THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

CRIMES (CHILD SEX TOURISM) AMENDMENT BILL 1994

Report by the
House of Representatives Standing Committee on
Legal and Constitutional Affairs

MAY 1994

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FOREWORD

This report from the House of Representatives Standing Committee on Legal and Constitutional Affairs is the result of a necessarily brief, but very intense study of the Crimes (Child Sex Tourism) Amendment Bill 1994. It is the first time a Bill has been subjected to such scrutiny by a House of Representatives standing committee during its passage through the House, although the process is well tried in the Senate.

On 4 May 1994 the Committee was requested to consider and prepare an advisory report on the Bill with a deadline of 30 May. This has involved a great deal of effort by many people. On behalf of the Committee I would like to thank the individuals and organisations who gave so generously of their time and expertise to advise the Parliament on a very difficult and novel piece of legislation. Many leading practitioners made themselves available at short notice to advise the Committee and through it, the Parliament.

I would also like to record my thanks to the Committee secretariat: Judy Middlebrook, Kelly Williams (seconded for the inquiry), Paula Baker and Gemma Searle, who toiled beyond the call of duty to assist with the inquiry and to help in the preparation of this report. We are grateful for their assistance.

Finally, I wish to thank the Members of the Committee for their contributions. They devoted much time and effort to the consideration of the Bill. They have done this by adding to an already heavy commitment of electorate and parliamentary work.

The issue of child sex tourism is an emotive one, arousing feelings of revulsion and hostility. On the one hand the Committee has been assisted by the bi-partisan support for the Bill's objectives. On the other hand, the emotional and psychological context in which the Bill has been studied, has threatened to detract from a rational and considered approach to the draft legislation itself.

Fears that the Committee has wanted to "water down" the legislation are misplaced and misguided. The Committee has been concerned to ensure that a Bill which has almost universal political support for its fundamental objective is workable and effective. At the same time it must maintain the presumption of innocence and ensure that persons charged receive a fair trial.

If the Parliament accepts the recommendations made by the Committee in this report, the Bill will be a much clearer and more effective piece of legislation. It will provide a stronger deterrent than the current draft and it will be enforceable. The protection offered to children in countries outside Australia will be more powerful.

Daryl Melham MP
Chair
30 May 1994

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Mr Alan Cadman MP, Deputy Chairman
Hon Michael Duffy, MP
Hon Wendy Fatin, MP
Hon Clyde Holding, MP
Mr Mark Latham, MP
Mr Christopher Pyne, MP
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Crimes (Child Sex Tourism) Amendment Bill 1994

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Acronyms and Abbreviations

ACS	Australian Customs Service
AFPA	Australian Federal Police Association
AIDAB	Australian International Development Assistance Bureau
ECPAT	End Child Prostitution in Asian Tourism
DFAT	Department of Foreign Affairs and Trade
DPP	Director of Public Prosecutions
NGO	Non-government organisation
SCAG	Standing Committee of Attorneys-General

Crimes (Child Sex Tourism) Amendment Bill 1994

1 Background

1.1 Introduction

1.1.1 On 4 May 1994 the Minister for Justice moved that the *Crimes (Child Sex Tourism) Amendment Bill 1994* be referred to the Committee for consideration and an advisory report[1]. The Committee was required to report by 30 May 1994.

1.1.2 In his second reading speech, Mr Kerr said that representatives of the Democrats in the Senate had indicated it was not their intention to refer this matter to a Senate committee and the matter would be dealt with directly in the Senate without referral[2].

1.2 Background

1.2.1 The Bill was introduced in the House of Representatives on 23 March 1994. The impetus for the Bill comes from recent initiatives of the international community designed to protect children from exploitation, sexual or otherwise. Some of these initiatives are briefly outlined in the following paragraphs. The Bill was also preceded by an increasing awareness that some Australian residents do travel overseas to engage in sexual acts with children.

1.2.2 Australia ratified the United Nations Convention on the Rights of the Child on 17 December 1990. The Convention came into force on 16 January 1991. It places general obligations on parties to take action, at both a national and international level, to protect children from sexual exploitation and abuse. Articles 19 and 34 of the Convention are relevant to the Bill. Article 19 provides, in part, that appropriate legislative measures should be taken to protect children from exploitation. Article 34 requires parties to the Convention to undertake to protect children from all forms of sexual exploitation. The relevant Articles are reproduced in Appendix 4.

1.2.3 A draft protocol to the Convention on the Rights of the Child has been drafted by the Human Rights Commissioner, Mr Brian Burdekin. The protocol is an Australian/French initiative and will strengthen international commitment to the protection of children.

1.2.4 The draft protocol was adopted at the Second International Workshop on National Institutions for the Promotion of Human Rights in Tunis late last year.

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1 *House of Representatives Daily Hansard 4 May 1994*, p. 167.

2 *Hansard*, 3 May 1994, p. 77.

At the 50th meeting of the UN Commission on Human Rights in Geneva in March this year, it was resolved to establish a working group to develop an optional protocol.

1.2.5 Professor Vitit Muntabhorn, the United Nations Commission on Human Rights Special Rapporteur of the Program for the Prevention of the Sale of Children, Child Prostitution and Child Pornography, visited Australia in October 1992 and prepared a report. Professor Muntabhorn proposed that '... the possibility of incriminating the acts of Australians overseas ...' in relation to 'transnational sexual exploitation' be considered[3]. He also suggested that serious consideration should be given to '... the possibility of extending national jurisdiction to cover the deeds of Australians overseas ...'[4].

1.2.6 The World Conference on Human Rights held in Vienna in June 1993 called for universal ratification of the Convention on the Rights of the Child by 1995. The Conference supported all measures by the United Nations and its specialised agencies to ensure the effective protection and promotion of human rights of the girl child[5]. It called for effective measures to combat the exploitation and abuse of children, including child prostitution, child pornography and other forms of sexual abuse[6].

1.2.7 In July 1993 the First World Congress on Family Law and Children's Rights was held in Sydney. The Minister for Justice delivered the opening address at this conference. A communique was issued at the conclusion of that conference on 8 July 1993. This communique called for countries to follow '... the leadership shown by Sweden, the Federal Republic of Germany, Canada and the Standing Committee of Attorneys-General of the Commonwealth and States of Australia in making and resolving to make changes to their criminal laws to facilitate the prosecution of extra-territorial offences against children ..'[7].

1.2.8 The Bill was drafted against the background of these international initiatives and resolutions. In June 1993 the Standing Committee of Attorneys-General (SCAG) agreed on the need for criminal legislation to make it illegal for Australians to engage in sexual activities with children overseas. The Minister for Justice

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3 Muntarbhorn V., *Sale of Children: Report submitted by Special Rapporteur appointed in accordance with the Commission on Human Rights resolution 1992/76*, E/CN.4/1993/67/Add.1, 9 February 1993, para 106.

4 ibid., para 113.

5 World Conference on Human Rights, *Final Declaration maps global programme of action, reaffirms fundamental principles of human rights and freedoms*, p. 12.

6 ibid., p. 12.

7 *Final Communique of the First World Congress on Family Law and Children's Rights*, 1993, resolution 7.

announced the Commonwealth proposal to amend the *Crimes Act 1914* at the SCAG meeting held in Sydney on 4 November 1993. Concentrated work on the drafting instructions began in December 1993. The draft Bill was presented to the SCAG at its meeting in February 1994. It was approved by the Attorneys-General and they agreed to enact supplementary State and Territory legislation to close any remaining jurisdictional gaps.

1.2.9 On 23 February 1994 the Western Australian Attorney-General, Mrs Cheryl Edwardes MLA, announced that the Western Australian Government would begin drafting laws to enable prosecution of those who organise or profit from the sexual exploitation of children overseas. It was reported that the Western Australian laws would deal specifically with organising and profiting from child sex tours, including publishing advertisements of sex tours and inciting any person to travel abroad with this purpose in mind.

1.2.10 It has also been reported that the New South Wales and Victorian governments are proposing similar legislation. In her submission to this committee, the Victorian Attorney-General Mrs Jan Wade, stated that she intends to introduce legislation to ensure that licensed travel agents in Victoria who are convicted of offences under the proposed Victorian legislation have their licences cancelled[8].

Recommendation 1

The Committee recommends that the Attorney-General and the Minister for Justice consult with other members of the Standing Committee of Attorneys-General, with a view to encouraging the states to reflect the issues raised in this report in supplementary and complementary state legislation.

1.3 Purpose

1.3.1 The Bill amends the *Crimes Act 1914* to insert a new Part IIIA dealing with:

(a) sexual offences committed by Australian residents overseas;

(b) related offences of benefiting from or encouraging the above-mentioned offences;

(c) defences to these offences;

(d) the provision of evidence by video link in proceedings under this Part; and

(e) the provision of rules relating to the conduct of trials under this Part.

8 *Submissions*, p. S9.

1.3.2 The primary responsibility for protecting children from sexual exploitation rests with the countries in which the children are exploited[9]. However, the Bill provides for the prosecution of Australian citizens and residents who perpetrate these offences and manage to escape prosecution in the country in which the offences are committed. Division 4 of the Bill also provides a means of prosecuting Australian corporations for facilitating the offences outlined in the Bill. These provisions extend to cover the activities of non-Australian corporations that carry on their activities principally in Australia.

1.3.3 The Committee believes that the effectiveness of the legislation is dependent on the resources committed to investigations and prosecutions. Unless additional resources are allocated, the objectives of the Bill will not be met.

9 *Hansard 3 May 1994*, p. 73.

2. The Issues

2.1 Introduction

2.1.1 Many major issues have been raised during the public hearings on the Bill. These range from major concerns about fundamental legal principles, to suggestions for improving some of the more peripheral aspects of the Bill. Some specific issues raised by the Democrats have been studied by the Committee, and it is believed that the recommendations made in this report should address the Democrats' concerns. The issues may be considered under the broad headings of social, foreign policy, practical and legal issues.

2.2 Social Issues

2.2.1 The fundamental social issue raised by the Bill is the abhorrence and outrage felt by the vast majority of Australians at the sexual abuse of children, whether they be Australian or foreign children. Such conduct is an offence against Australian community standards. It is also a criminal offence when committed in Australia. The champions of the Bill feel that such conduct ought to be criminalised when committed by Australians overseas. The Committee fully supports this view. The attitude is consistent with Australia's international stance on human rights issues. Commenting on this issue Mr John Dowd QC described the Bill in the following terms

> It is what I call 'aorta' legislation – they 'orta' do something about it.[10]

2.2.2 Most witnesses translated their repugnance of the proscribed conduct into a willingness to find solutions to some of the problems identified in the Bill. A typical expression of this response was

> I am absolutely delighted to see that parliament is going to enact this legislation. My only reservations are as to some details of drafting in the bill...[11]

2.2.3 In the Committee's view, the Bill does not effectively translate intentions into sound legislation. The problems with the Bill stem from the idea that the prosecution should be assisted to curb child sex tourism, even if at the expense of fundamental principles of justice. The Committee applauds the determination to extend the protection of Australian law to children in other countries who may be abused by touring Australians, but recognises that such an objective is bound to be problematic. It is difficult enough to gather evidence and mount a case against child

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10 Mr J Dowd QC, *Transcript*, p. 190.

11 Mr Richard Read, Prosecutor for the Queen, Victoria, *Transcript*, p. 210.

sexual abuse within Australia. How much more difficult then, to attempt to do so for conduct carried out overseas? Concerns of this nature must not be allowed to erode the principles of a fair trial.

2.2.4 The Bill's response to the problems of procuring evidence and prosecuting a case has been to short circuit some of the traditional safeguards afforded to accused persons in Australia.[12] In the context of the social issues referred to above, this has been seen as an acceptable balance between protecting the rights of the accused and protecting the human rights of overseas children. This may appear to be a worthy exercise, but it seems that in the minds of some of the proponents of the Bill, the "accused" approximates the "offender". When the balance in favour of the prosecution is analysed from the point of view of the **falsely** accused, it may not appear so wise or just.

Recommendation 2

The Committee recommends that the Bill uphold the legal protections afforded to accused persons which are at the heart of our criminal justice system.

2.2.5 No weighting of the social issues at the expense of fundamental legal principles should be approved by the Australian Parliament which is the framer of Australian statute law. This philosophy was expressed by Mr John Dowd:

> If parliaments adopted this [Bill] it would be an absolute outrage, firstly, because you would have people wanting it in other legislation. You would throw aside 200 years of criminal justice with fairness for the accused. Fairness for the accused is also fairness for the community. [13]

2.2.6 The same theme was picked up by Mr Martin Sides QC, the acting Senior Public Defender for New South Wales:

> Child sex tourism exploits children and it exploits poverty, and it is desirable that this country should play a part in bringing it to an end. Any legislation should be workable and it should be practical. It is no use passing legislation that is unworkable. In the rush to end this most hideous trade, we must not lose sight of the fundamental principles that underpin our democratic institutions; one of those is the right of the accused to a fair trial ... The right of the accused to receive a fair trial is paramount. If that right is undermined we compromise our democratic institutions.... It is my view that there are significant and powerful procedures that are not available to accused persons or, for that matter, the prosecution, in this legislative scheme.[14]

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12 See section 2.18 on the principles of justice.

13 *Transcript*, p. 194.

14 Mr M Sides QC, *Transcript*, p. 266.

2.2.7 The emotional response of the community to the idea of sexual conduct with children must not be permitted to threaten the quality of the Bill designed to protect children at risk. Ms Bernadette McMenamin, the representative of ECPAT (End Child Prostitution in Asian Tourism), one of the staunchest proponents of the Bill, recognised this problem:

> I firmly believe that we should not go hunting in a hysterical way the child sex tourists this year, saying that they are this year's most evil people in the world. It has to be put into context. We have to ensure that a fair trial does occur.[15]

2.2.8 It has been said that the Bill will operate as a deterrent to Australians who may think they can use children from other countries in ways that would be criminal in Australia. The Committee agrees with this rationale but notes that the deterrent effect will be nullified if the legislation cannot be translated into action. The way to do this is to sharpen the focus of the Bill: to simplify the issues but to spell out the detail of how the Bill will operate. It is not an option to enhance the deterrent effect of the Bill by making it easier to secure a conviction. The connection between the quality of the Bill and its effectiveness as a deterrent was recognised by Senator Margaret Reynolds:

> I do not propose to comment on the technicalities of the Bill except to emphasise that it is essential that the intention of the Bill be fully maximised. The significance of the Bill's deterrent effect must not be jeopardised by any legal uncertainty which could result in an unsuccessful prosecution.[16]

2.3 The Size of the Problem

2.3.1 The Committee has little information about the problem of child sex tourism in parts of the world other than Asia[17], but notes that **the legislation covers Australian conduct in the whole world. It is not confined to particular countries.** The Committee concentrated its attention on the Asian region because of its proximity and consequent greater opportunities for Australians seeking sex with children.

2.3.2 The reasons for so many children being forced into prostitution, particularly in Asia, are of relevance to the Bill. The poverty endemic in regions close to Australia (and well-served by air transport links) are a major contributor to the ease with which touring Australians can have access to children for sexual purposes. Ms Margie Cook, a journalist who has recently investigated the problem, notes that

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15 Ms B McMenamin, National Coordinator ECPAT, *Transcript*, p. 13.

16 Senator M Reynolds, *Submissions*. p. S240.

17 An exception is Submission 36 from the Anti-Slavery Society which provides useful information on the problem in other parts of the world. See *Submissions*, p. S247 ff.

