CHAPTER 3

KEY ISSUES

3.1 All of the submissions received by the committee were generally supportive of the amended and new sexual offences against children as proposed in the Bill. However, a number of issues were identified by submitters and witnesses. These were related to:

- the new preparatory offence (proposed section 272.20);
- the offence of causing a child to engage in sexual activity outside Australia (proposed section 272.9);
- the offence of persistent sexual abuse of a child outside Australia – double jeopardy (proposed section 272.11);
- sexual intercourse or activity with a young person – position of trust or authority (proposed section 272.12);
- issues relating to the practice of 'sexting';
- the requirement for the Attorney-General to give consent to commence proceedings against defendants under 18 years of age (proposed section 272.31); and
- defence provisions – valid and genuine marriage (proposed section 272.17) (including the issue of consent).

New preparatory offence

3.2 As outlined in Chapter 2, proposed section 272.20 of the Bill will create a new offence for preparing or planning an offence relating to sexual intercourse or other sexual activity with a child outside Australia (subsection 270.20(1)). It will also be an offence to prepare or plan for an offence relating to sexual abuse of a young person (that is, a person aged between 16 and 18 years of age) outside Australia, where the defendant is in a position of trust or authority in relation to the young person (subsection 270.20(2)).

3.3 The explanatory memorandum (EM) to the Bill explains that the purpose of this offence is to 'prohibit preliminary steps being taken by a person who wishes to participate in child sex tourism and to allow intervention prior to the child [or young person] being harmed'.[1] The EM offers the following justification for the new offence:

> Under the existing child sex tourism offence regime, a person who organises for others to engage in child sex tourism (eg as a child sex tour operator) would be captured by the [existing] benefiting and encouraging offences. While these offences allow police to adopt an interventionist

1 EM, p. 39.

> 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.
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> …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. Law enforcement should not have to wait until the offender is in the advanced stages of committing a child sex tourism offence to take action, as this places the child under unnecessary risk.[2]

3.4 The EM to the Bill notes that, in order to prove the proposed offence, it would not be necessary to prove that the person intended to commit a specific offence: it would be sufficient for the prosecution to prove that the particular conduct was related to a general intent to commit an offence. The EM states:

> This ensures that the offence will be available where a person has planned a range of activities preparatory to committing a child sex tourism offence, that are still in formative stages. For example, the person may not necessarily have decided on a particular target, time or date or other specific particulars of the elements that would constitute one of the specified child sex tourism offences.[3]

Concerns about the new preparatory offence

3.5 The Law Council of Australia (LCA) expressed significant criticisms about the proposed new preparatory offence. While the LCA was supportive of efforts 'to ensure Australia's laws allow for a robust approach to combating child sex tourism', it was concerned that, by specifically targeting purely preparatory acts, proposed section 272.20 'unnecessarily extends established principles of criminal responsibility'.[4] In general terms, the LCA expressed the view that:

> …[it] does not support the introduction of offence provisions which criminalise very nascent intentions which have only been advanced in the most preliminary way and are several steps from being realised—and may, in fact, be abandoned well before they are ever acted upon and realised.[5]

3.6 The LCA submission noted that the Criminal Code 1995 (the Criminal Code) presently contains so-called inchoate or extended liability offences, which may already capture cases where an offender has formed the requisite criminal intention to commit an offence, but the offence is not ultimately completed and no harm is caused. These include, for example, complicity, common purpose and conspiracy offences.[6] However, in relation to the proposed preparatory offence, the LCA argued:

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2 EM, p. 11.

3 EM, p. 41.

4 Law Council of Australia, *Submission 8*, p. 8.

5 Ms Helen Donovan, Law Council of Australia, *Proof Committee Hansard*, 9 March 2010, p. 6.

6 Law Council of Australia, *Submission 8*, p. 9.

> The proposed new offence…[goes] much further than existing extension of liability 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.[7]

3.7 The LCA argued that the new offence would for this reason represent a 'clear departure' from the established principles of criminal law, since:

> …[the criminal law has] traditionally been reluctant to penalise the unrealised private intentions of a person which have only been advanced in a preliminary way, particularly where those intentions have not yet crystallised into a specific criminal intent. This reluctance to attach criminal liability to purely preparatory conduct stems from the notion that a person can plan for conduct then change his or her mind before the plan is implemented.[8]

