Law Council
OF AUSTRALIA

Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007

Senate Legal and Constitutional Affairs Committee

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Introduction

Commonwealth child sex tourism offences are currently located in Part IIIA of the *Crimes Act,* sections 50AA-50GA.[1] The *Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007* (the Bill) would relocate the existing offences and corresponding defences to the proposed Division 272 of the *Criminal Code Act 1995.* The offences would be redrafted to reflect the drafting regime of the Code but would remain substantively unchanged, with the exception of increased maximum penalties in some cases.

The Law Council regards this further consolidation of offence provisions within the Criminal Code as a positive development.

In addition to relocating existing offences, the Bill also introduces the following new sets of offences:

- Division 273 - New offences relating to the possession, production and distribution of child pornography by Australian citizens or residents while overseas;

- Division 272 - three new offences involving:

    - engaging in conduct to procure persons under 16 years of age to engage in, or submit to, sexual activity outside of Australia (clause 272.11);

    - engaging in conduct to make it easier to procure persons under 16 years of age to engage in, or submit to, sexual activity outside of Australia (clause 272.12); and

    - preparing or planning to commit an offence against Division 272 (clause 272.17).

Of the three new offences to be included in Division 272, only the third offence is entirely new. The other two offences are modeled on existing offences under section 474.26 (use of carriage services to procure a person under 16 to engage in sexual activity) and section 272.27 of the *Criminal Code* (use of carriage services to "groom" a person under 16 to engage in sexual activity) but extend criminal liability to apply outside of the use of carriage services.

It is this third entirely new offence which the Law Council believes represents a unwarranted and worrying departure from established principles of criminal law and which requires careful consideration by the Committee.

The Law Council shares Parliament's concern to protect children from the threat of sexual abuse by providing a strong legislative regime criminalising child sex tourism.

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[1] These offences were inserted by the *Crimes (Child Sex Tourism) Amendment Act 1994*. Some sections were amended by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*. The offences largely target behaviour occurring outside of Australia. Under this legislative regime prosecutions can be undertaken against Australian citizens, residents of Australia, a body corporate under Australian law and a body corporate that carries out their activities principally in Australia. Child sex tourism stands as an exception to the general principle of 'international comity' which was originally proposed as a theory of criminal jurisdiction. The Constitutional validity of the child sex tourism offences was upheld by the High Court in *XYZ v The Commonwealth* [2006] ALR 495 where the legislative provisions were found to be a valid exercise of the external affairs power.

This is in line with Australia's international commitments to protect children from sexual abuse, including the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (ratified by Australia on 8 January 2007) and the *Convention on the Rights of the Child* (ratified by Australia in December 1990), in particular Article 34 which provides:

> *States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:*
>
> *(a) The inducement or coercion of a child to engage in any unlawful sexual activity;*
>
> *(b) The exploitative use of children in prostitution or other unlawful sexual practices;*
>
> *(c) The exploitative use of children in pornographic performances and materials.*

While the importance of protecting children from child sex tourism cannot be overstated, the moral repugnance with which the community regards these offences means that allegations of offending conduct will have devastating consequences for accused persons, regardless of whether any charges laid proceed to prosecution and conviction. For this reason, the components of criminal liability for child sex tourism offences must be clearly and specifically outlined in the amending legislation and the rights of the accused adequately protected.

In that regard, the Law Council is concerned about the new offence introduced by proposed clause 272.17 for the following reasons:

- clause 272.17 targets purely preparatory acts and does not require a sufficiently clear nexus to be established between those acts and any intent to commit a substantive criminal offence;

- clause 272.17 unnecessarily extends the net of criminal liability in circumstances where the existing legislative regime targeting child sex tourism is already sufficiently wide in scope and, in fact, already covers preliminary conduct in a manner which allows police to adopt a preventative, early intervention approach; and

- clause 272.17 will be, at any rate, very difficult to successfully prosecute because it targets behaviour which is not inherently criminal, but which might be undertaken in broad contemplation of future criminal activity of a generic kind. Establishing the requisite criminal intent to secure conviction in such circumstances may, quite rightly, prove very difficult. Prosecutions which fail because police have intervened prematurely, may do more harm than good to efforts to combat child sex tourism in the longer run.