> Many of the sexually exploited children come from poor families who have no idea that the 'hotel' or 'tea house' to which they are selling their children is actually a brothel.[18]

2.3.3 The Committee has been unable to determine a sensible approximation of the size of the problem as it relates to the number of children involved. ECPAT (End Child Prostitution in Asian Tourism) referred to a government study from Thailand which estimated from 20,000 to 800,000 children were involved in prostitution in that country.[19] AIDAB (Australian International Development Assistance Bureau) provided the Committee with an estimate from

> ... only 2,500 to as many as 20,000–40,000 children under age 16 who are working in brothels, bars and clubs.[20]

2.3.4 With the wide variation in the statistics it is clearly nonsensical to estimate the numbers of children involved. It is sufficient to note that even the smallest "guesstimate" is appallingly and unacceptably large.

2.3.5 Reliable statistics relating to the numbers of Australians involved in child sex tourism, or the proportion of Australians compared to other nationals are also unavailable. A picture can be built up using a number of different sources, but the Committee realises that it has no reliable data on the size of the problem as it relates to Australian tourists.

2.3.6 The AFPA (Australian Federal Police Association) informed the Committee that a recent report noted allegations that networks of Australian paedophiles were organising child-sex tours of third world countries.[21] It is common knowledge that an Australian tourist visiting Thailand or the Philippines (for example) would be able to access child prostitutes without any assistance from Australia. The ACS (Australian Customs Service) has made in excess of 284 seizures of child pornography at the customs barrier since 1989. Mr Brian Hurrell from the ACS noted that:

> A number of the people the seizures were made from met a profile of travellers who would most likely fit into the category that this legislation is aimed at.[22]

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18 Ms M Cook, *Submissions*, p. S100.

19 Ms B McMenamin, *Transcript*, p. 17. ECPAT provided the Committee with much information about the problem of child sex tourism. Other organisations involved in addressing the problem include UNICEF, the International Catholic Child Bureau and the International Abolitionist Federation which holds regional meetings in Africa, Latin America, South Asia and South East Asia. See AIDAB's submission *Submissions*, p. S107.

20 ibid.

21 AFPA, *Submissions*, p. S68.

22 Mr B Hurrell, *Transcript*, p. 122.

2.3.7 It seems reasonable to suppose that the number of videos seized would represent only a small proportion of the number of travellers having sex with children. A small proportion of such travellers would return with evidence of their conduct, and an even smaller number of these would be apprehended at the customs barrier.

2.3.8 Material distributed by ECPAT claims that Australian men are amongst the worst offenders in relation to child sexual abuse in Asia.[23] Recent Australian press reports tend to support this claim.[24]

2.3.9 Whatever the actual numbers, the Committee is convinced that many Australian men touring Asia (in particular) are involved in the sexual abuse of children. Their conduct is morally outrageous and deserves to be criminalised in Australia. (It is already a criminal offence in the countries in which the conduct occurs.) In addition to being morally repugnant, such behaviour brings Australia into disrepute and ought not to be tolerated by Australians at home.

2.4 Foreign Policy Issues

2.4.1 The conduct of Australians overseas impacts on our bilateral and multilateral relations. One could pose the rhetorical question "Why criminalise conduct outside Australia which is already subject to the laws of overseas countries?" The answer relates to Australia's foreign policy.

2.4.2 Australian Governments have long held that human rights and other matters such as environmental protection, are not matters which can be contained within the borders of sovereign states. Most witnesses supported some sympathy for a view that the nations of the world are moving closer to the proposition that some things need to be dealt with internationally.

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23 ECPAT has provided the Committee with a table listing the national origins of 160 cases of foreign men arrested by Asian police for sexually abusing children. The list begins: USA...40; Germany...28; Australia...22; England...19; France...10; Japan...7; Canada...7; Switzerland...5; Sweden...4; ...

24 See for example the *Age,* 21 May 1994 pp. 18 and 21, and *Sydney Morning Herald,* p 22.

In addition Mr Michael Hall cites a study which attempts to estimate the incidence of sex (not necessarily child sex) tourism:

"between 70 and 80 per cent of male tourists who travel from Japan, the United States, Australia, and Western Europe to Asia do so solely for the purpose of sexual entertainment...While [this] estimate is almost certainly on the high side, especially given contemporary concerns over AIDS, it is likely that sexual entertainment is a major motivating factor for many male travellers to the region." C. Michael Hall, University of Canberra, quoting from his forthcoming book *Tourism and Gender,* eds Kinnaird, V.H. & Hall, D.R., Belhaven Press, London, 1994, citing (Gay, 1985, p. 34).

2.4.3 The Department of Foreign Affairs and Trade stressed the importance of the legislation in a bilateral and regional context:

> We believe this legislation is important in terms of our bilateral relationships with the Philippines and Thailand as it will improve perceptions of Australia in those countries and also allow us to do our part in stopping these practices.
>
> This is an issue on which our regional neighbours are looking to Australia to take the initiative in dealing with Australian citizens engaging in or facilitating criminal acts abroad.[25]

2.4.4 Senator, the Hon Gareth Evans, the Minister for Foreign Affairs, has discussed the proposed legislation with Ministers, judges and senior Government officials in Thailand and the Philippines. He reports that

> Thai and Philippine government officials warmly welcomed the Australian Government initiatives in this field in general, and the legislation currently before your Committee in particular.
> ... enactment of the *Crimes (Child Sex Tourism) Amendment Bill 1994* can only serve to improve relations with Thailand and the Philippines and increase our standing in the region.[26]

2.5 Constitutional Basis for Extra-territorial Legislation: A. The External Affairs Power

2.5.1 The Commonwealth has a two-fold authority for enacting domestic legislation relating to extra-territorial conduct. The first is the external affairs power specified in the Constitution (s51). Mr Greg James QC, provided the Committee with examples of analogous legislation enacted under this head of power. He noted that

> The extra-territorial application of the criminal law, particularly to Australians, or in matters of Australian concern, is no novelty and has been upheld by the High Court.[27]

2.5.2 Mr James QC referred the Committee to the Council of Europe's resolutions on extra-territorial criminal jurisdiction and legislation.[28]

2.5.3 The Committee accepts that the first line of protection for overseas children is the relevant local legislation. However, it would be less than realistic to assume that unilateral action in some foreign countries could be sufficient to deal with the

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25 Department of Foreign Affairs and Trade, *Transcript*, p. 108.

26 Department of Foreign Affairs and Trade, *Submissions*, p. S47.

27 Mr G James QC, *Transcript*, pp. 244–245 and *Submissions*, p. S57.

28 ibid., p. 240.

problem effectively.[29] Mr Stuart Fowler, President-elect of the Law Council of Australia and Co-Chairman of the First World Congress on Family Law and Children's Rights held in Sydney in July 1993, noted that regional countries looked to Australia to assist in the promotion of children's rights because

> it was part of our legal tradition that the individual was valuable and had rights ... That ... gave us not only a right but an obligation to lead if so requested.[30]

Insofar as Australians are part of the problem, Australian law should attempt to redress the problem.

2.6 Constitutional Basis for Legislation B. Treaty Obligations

2.6.1 In addition to relying on the external affairs power, the Commonwealth can find authority for extra-territorial legislation in its obligations under international treaties. Australia values its role as an active player in the international community. An alternative basis for creating the proposed offences against children overseas is the United Nations Convention on the Rights of the Child (refer to paragraph 1.2.2).

2.6.2 The submission from AIDAB stressed the importance of the treaty and noted that Australia is committed to fulfilling its obligations under the Convention to protect children from sexual exploitation.[31]

2.7 Adequacy of the External Affairs Power as Authority for the Bill

2.7.1 Several witnesses commented on the fact that although there existed a two-pronged authority for the legislation (the external affairs power as well as the convention), there was in fact no need to place reliance on the convention. The external affairs power can stand alone.[32]

2.7.2 This position was argued by the Attorney-General's Department in order to avoid any arguments about the exact nature of the provisions in the convention:

> The bill is based on the external affairs power. If we put to one side the possible basis of the rights of the child convention, which takes you to an argument about the exact thrust of the provisions in the rights of the child convention and whether this is a reasonable or appropriate way to give effect to obligations and that line of argument,

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29 Ms M Cook, *Submissions*, p. S100.

30 Mr S Fowler, *Submissions*, p. S62.

31 AIDAB, *Submissions*, p. S107.

32 See for example Mr G James QC, *Transcript*, pp. 244–245.

> we have no doubt that the bill is valid with regards to conduct that *is* geographically external to Australia on the basis of Polyukhovich.[33]

2.8 Policy Reasons for Legislating Extra-territorially

2.8.1 While the external affairs power is relevant to the authority for the Bill, the policy aspects of the legislation are also persuasive. Justice Elizabeth Evatt noted:

> ... the committee has had sufficient submissions on extraterritoriality to show that this is well within the power of government. As to the policy of legislating extraterritoriality, I simply draw attention to the fact that war crimes legislation, genocide legislation, torture legislation and so on all permit prosecution of extraterritorial crime. This type of offence really has an international and human rights flavour to it. It is a shame on us that our citizens participate in it. It is well comparable with those other crimes against humanity which we should stand up against when they are committed by our fellow countrymen.[34]

2.9 The External Affairs Power and Aspects of the Bill Relating to Conduct within Australia

2.9.1 This issue arises from the inclusion of offences that prohibit benefiting from, and encouraging, offences under the Bill within Australia. Mr Ian Barker QC queried whether the prohibition of certain criminal conduct occurring within Australia is outside the scope of the external affairs power[35]. Other witnesses also raised this issue[36]. However, the Attorney-General's Department submitted that it has no doubt that conduct within Australia that is directly connected with, or in the furtherance of, conduct outside Australia is within the external affairs power[37]. Mr James QC agreed with this view.

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33 Mr G Dabb, *Transcript*, p. 33.

34 Justice E Evatt, *Transcript*, p. 294.

35 Mr I Barker QC, *Submissions*, p. S50.

36 For example Mrs Jan Wade MP, Victorian Attorney-General, *Submissions*, p. S9.

> "... I have always maintained that legislation dealing with associated paedophile activities such as the promotion of child sex tourism is a matter for State jurisdictions. Travel agents are licensed under State legislation, and their discipline is also a matter for State legislation."

> Mr M Adams QC, was also concerned about the constitutionality of Clause 50DA: *Transcript*, pp. 144–145.

> Mr J Dowd QC, agreed with Mr Barker QC. *Transcript*, p. 159.

37 Mr G Dabb, *Transcript*, p. 33.

> Clearly the Commonwealth has power to legislate provided it is doing so under the external affairs power for a matter which is an external affair, for matters that occur within Australia as well as externally[38].

2.9.2 For further discussion of the relevant offences, refer to paragraph 4.9.1.

2.10 Issues of Practical Difficulties Arising from the Bill

A. Costs of Prosecuting a Case

2.10.1 The Minister's second reading speech provided no details of the costs of implementing the legislation apart from noting that

> It is not anticipated that the Bill will occasion any additional costs to the Government. The costs of any prosecutions will come from the budgetary allocations for the Australian Federal Police and the Office of the Director of Public Prosecutions...[39]

2.10.2 Many witnesses pointed to the short-sightedness of this claim. The representatives from the Australian Federal Police Association detailed the additional costs which would be necessary to support the legislation and estimated that a single prosecution might cost $90,000.[40]

2.10.3 The Australian Democrats devoted part of their submission to the issue of costs and called for increased resourcing for the AFP and the DPP (Director of Public Prosecutions), for funds to establish video link technology and resourcing for various other programs associated with the problem of child sex tourism.[41]

2.10.4 Mr Richard Read, Prosecutor for the Queen in Victoria, pointed to the need for trained specialist enforcement units.[42] Other costs associated with the prosecution might involve the accreditation of interpreters. Even with the use of video link technology, both prosecution and defence would need to send representatives to the country in question. The fact that the offences might demand committal proceedings in some jurisdictions has also been cited in reference to costs.[43]

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38 Mr G James QC, *Transcript*, p. 244.

39 Second Reading Speech, p. 8.

40 Australian Federal Police Association, *Submissions*, pp. S68–70.

41 Senator Sid Spindler, *Submissions*, pp. S74–75.

42 Mr R Read, *Submissions*, p. S84.

43 Mr G James QC, *Transcript*, p. 250.

2.11 Practical Difficulties

B. Costs of Defending a Case

2.11.1 The Committee benefited from the views and comments of several Queens Counsel on the subject of the costs of defending a case brought under the proposed legislation.[44] One described the exercise as 'mind-blowingly expensive', noting that there was a potential for some lawyers and some defendants to deliberately abort a trial which could cost $400,000 (for example) to remount. The political pressure engendered by such situations would be considerable.[45]

2.11.2 Several witnesses commented that if an accused person was eligible for legal aid, the consequences for the legal aid budget would be enormous. A greater difficulty is that most accused persons would not be eligible for legal aid. It is difficult to imagine how Australians could travel overseas and be eligible for legal aid. The New South Wales Council for Civil Liberties forecast two classes of defendants: those who could afford a thorough defence and those who would be forced to rely on the video link.

> ... video link evidence from overseas should not be permitted because of unfairness to the accused. It could create two systems of justice: the very wealthy accused may be able to send experts and investigators over to the foreign country to interview the principal witness ... but it would disadvantage all those other accused... who would not have the financial resources to be able to send experts to interview in the country where the offence allegedly took place.[46]

2.11.3 It has been suggested that persons tried under the legislation should be given the same access to legal aid that persons accused under war crimes legislation have.[47] This would have serious repercussions for the legal aid budget but would go some way to reassuring the civil liberties concerns raised during the hearings on the Bill.

2.11.4 Both Justice Evatt and Mr Dabb (Attorney-General's Department) considered the principle in *Dietrich* would cover the reasonable requirements of the defendant.[48] Clearly the issue needs to be clarified and a policy on access to legal aid should be developed by the Government.

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44 For example, Mr I Barker QC, *Submissions*, p. S53.

45 Mr J Dowd QC, *Transcript*, p. 174.

46 Ms B Schurr, *Transcript*,p. 200.

47 Mr T O'Gorman argued that people could find themselves significantly under-resourced because of the likely need to travel to the country concerned. *Transcript*, p. 343. The relevant section in the war crimes legislation is S19 *War Crimes Act 1945.*

48 Justice E. Evatt and Mr G Dabb, *Transcript*, pp. 343–344.

2.12 Practical Difficulties

C. Problems of the Video Link

2.12.1 While recognising that video evidence is used in Australia to protect the rights of the child, many witnesses saw problems with the use of this technology between Australia and another country. The problems raised by witnesses in relation to the video link related to the practicalities of providing the facilities in overseas countries, to the costs involved, and to the difficulty of ensuring procedural safeguards. The fact that others might be in the room with the witness but that this would not be obvious to viewers in Australia was mentioned in particular.

2.12.2 Most witnesses rejected the concept of determining the age of a child who might only be seen via video, if the video evidence were to be the basis for determining the age.

2.12.3 The more optimistic witnesses considered that the problems could be solved:

> There have been difficulties raised ... with reference to a child being put up before the video screen who is in fact not the true victim. There is corruption at the other end, in other words. There are difficulties with identifying children at the other end of the video link.
>
> I believe those sorts of difficulties can be relatively easily overcome with our enforcement officers liaising with, say, the Thai authorities, so that there would be somebody from the Australian Federal Police over there when a case arises like this.[49]

2.12.4 The Committee acknowledges that the use of video link is an important aspect of the enforceability of the proposed legislation but in reconsidering the Bill the Government should ensure that injustices do not occur because of the use of this technology.