3.8 The LCA also rejected the justification put forward in the EM for the new preparatory offence (see above at paragraph 3.3), arguing that the existing legislative regime in respect of child sexual offences was 'extensive'. In addition to the available inchoate offences, the proposed legislative regime, even without the preparatory offences, would provide 'sufficient scope to allow police to adopt a preventative approach to child sex tourism'.[9] That is:

> [Such a regime would allow]…police to intervene and charge a person in any circumstance where he or she has interacted with another with the intention of aiding, facilitating, encouraging or contributing to (either as a participant or as an operator) the commission of a sexual offence against a child overseas.[10]

3.9 For the reasons set out above, the LCA opposed the introduction of the new preparatory offence. Alternatively, the LCA called for the new offence 'to be narrowly defined so that it only captures conduct of…[a] more advanced and direct nature'. The LCA submission explained:

> In that way, the likelihood of innocent and legitimate conduct erroneously becoming the subject of charge and prosecution would be decreased. Likewise, the likelihood of malevolent but nascent private intentions, which are yet to result in any harm and are still several significant steps from being realised, would also be avoided.[11]

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7 Law Council of Australia, *Submission 8*, p. 8.

8 Law Council of Australia, *Submission 8*, p. 8.

9 Law Council of Australia, Submission 8, pp 8, 9.

10 Law Council of Australia, *Submission 8*, p. 9.

11 Law Council of Australia, *Submission 8*, p. 10.

Department response

3.10 In response to the concerns raised by the LCA, the Attorney-General's Department (the Department) advised that the new preparatory offence was justified in the context of technological developments which had facilitated the activities of child sex offenders:

> The rationale for this offence is that advances in technology and the expansion of the internet have resulted in offenders becoming increasingly sophisticated in their networking activities and they are able to plan child sex tourism activities. This evidence often comes to the attention of law enforcement authorities before the person departs Australia. The intention of including this offence is to allow law enforcement authorities in Australia to intervene at an earlier stage and deal with that issue before the person leaves for overseas. We think the offence is appropriate.[12]

3.11 While the Department acknowledged that the proposed offence would operate more broadly than offences targeting more specific actions, it stressed that the offence was sufficiently constrained in terms of its potential application:

> [The Department considers the offence to be]…appropriately focused because it requires a proof of intention that the person is actually preparing or planning a child sex tourism offence, which means that innocuous research would never ground a prosecution for this offence—you would need some actual proof that the person was intending to go on and engage in the child sex tourism offence.[13]

Offence of causing a child to engage in sexual activity

3.12 As noted in Chapter 2, the Bill seeks to simplify the existing child sex tourism offences in Part IIIA of the *Crimes Act 1914*, which relate to inducing a person under 16 to engage in sexual intercourse or sexual conduct in the presence of the defendant (outside Australia). The existing sexual conduct offences will be replaced by an offence directed at *sexual activity*, which will apply to engaging in sexual activity with a child (paragraph 272.9(1)(a)) or causing a child to engage in sexual activity in the presence of the defendant (paragraph 272.9(2)(b)).

3.13 The LCA was concerned about the potential breadth of the proposed offence for causing a child to engage in sexual activity in the presence of the defendant. It noted that the new offence would remove an element of the current inducing offence: that the defendant 'intended to derive sexual gratification from the presence of the child'.[14] This element has been translated into a defence which would require a

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12 Ms Sarah Chidgey, Attorney-General's Department, *Proof Committee Hansard*, 9 March 2010, p. 10.

13 Ms Sarah Chidgey, Attorney-General's Department, *Proof Committee Hansard*, 9 March 2010, p. 10.

14 Ms Helen Donovan, Law Council of Australia, *Proof Committee Hansard*, 9 March 2010, p. 8.

defendant to establish that he or she did not intend to derive sexual gratification from the presence of the child (subsection 272.9(5)).[15]

3.14 The LCA argued that the new offence had the potential 'to cover a wide range of innocent conduct'.[16] For example, the offence could be committed where:

> …a family was sleeping in the same hotel room while on holiday overseas and the parents engaged in consensual kissing or groping which happened to be observed by their children. Other examples abound, such as circumstances where a group of young people are on an overseas excursion together and sharing a dormitory [and two] of the friends engage in consensual sexual activity while another friend aged under 16 is awake in the room.[17]

3.15 Further, the LCA was not convinced that the proposed defence:

> …provides adequate protection against the potential for the proposed offence in s272.9(2) to capture innocent, everyday sexual relations between consenting adults that happen to be observed by children.[18]

3.16 Given the seriousness of allegations of child sexual abuse, the LCA argued that the proposed offence should retain the element that the defendant 'intended to derive sexual gratification from the presence of a child' (as opposed to being relevant only as a defence).[19] It contended that such an approach was appropriate because this issue is 'central to the question of culpability for the offence'.[20]

3.17 Alternatively, the LCA called for the proposed defence regarding the absence of intent to derive sexual gratification to be amended 'to place an evidentiary rather than a legal burden on the defendant'.[21]

3.18 This alternative recommendation was underpinned by the LCA's criticism of the proposed defence, whereby the defendant has the legal burden to prove (on the balance of probabilities) an absence of intent to derive sexual gratification from the presence of the child. The EM states that this is appropriate because:

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15 Ms Helen Donovan, Law Council of Australia, *Proof Committee Hansard*, 9 March 2010, p. 8.

16 Law Council of Australia, *Submission* 8, p. 12. The LCA's arguments on this issue were also identified as relevant to subsection 272.12(6), which creates a similar offence for causing a young person to engage in sexual activity in the presence of the defendant, where the defendant is in a position of trust or authority.

17 Law Council of Australia, *Submission 8*, p. 12.

18 Law Council of Australia, *Submission 8*, p. 12.

19 Law Council of Australia, *Submission 8*, p. 12.

20 Law Council of Australia, *Submission 8*, p. 13.

21 In simple terms, a legal burden would require the defendant to prove the issue (that is, lack of intent to derive sexual gratification) on the balance of probabilities. An evidential burden would require the defendant to put forward enough evidence to allow the issue to be examined by the court. The prosecution would then have to disprove that evidence (beyond reasonable doubt).

> …whether or not the defendant derived gratification from something is a matter peculiarly within the defendant's knowledge and not readily available to the prosecution. The defendant is better placed to adduce evidence that he or she did not intend to derive gratification from the presence of the child during the activity concerned.[22]

3.19 The LCA contended that, while such reasoning may be appropriate in cases where a defendant's belief about a certain state of affairs is in question, it was not appropriate in cases where the question is whether or not the defendant possessed a requisite state of intention.[23]

Department response

3.20 In response to the LCA's particular concerns about the offence at paragraph 272.9(2)(b), the Department advised that it considers the offence is appropriately constructed. The element regarding the defendant's intention to derive sexual gratification has not been included in the new offence because of difficulties in establishing this element in prosecutions for the equivalent current offence (that is, the inducing offence that is to be replaced by the new offence). A representative of the Department explained further:

> The Commonwealth Director of Public Prosecutions [has] advised…[the Department] that it had proven to be an extremely problematic element of the offence because, for the prosecution to try and prove the state of mind of a defendant was very difficult. It is much easier for a defendant to disprove that.[24]

3.21 Further, the Department considers that it is appropriate, in the context of the offence, to require the defendant to establish his or her state of mind as to the absence of intent:

> It is the department's view that, where there is sufficient evidence for that evidence and you can demonstrate that a defendant has caused a child to engage in sexual activity, it is appropriate that demonstrating that there was no intention of deriving gratification rests on the defendant because that knowledge is wholly within their mental state.[25]

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22 EM, p. 20.

23 Law Council of Australia, *Submission 8*, p. 13.

24 Ms Sarah Chidgey, Attorney-General's Department, *Proof Committee Hansard*, 9 March 2010, p. 10.

25 Ms Sarah Chidgey, Attorney-General's Department, *Proof Committee Hansard*, 9 March 2010, p. 10.

Offence of persistent sexual abuse of a child – double jeopardy

3.22 Proposed section 272.11 will create an offence where a person commits one or more child sex tourism offences (the underlying offences) against a child outside Australia on three or more separate occasions during any period. The offences that will constitute an underlying offence for the purposes of subsection 272.11(1) include the 'engaging in sexual intercourse' and 'engaging in sexual activity' offences in proposed sections 272.8 and 272.9.