In addition to these concerns with clause 272.17, the Law Council also suggests that the Committee should take the opportunity provided by the Bill to consider the available statutory defences and whether they remain adequate and appropriate.

In particular, the Law Council would ask the Committee to consider:

- whether a further defence should be introduced to cover circumstances where the alleged sexual activity is consensual and the alleged perpetrator is no more than two years older than the alleged victim;
- whether the defence of valid and genuine marriage is a necessary and appropriate defence, in view of the aims of the legislation and the position under Australian domestic law; and
- whether it should be clarified that the listed statutory defences are only available in circumstances where the alleged sexual activity was consensual (that being a matter which, because of the age of the victim, is otherwise irrelevant).

Proposed clause 272.17 – Preparing to commit a child sex offence outside Australia

Details of the offence created by proposed clause 272.17

Proposed clause 272.17 creates an offence intended to capture people who are preparing to commit a child sex offence against clauses 272.7 to 272.10 and 272.15.

Pursuant to clause 272.17, it is an offence to act *in preparation for, or planning,* conduct that would constitute an offence under the relevant clauses. According to the note to clause 272.17(1) and (2), this would cover behavior such as booking an airline ticket and accommodation to travel outside Australia in preparation for engaging in sexual intercourse with a person under 16 years while outside Australia.

The *Explanatory Memorandum* explains that while the existing offences in 50DA (272.15) and 50DB (272.16) prohibit a person from benefiting from or encouraging conduct that would amount to child sex tourism overseas, they do not clearly prohibit any preliminary steps being taken by a person who wishes to participate in a child sex tour. In the Second Reading speech, the preparatory offences were described as including the following activities:

> *arranging travel and making a hotel reservation in a well known child sex tourism destination, so long as this behaviour can be linked to an intention to commit an offence against the child sex tourism regime.*

The offences in clause 272.17 attract a maximum penalty of 15 (for conduct relating to clauses 272.9 and 272.10) and 17 (for conduct relating to clauses 272.7, 272.8 and 272.15) years imprisonment.

A person commits an offence under this provision even if:

- the conduct planned (that would constitute an offence) does not occur;
- the person's act is not done in preparation for, or planning, specific conduct of a kind that would constitute an offence;
- the person's act is done in preparation for, or planning, more than one course of conduct that would constitute an offence.

The new offence involves an unnecessary extension of criminal responsibility

Part 2.4 of the *Criminal Code* creates 'inchoate' offences that apply to all Commonwealth crimes. These offences include attempt (s11.1), incitement (11.4) and conspiracy (11.5) and punish a person where the substantive offence that was intended is not completed and no harm is caused. These provisions are based on well established criminal principles and are underpinned by the rationale of crime prevention.

The Law Council is concerned, however, that the proposed new offence in clause 272.17 goes much further than existing inchoate offences by criminalising preliminary acts which, although undertaken in contemplation of criminal conduct of some kind, can not be connected to any clear intent to commit a specific criminal act.

Unlike the offence of attempt outlined in section 11.1 of the *Criminal Code,* which expressly excludes acts that are 'merely preparatory to the commission of the offence', the proposed offence in clause 272.17 is specifically targeted at preparatory acts.

The common law has always been reluctant to attach criminal liability to action that is undertaken in preparation for conduct that, if carried out, may constitute a criminal offence, primarily because a person can plan for conduct and then change his or her mind before the plan is implemented.

In short, the criminal law has not traditionally penalised nascent and unrealised private intentions which have only been advanced in a preliminary way, particularly where those intentions have not yet crystallised into a specific criminal intent.

The Law Council believes that this should remain the case.

The Law Council believes that the existing legislative regime already casts a wide net for offenders seeking to participate in the child sex tourism industry. Without clause 272.17, the regime already prohibits:

- sexual intercourse with a person under the age of 16 outside Australia;
- conduct that induces or attempts to induce persons under 16 to engage in sexual intercourse outside Australia;
- the commission or attempted commission of an act of indecency with a person under 16 outside Australia;
- conduct that induces or attempts to induce persons under 16 to be involved in sexual conduct overseas;
- conduct intended to procure a persons under 16 to be involved in sexual activity outside Australia;
- conduct intended to makes it easier to procure persons under 16 to be involved in sexual activity outside Australia (broadly referred to as 'grooming');
- conduct engaged in with the intention of benefiting from child sex tourism (or more specifically with intention of benefiting from conduct which would constitute an offence under Division 272 of the Criminal Code); and
- conduct engaged in with the intention of encouraging child sex tourism (or more specifically with intention of encouraging conduct which would constitute an offence under Division 272 of the Criminal Code) ***where "encouraging" is defined as: to encourage; to incite to; to urge by any means whatever (including by a written, electronic or other form of communication); to aid; to facilitate; or to contribute to, in any way whatever***. (Emphasis added.)