Recommendation 3

The Committee recommends that the Government ensure that traditional standards of justice be given priority whenever video links are used in conducting a case under the legislation.

2.12.5 Another issue in relation to videos was whether the technology would be more appropriately used in committals rather than in trials. It seems likely that both prosecuting and defence lawyers would travel to the country concerned to gather evidence for a trial.

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49 Mr R Read, *Transcript*, p. 210.

2.13 Practical Difficulties

D. Collecting Evidence of the Proscribed Conduct

2.13.1 Australia has mutual assistance treaties with several of the countries which might be relevant to the application of the proposed legislation. These treaties will be helpful, but cannot be expected to overcome the considerable practical difficulties which will have to be overcome in order to enforce the legislation. Ms Margie Cook, who knows the situation in some regional countries has identified

> the difficulties of working undercover in a country where physical characteristics and cultural differences clearly identify such investigators;[50]

2.13.2 Ms Cook considers that evidence could be collected by working with NGOs, child-care workers and trusted law enforcement sources.[51]

2.13.3 Australian Federal Police stationed in various overseas countries could also be a source of evidence of the conduct of Australians overseas. If advice on the travel plans of known paedophiles could be given to the posts local authorities could be advised to investigate and take action if required.[52]

2.13.4 The Committee acknowledges the difficulties of gathering evidence (for the prosecution) and is concerned that these difficulties should not be used to excuse lesser standards of fairness than a person accused of a crime which is committed in Australia might expect.

2.13.5 The Anti-slavery Society has pointed out that Australia is already involved with other countries in mutual cooperation in various operations relating to law enforcement, extradition and the suppression of the trade in narcotic drugs. The eradication of sex involving children is consistent with these activities. Indeed the lack of Australian support in combating child sex tourism may adversely affect cooperation in other areas.[53]

2.13.6 Obtaining evidence of proscribed conduct within Australia will not pose particular technical problems. However, the Committee notes that there may need to be negotiations between state and federal authorities regarding the collection of evidence within Australia.

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50 Ms M Cook, *Submissions*, p. S104.

51 ibid.

52 Information extrapolated from attachment to Department of Foreign Affairs and Trade, Submission 34.

53 Anti-slavery Society, *Submissions*, p. S262. The Anti-Slavery Society consists mostly of barristers and solicitors. It is dedicated to the eradication of slavery, and institutions and practices similar to slavery, in South-East Asia. ibid., p. S246.

2.14 Practical Difficulties

E. Control of Evidence: Perjury, Blackmail and Perverting the Course of Justice

2.14.1 One of the more serious concerns raised during consideration of the Bill is the fact that neither prosecution nor defence has the same control over witnesses that would apply within the Australian jurisdiction. Witnesses who will be giving evidence by video link will not be able to be compelled. For such witnesses perjury cannot be punished and the crime of perverting the course of justice will not exist.

2.14.2 The Committee has been told that the possibility of the false accuser is all the more likely in such a situation. Several witnesses raised the possibility of blackmail as a real possibility in the absence of Australian courts being unable to impose penalties for false evidence.

> The proposed bill will create opportunities for blackmail. The consensual purchase of sex with persons over 16 is not prohibited. Anyone engaging in those sexual encounters runs a blackmail risk – indeed, as does anyone who innocently has his photograph taken with an under 16 foreigner.[54]

2.14.3 The Committee considers that these problems should be taken into account in relation to the Bill, but notes that not all witnesses identify blackmail as a problem peculiar to this legislation.[55]

2.15 Practical Difficulties

F. The Age of the Child

2.15.1 In many overseas countries reliable documentary evidence on the age of the child may be difficult to obtain. The Bill in its present form allows the jury to estimate the age of a child when the judge is unable to determine the age. The Committee took evidence from an eminent professor of paediatrics on the possibility of determining the age of a child with expert evidence. Professor Bode is one of the foremost authorities in Australia on the growth and development of children.[56] The professor stated that it was possible to establish the state of (skeletal) maturation

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54 Mr I Barker QC, *Submissions*, p. S55.

55 Mr G James Qc, for example, commented that the risk of blackmail is no greater than the risk in Australia. *Transcript*, p. 248.

56 Professor Bode became the director of the Prince of Wales Children's Hospital in 1990. He was previously professor of paediatric endocrinology and metabolism at Harvard University. His speciality of paediatric endocrinology relates to "hormones and basically growth and development". [*Transcript*, p. 178] His overseas experience extends to India, Africa and South America. [*Transcript*, pp. 184–185].

or bone age of a child, but this would establish the "pubertal staging" rather than the chronological age.[57]

2.15.2 Professor Bode told the Committee that age could be established with probably 95 per cent confidence to within one and a half years at twelve years of age.[58] Professor Bode's evidence on the difficulty of establishing chronological (as opposed to bone) age was supported by Dr Geoffrey Stubbs, who provided evidence on estimating age to the Attorney-General's Department.[59] Ms McMenamin raised the point that if make-up is applied, children may look older than their years.[60]

2.15.3 If the jury is empowered to estimate the age of the child, in the absence of other evidence, the possibility of a gross miscarriage of justice must be considered. (The Committee addresses this issue in 3.6.)

2.15.4 Difficulties in establishing the age of the child are compounded because the legislation provides for one offence if the child is aged twelve to fifteen years and an aggravated offence if the child is under twelve years. The Committee recommends collapsing the two offences into one, allowing the judge to deal with the added seriousness of an offence with a younger child by applying a stricter penalty. (See discussion at 3.7 below.)

2.16 Practical Difficulties

G. Protection of Witnesses

2.16.1 One of the more serious practical difficulties which may arise during the prosecution of a case under the legislation is the potential for putting key witnesses, particularly child witnesses, at risk. The child sex trade involves large amounts of money and (allegedly) powerful interests in some Asian countries. Ms Margie Cook gave evidence of the threats to church workers who are trying to rescue children at risk.[61] If Catholic priests have to carry guns with them for protection, the position of children bringing complaints must be regarded as dangerous.

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57 Professor Bode, Professor of Paediatrics, Prince of Wales Children's Hospital, *Transcript*, p. 181.

58 ibid.

59 Dr Stubbs supported Professor Bode's information that the estimation of age is more difficult in the older child:
"The child is growing so rapidly that the correspondence diminishes and the gap between bone and chronological age probably becomes plus or minus 2 years, that is a boy with a bone age of 14 is 95% certain to be within the age range 12 to 16". [*Submissions*, p. S175].

60 "... when the child has make-up and is dressed in a particular way, it may be difficult. I could bring you many pictures today of children who look far older than they are. *Transcript*, p. 7.

61 Ms M Cook, *Submissions*, p. S102.

2.16.2 While there are NGOs in various Asian countries which could offer shelter to children involved in cases brought under the proposed legislation, there are no guarantees of safety in this sort of informal protective network.[62]

2.16.3 The mutual assistance treaties already in place between Australia and some of its neighbours would need to be reconsidered in the light of assistance for witnesses in cases brought in Australia. It is possible that in extreme cases nothing less than sanctuary could be considered satisfactory.

2.17 Possible Unintended Consequences of the Bill

2.17.1 Mr John Dowd QC gave evidence regarding possible unintended consequences of the Bill. He emphasised that the legislation is not specific to any particular country or region. It embraces the whole world. One consequence of this is that Australia would have to be prepared for the rest of the world to legislate for behaviour carried out in Australia. Other countries might legislate in the areas of trade practices, industrial law or the environment. Australia would not be in a good position to protest.[63]

2.18 The Principles of Justice

2.18.1 This is the most important of the issues of concern raised by witnesses in submissions and public hearings. The analysis of particular clauses in the next section of this report focuses on particular concerns which relate to the right of the accused to a fair trial and accepted Australian standards of justice.

2.18.2 Some witnesses believe that the presumption of innocence, the basis of the Australian tradition of criminal law, is put at risk by the Bill. Mr Greg James QC encapsulated the concerns of many witnesses:

> The most important thing about this legislation is that it should not involve a surrender of the standards that Australians have come to expect of their justice system and, indeed, are entitled to according to the High Court. When one looks at section 80, relating to trial by jury of offences against the laws of the Commonwealth, that involves a unanimous verdict beyond reasonable doubt.[64]

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62 "I believe there are some secure places where the kids involved in action can spend a number of years and receive an education and where they can be isolated from people who may wish to do them some harm". Ms M Cook, *Transcript*, p. 291:

63 Mr J Dowd QC, *Transcript*, pp. 160–161.

64 Mr G James QC, *Transcript*, p. 248.

2.18.3 Justice Elizabeth Evatt noted

> We have to look here at the principles of law and at the issues of civil rights which arise under the legislation.

2.18.4 Justice Evatt is a strong supporter of the Bill and the principles underlying it, but stated that the Bill in its current form would not comply with article 14 of the International Covenant on Civil and Political Rights.

> To comply with that [the ICCPR], it is clear that some changes will be necessary. I have spoken already about the clarity of the offence. I think it is important that people understand exactly what the offence consists of and that the legislation is not complicated by convoluted defences and bouncing onus of proof. ... There must be adequate facilities and opportunities for the preparation of the defence, and there must be the availability of legal representation. I am speaking now of requirements under article 14 of the covenant.[65]

2.19 Lack of Consultation in Preparing the Legislation

2.19.1 Underlying the concerns expressed about the Bill during the public hearings conducted by the Committee, is the issue of consultation during the policy development and initial drafting stages of the Bill. This Committee has previously urged the Government to improve its record of consultation, particularly where complex issues are concerned. The recently published Sackville Report cited the Committee's concerns[66] and supported its conclusions, noting

> Better consultation is also likely to mean that less parliamentary time will be spent debating matters that are contentious because their ramifications are unclear (as against matters that are contentious because people have different views about what policy is preferable.[67]

2.19.2 The need for wide consultation was a particular issue with the Bill under consideration because of the innovative nature of the legislation. The lack of consultation was commented on adversely by several witnesses. Mr Terry O'Gorman, the Vice-President of the Queensland Council for Civil Liberties, was trenchant in his criticism:

> The consultation process up until the time this bill was introduced into the House was restricted to the law enforcement lobby.[68]

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65 Justice E Evatt, *Transcript*, p. 296.

66 Professor Ronald Sackville QC, Chairman Access to Justice Advisory Committee, *Access to Justice – an Action Plan*, p. 466.

67 ibid., p. 467.

68 Mr T O'Gorman, *Transcript*, p. 303.

and

> The consultation has been one way and one way only. That, in my submission, is why there are so many problems with this bill.[69]

2.19.3 Mr Sides QC, acting Senior Public Defender for New South Wales, agreed with Mr O'Gorman:

> *There has been no prior consultation with public defenders before the Committee* contacted us. Normally, where ... there is federal legislation that the state government has an interest in, the state Attorney-General would seek the views of public defenders. ... It would seem to me that the reason why there has not been consultation on this occasion is because of lack of time.[70]

2.19.4 A representative from the Attorney-General's Department pointed out that there had been consultation through the Standing Committee of Attorneys-General but added that he could not say that each jurisdiction 'conducted a lengthy or elaborate consultation process' though some did.[71] It is clear that consultation involved the Commonwealth Director of Public Prosecutions and (presumably) members of ECPAT and others concerned to address the social problems underlying the Bill. The Committee's concern is that there has been an absence of consultation with experienced practitioners, particularly those experienced in defending criminal cases.

2.19.5 Setting aside the question of consultation, Mr Dabb from the Attorney-General's Department noted:

> Having said what I have about consultation, it does not follow that the department regards the bill as perfect and being incapable of being improved in any respect at all. Clearly it is capable of being improved.[72]

2.19.6 The Committee considers that the level of consultation on this occasion fell well short of the standard required and that this has been, at least in part, the cause of problems in the Bill. The Government has failed to consult sufficiently with people with the appropriate practical legal qualifications and experience. The Committee is pleased to report to the Parliament that it has had the assistance of many eminent practitioners with both prosecution and defence experience. The lawyers consulted have, for the most part, been strong in their support for the policy underlying the Bill and have expressed their concern that the Government "gets it right".

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69 ibid., p. 304.

70 Mr M Sides QC, *Transcript*, p. 265.

71 Mr G Dabb, Attorney-General's Department, *Transcript*, p. 321.

72 ibid., p. 323.

2.19.7 While criticising the process of consultation up to the time of the preparation of the Bill, the Committee feels it is fair to add that the Minister and the Attorney-General's Department have been most supportive in assisting the Committee with its present analysis of the Bill. The Committee is particularly grateful for the secondment of a legal officer from the Criminal Justice branch of the Department to advise the Committee on aspects of the Bill.

2.19.8 In order to avoid similar problems arising in the future the Committee adds its voice to those of the Access to Justice Committee and the witnesses consulted in relation to this Bill.

Recommendation 4

The Committee recommends that the Government ensure adequate and effective consultation in the preparation of legislation. Such consultation should extend to practitioners experienced in both prosecution and defence, as well as to lawyers' organisations such as the bar associations and the Law Council and to non-legal organisations such as civil liberties groups.

3 Analysis of Particular Clauses

3.1 Introduction

3.1.1 The committee recognises that many of the problems with the provisions of the Bill have arisen due to the novel nature of the legislation. However, as this Bill may become a drafting model[73] for other countries to follow, every effort should be made to protect child victims and to ensure the legal protections for the accused are not compromised.

3.1.2 It was submitted that the simpler the case and the issues, the easier it is for a jury to reach a verdict[74]. Ms McMenamin adopted a similar line in her evidence to the committee:

> 'There should be clarity without confusion.'[75]

The committee supports this view and believes that simple legislation increases the chances of securing convictions and thereby deters potential offenders. With this in mind, the committee has proposed a number of changes to the Bill.

3.1.3 The committee notes that a unanimous verdict is now required in prosecutions for Commonwealth offences[76]. Following the decision of the High Court in *Cheatle v. The Queen*[77], State laws permitting majority verdicts cannot apply to Commonwealth offences.

Division 1 - Preliminary

3.2 Definition of induce

3.2.1 One witness and a number of submissions suggested that the definition of 'induce' in clause 50AA(1) was too narrow as it lacks any reference to financial inducement. This view was not unanimously held by all witnesses.

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73 Mr G. James QC, *Transcript*, p. 245.

74 Mr M. Sides QC, *Transcript*, p. 334.

75 Ms B. McMenamin, *Transcript*, p. 6.

76 Mr G. Dabb, *Transcript*, p. 28.

77 (1993) 177 CLR 541.

3.2.2 Mr Dowd QC suggested that the definition of induce should be amended to read 'induce includes induce by threats, promises or otherwise' as this would include financial inducements[78]. Another suggestion was to make the definition inclusive and to mention 'financial reward' as a means of inducement[79]. A further submission suggested that the definition be amended so it would read 'induce means induce by any means and includes threats, promises, trickery or untrue representations'[80].

3.2.3 The Committee considers that the term 'or otherwise' is sufficient to encompass financial inducements and consequently, the current definition in the Bill is satisfactory.

3.3 Definition of act of indecency

3.3.1 'Act of indecency' is not defined in clause 50AA(1) as the common law definition is relied upon. Clause 50AB(3) makes it clear that an act is not an act of indecency if it is carried out for a proper medical or hygienic purpose, or for a proper law enforcement purpose.

3.3.2 There was no unanimous view among witnesses and submissions as to whether it is necessary to define 'act of indecency' or whether it is sufficient to rely on the common law definition[81].