3.23 To prove the offence proposed in section 272.11, the prosecution would need to prove beyond reasonable doubt that the defendant committed an underlying offence in relation to the same child, and that such an offence was committed on three or more separate occasions during any period. The prosecution would be required to establish beyond reasonable doubt all of the elements constituting the relevant underlying offence.

3.24 Given the reliance of the offence proposed in section 272.11 on the underlying offences, that section provides explicit protection against 'double jeopardy'.[26] The EM explains:

> Subsection 272.11(11) will prevent a person who has been convicted or acquitted of an underlying offence from being convicted of an offence…if any of the occasions relied on as evidence [of] the commission of this offence include the conduct that constituted the offence [of] which the person was convicted or acquitted…[27]

3.25 However, the LCA expressed concern that the proposed protection against double jeopardy would not prevent a defendant from being tried for an offence under section 272.11, where one of the underlying offences relates to an offence of which he or she was convicted or acquitted in a foreign jurisdiction:

> Proposed s272.29 does provide that if a person has been convicted or acquitted in a country outside Australia of an offence against the law of that country in respect of any conduct, the person cannot be convicted of an offence against Division 272 in respect of that conduct.
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> However, the Law Council's concern is that given that the offence provision in s272.11 is directed at a course of conduct, essentially the carrying on of a sexually abusive relationship, a prior conviction or acquittal in a foreign jurisdiction for a single act may not be regarded as relating to the same conduct as that targeted by s272.11. As a result, proposed section 272.29 may not apply.[28]

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26 In simple terms, double jeopardy is the prosecution of a defendant for an offence for which he or she has already been tried and convicted or acquitted.

27 EM, p. 26.

28 Law Council of Australia, *Submission 8*, p. 14.

Department response

3.26 In response to this concern, the Department confirmed:

> …that the general overseas double jeopardy provision operates in exactly the same way as the specific provisions in the persistent sexual abuse offence. So we are confident that double jeopardy also works in relation to overseas convictions in that respect.[29]

Sexual intercourse or activity with a young person – position of trust or authority

3.27 As noted in Chapter 2, the Bill provides that it will be an offence to engage in sexual intercourse with a young person (subsection 272.12(1)) or to cause a young person to engage in sexual intercourse in the presence of the defendant (subsection 272.12(2)) outside Australia, where the defendant is in a position of trust or authority in relation to the young person.

3.28 The LCA was concerned that the proposed offence goes beyond the scope of, and has the potential to capture a broader range of sexual interactions than, similar provisions in other Australian jurisdictions. The committee was advised that, in these jurisdictions, the offence is limited to 'sexual intercourse', 'indecent act' or an 'act of gross indecency'. In contrast, the proposed offence:

> …would cover any 'sexual activity' between the young person and the offender...[because the] definition of 'sexual activity' is very broad, encompassing any activity of a sexual nature whether or not that activity involves physical contact between people. It has the potential to capture, for example, a consensual act of kissing or groping and would also cover circumstances where a young person sees or hears a sexual activity between other persons.[30]

3.29 Further, the LCA submitted that the proposed offence would cover a broader range of relationships than has been proposed for such offences by the Model Criminal Code Officers Committee (MCCOC), when it recommended that offences of this type should be created.[31] The offence would extend the class of persons falling under the definition of 'position of trust and authority' to include sports coaches and employers, or those persons who have the authority to determine significant aspects of a young person's employment (paragraphs 272.3(1)(e) and (h)). The LCA noted that this broader definition, coupled with the broad meaning given to 'sexual activity’, means that the offence could capture 'a range of consensual sexual contact involving young persons in circumstances that may not necessarily suggest an abuse of trust or authority by the defendant'. For example:

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29 Ms Sarah Chidgey, Attorney-General's Department, *Proof Committee Hansard*, 9 March 2010, p. 10.