The Law Council believes that this regime, without clause 272.17, already provides sufficient scope to allow police to adopt a preventative approach to child sex tourism.

Where evidence is available, the offence provisions essentially allow police to intervene and charge a person in any circumstance where he or she has interacted with another with the intention of assisting, facilitating, encouraging and arranging for (*either as a participant or as an operator*) the commission of a sexual offence against a child overseas.

What the offence provisions do not presently cover is a private intention to engage in some form of sexual activity with a child overseas which has been advanced by a preliminary act, such as the purchase of a ticket, but which has not yet evolved to the point where any communication has been made with another which would signal demand for child sex tourism or which might set in train conduct by another to procure a child and/or venue and/or an opportunity for the commission of the offence.

The Law Council believes that the Criminal Code need not proceed into this new territory. To do so would risk penalising a person for broad intentions which they may never have acted upon, or worse, risks exposing entirely innocent activity to ruinous prosecution.

The existing offence provisions have already allowed police to adopt an interventionist approach.

For example, Harry Ruppert was charged with the existing offence of encouraging a child sex tourism offence over a series of explicit letters he wrote to adults in Ghana in which he encouraged them to engage in sexual activity with children.[2]

The more recent case of *Kaye*[3] also dealt with the existing encouraging offence provisions. The defendant in that case placed a classified advertisement in the community newspaper offering the services of a personal young male Thai tour guide for Australians visiting Thailand. When contacted by a person responding to the advertisement the defendant proceeded to offer to arrange for sexual activity to occur between the person and a Thai boy under the age of 16.

In addition to allowing for successful prosecutions of this kind, the Law Council also believes that the existing offence provisions are already broad enough to legitimately enliven, at a very early stage, the wide ranging investigative powers which are available to law enforcement agencies investigating activity connected with child sex tourism.[4] Law enforcement agencies do not need an offence provision like clause 272.17, which because of its broad, catch-all nature has a low threshold for suspicion, to provide a hook for activating and justifying the early exercise of their powers at a point before harm has occurred.

In fact, the ill-defined nature of clause 272.17 affords law enforcement agencies too broad a discretion to intervene and investigate conduct which, in itself, may be entirely innocent. Such broad discretions are amendable to misuse and ought to be avoided.

The new offence replaces old barriers to successful prosecution with new ones

A significant barrier to the successful prosecution of any child sex offence is the low level of reporting of sexual offences by child victims or their parents. This is particularly pronounced in the context of child sex tourism offending, where victims are likely to come from developing countries where poverty, lack of basic infrastructure and lack of transparency in the criminal justice system can add to victims' reluctance or inability to report sexual abuse. Delays in complaints and inadmissibility of complaints by victims

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[2] *Harry Ernst Rupert* (unreported judgment of the County Court in Victoria, 19 August 1998)

[3] *Kaye v The Queen* [2004] WASCA 227

[4] For example, under the *Australian Crime Commission Act,* the *Telecommunications (Interception Access) Act 1979,* the *Surveillance Devices Act* and the *Crimes Act.*

has hindered past prosecutions of child sex tourism offences and remains a significant barrier to the success of the proposed offences in protecting children from harm.

In addition, there remain several practical limitations to conducting prosecutions under child sex tourism legislation, including:[5]

- the difficulties of obtaining evidence from overseas, including the cost and difficulties in locating witnesses, and the need to use interpreters during preparation and the trial process itself; and

- the difficulties of dealing with witnesses who are children, particularly children who have been sexually abused or exploited.

Given these difficulties, the Law Council understands the desire to provide for preventative offences which allow potential child sex offenders to be apprehended *prior* to the commission of any sexual offence.