3.3.3 In *Saraswati v. R.*[82], the High Court held that the expression an 'act of indecency' does not include an act which constitutes an indecent assault. Mr James QC and Mr Sides QC submitted that, in view of this decision, 'act of indecency' should be defined[83]. Mr Sides QC stated that the simplest way to overcome the problems that may be created by the High Court decision is to state that an 'act of indecency' includes an 'act of indecent assault'[84]. Such a definition need not be *exhaustive*.

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78 Mr J. Dowd QC, *Transcript*, p. 163.

79 Mr J. Fajgenbaum and Mr W Brind Zichy-Woinarski QC, *Submissions*, p. S24.

80 Dr J. Hunter, Ms D. Boniface and Dr S. Egger, *Submissions*, p. S112.

81 See for example, Mr G. James QC, *Submissions*, p. S59. (that definition is required) and Mr M. Adams QC, *Transcript*, p. 138. (that common law definition is acceptable).

82 (1990) 172 CLR 1.

83 Mr G. James QC, *Submissions*, p. S58
Mr M. Sides QC, *Transcript*, p.325.

84 *Transcript*, p.325.

Recommendation 5

The Committee recommends that, to avoid doubt, the inclusion of a definition of 'act of indecency' in clause 50AA(1) should be considered.

3.4 Definition of a resident of Australia

3.4.1 Clause 50AC provides that both Australian citizens and residents can be charged with offences under Part IIIA. Mr Dowd QC queried whether 'residents' includes citizens of other countries (such as New Zealand), who may not have residency status, but whose residency in Australia is covered under agreements such as the Australia New Zealand Closer Economic Relations Trade Agreement[85].

3.4.2 The Committee accepts the explanation of the Attorney-General's Department for the narrow definition of resident. It was submitted that the intention was to cover the conduct of individuals who live in Australia or who are here for permanent stay, rather than someone who may live in Australia under a one or two year permit[86]. However, the Committee is concerned that the narrow definition may prove problematic.

Recommendation 6

The Committee recommends that the definition of resident in clause 50AC be given further consideration.

85 Mr J. Dowd QC, *Transcript*, p. 164.

86 Mr G. Dabb, *Transcript*, p. 325-326.

Division 2: Sexual offences against children overseas

3.5 Problem with current Division 2 offences

3.5.1 Professor Lanham suggested, and a number of other witnesses agreed, that there may be a potential gap in the legislative scheme[87]. The offences in Division 2 are framed to distinguish between offences where the child is under 12, from offences where the child is at least 12 but under 16 years. If evidence before the jury is sufficient to prove that the child was aged 11 or 12 years, but the age cannot be determined conclusively, the jury would not be able to determine beyond a reasonable doubt that the child was 11 or 12 years. If this occurs, the accused may be acquitted of offences in relation to both age groups. The Attorney-General's Department recognises that there is a potential gap in the legislation[88]. This problem could be remedied by redrafting the offences in the Division dealing with a child aged 12-15 years and making the age limit under 16 years. If there is a conviction for an offence with a child under 16 years, the rules against double jeopardy would prevent the person from being prosecuted for the offence where the child is under 12 years.

3.6 Merging each offence into one age group

3.6.1 Mr Sides QC proposed an alternative approach to that outlined at paragraph 3.5.1. He submitted that:

> It would make things a lot simpler to remove the under 12 barrier and simply create offences that cover complainants under the age of 16.[89]

Justice Evatt agreed that there may be merit in condensing each offence into one age group, that is, under 16 years[90]. This alternative proposal would simplify the legislation. The condensed offences would comprise:

(a) sexual intercourse with a child under 16;

(b) inducing a child under 16 to engage in sexual intercourse;

(c) sexual conduct involving a child under 16; and

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87 Professor D. Lanham, *Submissions*, p. S1.

88 Mr O. Walsh, *Transcript*, p. 40.

89 *Transcript*, p. 268.

90 Justice E. Evatt, *Transcript*, p. 295.

(d) inducing a child under 16 to be involved in sexual conduct.

3.6.2 Merging the offences in this manner would overcome some of the problems associated with the determination of age. The jury need only be convinced beyond reasonable doubt that the child was under 16 for that element of the offence to be satisfied. For very young children, this would appear a relatively simple task. For those older children aged 15 years, for example, it may be unlikely that a prosecution would proceed if proof of age was not readily obtainable.

3.6.3 Merging the offences in this manner can be justified on a number of grounds. As age is relatively easy to establish within the Australian community, the merged offences the committee are proposing are unnecessary in State and Territory offences in this area. However, age may be difficult to prove conclusively in proceedings under the Bill, and this approach would only require proof that the child was under 16 years.

3.6.4 Furthermore, when aggravation is included in the legislation, it must be pleaded and proved[91]. By simply removing aggravation from the offences, the legislation becomes simpler. However, aggravation will still be taken into account by the judge upon conviction when determining the question of penalty[92].

3.6.5 'Collapsing' offences in this manner is not without precedent. In its recent discussion paper, the New South Wales Law Reform Commission recommended that the murder/manslaughter distinction be abolished and that the difference in criminality between murder and manslaughter should be reflected in sentence[93].

3.6.6 Professor Bode's evidence supports the merging of the offences. He stated that he could not differentiate between a child under the age of 12 and a child over the age of 12 by just looking at the child or by even examining the child[94]. Professor Bode also stated that it is easier to make an accurate determination of the maturation of a child rather than the child's chronological age[95]. He informed the committee that the developmental stage of a child can be estimated by taking an X-ray of the child's hand. The X-ray reveals the degree of skeletal maturation[96]. If the offences are condensed and a broad age range exists, evidence of the maturation of the child can be led. If the child is pre-pubescent, a more severe penalty could be imposed regardless of chronological age.

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91 Mr M. Sides QC, *Transcript*, p. 332.

92 Justice E. Evatt, *Transcript*, p. 295.

93 Mr M. Sides QC, *Transcript*, p. 329.

94 *Transcript*, p. 279.

95 *Transcript*, p. 178.

96 *Transcript*, p. 181.

3.6.7 Existing state legislation in this area makes a distinction between older and younger children. This may be an argument for retaining the two age groups for each offence. Furthermore, a dividing line that separates pubescent and pre-pubescent children may be desirable.

3.6.8 However, after much consideration, the Committee has concluded that merging the offences to create a single offence for each type of conduct with a child under sixteen years of age is the best option as it will simplify the issues at trial.

Recommendation 7

The Committee recommends that:

(a) clauses 50BA, 50BC, 50BE and 50BG be deleted; and

(b) the age of the child be amended in clauses 50BB, 50BD, 50BF and 50BH to read 'a person under 16'.

3.7 Penalties for merged offences

3.7.1 If this approach is adopted, the maximum penalties should be retained for the under 16 offences. The penalties would, therefore, be:

(a) 17 years imprisonment for sexual intercourse with a child under 16 years;

(b) 17 years imprisonment for inducing a child under 16 years to engage in sexual intercourse;

(c) 12 years imprisonment for sexual conduct involving a child under 16 years; and

(d) 12 years imprisonment for inducing a child under 16 years to be involved in sexual conduct.

3.7.2 State laws relating to sexual offences with minors are inconsistent. The laws differ in relation to the age at which the offence becomes aggravated. The offences can be aggravated at 10, 12, 13 or 14 years depending on the jurisdiction[97]. The severity of the maximum penalties are also disparate. Given these varying penalties, there is no consistent standard to be adopted.

97 See Attorney-General's Department, *Submissions*, p. S152

3.7.3 Concerns were expressed that a harsher penalty may be imposed for offences committed under this Part than would be imposed for the same offences committed within Australia. Mr Adams QC raised the offence of carnal knowledge as an example. He pointed out that offences within Australia involving the carnal knowledge of girls aged 12 to 15 years are rarely prosecuted[98]. Mr Adams also suggested the maximum penalties may be too high, as did Mr Sides[99].

3.7.4 If an accused person was prosecuted for an offence committed against a child of the upper age level, it is to be expected that the sentencing discretion would be exercised and a penalty would be imposed similar to that which would be imposed if the offence occurred in Australia in similar circumstances.

Recommendation 8

The Committee recommends that the maximum penalties should be retained for the merged offences.

3.8 Sentencing discretion

3.8.1 The imposition of penalty for the merged offence is a matter of sentencing discretion for the judge. Mr Sides QC commented that:

> ...[I]t would be up to the judge on sentence to be satisfied of the approximate age of the person and how that reflected on criminality of the offender and therefore to be reflected in sentence.[100]

These sentiments were also expressed by Mr Terry O'Gorman[101].

3.8.2 When sentencing, the judge is required to determine the facts of the case and to assess the objective seriousness of the case[102]. The courts have often regarded the age of the victim as an aggravating feature of the crime even though the age of the victim was not relevant to the offence. For example, in *R v. Garforth*[103], a life

98 Mr M. Adams QC, *Transcript*, p. 139.

99 Mr G. Adams QC, *Transcript*, p. 139.
Mr M. Sides QC, *Transcript*, p. 271.

100 Mr M. Sides QC, *Transcript*, p. 269.

101 *Transcript*, p. 332.

102 *R v. Dodd* (1991) 57 A Crim R 349.

103 Unreported, NSW CCA, 23 May 1994.
See also *R v. Trotter* (Unreported, NSW SC, 10 August 1993).

sentence for murder was upheld for the killing of a nine year old. The judgments of cases involving the sexual assault of children make it clear the courts will punish offenders severely. For example, in *R v. Garnam*, Yeldam J. stated:

> There is no doubt ... that sexual abuse of children is on the increase and the courts, by the imposition of severe sentences, must play their part in endeavouring to stamp out and to deter others from similar evil conduct ... They must truly by their sentences reflect the outrage which the community undoubtedly feels towards those who do sexually assault, one way or the other, young children.[104]

3.8.3 Subsection 16A(2) of the *Crimes Act 1914* details matters that the court must take into account when passing sentence so far as they are relevant. These matters include the nature and circumstances of the offence (ss. 16A(2)(a)), the personal circumstances of the victim of the offence (ss. 16A (2)(d)) and any injury resulting from the offence (ss. 16A(2)(3)). These matters would all assist the court in the exercise of its discretion in determining the appropriate penalty for one of the merged offences under Part IIIA.

3.8.4 Notwithstanding the court's discretion in sentencing and the matters listed at subsection 16A(2) of the *Crimes Act 1914* , the Committee recommends the insertion of a provision that states the court must take the age of the victim into account when sentencing a person for an offence or offences under Division 2 The addition of such a provision will avoid any doubt that, despite the merging of offences, age is a significant aggravating factor in the crime.

Recommendation 9

The Committee recommends that a provision be inserted stating that in sentencing a person convicted of an offence under this Part, the court must take the age and maturity of the complainant into account.

3.9 Clause 50BA - Sexual intercourse with a child under 12
Clause 50BB - Sexual intercourse with a child 12-15 years

3.9.1 If the offences are merged as outlined in paragraph 3.7.1, then this will become one offence of sexual intercourse with a child under 16 years.

3.10 Clause 50BE - Sexual conduct involving a child under 12
Clause 50BF - Sexual conduct involving a child 12-15 years old

3.10.1 If the offences are merged as outlined in paragraph 3.7.1, then this will become one offence of sexual conduct involving a child under 16 years.

104 Unreported, NSW CCA, 9 March 1989, p. 5.

3.10.2 The Committee recognises that 'the offender' was inserted as a drafting tool in clauses 50BE, 50BF, 50BG and 50BH. However, the accused person has not been convicted and describing him or her as 'the offender' is technically incorrect. The Committee also believes 'the offender' is a value-laden term.

Recommendation 10

The Committee recommends that 'the offender' be deleted from clauses 50BE, 50BF, 50BG and 50BH and a neutral term substituted.

3.10.3 Mr Dowd QC criticised the use of the word 'submits' in subclauses 50BE(b) and 50BF(b). He identified two problems related to the use of this term. The first problem relates to the definition of a submission. Mr Dowd cited an example where a 12 year old female appears on stage at a strip show and commits an act of indecency in front of a man without his consent or prior knowledge that it would occur[105]. The person may not form a view as to whether the female is under 16 years at that time. But depending on the age of the girl, the person present may have committed a serious criminal offence merely by witnessing an act of indecency in a public place. The definitional problem as to the point in time at which a person 'submits' was also raised[106].

Recommendation 11

The Committee recommends that, in light of problems with the definition 'submits', the use of the term in subclauses 50BE(b) and 50BF(b) should be reconsidered.

3.10.4 Mr Dowd QC also pointed out that submitting to an indecent offence would normally be a summary offence in Australia[107]. It was noted that the disposal of some matters summarily may decrease costs[108]. The Committee notes that the conduct targeted by the legislation is of a serious nature, not normally considered as a summary offence.

3.10.5 The intention to derive gratification is included as an element of subsections 50BE(c) and 50BF(c). The intention was included to ensure that couples who

105 Mr J. Dowd QC, *Transcript*, p. 167.

106 ibid., p. 167.

107 *Transcript*, p. 175.

108 Mr M. Sides QC, *Transcript*, p. 272.

engage in sexual intercourse in the presence of an uncomprehending child are not caught within the ambit of the offences, irrespective of motive.

3.10.6 It was suggested in the hearings that this intention should also be expressed to apply to subsections 50BE(a), 50BE(b), 50BF(a) and 50BF(b)[109]. The Attorney-General's Department submitted that, given the common law definition of an act of indecency, a jury would be required to consider whether a consenting adult couple who perform sexual acts on each other in the presence of an uncomprehending child, but otherwise in private, should or should not be regarded as engaging in the conduct offending against community standards of decency[110].

3.10.7 The committee recognises that the element of gratification is not a requirement of equivalent State and Territory offences concerning acts of indecency. However, to avoid doubt, the it would appear that the intention to derive gratification should be included as an element of subsections 50BE(a), 50BE(b), 50BF(a) and 50BF(b).

Recommendation 12

The Committee recommends that 'intends to derive gratification' should be included as an element of subsections 50BE(a), 50BE(b), 50BF(a) and 50BF(b).

3.10.8 The committee is concerned that the phrase 'intends to derive gratification' in subclauses 50BE(c) and 50BF(c) may be vague. It was suggested it may be appropriate that the word 'sexual' does not appear before 'gratification' because while the gratification may be perverse, it may not be primarily sexual[111]. However, as serious criminal offences are being created, the narrower term 'sexual gratification' may be more appropriate.

Recommendation 13

The Committee recommends that consideration be given to inserting 'sexual' before 'gratification', where appearing.

109 Mr M. Sides QC, *Transcript*, p. 274.

110 *Submissions*, p. S34.

111 Mr T. Reid, *Transcript*, p. 74.

3.11 Applicability of Part IIIA to accused persons under the age of 18 years

3.11.1 Mr Sides QC suggested that a person under the age of 18 years should not be prosecuted under this legislation or, alternatively, the person should not be prosecuted without the consent of the Attorney-General in writing[112]. Consensual intercourse between a 17 year old youth and a 15 year old girl was cited as an example of a case that would probably not warrant prosecution. Justice Evatt accepted the proposition that when dealing with a statutory offence of sexual relations with a person under age, it is appropriate that another young person close to that person in age should not be prosecuted[113]. The New South Wales Society of Labor Lawyers also flagged the potential problem by citing an example where a 16 year old Australian travels abroad and has a relationship with a person under 16[114].

3.11.2 In cases where both participants are under 18 years but there is a large difference in ages, the consent of Attorney-General could be obtained and the prosecution could proceed[115].

Recommendation 14

The Committee recommends that consideration should be given to inserting a provision so that persons under 18 years cannot be prosecuted under Part IIIA, unless the Attorney-General gives his or her consent in writing.