30 Law Council of Australia, *Submission* 8, p. 15.

31 Law Council of Australia, *Submission* 8, p. 15.

> …a 17 year old and a 19 year old could form a consensual sexual relationship in Australia and then travel together overseas. While overseas, the 19 year old attains a position of trust or authority over the 17 year old by becoming his or her sports coach. If sexual activity such as kissing or groping continues, this type of relationship may now be captured by the proposed offence...[32]

Department response

3.30 In response to these concerns, the Department noted that, in terms of the potential scope of the offence, 'there is scope for law enforcement and prosecution agencies…to determine where it is appropriate to take action in the public interest'.[33]

3.31 Further, the Department advised that it has considered state offences in formulating the offence and has 'very much followed existing models'. It observed, for example, that both New South Wales and Victoria have between them included individuals such as sports coaches and employers in the scope of similar offences.[34]

Issues relating to the practice of 'sexting'

3.32 The Australian Privacy Foundation (APF) expressed concern about the potential impacts of the Bill, and the child sexual offences regime more broadly, in relation to 'sexting'. Sexting could be defined as:

> …electronic communication of non-professional images or videos portraying one or more persons in a state of nudity or otherwise in a sexual manner.[35]

3.33 The APF suggested that the practice of sexting was relatively commonplace amongst teenagers:

> A study carried out by *Girlfriend* Magazine showed that 40% of the 588 Australian teenage girls that participated in the study had been asked to send a naked or seminaked image of themselves over the Internet. Studies overseas give similar results. In the US, a study involving 653 teenagers found that 20% had engaged in sexting.[36]

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32 Law Council of Australia, *Submission 8*, p. 16.

33 Ms Sarah Chidgey, Attorney-General's Department, *Proof Committee Hansard*, 9 March 2010, p. 10-11.

34 Ms Sarah Chidgey, Attorney-General's Department, *Proof Committee Hansard*, 9 March 2010, p. 10.

35 Dr Dan Svantesson, Australian Privacy Foundation, *Proof Committee Hansard*, 9 March 2010, p. 2.

36 Australian Privacy Foundation, *Submission 5*, p. 3.

3.34 The APF submitted that there were 'serious risks' that some of the proposed and existing child pornography offences could apply to young people involved in the practice of sexting:

> Let us imagine we have a 15-year-old girl meeting an 18-year-old boy. They start dating and after a few months perhaps the girl, on her own initiative, sends an image of herself in the nude to the 18-year-old boy. She might also ask him to do the same for her and let us say that he complies with that. In that scenario, which does not seem to be entirely uncommon, both the boy and the girl could be convicted of child pornography offences of various kinds both under the existing law and under the new crimes introduced through the bill.[37]

3.35 The APF therefore considered that the child sexual offences regime should take account of sexting as a common practice among young people, in order to avoid criminalising or stigmatising young people as child sex offenders:

> The key task in relation to the bill would be to find some sort of exception, defence or something along those lines excluding sexting from child pornography offences while at the same time avoiding creating some sort of a loophole that can be used by serious child pornography offenders.[38]

3.36 While the APF acknowledged that the prosecution of young people in relation to such offences would depend on the discretion of police and prosecuting authorities, it preferred an approach that relies on the availability of appropriate defences or definitions to ensure that sexting is not captured by child sex offences. In this way, young people would not have to rely on discretionary decisions to otherwise avoid prosecution for very serious offences.[39]

Attorney-General's consent to commence proceedings against defendant under 18 years of age

3.37 As noted in Chapter 2, the Bill provides that proceedings for an offence against Division 272 must not be commenced without the consent of the Attorney-General, if the defendant was under 18 at the time he or she allegedly engaged in the conduct constituting the offence.

3.38 The EM explains that the child sex tourism regime does not require that an offender is over 18 years of age. The absence of any such limit is considered desirable as it provides flexibility to prosecute persons under the age of 18 years of age who

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37 Dr Dan Svantesson, Australian Privacy Foundation, *Proof Committee Hansard*, 9 March 2010, p. 2.