However, the barriers to successfully combating child sex tourism and prosecuting child sex offenders can not be overcome simply by creating broad, poorly defined preparatory offences which distort the principles of criminal liability and target a wide range of behaviour which is not in itself harmful or criminal.

While such provisions may provide increased scope for the arrest and even charge of person of interest to police, they appear unlikely to lead to an overwhelming number of successful prosecutions.

Firstly, as the provisions allow charges to be laid on the strength of conduct that is not directly connected to specific criminal activity, juries may not feel confident in determining guilt – they may not be convinced that a crime was in fact committed.

Secondly, given the nature of the non-specific acts which are likely to provide the basis of the charge, significant difficulty is likely to be encountered in proving the requisite criminal intent to the exclusion of all other hypothesis consistent with innocence.

Even where the prosecution is assisted by a recorded admission as to criminal intent, questions may still arise as to whether that intent must be proven to be the ***primary* or *sole*** motivation for the preparatory acts said to constitute the offence or simply ***a*** motivation. For example, would a person who books an airline ticket and hotel for the purpose of a business trip but who also intends to use the trip as an opportunity to engage in sexual conduct with a child be guilty be of an offence under clause 272.17?.

Anti-terror laws should not be allowed to become a model for law enforcement

Preparatory offences, (similar to that proposed by clause 272.17), which empower police to act pre-emptively by arresting individuals before they have formed a definite plan to commit a criminal act, were inserted into the Criminal Code to address the threat of terrorism.[6]

The novel nature of those laws and the departure they represent from traditional criminal principles was acknowledged by Spigelman CJ in *Lodhi*. His Honour stated:

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[5] Fiona David, 'Child Sex Tourism' (2000) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* No. 156.

[6] See in particular section 101.6 of the Criminal Code.

Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier state than is usually the case for other kinds of criminal conduct … . [7]

The Law Council is concerned that the extraordinary precedent set by the anti-terror laws is already being replicated in the current Bill.

If every time the community is horrified by the heinous nature of a particular crime or every time law enforcement agencies feel impotent in the face of a particular type of offending, we amend not just the content of our laws but the manner in which we apportion criminal responsibility and adjudicate guilt, then the integrity of our criminal justice system will quickly be compromised.

The Committee may regard the offence provision in clause 272.17 as necessary and appropriate in the circumstances. If that is the case, the Law Council hopes at least that in reaching that conclusion the Committee will, nonetheless, recognise the unusual nature of the offence provision in clause 272.17 and the risks associated with it.

If such provisions are passed without comment or words of caution of any kind, then the Law Council fears they are even closer to becoming routine.

The maximum penalty for the new offence should be decreased

The maximum penalty attaching to the preparatory conduct offence should be less than the penalty attaching to the substantive offence.

At present the penalty is the same, that is:

- 17 years for an act undertaken in preparation for, or planning, conduct of a kind that would constitute an offence against section 272.7, 272.8, or 272.15; and

- 15 years for an act undertaken in preparation for, or planning, conduct of a kind that would constitute an offence against section 272.9 or 272.10.

This sentencing approach treats an offence under clause 272.17 as an "attempt". However, as explained above, it targets behavior which is too preparatory in nature to qualify as an attempt.

An attempt to commit an offence attracts the same penalty as the offence itself in recognition of the fact that, but for the defendant's actions failing to achieve their intended outcome or being thwarted at an advanced stage, they would have resulted in the commission of the substantive offence.

If a person is successfully prosecuted under clause 272.17 with purchasing an airline ticket in preparation for traveling abroad to engage in sexual intercourse with a child, it will not be possible to definitively assert that, but for the intervention of police, the person would certainly have committed the substantive offence. The possibility will

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[7] *Lodhi v The Queen* [2006] NSWCCA 121 at [66].

remain that the defendant may not have further advanced his or her plans, formed a more specific intention and acted to realize that intention.

The maximum penalty should be reduced to reflect this.