4 Division 3 - Defences

4.1 General criticisms

4.1.1 Concerns were raised in relation to the incorporation of consent as a defence under clauses 50CA and 50CB when consent is not an element of the offence charged[116]. The committee recognises that consent is a requirement of the reasonable mistake defence available in respect of similar offences under some State

112 *Transcript*, p. 277.

113 *Transcript*, p. 298.

114 *Submissions*, p. S308.

115 *Transcript*, p. 299.

116 Director of Public Prosecutions, *Transcript*, p. 86.

laws[117]. The Minister for Justice commented that consent was included as a defence to avoid the result where the defendant satisfies the jury of his or her belief that the child was 16 years or older, but the child did not consent and the defendant had no belief as to consent[118].

4.1.2 However, including consent as an element of the defence raises another issue at the trial. Mr Sides QC criticised the inclusion of consent as a source of potential confusion for juries[119]. Mr Justin McCarthy, of the Office of the Commonwealth Director of Public Prosecutions, was also in favour of the removal of consent as an element of the defence[120]. Evidently both defence and prosecution counsel favour the removal of consent as an element of the defences under clauses 50CA and CB.

4.1.3 The practical effect of the inclusion of consent in the proposed defences has been noted by a number of witnesses. Mr McCarthy suggested that:

> ... the practical effect of the proposed defences is to provide for the conviction of a defendant for rape or some other non-consensual act via the back door[121].

This view was supported by Justice Evatt and Mr Sides QC[122]. Rape and other criminal offences (for example, murder and armed robbery) committed by Australians overseas are outside the intended scope of this Bill. These offences are dealt with in the country in which the offence occurs.

4.1.4 Justice Evatt also favoured the removal of consent as an element of both defences because:

> It would certainly lead to the cross-examination of the child as a major element in the case for the defence.[123]

4.1.5 Mr Sides QC intimated that it may be easier to secure convictions if the consent element was removed from the defences at clauses 50CA and 50CB. He stated that:

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117 Attorney-General's Department, *Submissions*, p. S139.

118 *Hansard*, p. 75

119 Mr M. Sides QC, *Transcript*, p. 275.
Justice Evatt, *Transcript*, p. 300.

120 *Transcript*, p. 87.

121 Director of Public Prosecutions, *Submissions*, p. S114.

122 Justice Evatt, *Transcript*, p. 298.
Mr M. Sides, *Transcript*, p.334.

123 *Transcript*, p. 334.

> My experience is that if a person is charged with intercourse without consent, if the defence is, 'She consented', or 'I believe she was consenting', it is much easier to achieve an acquittal than if your client says, 'I did not have intercourse at all ...'.[124]

By removing the consent element, the issues are limited to the age of the child and whether sexual intercourse or sexual conduct actually took place. If consent is not an issue at trial, it would appear that convictions will be more easily secured under the legislation. Removing consent as an issue may also decrease the trauma to which the victim is exposed as he or she will not be subject to cross-examination on that issue.

Recommendation 15

The Committee recommends that the belief as to consent should be removed as an element of the defences in clauses 50CA and 50CB.

4.2 Clause 50CA - Defence based on belief about age and consent

4.2.1 This defence is expressed to not apply to offences where the child is under 12. Ms Schurr suggested that the defence of mistake of age should be extended to every offence under this legislation where age is the essence of the offence. She argued that not to permit the defence of mistake as to age to exist creates a strict liability offence allowing persons to be convicted of serious criminal offences on the basis of a mistake[125]. Ms Schurr also noted that the High Court has insisted that the common law will imply a defence of mistake in statutory offences[126].

4.2.2 If the offences are merged and the defence based on belief about age is retained for the merged offences, the defence based on belief about age is not afforded a wider scope. The younger the established or apparent age of the complainant, the less likely in practice a jury will be to believe the defence of mistaken belief as to age[127].

Recommendation 16

The Committee recommends that the defence based on belief about age should be retained for the merged offences.

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124 *Transcript*, p. 275.

125 *Transcript*, p. 199.

126 Citing *He Kaw Teh v. The Queen* 157 CLR 523 at *Transcript*, p. 199.

127 Mr M. Sides, *Transcript*, p.269, p. 331.

4.2.3 If the Government decides not to merge the offences in the manner recommended by the Committee, the defence based on belief about age should be available for all offences, including those where the child is under 12 years. The same consideration outlined above would apply, that is, the younger the child the less likely a jury would believe the accused's defence based on belief about age.

Recommendation 17

If the merger proposal is not accepted, the Committee recommends that the defence based on belief about age should be available for all offences, including those offences where the child is under 12 years.

4.3 Clause 50CB - Defence based on valid and genuine marriage and belief about consent

4.3.1 This clause is a relatively novel provision. It does not appear in state legislation as the issue of a valid marriage involving 14 or 15 year olds would generally not arise within the Australian domestic sphere[128].

4.3.2 The committee accepts this defence, provided the consent element is deleted according to recommendation 15.

4.4 Clause 50CC - Defence must be proved on balance of probabilities

4.4.1 Concern was expressed that in establishing the defences, the defendant bears a legal burden rather than just an evidentiary burden[129]. A legal burden is the burden of proving the existence of the matter and an evidential burden is the burden of presenting or pointing to evidence that suggests a reasonable possibility that a matter does or does not exist[130].

4.4.2 Clause 50CC has been criticised as providing prosecutors with a short cut to conviction[131]. It places the legal burden for both defences on the defendant. The Model Criminal Code states that the burden of proof on a defendant should be

128 Mr J. Woodger, *Transcript*, p. 64.

129 Mr J. McCarthy, *Transcript*, p. 87.
Ms B. Schurr, *Transcript*, p. 198.
Professor D. Lanham, *Transcript*, p. 228.

130 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: General Principles of Criminal Responsibility chapter 2*, December 1992, paras. 601 and 602.

131 Mr I. Barker QC, *Submissions*, p. 51.

evidentiary only[132]. The Committee notes that the Model Code general principles are not absolutes but are intended to be capable of variation in the context of different offence provisions[133]. The Committee also recognises that the Model Criminal Code Officers Committee is yet to deal with sexual offences[134].

4.4.3 It has been submitted the imposition of a legal burden on the accused in this legislation is justified on the basis that an assertion as to the defendant's subjective belief of age or the genuineness of a marriage would be extremely difficult for the prosecution to disprove as the matters are peculiarly within the knowledge of the defendant[135]. The Senate Standing Committee for the Scrutiny of Bills has approved this approach[136]. However, in all criminal charges (except those of strict liability), the prosecution must prove the state of mind of the accused.

4.4.4 Mr Adams QC recognised that a reversal of the onus of proof is justified where the defendant has peculiar knowledge. He cited the possession of goods that are reasonably suspected to be the proceeds of crime as an example of when the onus of proof could be legitimately reversed[137]. In that situation the defendant is likely to know the origin of the goods. However, under this legislation, he considered the defendant may be in no better position to determine the age of the alleged victim than anyone else. Mr Adams found it very difficult to understand the policy reasons why the onus of proof in relation to age was placed on the defendant[138]. He stated that:

> ... Assessment of age is extremely difficult. The trouble with a balance of probabilities is that even if, at the end of the day, the jury says, 'We don't know one way or the other. It is a 50 per cent bet,' the defence loses. In other words, even if there is a very substantial level of certainty in the mind of the jury, far more than merely a reasonable doubt, but it says, 'It is an even way chance,' the defence loses on the balance of probabilities test.[139]

4.4.5 Mr James QC suggested that clause 50CC be divided so that the defence of valid and genuine of marriage should remain as it is, to be proved by the accused on the balance of probabilities. However, he stated that there should be no reversal of the onus of proof in relation to age and consequently, the defence of age should be

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132 *Model Criminal Code*, para. 602.

133 Attorney-General's Department, *Submissions*, p. S140.

134 Mr G. Dabb, *Transcript*, p. 335.

135 Attorney-General's Department, *Submissions*, p. 40.

136 *Alert Digest No. 6*, 4 May 1994, p. I7.

137 Mr M. Adams QC, *Transcript*, p. 143.

138 ibid., p. 143.

139 ibid., p. 143.

rebutted beyond reasonable doubt[140]. This view was supported by Mr Sides QC and Mr O'Gorman[141].

4.4.6 The lack of compellability of foreign witnesses should also be noted in this respect. Where an accused bears an onus of proof, the difficulties in discharging that onus will be exacerbated if the defence requires foreign witnesses to give evidence[142].

Recommendation 18

(a) The Committee recommends that the current clause 50CC should be deleted.

(b) The Committee's view is that the onus of proof in relation to the defence based on belief about age should not be reversed.

(c) The Committee recognises that the onus of proof in relation to the defence based on valid and genuine marriage should be reversed and the accused should be required to prove this defence on the balance of probabilities.

4.5 Clause 50CD - Reasonableness of alleged belief

4.5.1 Clause 50CD provides that the jury may consider the reasonableness of any alleged belief of the accused. The Committee accepts that the jury should be able to consider the reasonableness of the accused's belief as to age. This is consistent with the Model Criminal Code[143].

4.5.2 The Explanatory Memorandum states that the reasonableness of the defendant's belief as to the child's consent is a matter that the jury may take into account[144]. The memorandum does not include reference to the defendant's belief as to the child's age.

140 Mr G. James QC, *Transcript*, p. 254.

141 *Transcript*, p. 335.

142 Mr M. Adams QC, *Transcript*, p. 142.

143 *Model Criminal Code*, op. cit., para. 306.

144 *Crimes (Child Sex Tourism) Amendment Bill 1994*, Explanatory Memorandum, p. 9.

4.5.3 If the Government adopts the Committee's recommendation at paragraph 4.1.5 that consent be deleted as a defence, the Explanatory Memorandum will need to be amended.

Recommendation 19

The Committee recommends that the notes on clause 50CD in the Explanatory Memorandum should be amended to include a reference to the defendant's belief as to the child's age.

4.6 *Clause 50CE - Lack of physical resistance not conclusive*
Clause 50CF - When belief about consent must be disregarded

4.6.1 In light of the recommendation that consent be deleted from clauses 50CA and 50CB, clauses 50CE and 50CF should also be deleted.

Recommendation 20

The Committee recommends that clauses 50CE and 50CF should be deleted.

4.6.2 However, if the Government decides to retain consent as a defence, some concerns were raised in relation to clause 50CF and the committee suggests they be noted. The use of the word 'knew' was considered problematic and 'knew or believed' may be a better formulation[145]. Secondly, the party who bears the onus of proving or disproving the requirements in subclause 50CF(1) is unclear on the face of the provision[146]. A number of witnesses stated that if consent remains as a defence (although they all felt it should be deleted), then the burden of proving lack of consent should be on the prosecution rather than the burden of proving consent resting with the defendant[147]. The final concern relates to the omission of financial inducement from the factors outlined in subclause 50CF(1)(a) to (j) that cause consent to be disregarded[148]. However, in relation to the final concern, the

145 Mr M. Adams QC, *Transcript*, p. 143.

146 Mr M. Adams QC, *Transcript*, p. 144.

147 Mr M. Sides QC, *Transcript*, p. 337.
Mr T. O'Gorman, *Transcript*, p. 337.
Justice E. Evatt, *Transcript*, p. 337.

148 Mr J. Dowd QC, *Transcript*, p.168.

committee recognises that to negate consent where payment is made would render the defence of consent superfluous in many cases[149].

4.7 Defence of legality

4.7.1 One witness[150] and two submissions[151] raised the possibility that a defence of legality should be included. This type of defence would provide that conduct which is legal in the relevant foreign country would not be actionable upon return to Australia, even if the conduct is illegal in Australia. The Committee recognises the rationale of the Attorney-General's Department in not including this defence. It was considered that such a defence may encourage paedophiles to target those countries whose laws against child sexual abuse may be inadequate or who lack the resources to combat it[152].

4.7.2 The provisions are designed to act as a net to catch offenders who are found to have escaped the criminal justice system of the foreign country where the act occurred[153]. Therefore, the Bill should only operate where the conduct is criminal in the country in which it occurs and the offender has managed to escape the net. However, if the conduct is legal in the country in which it occurred, then the accused should not be subject to the provisions of this Bill.

Recommendation 21

The Committee recommends that no prosecution should proceed in Australia if the actions are not criminal in the laws of the foreign country.

149 Attorney-General's Department, *Submissions*, p. S140.

150 Mr M. Sides QC, *Transcript*, p. 276.

151 Professor D. Lanham, *Submissions*, p. S4.
Queensland Law Society, *Submissions*, p. S17.

152 Attorney-General's Department, *Submissions*, p. S40.

153 Attorney-General's Department, *Submissions*, p. S31.

Division 4 - Offences of benefiting from, or encouraging, offences against this Part

4.8 Introduction

4.8.1 Division 4 of the Bill creates two secondary offences of benefiting from, and encouraging, offences against Part IIIA. To some extent these offences cover conduct that is within the ambit of normal complicity offences, but the main purpose of the offences is to deter conduct which facilitates or benefits from the primary offences[154].

4.9 Constitutionality of Division 4 offences that occur within Australia

4.9.1 As discussed in paragraph 2.9.1 above, the two offences created in Division 4 deal with conduct within and outside Australia. Mr Barker QC queried whether the external affairs power can support legislation proscribing conduct within Australia, given the specific absence of a general Commonwealth criminal power[155].

4.9.2 The Attorney-General's Department considers that the provisions of Division 4, to the extent they apply to conduct within Australia, can be supported by the external affairs power[156]. The Department cites *Polyukhovich v. The Commonwealth*[157] as authority for this view. In *Polyukhovich*, McHugh J. stated:

> In my opinion, the external affairs power extends to conduct engaged in Australia for the purpose of carrying out some object external to Australia.[158]

4.9.3 The Committee accepts that legislating for offences that may occur inside Australia, under Division 4 of the Bill, is valid under the external affairs power.

4.10 Clause 50DA - Benefiting from an offence against this Part

4.10.1 Mr Sides QC queried the use of the word 'benefiting' in clause 50DA. He claimed it is a word with which the criminal law is unfamiliar. Mr Sides drew the Committee's attention to the term 'for advantage' which he considers is well known

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154 Mr T. Reid, *Transcript*, p. 66.

155 Mr Ian Barker QC, *Submissions*, p. S50.

156 *Submissions*, p. S129.

157 (1991) 172 CLR 501.

158 (1991) CLR 501 at pp. 716-717.

in criminal law. Mr Sides suggested that the term 'benefiting' should not be limited to obtaining financial benefit[159].

Recommendation 22

The Committee recommends that consideration should be given to ensuring that the term 'benefiting' is not limited to obtaining a financial benefit in clause 50DA.

4.11 Encouraging an offence against this Part

4.11.1 Clause 50DB creates an offence where an act or omission is made with the intention of encouraging conduct that would be an offence against Part IIIA and the act or omission is reasonably capable of encouraging such conduct. Clause 50DB(2)(a) states that 'encourage means encourage, incite to, or urge, by any means whatever, for example, by written, electronic or other form of communication'. Clause 50DB(2)(b) further defines 'encourage' to mean 'aid, facilitate, or contribute to, in any way whatever'. The Attorney-General of South Australia, Mr K. Trevor Griffin, stated that the definition of 'encourage' is very broad and that it appears the drafter has tried to squeeze the whole of the law of complicity into the word 'encourage'[160].