38 Dr Dan Svantesson, Australian Privacy Foundation, *Proof Committee Hansard*, 9 March 2010, p. 2.

39 Dr Roger Clarke, Australian Privacy Foundation, *Proof Committee Hansard*, 9 March 2010, p. 3.

sexually exploit children overseas.[40] However, in 1994, the Attorney-General issued a direction 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. The Bill will enshrine this direction in the Criminal Code in order to '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'.[41]

3.39 The LCA advised that it welcomes this proposal:

> …[It] provides some safeguard against the inappropriate use of this legislation to criminalise sexual conduct between young people of similar age, as opposed to sexual conduct involving a sexual predator and a child.[42]

3.40 However, the LCA also called for this requirement to be extended to cover proceedings against Division 273 (relating to child pornography and child abuse material). The LCA observed, for example, that a wide range of material able to be distributed by young people through mobile phones and social networking sites could be captured by the broad definition of 'child pornography material' in the Criminal Code:

> …the Law Council would submit that the Attorney-General's consent requirement should perhaps be extended to a number of other child sex offence provisions as some sort of safeguard against the misapplication of those provisions to behaviour which some of us may regard as socially undesirable or harmful but which is not predatory or exploitative of children and therefore is not the sort of behaviour that is sought to be targeted by this bill and broader legislation.[43]

Defence provisions

Valid and genuine marriage (including the issue of consent)

3.41 The Bill makes available to a number of offences a defence based on valid and genuine marriage (proposed section 272.17). The EM provides the following justification for the defence:

> 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

40 EM, p. 45.

41 EM, p. 44.

42 Law Council of Australia, *Submission 8*, p. 17.

43 Ms Helen Donovan, Co-Director, Law Council of Australia, *Proof Committee Hansard*, 9 March 2010, p. 6.

> the laws of the country in which they were in, may be subject to criminal charges under the Australian child sex tourism offence regime.[44]

3.42 The LCA questioned whether the defence relating to valid and genuine marriage 'is consistent with the broader rationale behind the Bill'. As Ms Donovan explained at the public hearing:

> …some provision needs to be made to plug the gap where the sexual activity which is the subject of the charges is non-consensual, or there is evidence that it is non-consensual or forced, but the defendant is able to escape conviction because he or she has successfully made out a defence of mistaken belief as to age or valid and genuine marriage.[45]

3.43 Ms Donovan submitted further:

> …the rationale behind the legislation…is that, regardless of what the law in other jurisdictions may say and what protections it may or may not offer, either on paper or in practice, Australia has an obligation to protect children under the age of 16 from harm. Our submission would be that the justification for the retention of the defence does not actually explain how marriage changes the nature of behaviour which is sexually exploitative or predatory into something different.[46]

3.44 The Department advised that, in relation to child sex offences, the issue of consent is not generally considered as relevant:

> 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.[47]

3.45 However, the LCA called for the issue of consent to be made a relevant fact in relation to the available defences of 'belief in age' or 'valid and genuine marriage' (the statutory defences). Specifically, the LCA submitted that the issue of consent should become relevant:

> …where a defendant seeks to rely on one of the statutory defence provisions. 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.[48]

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44 EM, p. 37.

45 *Proof Committee Hansard*, 9 March 2010, p. 6.

46 Ms Helen Donovan, Law Council of Australia, *Proof Committee Hansard*, 9 March 2010, p. 9.

47 Attorney-General's Department, *Answer to question on notice*, 11 March 2010, p. 2.

48 Law Council of Australia, *Submission 8*, p. 20.

3.46 The LCA was concerned that, without an element going to consent:

> …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 nonconsensual sexual activity with a person under 16.[49]

3.47 The LCA submission stated that it was particularly important to amend the statutory offence provisions 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). 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 law of the country where the offending took place.[50]

Department response

3.48 In response to the concerns raised by the LCA, the Department reiterated that it was not appropriate that consent be included as an element of child sex offences:

> 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.[51]

3.49 The Department advised that the inclusion of consent as an element of child sex offences would lead to the cross-examination of a child victim on the issue of consent in prosecutions for child sex offences. Such an outcome would be likely to confuse the issues at trial as well as cause possible trauma to child victims, which would be an 'unacceptable result'.[52]

3.50 Further, the Department acknowledged that 'prosecuting the defendant for an alternative Australian offence of sexual activity without consent is not available in the child sex tourism context'. This means that offences such as rape fall 'outside the intended scope of the child sex tourism regime', and would have to be prosecuted under the laws of the country in which the conduct occurs.[53]

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49 Law Council of Australia, *Submission 8*, p. 20.

