2.24 Other proposed changes include:

- the defendant would carry an evidential burden rather than a legal burden under the defence based on belief about age;²¹ and
- the defence based on valid and genuine marriage will no longer be available where a person outside the marital relationship is directly involved.²²

2.25 Proposed Divisions 272 and 273 of Schedule 1 of the Bill both contain a subdivision D that would allow the use of video evidence in relation to child sex offences committed outside Australia under those divisions. The EM states that these provisions are the same as existing provisions contained in Division 5 of Part IIIA of the Crimes Act with only some minor drafting and referencing changes.²³

17 EM, p. 3. See also p. 7 of the EM for a comparative table of the existing Crimes Act provisions and the equivalent proposed Criminal Code provisions.

18 p. 3.

19 See proposed sections 272.9 and 272.10, compared to current sections 50BC and 50BD of the Crimes Act.

20 p. 11; see also pp 11-12.

21 Proposed section 272.13: see further EM, p. 16.

22 Proposed section 272.14; see further EM, p. 16.

23 See proposed subdivision D in Divisions 272 and 273. It is noted that the section numbering in the EM for proposed subdivisions D and E of Division 272 appears to be inconsistent with the numbering contained in the Bill.

Broadening existing 'grooming' provisions

2.26 Items 10 and 11 of Schedule 1 of the Bill propose to broaden the operation of the offences of using a carriage service to groom persons under 16 for sexual activity. More specifically, these items would amend the existing 'grooming' offence in section 474.27 of the Criminal Code by removing the requirement that a communication must include indecent material.

2.27 These offences currently require, among other matters, that a person uses a carriage service to transmit a communication to a second person and that the communication includes indecent material.²⁴ The EM explains that:

The requirement that the communication include material that is indecent limits the type of communications that are captured by the grooming offences. Grooming activity may involve the transmission of indecent material – such as pornography – but is just as likely to include communications that are designed to build trust with the perpetrator or invoke romantic feelings in the person under 16 years of age.²⁵

Forfeiture provisions

2.28 Item 2 of Schedule 1 of the Bill proposes to amend the Crimes Act to provide for the forfeiture of child abuse and child pornography material (or equipment that contains such material) that is used in the commission of a Commonwealth child sex offence. Currently, such material can only be forfeited after following the full process under the *Proceeds of Crime Act 2002*. The EM states that:

Such material is clearly inappropriate to return to the owner, so the proposed amendments create a streamlined process for forfeiture by order of a court either immediately after a conviction or following a separate hearing.²⁶

Australian Crime Commission definition of 'serious organised crime'

2.29 The Bill amends the definition of 'serious organised crime' in the *Australian Crime Commission Act 2002* to include offences relating to child pornography and the use of carriage services to procure or groom persons under 16 for sexual activity. This reflects regulations made in December 2006.²⁷ The Bill would incorporate these offences in the definition in the principal Act. The EM explains that this would 'ensure

24 Subsection 474.27(5) states that indecent means 'indecent according to the standards of ordinary people'.

25 p. 27.

26 p. 5

27 *Australian Crime Commission Amendment Regulations 2006 (No 4)*.

that the changes already made by regulations are subjected to full Parliamentary scrutiny and become apparent on the face of the Act.²⁸