4.11.2 Clause 50DB(3) provides some examples of acts that may be reasonably capable of encouraging conduct which is an offence under Part IIIA. The use of examples in this manner was criticised. The first example is 'organising an arrangement that facilitates an offence against this Part'. It was considered that 'organising', 'arrangement' and 'facilitation' are all vague words[161]. Mr Dowd QC considered that the use of examples in legislation and the interpretation of these examples may be problematic[162]. Mr Griffin also considered it unhelpful to provide descriptions of conduct as examples[163].

4.11.3 The word 'encourage' encompasses a number of activities. However, in order to commit an offence under clause 50DB, the accused must have the requisite intention, that is, the intention of encouraging conduct that would constitute an

159 Mr M. Sides QC, *Transcript*, p. 273.

160 Mr K. Trevor Griffin, *Submissions*, p. S19.

161 Mr D. Williams AM QC MP, *Transcript*, p. 74.

162 Mr J. Dowd QC, *Transcript*, p. 169.

163 *Submissions*, p. S19.

offence against Part IIIA. The Committee accepts the use of the word 'encourage' in this context, notwithstanding the fact that it is a broad term.

4.12 Increased penalties for offences under Division 4

4.12.1 The maximum penalty for offences under Division 4 of the Bill is ten years imprisonment. In the opinion of Mr Sides QC, this penalty is too low for clause 50DA. Given that this provision is designed to catch those individuals who derive profits from child sex tourism, Mr Sides QC suggested that 17 years imprisonment would be a more appropriate maximum penalty[164]. The Attorney-General of Victoria, Mrs Jan Wade, suggested that the penalties for both offences in Division 4 were too low. She believed that the penalties should be at the top of the relevant range as the role of a tour operator, who organises child sex tours, can be likened to that of a drug-dealer who provides the means for many subsequent offences to be committed[165]. The maximum penalties available for persons convicted of importing commercial and trafficable quantities of narcotics are life imprisonment and 25 years imprisonment respectively[166].

4.12.2 The Committee believes that the maximum penalties in Division 4 should be increased to seventeen years imprisonment.

Recommendation 23

The Committee recommends that the maximum penalties in Division 4 should be increased to seventeen years imprisonment.

5 Division 5 - Video link evidence

5.1 Clause 50EA - When court may take evidence by video link
Clause 50EB - When court must take evidence by video link

5.1.1 Division 5 of the Bill is broadly based on Part IV of the *Evidence and Procedure (New Zealand) Bill 1993*[167]. It provides two means whereby evidence can be taken by video link. Under clause 50EA the court has a discretion to direct that evidence be taken by video link where certain conditions are satisfied. These

164 Mr M. Sides QC, *Transcript* p. 272.

165 *Submissions* p. S10

166 Section 235 of the *Customs Act 1901.*

167 Mr T. Reid, *Transcript*, p. 66.

conditions include where the witness is not the defendant in the proceeding, the specified facilities are available and the taking of evidence in this manner is in the interests of justice.

5.1.2 Under clause 50EB(1), it is mandatory that the court take evidence by video link where the attendance of the witness would cause unreasonable expense or inconvenience, or would cause the witness psychological harm or to be intimidated to an extent that the reliability of the witness would be affected.

5.1.3 A number of concerns were expressed in relation to this Division. The first concern is a policy concern and relates to the basic right of an accused to confront his accuser. Australian is a signatory to the International Covenant on Civil and Political Rights. Article 14(3) provides that:

> In the determination of any charge against him, everyone shall be entitled to the following minimum guarantees in full equality:
>
> (a) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

5.1.4 It was submitted that in order for Australia to comply with this Convention, the video link provisions must be deleted[168]. The covenant was drafted when video links were unknown. If cross-examination were not permitted via video link, then Australia may be in breach of its international obligations. However, as cross-examination is possible with video link, it was submitted that the provisions are not in breach of the spirit of the covenant[169]. The committee agrees that video link provisions would not necessarily place Australia in breach of its international obligations. However, there needs to be ample opportunity for cross-examination in any evidence taken by video link.

5.1.5 Clause 50EB(1) is drafted in mandatory terms. The clause need not be framed in this manner, as the interests of justice requirement will always allow the court a discretion as to whether a direction to take evidence by video link should be made.

Recommendation 24

The Committee recommends that clauses 50EA and 50EB be combined into one provision detailing when the court may make a direction that evidence be taken by video link.

168 Mr I. Barker QC, *Submissions*, p. S53

169 Mr G. Dabb, *Transcript*, p. 44.

5.1.6 There was some criticism of subclause 50EB(1)(a) as it elevates unreasonable expense or inconvenience to a position of priority in criminal legislation[170]. In response to this concern, Mr McCarthy from the DPP suggested that issues of cost and inconvenience would be irrelevant in relation to a crucial child witness[171]. Other subclauses in clause 50EB were also criticised. It was noted by one witness that it would be very difficult to prove that the attendance of the overseas witness would cause the witness harm, distress, or reduce his or her reliability as a witness under subclauses 50EB(1)(b) and 50EB(1)(c)[172].

5.1.7 The 'unreasonable expense or inconvenience' requirement was defended on the grounds that it would not result in a direction unless the court was satisfied the direction was not contrary to the interests of justice[173]. However, the saving provision in subclause 50EB(2) was, in itself, criticised for a number of reasons. These reasons include that:

(a) the meaning of the subclause is unclear on its face[174]; and

(b) the onus of proof should be on the party seeking to persuade the court that evidence should be taken by video link[175].

The Committee suggests that the use of a 'double negative' in clause 50EB(2) is a curious drafting tool.

5.1.8 After some discussion, the Committee has decided not to oppose the 'unreasonable expense or inconvenience' requirement because the court would always have the overriding discretion not to make a direction if the interests of justice requirement was not satisfied. However, if the mandatory formulation is retained (as in the current clause 50EB), the Committee does not favour the retention of the 'unreasonable expense or inconvenience' requirement.

5.1.9 The Committee's proposal takes account of the concerns of those who thought the child witness should be present at trial as the 'unreasonable expense or inconvenience' requirement will not operate to excuse the witness from attending at trial unless the court is satisfied it is in the interests of justice.

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170 Mr G. Adams QC, *Transcript*, p. 147.

171 *Transcript*, p. 90.

172 Mr M. Adams QC, *Transcript*, p. 149.
Mr T. O'Gorman, *Transcript*, p. 340.

173 Mr G. Dabb, *Transcript*, p. 24.

174 Mr M. Adams QC, *Transcript*, p. 147.

175 Mr G. James QC, *Transcript*, p. 261.

5.1.10 Reference was made in the hearings to a decision of the Supreme Court of Victoria in *Director of Public Prosecutions v. "X"*[176]. The case concerned a plaintiff's motion to have the complainant give evidence from teleconferencing facilities in the State where he now lived. There was evidence from a police officer that the complainant feared for his life if he returned to Melbourne to give evidence. Justice Batt held that as the complainant could give evidence material to the proceeding, justice would be best served by granting the order sought. This was considered an appropriate instance of when evidence should be taken by video link as the evidence suggested the child would be severely traumatised if forced to attend court.

Recommendation 25

The Committee recommends that:

(a) the 'unreasonable expense and inconvenience' requirement be retained provided the provision is not mandatory; and

(b) the 'interests of justice' formulation in current subclause 50EB(d) be used rather than that in subclause 50EB(2) because it places the onus of proof on the party seeking to persuade the court that evidence should be taken by video link.

5.1.11 Some witnesses pointed out that the provisions relating to evidence by video may need to draw a distinction between committal proceedings and trial[177]. However, drawing a distinction may be difficult given that some jurisdictions no longer have traditional committal proceedings.

176 Unreported decision of the Practice Court of the Supreme Court of Victoria, No. 5178 of 1994.

177 Mr T. O'Gorman, *Transcript, p. 338.*

Recommendation 26

The Committee recommends that the clause detailing when evidence may be taken by video link provides that:

(i) all the requirements in 50EA(a), (b), and (c) must be met before a direction can be made;

(ii) one of the requirements in clause 50EB(1)(a), (b) or (c) must be satisfied; and

(iii) the court should be satisfied that it is in the interests of justice that the evidence be taken by video link.

5.2 Clause 50ED - Technical requirements for video link

5.2.1 Clause 50ED(1) provides that a witness can give evidence via video link from overseas at 'the overseas point'. The overseas point must be equipped with video facilities that enable appropriate persons in Australia to see and hear the witness give evidence and that enable appropriate persons at the overseas point to see and hear appropriate persons at the Australian point. There is no other limitation as to what the overseas point may be[178]. The Anti-Slavery Society submitted that it would be unsatisfactory if the witness was giving evidence from a brothel[179]. This concern may be obviated as persons considered appropriate by the court will be present at the overseas point. However, the Committee believes that it may be useful to further define 'overseas point' to include the places deemed acceptable for the taking of evidence.

5.2.2 In relation to evidence taken by video link, Mr Dabb recognised that:

> ... there does need to be some fleshing out of arrangements so that the court does not have to begin from scratch when one of these cases comes on as to how on earth it is going to handle these terrible difficulties. There should be a framework laid down ...[180]

The Committee agrees with Mr Dabb's comments and believes that further consideration needs to be given to the practicalities of taking evidence via video link for the purposes of Part IIIA.

178 The Anti-Slavery Society, *Submissions*, p. S274.

179 ibid., p. S274.

180 *Transcript*, p. 341.

5.3 Clause 50EE - Application of laws about witnesses

5.3.1 Subclause 50EE(1) provides that a witness giving evidence under a direction is deemed to be giving evidence from the place in Australia in which the court is sitting. Subclause 50EE(2) provides that State or Territory laws of evidence and procedure would be applied depending on where the court is sitting. These State and Territory laws apply through the application of subsection 68(1) and section 79 of the *Judiciary Act 1903*. Contempt of court and perjury are inherent powers in every court.

5.3.2 It was recognised that it may be difficult to enforce perjury laws in relation to overseas witnesses[181]. The committee recognises that enforcement problems in this area may be a major difficulty. Mr Sides QC stated that the lack of power to compel witnesses to attend to give evidence will undermine the effectiveness of the legislation[182]. The committee understands that an amendment to the *Mutual Assistance in Criminal Matters Act 1987* to facilitate special arrangements concerning the enforcement of perjury laws is currently being considered[183]. Punishment for contempt and conspiring to pervert the course of justice will also pose problems. The Committee considers that the legislation will be ineffective until witnesses can be compelled to attend and give evidence and sanctions for perjury, contempt and conspiring to pervert the course of justice can be enforced.

Recommendation 27

The Committee recommends that consideration be given to amending the *Mutual Assistance in Criminal Matters Act 1987* and any other relevant Acts to enable perjury and contempt laws and laws relating to conspiring to pervert the course of justice to be enforced against witnesses who give evidence via video link in proceedings under Part IIIA.

5.4 Clause 50EF - Administration of oaths and affirmations

5.4.1 Mr Sides QC identified a minor drafting error in subclause 50EF(a), as did the Anti-Slavery Society[184]. They both suggested that the word 'defendant' should read 'witness'. The Committee agrees with this observation.

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181 Mr G. Dabb, *Transcript*, p. 43.

182 Mr M. Sides QC, *Transcript*, p. 266.

183 Attorney-General's Department, *Submissions*, p. S145.

184 Mr M. Sides QC, *Transcript*, p.279.
Anti-Slavery Society, *Submissions*, p. S278.

Recommendation 28

The Committee recommends that 'defendant' should be deleted from subclause 50EF(a) and substituted with the word 'witness'.

5.4.2 Consideration may need to be given as to whether child witnesses understand the nature and quality of any oath or affirmation that they give. Pursuant to section 79 of the *Judiciary Act 1903*, the laws of the State or Territory in which the relevant proceeding is conducted are applicable in determining the competency of witnesses.

5.5 Clause 50EG - Expenses

5.5.1 Clause 50EG provides that the court may make orders for payment of expenses incurred in the taking of evidence by video link. The clause is based on clause 28 of the *Evidence and Procedure (New Zealand) Bill*[185]. The main concern with this provision is that it allows orders to be made against the accused. It was submitted that:

> The concept behind the video link is to ensure that all the available evidence is before the tribunal... The community has an interest and should bear the cost, not the accused.[186]

The Committee considers that the provision in the *Evidence and Procedure (New Zealand) Bill* is inapplicable in this context as it does not deal exclusively with civil proceedings. The committee also considers that a provision allowing orders to be made against the accused is undesirable in criminal proceedings.

5.5.2 In considering this clause, some witnesses commented on witness expenses and victims compensation[187]. The provision is not broad enough to cover witness expenses in the event that a direction to take evidence by video link is not made and the witness is brought to Australia to give evidence.

185 Mr T. Reid, *Transcript*, p. 76.

186 Mr M. Sides QC, *Transcript*, p. 279.

187 See, for example, Mr O'Gorman, *Transcript*, p. 309.

Recommendation 29

The Committee recommends that the Government give more detailed consideration as to how expenses are to be dealt with, and in particular, to whether there is a need for regulations in this area or for the Court to have rule-making powers.

5.6 Democrat Amendments

5.6.1 The Democrats have proposed a number of amendments to the Bill. The Committee understands that the Government has agreed in principle to amend Division 5 of the Bill to enable the judge to warn the jury not to draw an adverse inference against the defendant because evidence was taken via video link[188]. It is also understood that the Bill will be amended to allow specified support persons to be present and to ensure that State and Territory laws allowing children's evidence to be given via closed circuit television or to be pre-recorded will apply to proceedings when child witnesses give evidence in Australia[189].

5.6.2 Clauses 50EFB and 50FAC, proposed by the Democrats, provide for the separate representation of child witnesses. The clauses were criticised by Mr Sides QC. He stated that:

> These proceedings are not of the nature of custody proceedings in the Family Court where the welfare of the child is paramount and which clearly justify the child being separately represented.[190]

Mr Sides agreed that the judge and the prosecutor can adequately protect the particular people involved. He also noted that if the amendment is proclaimed, there will be a massive 'blow-out' in funding as funds will be needed for the representation of the accused, the representation of the complainant and possibly, the representation of other witnesses[191].

5.6.3 The Committee does not oppose provision being made for the presence or absence of certain persons. However, it does oppose the inclusion of any provision allowing for the separate representation of child witnesses. Leaving aside the increase in costs that such an amendment would bring, the Committee believes that separate representation will be unnecessary if consent is deleted as an element of

188 Attorney-General's Department, *Submissions*, p. S 146.

189 ibid., p. S146.

190 *Transcript*, p. 280.

191 ibid., p. 280.

the defences in clauses 50CA and 50CB. The removal of consent from the defences will mean that cross-examination of the victim will no longer be a major part of the defence case. The trauma to the victim will be significantly alleviated. The Committee suggests that the recommendation in relation to consent will alleviate the Democrats valid concerns about child witnesses.

Recommendation 30

The Committee recommends that proposed clauses 50EFB and 50FAC dealing with the separate representation of child witnesses should not be included in the Bill.

6 Division 6 - Other rules about the conduct of trials

6.1 Clause 50FA - Finder of fact may estimate age of victim

6.1.1 Clause 50FA(1) is based on section 411 of the *Crimes Act 1958* of Victoria[192]. It provides that where there is insufficient evidence to determine the age of the victim, the jury may estimate the victim's age. The provision in this Bill is, however, broader than its Victorian counterpart[193]. The Victorian provision has been not been relied on recently, mainly because of the availability of improved records that establish the real age of the relevant person[194].