50 Law Council of Australia, *Submission 8*, p. 20.

51 Attorney-General's Department, *Answer to question on notice*, 11 March 2010, p. 2.

52 Attorney-General's Department, *Answer to question on notice*, 11 March 2010, p. 2.

53 Attorney-General's Department, *Answer to question on notice*, 11 March 2010, p. 2.

Committee view

3.51 The committee notes the unanimous support among submitters and witnesses for a strong and comprehensive regime of laws to address child sex tourism and, indeed, child sex crimes more broadly. The evidence to the inquiry indicated that the offences being introduced by the Bill will serve to strengthen and improve Australia's laws in this area, by introducing new offences and simplifying and enhancing the coverage of existing offences.

3.52 The committee notes concerns in relation to the potentially broad scope and application of the proposed new offence for preparing or planning sexual intercourse or other sexual activity with a child. However, the committee is satisfied that this offence will capture only preparatory activities that are informed by a substantial intent to commit a sexual offence against a child, and will not be readily applied to legitimate or innocent conduct. Further, the committee agrees that the serious nature and consequences of child sex offences justify the creation of a preparatory offence that can enable law enforcement authorities to apprehend offenders before children are exposed to significant threat of harm or sexual abuse. The need for this type of offence would also appear to be greater as technological developments facilitate the potential for sex offenders to organise and undertake their criminal activities.

3.53 The committee notes also particular concerns that were raised in relation to the potentially broad scope and application of the proposed new offence for causing a child to engage in sexual activity in the presence of the defendant. The committee accepts that past difficulties in prosecuting the equivalent current offence justify the proposed form of the new offence, particularly in light of the seriousness of the criminal conduct that it addresses. Further, the proposed defence, in conjunction with the appropriate exercise of discretion by police and prosecuting authorities, should ensure that the provision does not capture behaviour that is not connected to an intention to commit a child sexual offence.

3.54 Similarly, the committee heard concerns in relation to the aggravated offence for engaging in sexual intercourse with a young person, or to cause a young person to engage in sexual intercourse, where the defendant is in a position of trust or authority. However, the committee is satisfied that the proposed offence does not appear significantly broader than similar existing offences in terms of its scope and application. Further, the committee is reassured that the discretion of police and prosecuting authorities will ensure that the provision does not give rise to unmeritorious prosecutions.

3.55 In a similar vein, the committee notes that police and prosecutorial discretion is an important element of ensuring that the new and existing child sex offences will not operate to unduly capture young people who may be involved or participate in the practice of 'sexting'. While the committee acknowledges that the practice may be undesirable, it agrees with arguments that young people engaged in such behaviour should not be exposed to the grave consequences and stigma that attach to allegations of, and convictions for, child sexual offences.

3.56 In light of the evidence provided in relation to sexting, the committee is inclined to favour calls for the discretion of the Attorney-General to be extended in relation to prosecutions of people under 18 years of age for child sex offences. This would mean that a young person could not be prosecuted for an offence under Division 272 (as already proposed) or Division 273, without the consent of the Attorney-General. The committee is of the view that the extension of this safeguard may ensure that behaviour which is not exploitative of, or harmful to, children is not captured by the child sex offence regime (particularly where that behaviour involves children themselves).

3.57 Finally, the committee notes the recommendations of the LCA concerning the statutory defences to be made available under the child sex offence regime, and particularly its arguments that an element of consent should be included in the defences relating to 'belief in age' and 'valid and genuine marriage'. In 2007, the committee was persuaded to support this recommendation by legitimate concerns underpinning the issue.[54] However, having considered the matter afresh, and with the benefit of further evidence from the Department, the committee accepts the rationale that the element of consent is not appropriate in the context of the child sex offence regime.

Recommendation 1

3.58 The committee recommends that the Bill be amended to provide that, consistent with the proposed approach under Division 272, a proceeding for an offence under Division 273 of the *Criminal Code Act 1995* (relating to child pornography and child abuse material offences) must not be commenced without the consent of the Attorney-General, if the defendant was under 18 years of age at the time he or she allegedly committed the offence.

Recommendation 2

3.59 Subject to the preceding recommendation, the committee recommends that the Senate pass the Bill.

Senator Trish Crossin
Chair

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54 Senate Legal and Constitutional Affairs Committee, *Inquiry into Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007[Provisions]*, October 2007, p. 21.