This would be consistent, for example, with the sentencing approach adopted under state laws to the offence of "going equipped for stealing" which carries a maximum sentence significantly below the sentence for theft or burglary.[8]

{Offences which fall under the banner of "going equipped for stealing" represent a relatively rare comparable offence in that they criminalise a preparatory act (the possession of certain implements which might be used to carry out a burglary or theft) which:

- does not, on its own, constitute an offence, and
- falls short of an "attempt" to commit an offence; but
- is nonetheless an offence if the defendant undertakes the act (the possession of the housebreaking implements) with the intent of committing certain criminal conduct.}

Defences to child sex tourism offences

Two defences to child sex tourism offences exist in sections 50CA and 50CB of the *Crimes Act*: defence based on belief about age (section 50CA) and defence based on valid and genuine marriage (section 50CB). The Bill relocates these defences to clauses 272.13 and 272.14 of the *Criminal Code*.

While the Law Council acknowledges that these defences have not been introduced or changed by the Bill, the Law Council would ask the Committee to take the opportunity provided by this consolidation of the legislation to consider:

- whether a further defence should be included to cover circumstances where the alleged sexual activity is consensual and the alleged perpetrator is no more than two years older than the alleged victim;
- whether the defence of valid and genuine marriage is a necessary and appropriate defence, in view of the aims of the legislation and the position under Australian domestic law; and
- whether it should be clarified that all the listed defences are only available in circumstances where the alleged sexual activity was consensual (that being a matter which, because of the age of the victim, is otherwise irrelevant).

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[8] Compare for example: section 114 of the *Crimes Act 1900 (NSW) and* section 133 *Crimes Act 1900 (NSW)*; Section 425 of the *Criminal Code 1899 (Qld) and* Section 419 of the *Criminal Code 1899 (Qld); and section 91 of the Crimes Act 1958 (Vic) and section 74 and 76 of the Crimes Act 1958 (Vic).*

Defence based on age of defendant

In a number of Australian jurisdictions it is a defence to a charge of unlawful sexual conduct with a minor, if the alleged perpetrator is no more than a specified number of years older than the alleged victim (for example, two years) and the alleged sexual activity is consensual.[9]

The Law Council would ask the Committee to consider whether a further defence of this nature should be included in the Bill. This would not be inconsistent with the object of the Bill and would help distinguish between sexual behaviour involving an adult sexual predator and a young person under 16 years and sexual behaviour between two young persons.

Defence based on valid and genuine marriage

It is a defence to offences in clauses 272.7 and 272.9 (engaging in sexual intercourse or act of indecency with someone under 16 while overseas) if at the time of the sexual intercourse or act of indecency a valid and genuine marriage[10] existed between the defendant and the person under 16. A similar defence is available for offences under 272.11(1) and 272.12(1).

This defence is based on existing sections 50CB of the *Crimes Act*, however the proposed clause 272.14 defence no longer extends to situations where a person outside the martial relationship is directly involved. The defendant bears the legal burden in establishing these defences and must establish the elements of the defence on the balance of probabilities.

The defence of valid and genuine marriage has been included in the legislative regime since the child sex tourism provisions were originally introduced in 1994.

In the second reading speech, Senator Ray, the then Minister for Defence, explained the inclusion of the defence as follows:

> *Marriages celebrated in foreign countries, where one of the parties is under 18 years, are generally not recognisable in Australia. Nevertheless, it is quite possible that an Australian citizen or resident who came to Australia from a foreign country, or whose parents did so, might return to that country to marry according to its customs. The government has no intention, in multicultural Australia, of rendering any such person vulnerable to conviction for a criminal offence on returning to Australia. That would be an entirely different matter from simply not recognising the marriage.*

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[9] For example see *Crimes Act 1900 (ACT)* s55; *Criminal Law Consolidation Act 1935* (SA) s49; Criminal Code (TAS) ss 124(2), 124(3), 124(4) (consent is a defence for vaginal intercourse where the person who consented was above the age of 15 and the accused was not more than five years older or the person was of or above the age of 12 years and the accused was not more than three years older. Consent is not a defence for anal intercourse); Crimes Act 1958 (VIC) s 45(4)(b) (consent is not a defence unless the child was aged at least 10 years and the accused was not more than two years older than the child).

[10] Pursuant to clause 272.14 a marriage is “valid” if it is valid under the law of the country where the marriage took place or the country where the offence was committed or the defendant’s residence or domicile. A marriage is “genuine” if when it was solemnised, the marriage was genuine.