6.1.2 The current clause 50FA was inserted because of the potential absence of proof of age of the victim. The committee recognises the point of Mr McCarthy, from the Office of the Commonwealth Director of Public Prosecutions, that there would be community outrage if a prosecution for an offence of this type committed on a child clearly under 16 years could not proceed because of an absence of the traditional means of proving age[195]. However, a large amount of criticism has been levelled at clause 50FA(1). There are many problems associated with juries estimating the age of children with accuracy[196]. The committee identified other flaws with the provision. These flaws are outlined below.

192 Attorney-General's Department, *Submissions*, p. S40.

193 Mr T. Reid, *Transcript*, p. 71.

194 Mr J. Fajgenbaum and Mr W. Zichy- Woinarski QC, *Submissions*, p. S27.

195 *Transcript*, p. 93.

196 Refer to paragraph 2.15.1.

(a) The notion that an estimate be proved beyond reasonable doubt was considered curious[197].

(b) The estimation is only left to the jury when the judge is satisfied there is insufficient evidence to determine the age of the victim[198].

(c) The offences require proof that the child is either under 12 or aged 12 to 15 years, not proof of the exact age of the child. The provision is introducing the power to estimate age where the court is satisfied that age cannot be proved and exact age need not be proved according to the elements of the offence[199].

(d) The committee was informed the clause was necessary because otherwise the defence could ask the judge that the case not be left to the jury or be taken away from the jury due to insufficient evidence as to age[200]. However, it was suggested that this may then provide inbuilt encouragement to the prosecution to provide no evidence as to age[201] or encourage the prosecution not to provide the best evidence of age[202].

Modification 1

6.1.3 The Attorney-General's Department developed a replacement provision for clause 50FA(1). This provision reads:

'1. This section applies where it is necessary for the purposes of this Part to determine the age of a person or that a person is or was at a particular time under a certain age and the judge or magistrate is satisfied, on application being made to him or her by the prosecution, that all reasonable efforts have been made to obtain and produce admissible evidence as to the age of the person.

2. Where this section applies a judge or magistrate or jury may determine the age of the person or that the person is or was under a certain age, having regard to any available evidence or other material available to

197 Mr D. Williams AM QC MP, *Transcript*, p. 80.

198 Mr G. James QC, *Transcript*, p. 251.

199 Mr D. Williams AM QC MP, *Transcript*, p. 40.

200 Mr G. Dabb, *Transcript*, p. 41.

201 Mr D. Williams AM QC MP, *Transcript*, p. 41.

202 Mr M. Sides QC, *Transcript*, p. 345-346.

> it, including documents purporting to be official or medical reports of foreign countries and the appearance of the person.'[203]

6.1.4 Mr Sides QC saw a benefit in this approach in that it requires the prosecution to lead the best evidence of age (that is, documentation if possible) and a reliable witness (for example, the child's mother) to relate the documentation to the victim[204]. Where the best evidence of age is from the child's mother, the prosecution should bear the expense of attempting to find the mother[205].

6.1.5 If the prosecution establishes it has made all reasonable efforts to produce this type of evidence and has been unsuccessful, then secondary evidence may be led. Secondary evidence would include medical reports and the complainant's perception of his or her age. Evidence of maturation (as suggested by Professor Bode) could also be led as it would provide persuasive evidence as to age[206]. This type of approach was favoured by both Mr Sides QC and Mr O'Gorman as it ensures the prosecution undertakes the burden and expense of finding the child's mother to give evidence as to age[207].

Modification 2

6.1.6 The Attorney-General's Department submitted a later provision to replace clause 50FA(1). It reads:

> 'In determining for the purposes of this Part the age of a person or whether a person is, or was at a particular time, under a certain age, a judge, magistrate or jury may have regard to, as evidence, the appearance of the person, medical or other scientific opinions, and documents being or purporting to be copies of official or medical records of a foreign country.
>
> This section is not intended to limit the evidence which may be received in proceedings for the purposes of this Part.'[208]

The Department states that the jury must be satisfied beyond reasonable doubt as to age. It submits that the prosecution will have no interest in producing less

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203 Attorney-General's Department, *Submissions*, p. S128.

204 *Transcript* p. 345.

205 ibid., p. 345.

206 Mr M. Sides QC, *Transcript*, p. 270.

207 Mr M. Sides QC, *Transcript*, p. 345.
Mr T. O'Gorman, *Transcript*, p.345.

208 *Submissions*, p. S148.

material than is sufficient for this purpose[209]. Mr Dabb also stated that evidence of the appearance of the person is admissible evidence of age[210]. He informed the Committee that some exceptions to the hearsay rule may also be admissible evidence and the first modification prepared by the Department may draw a false distinction by suggesting a move from admissible evidence[211].

6.1.7 Given that evidence of appearance is admissible evidence as to age, the Committee is concerned about the use of photographs as evidence of the appearance of the person. This concern arises from the evidence of Professor Bode who stated that it would be very difficult to estimate the age of children from photographs[212].

Modification 3

6.1.8 The Committee considers that adopting modification 2 as subsection 50FA(1) and adding the following subsection 50FA(2) may address the concerns raised.

'50FA(2) *This section is not intended to:*

(a) relieve the prosecution authorities from the duty of making every effort to obtain the best evidence of the age of the person; and

(b) limit the evidence which may be received in proceedings for the purpose of this Part.'

6.1.9 The Committee considers that this is the most appropriate reformulation of clause 50FA to date. The advantages of this provision are that:

(a) it includes a statement emphasising that the prosecution should obtain the best evidence available; and

(b) it takes the points Mr Dabb raised into account, that is, evidence of the appearance of a person is admissible evidence of age and the formulation at paragraph 6.1.3 may draw a false distinction by including the appearance of the person in the reference to 'other material available'.

209 *Submissions*, p. 148.

210 Mr G. Dabb, *Transcript*, p. 317.

211 *Transcript*, p. 345.

212 *Transcript*, p. 182.

Recommendation 31

The Committee recommends that:

(a) clause 50FA be deleted;

and

(b) it be replaced with modification 3.

6.2 Warning to jury

6.2.1 Mr Sides QC suggested the legislation should include a requirement that a warning be given to a jury about the dangers in relying on secondary evidence. The Anti-Slavery Society also flags the possibility that, in the absence of documentary or expert evidence, the trial judge could warn the jury of the difficulties in determining a minor's age[213].

6.2.2 Given Professor Bode's evidence concerning the difficulty in establishing a child's age from a photograph, the committee considers that it may be desirable to include such a requirement. The provision could state that a jury should be warned of the difficulty in determining age from the appearance of the person, particularly where the person is appearing before the jury on a television monitor[214].

Recommendation 32

The Committee recommends that the inclusion of a warning as to the difficulty in determining the age from the appearance of the person should be considered.

6.3 Clause 50FB - Alternative verdicts

6.3.1 Some difficulties were expressed in determining the relationship between clauses 50FB and 50FC. It was explained that there is not likely to be an overlap between the provision as clause 50FB provides alternative verdicts and clause 50FC

213 *Submissions*, p. S280.

214 *Transcript*, p. 270.

would be invoked where the operation of clause 50FB would lead to an inappropriate alternative verdict[215].

6.3.2 If the Government accepts the Committee's recommendation that the offence provisions be merged, consequential amendments will need to be made to clause 50FB.

6.4 Clause 50FC - Judge may direct new trial for alternative offence

6.4.1 Clause 50FC is an attempt to reflect the common law position that a jury cannot convict an accused of an offence of an entirely different character from that alleged in the indictment[216]. The provision is intended to avoid the injustice that may arise from the use of alternative verdicts by, for example, denying an accused the opportunity of preparing a defence to an 'alternate' offence which was not available for the charged offence[217]. However, the evidence from those with practical experience indicates that this clause goes beyond reproducing the common law.

6.4.2 Clause 50FC attracted almost universal criticism. Many concerns were expressed that this provision may deny the accused an acquittal and leave the accused open to a subsequent prosecution for the same offence if additional evidence is obtained. Mr James QC stated that:

> It [clause 50FC] is utterly contrary to our general views of what constitutes a fair trial. Once you are in the hands of the jury you are delivered by the verdict of the jury ... If the Crown cannot prove its case then that is no basis for entering a nolle prosequi from the bench. [218]

6.4.3 It was suggested that clause 50FC may avoid autrefois acquit on the original offence[219]. It was also submitted that as clause 50FC allows the judge to bring the proceedings to an end on his or her own motion without a jury verdict, the provision effectively allows the judge to usurp the function of the jury and the prosecutor[220].

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215 Mr G. Dabb, *Transcript*, p. 48.

216 Mr O. Walsh, *Transcript*, p. 46.

217 Explanatory Memorandum, p. 15.

218 *Transcript*, pp. 152-153.

219 Mr G. James QC, *Transcript*, p. 152.

220 Mr M. Sides QC, *Transcript*, p.281.

6.4.4 Many witnesses submitted that the provision should be deleted entirely[221]. Mr Sides QC described clause 50FC in the following manner.

> This is an attempt to try and codify a procedural matter, and I fear that in that attempt there will be miscarriages of justice. The procedures are already there to ensure that justice occurs, and I do not think there ought to be an attempt to qualify, or codify them, or put them in a straitjacket. I do not think that proposed section 50FC, in any shape or form, is necessary.[222]

6.4.5 The Attorney-General's Department conceded that there may be little practical need for sub-paragraph 50FC(a)(ii) in view of the limited range of offences covered by the Bill[223]. The Department has also stated that it would not object to the deletion of subparagraph 50FC(a)(ii) if there is a strong view that it is unnecessary[224].

6.4.6 The Committee believes that the matters dealt with in clause 50FC should be left to the common law and it is convinced that there is no justification for the retention of the clause.

Recommendation 33

The Committee recommends that clause 50FC be deleted.

6.5 Clause 50FD - Double jeopardy

6.5.1 Clause 50FD provides that a person cannot be convicted of an offence under this Bill if he or she has been convicted or acquitted in another country in respect of the same conduct.

6.5.2 The Committee notes that corruption may allow a person to be acquitted of a relevant offence in another country. The committee was also informed that it may be relatively easy to organise an acquittal or a conviction for a minor offence in another country to avoid prosecution in Australia for the same conduct[225]. The

221 Mr M. Sides QC, *Transcript*, p. 346.
Mr T. O'Gorman, *Transcript*, p. 346.
Justice E. Evatt, *Transcript*, p. 346.

222 *Transcript*, p. 346.

223 Attorney-General's Department, *Submissions*, p. S149.

224 Mr G. Dabb, *Transcript*, p. 318.

225 Mr J. Dowd QC, *Transcript*, p. 187.

Anti-Slavery Society suggested that this potential problem could be remedied by deleting 'in respect of that conduct' in clause 50FD and substituting 'for the same or a similar offence'[226].

Recommendation 34

The Committee recommends that the possibility of deleting 'in respect of that conduct' from clause 50FD and substituting 'for the same or a similar offence' should be considered.

6.5.3 Mr James QC raised the double jeopardy issue and stated that it should be made explicit in the provision that an Australian who is punished under Australian law for offences against this Part cannot be extradited and prosecuted for the same conduct[227]. Mr Dabb informed the committee that it is a bar to extradition where a person has previously been dealt with for the same conduct[228].

6.6 Corroboration requirement

6.6.1 The possibility of including a corroboration requirement for offences against this Part was raised by one witness. It was justified by the special circumstances surrounding child sex tourism and the possibility of false accusations. It was submitted that there should at least be a requirement of corroboration to show some degree of association between the accuser and the accused[229]. Corroboration could include photographs, video evidence and admissions by the accused. The Committee noted that, in reality, prosecutions would probably not proceed unless there was some corroborative evidence.

226 Anti-Slavery Society, *Submissions*, p. S 269.

227 *Transcript*, p. 242.

228 *Transcript*, p. 347.
See also subsection 7(e) of the *Extradition Act 1988*.

229 Mr T. O'Gorman, *Transcript*, p. 312.

7 Division 7 - Saving of other laws

7.1 State Laws

7.1.1 Clause 50GA provides that Part III is not intended to exclude or limit the operation of any other Commonwealth, State or Territory law. The Attorney-General of Western Australia, Mrs Cheryl Edwardes MLA informed the Committee that the clause was included at her request[230]. She was concerned that this type of Commonwealth legislation should not render inconsistent State legislation inoperative or take precedence over State law.

7.1.2 However, this section has been criticised by Mr James QC. He stated that given the varying state regimens, it is not a good idea to try and subvert the application of section 109 of the Constitution[231]. Section 109 provides that where State and Commonwealth laws conflict, the Commonwealth law will prevail and the State law will be invalid to the extent of the inconsistency.

7.1.3 The saving provision is very broad. It may be useful to reconsider this provision in the light of the State and Territory laws that will apply to this legislation.

Recommendation 35

Pursuant to recommendation 1, the Committee recommends that clause 50GA be reconsidered in light of the state and territory laws that will apply to this legislation.

8 Conclusions and Recommendations

8.1 Support for the Bill

8.1.1 The Committee supports the objectives of the Bill. It accepts that in the past Australians travelling overseas have been able to abuse children sexually and escape the consequences of their behaviour on their return to Australia. The same conduct would be criminal if it were perpetrated in Australia. This conduct is repugnant to Australians and to the world, not least because of the devastating effect on children in the countries concerned. A secondary effect of this conduct is that it brings

230 *Submissions*, p. S49

231 Mr G. James QC, *Transcript*, p. 257.

Australians into disrepute. Such conduct should be regarded as criminal, despite the fact that it occurs in other countries. Related conduct perpetrated in Australia (encouraging and benefiting) should also be proscribed in the Commonwealth Crimes Act.

8.2 Need to Redraft Certain Clauses to Overcome Oversights and Errors in the Bill

8.2.1 From the beginning of the Committee's consideration of the Bill, concerns were expressed about provisions in the Bill which, in the view of some witnesses contain unacceptable changes to criminal law principles and procedures. These include apparent short-cuts to assist the prosecution because of the practical difficulties of conducting a successful prosecution. Examples are the reversal of the onus of proof in Clause 50CC and the arrangements for estimating the age of the child in Clause 50FA. The apparent requirement that the defence establish that the use of a video link would be contrary to the interests of justice.

8.2.2 The Committee believes that certain Clauses can be successfully redrafted to ensure the Bill is effective and enforceable without abandoning the safeguards that have been traditional elements of the criminal law in Australia. In reconsidering the Bill the Minister and his Department should consult widely with practitioners in order to discover solutions to some of the practical and legal problems identified by the Committee. The Committee has been informed by Mr James QC and Mr Sides QC that they would be happy to assist the Minister with the Bill. A similar offer was made by the New South Wales Bar Association in relation to redrafting the Bill. These offers were made to assist the legislation pass through both houses on a bipartisan basis.

Recommendation 36

The Committee recommends that the Government accept the generous offers made by Mr James QC, Mr Sides QC and the New South Wales Bar Association to assist in modifying the Bill.

8.3 Urgency of the Bill

8.3.1 Several witnesses urged the Committee to put the fine-tuning of the Bill above any considerations of urgency of passing it.[232] The Committee was urged to recommend consideration of the Bill by the Law Reform Commission. The arguments for passing the legislation as soon as possible go to social policy considerations. The community, the Government (and Members of Parliament

232 See for example, Mr Terry O'Gorman, *Submissions*, p. S289.

including Committee members) are anxious to have the legislation in place as quickly as possible in order to address the crimes encompassed by the legislation.

8.3.2 Nevertheless the Committee urges the Parliament to take account of the legitimate issues and concerns raised by witnesses during the consideration of the Bill. Addressing these concerns will not result in **undue** delay. Rather delay, which should be no more than two months, will be time well spent to ensure the adequacy and effectiveness of the legislation.