This statement is a somewhat at odds with the position in the majority of Australian states, which appear to make no provision for marriage as a defence to charges of engaging in sexual activity with a person below the age of consent.[11]

The position also appears somewhat at odds with recent amendments to the Commonwealth *Crimes Act* introduced by the *Crimes Amendment (Bail and Sentencing) Act (no 171 of 2006).*

Subsection 16A (2A) of the Crimes Act now specifically provides that:

> *"However, the court must not take into account under subsection (1) or (2) any form of customary law or cultural practice as a reason for:*
>
> *(a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or*
>
> *(b) aggravating the seriousness of the criminal behaviour to which the offence relates."*

The Law Council is concerned that the defence in clause 272.14 may detract from the primary purpose of the Bill, namely to protect children from being forced or encouraged to engage in sexual activity before they have reached the requisite level of maturity and are above the age of consent. The defence could result in a double standard of protection for child victims of sexual abuse overseas, determined by marital status.

While nearly all jurisdictions within the Asia Pacific region set the minimum martial age at over 16, many jurisdictions permit persons younger than the minimum age to be married by order of the court for reasons such as religion. There may also be circumstances in some countries where marriage of persons under 16 pursuant to customary law will fall within the definition of a valid and genuine marriage for the purposes of this defence.

The Law Council urges the Committee to review the appropriateness of this defence in view of both the aims of the legislation and the position under the domestic law in the majority of states and territories.

Clarifying that statutory defences are only available where the sexual activity is consensual

A person may be prosecuted for an offence under Division 272, whether or not the alleged victim is claimed to have consented to the sexual conduct which is the subject of the charge. An absence of consent is not a matter the prosecution is required to prove because of the age of the alleged victim. The use of actual or threatened force or some other form coercion or intimidation is not an element of the offences in Division 272 and is relevant only to sentencing.

This position is, of course, entirely appropriate given the protective aims of the legislation.

However, the Law Council believes that where the issue of consent should become relevant is where a defendant seeks to rely on one of the statutory defence provisions.

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[11] It is, however, consistent with the position in SA (Criminal Law Consolidation Act 1935 s 49(8)), VIC (Crimes Act 1958 s 45(3)(b)) and WA (Criminal Code s 321(10)).

That is, the Law Council believes that a defendant should only be able to rely on the defence of belief in age or the defence of valid or genuine marriage, if the sexual conduct which is the subject of the charge was consensual. As currently formulated, the Law Council is concerned that a belief that the person was over 16 or the existence of a valid and genuine marriage could absolve a defendant of criminal liability for engaging in non-consensual sexual activity with a person under 16.

In at least two Australian state jurisdictions, consent is reactivated as a live issue when a defendant relies on a statutory defence to a charge of sexual intercourse with a person under 16.[12] For example, section 55 of the ACT Crimes Act provides as follows:

CRIMES ACT 1900 - SECT 55

Sexual intercourse with young person

1. *A person who engages in sexual intercourse with another person who is under the age of 10 years is guilty of an offence punishable, on conviction, by imprisonment for 17 years.*

2. *A person who engages in sexual intercourse with another person who is under the age of 16 years is guilty of an offence punishable, on conviction, by imprisonment for 14 years.*

3. ***It is a defence to a prosecution for an offence against subsection (2) if the defendant establishes that—***

   (a) he or she believed on reasonable grounds that the person on whom the offence is alleged to have been committed was of or above the age of 16 years; or

   (b) at the time of the alleged offence—

   (i) the person on whom the offence is alleged to have been committed was of or above the age of 10 years; and

   (ii) the defendant was not more than 2 years older;

   and that that person consented to the sexual intercourse.

   (Emphasis Added)

The Law Council believes that, where relevant, the statutory defence provision in Division 272 should be amended in line with section 55 of the Crimes Act (ACT) in order to clarify that the listed statutory defences are only available in circumstances where the alleged sexual activity was consensual (that being a matter which, because of the age of the victim, is otherwise irrelevant).

The Law Council believes that it is particularly important that the statutory defence provision are amended in this way because, unlike under domestic state and territory law, the option is not available under the Criminal Code to charge an offender with the more general offence of sexual intercourse without consent (thus rendering both age and marital status and any belief in relation thereto irrelevant).

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[12] See for example (ACT) *Crimes Act 1900* s55, (Vic) *Crimes Act 1958 s45.*

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.