Recommendation 37

The Committee recommends that the Parliament pass the Crimes (Child Sex Tourism) Amendment Bill 1994 as soon as the serious problems raised in this report are considered and addressed.

8.3.3 For the convenience of those considering this report the recommendations are consolidated below.

Recommendation 1

The Committee recommends that the Attorney-General and the Minister for Justice consult with other members of the Standing Committee of Attorneys-General, with a view to encouraging the states to reflect the issues raised in this report in supplementary and complementary state legislation.

Recommendation 2

The Committee recommends that the Bill uphold the legal protections afforded to accused persons which are at the heart of our criminal justice system.

Recommendation 3

The Committee recommends that the Government ensure that traditional standards of justice be given priority whenever video links are used in conducting a case under the legislation.

Recommendation 4

The Committee recommends that the Government ensure adequate and effective consultation in the preparation of legislation. Such consultation should extend to practitioners experienced in both prosecution and defence, as well as to lawyers' organisations such as the bar associations and the Law Council and to non-legal organisations such as civil liberties groups.

Recommendation 5

The Committee recommends that, to avoid doubt, the inclusion of a definition of 'act of indecency' in clause 50AA(1) should be considered.

Recommendation 6

The Committee recommends that the definition of resident in clause 50AC be given further consideration.

Recommendation 7

The Committee recommends that:

(a) clauses 50BA, 50BC, 50BE and 50BG be deleted; and

(b) the age of the child be amended in clauses 50BB, 50BD, 50BF and 50BH to read 'a person under 16'.

Recommendation 8

The Committee recommends that the maximum penalties should be retained for the merged offences.

Recommendation 9

The Committee recommends that a provision be inserted stating that in sentencing a person convicted of an offence under this Part, the court must take the age and maturity of the complainant into account.

Recommendation 10

The Committee recommends that 'the offender' be deleted from clauses 50BE, 50BF, 50BG and 50BH and a neutral term substituted.

Recommendation 11

The Committee recommends that, in light of problems with the definition 'submits', the use of the term in subclauses 50BE(b) and 50BF(b) should be reconsidered.

Recommendation 12

The Committee recommends that 'intends to derive gratification' should be included as an element of subsections 50BE(a), 50BE(b), 50BF(a) and 50BF(b).

Recommendation 13

The Committee recommends that consideration be given to inserting 'sexual' before 'gratification', where appearing.

Recommendation 14

The Committee recommends that consideration should be given to inserting a provision so that persons under 18 years cannot be

prosecuted under Part IIIA, unless the Attorney-General gives his or her consent in writing.

Recommendation 15

The Committee recommends that the belief as to consent should be removed as an element of the defences in clauses 50CA and 50CB.

Recommendation 16

The Committee recommends that the defence based on belief about age should be retained for the merged offences.

Recommendation 17

If the merger approach is not accepted, the Committee recommends that the defence based on belief about age should be available for all offences, including those offences where the child is under 12 years.

Recommendation 18

(a) The Committee recommends that the current clause 50CC should be deleted.

(b) The Committee's view is that the onus of proof in relation to the defence based on belief about age should not be reversed.

(c) The Committee recognises that the onus of proof in relation to the defence based on valid and genuine marriage should be reversed and the accused should be required to prove this defence on the balance of probabilities.

Recommendation 19

The Committee recommends that the notes on clause 50CD in the Explanatory Memorandum should be amended to include a reference to the defendant's belief as to the child's age.

Recommendation 20

The Committee recommends that clauses 50CE and 50CF should be deleted.

Recommendation 21

The Committee recommends that no prosecution should proceed in Australia if the actions are not criminal in the laws of the foreign country.

Recommendation 22

The Committee recommends that consideration should be given to ensuring that the term 'benefiting' is not limited to obtaining a financial benefit in clause 50DA.

Recommendation 23

The Committee recommends that the maximum penalties in Division 4 should be increased to seventeen years imprisonment.

Recommendation 24

The Committee recommends that clauses 50EA and 50EB be combined into one provision detailing when the court may make a direction that evidence be taken by video link.

Recommendation 25

The Committee recommends that:

(a) the 'unreasonable expense and inconvenience' requirement be retained provided the provision is not mandatory; and

(b) the 'interests of justice' formulation in current subclause 50EB(d) be used rather than that in subclause 50EB(2) because it places the onus of proof on the party seeking to persuade the court that evidence should be taken by video link.

Recommendation 26

The Committee recommends that the clause detailing when evidence may be taken by video link provides that:

(i) all the requirements in 50EA(a), (b), and (c) must be met before a direction can be made;

(ii) one of the requirements in clause 50EB(1)(a), (b) or (c) must be satisfied; and

(iii) the court should be satisfied that it is in the interests of justice that the evidence be taken by video link.

Recommendation 27

The Committee recommends that consideration be given to amending the *Mutual Assistance in Criminal Matters Act 1987* and any other relevant Acts to enable perjury and contempt laws and laws relating to conspiring to pervert the course of justice to be enforced against witnesses who give evidence via video link in proceedings under Part IIIA.

Recommendation 28

The committee recommends that 'defendant' should be deleted from subclause 50EF(a) and substituted with the word 'witness'.

Recommendation 29

The Committee recommends that the Government give more detailed consideration as to how expenses are to be dealt with, and in particular, to whether there is a need for regulations in this area or for the Court to have rule-making powers.

Recommendation 30

The Committee recommends that proposed clauses 50EFB and 50FAC dealing with the separate representation of child witnesses should not be included in the Bill.

Recommendation 31

The Committee recommends that:

(a) clause 50FA be deleted; and

(b) it be replaced with modification 3.

Recommendation 32

The Committee recommends that the inclusion of a warning as to the difficulty in determining the age from the appearance of the person should be considered.

Recommendation 33

The Committee recommends that clause 50FC be deleted.

Recommendation 34

The Committee recommends that the possibility of deleting 'in respect of that conduct' from clause 50FD and substituting 'for the same or a similar offence' should be considered.

Recommendation 35

Pursuant to recommendation 1, the Committee recommends that clause 50GA be reconsidered in light of the state and territory laws that will apply to this legislation.

Recommendation 36

The Committee recommends that the Government accept the generous offers made by Mr James QC, Mr Sides QC and the New South Wales Bar Association to assist in modifying the Bill.

Recommendation 37

The Committee recommends that the Parliament pass the Crimes (Child Sex Tourism) Amendment Bill 1994 as soon as the serious problems raised in this report are considered and addressed.

Daryl Melham MP
Chair

Appendix 1

Details of Public Hearings

Canberra, 18 May 1994

End Child Prostitution in Asian Tourism (ECPAT)

Ms Bernadette McMenamin, National Coordinator

Attorney-General's Department

Mr Geoffrey Dabb, First Assistant Secretary, Criminal Law Division
Ms Laurel Johnson, Assistant Secretary, Criminal Justice Branch
Mr Owen Walsh, Principal Government Lawyer, Criminal Law Branch

Office of Parliamentary Counsel

Ms Hilary Penfold, First Parliamentary Counsel
Mr Thomas Reid, Second Parliamentary Counsel
Mr Jonathan Woodger, Assistant Parliamentary Counsel

Director of Public Prosecutions

Mr Justin McCarthy, Senior Assistant Director, Policy
Ms Julianne Patterson, Principal Legal Officer

Australian Federal Police Association

Mr Gerard Butler, Industrial Consultant
Sergeant Christopher Eaton, Special Representative

Australian Customs Service

Mr James Fox, Chief Inspector Passenger Processing
Mr Brian Hurrell, Assistant National Manager Investigation

New South Wales Bar Association

Mr Michael Adams QC

Sydney, 19 May 1994

Appeared in a personal capacity

Ms Beverley Schurr
Professor David Lanham
Mr Richard Read
Mr Greg James QC

International Commission of Jurists

Mr John Dowd QC, Chairman of Council, Australian Section

Prince of Wales Children's Hospital

Professor Hans Bode, Clinical Director

Australian Democrats

Senator Sid Spindler, Spokesperson on law and justice for the Australian Democrats

Canberra, 23 May 1994

Appeared in a personal capacity

Ms Margaret Cook
The Hon Justice Elizabeth Evatt AO

Public Defenders

Mr Martin Sides QC, Acting Senior Public Defender

Queensland Council for Civil Liberties

Mr Terrence O'Gorman, Vice-President

Attorney-General's Department

Mr Geoffrey Dabb, First Assistant Secretary, Criminal Law Division
Ms Laurel Johnson, Assistant Secretary, Criminal Justice Branch
Mr Owen Walsh, Principal Government Lawyer, Criminal Law Branch

Appendix 2

List of submissions

Submission number	Individual/Organisation	Date of submission	Page number
1	Professor David Lanham Law School University of Melbourne	9/5/94	S 1
2	Mr Wayne Briscoe Commissioner Queensland Law Reform Commission	11/5/94	S 5
3	The Hon Jan Wade MP Attorney-General, Victoria	11/5/94	S 9
4	Justice Elizabeth Evatt AO	12/5/94	S 11
5	Mr Greg Thompson World Vision Australia	11/5/94	S 15
6	Mr Scott S Carter Queensland Law Society Inc	12/5/94	S 17
7	The Hon Trevor Griffin LL.M, MLC Attorney-General, South Australia	13/5/94	S 19
8	Mr W Brind Zichy-Woinarski QC Chairman, Criminal Bar Association of Victoria and Mr Jacob I Fajgenbaum Chairman, Human Rights Committee of the Victorian Bar	13/5/94	S 22
9	Attorney-General's Department	5/94	S 30
10	Mr Terry Connolly MLA Attorney-General, Australian Capital Territory	13/5/94	S 45
11	Senator the Hon Gareth Evans QC Minister for Foreign Affairs	14/5/94	S 46

12	The Hon Mrs Cheryl Edwardes MLA Attorney-General, Western Australia	16/5/94	S 48
13	Mr Ian Barker QC	17/5/94	S 50
14	Mr Greg James QC *President* NSW Criminal Lawyers' Association	17/5/94	S 56
15	Mr Stuart Fowler and Mr Rod Burr Family Law Section Law Council of Australia	17/5/94	S 61
16	Mr Gerard Butler National Executive Australian Federal Police Association	18/5/94	S 65
17	Senator Sid Spindler Democrat Law & Justice Spokesperson	17/5/94	S 73
18	Mr Richard Read Prosecutor for the Queen, Victoria	18/5/94	S 82
19	Mr Julian Mallet A/g National Manager Passenger Processing Australian Customs Service	18/5/94	S 92
20	Ms Beverley Schurr	18/5/94	S 94
21	Ms Margie Cook Margie Cook & Associates	19/5/94	S 99
22	Ms Helen Ware Assistant Director General Sectoral Policy & Review Branch AIDAB	18/5/94	S 106
23	Earl Wilkinson Philippines	5/94	S 111
24	Dr Jill Hunter, Ms Dorne Boniface and Dr Sandra Egger Faculty of Law University of New South Wales **Exhibit no. 17**	20/5/94	S 112

25	Mr Justin McCarthy Senior Assistant Director Commonwealth Director of Public Prosecutions Head Office	20/5/94	S 114
26	Legal Aid Commission of New South Wales	5/94	S 116
27	Wilma Fleming President VICPACE	20/5/94	S 127
28	Attorney-General's Department **Supplementary submission to no. 9**	5/94	S 129
29	Attorney-General's Department **Supplementary submission to nos. 9 & 28**	23/5/94	S 133
30	Mr Terry O'Gorman Vice President Queensland Council for Civil Liberties	5/94	S 177
31	Ms Penelope Lee Director Research & Information Australian Council for Overseas Aid	18/5/94	S 197
32	Ms Bernadette McMenamin National Director ECPAT	5/94	S 202
33	Ms Hilary Penfold First Parliamentary Counsel Office of Parliamentary Counsel	26/5/94	S 221
34	Mr Peter Woolcott Director, Human Rights Section Department of Foreign Affairs and Trade	25/5/94	S 235
35	Senator the Hon Margaret Reynolds Senator for Queensland	26/5/94	S 240
36	Mr Paul Bravender-Coyle A/g Secretary-General The Anti-Slavery Society	20/5/94	S 243

37	Mr Terry O'Gorman Vice President Queensland Council for Civil Liberties **Supplementary submission to no. 30**	26/5/94	S 289
38	Mr M H Tobias QC President New South Wales Bar Association	27/5/94	S 297
39	Mr Tim Robertson Honorary Secretary New South Wales Society of Labor Lawyers	27/5/94	S 305
40	Australian Law Reform Commission	30/5/94	

Appendix 3

List of exhibits

Exhibit Number	Exhibit
1 (i)	Statistics on child prostitution in Asia. **Presented by ECPAT, 18 May 1994.**
(ii)	Hornblower, Margaret 1993, 'Sex for sale', *Time Magazine*, 21 June, pp 18-29. **Presented by ECPAT, no date.**
2 (i)	Senate Standing Committee on Legal and Constitutional Affairs 1982, *The Burden of Proof in Criminal Proceedings*, Parliamentary Paper No. 319. **Presented by Ms Beverley Schurr on 19 May 1994.**
(ii)	*Crimes Act 1958 No. 6231.* **Presented by Office of Parliamentary Counsel, 18 May 1994 and by Ms Beverley Schurr, 19 May 1994.**
(iii)	*He Kaw Teh v. the Queen*, 157 CLR 523. **Presented by Ms Beverley Schurr, 19 May 1994.**
3	Draft optional protocol to the United Nations Convention on the rights of the child concerning the elimination of sexual exploitation and trafficking of children. **Presented by Department of Foreign Affairs and Trade, 18 May 1994.**
4	Muntarbhorn, Vitit, Special Rapporteur to Commission on Human Rights, 'Rights of the child', United Nations Economic and Social Council, February 1993. **Presented by Australian Federal Police Association, 18 May 1994.**
5 (i)	Justice Elizabeth Evatt AO 1992, 'Legal responses to child prostitution and tourism', Melbourne, 10 Nov. **Presented by Justice Evatt, 23 May 1994.**
(ii)	Outline of comparable German Law (Unofficial Translation). **Presented by Justice Evatt, 23 May 1994.**
(iii)	Congress of the United States, House of Representatives Child Sexual Abuse Prevention Act of 1994. **Presented by Justice Evatt, 23 May 1994.**

6 *Director of Public Prosecutions v. "x"*, unreported decision of the Practice Court of the Supreme Court of Victoria, No. 5178 of 1994.

7 New South Wales *Crimes Act 1900 No. 40.*

8 *International Covenant on Civil and Political Rights*, Annex 1.
Presented by Justice Evatt, 23 May 1994.

9 Council of Europe 1992, 'Extraterritorial Criminal Jurisdiction', *Criminal Law Forum*, vol. 3, no. 3, pp 441-480.

10 Joint news release by the Attorney-General, The Hon Michael Lavarch MP and the Minister for Justice, The Hon Duncan Kerr MP, dated 19 May 1994 'Ministers reject criticism of Crimes (Child Sex Tourism) Amendment Bill'.

11 Criminal Law Officers Committee of the Standing Committee of Attorney-General 1992, *Model Criminal Code*, Final Report, AGPS, Canberra.
Presented by the Attorney-General's Department, 18 May 1994 and held in Committee secretariat.

12 Commonwealth Director of Public Prosecutions 1990, *Prosecution Policy of the Commonwealth*, AGPS, Canberra.
Presented by the Director of Public Prosecutions Office, 18 May 1994 and held in the Committee Secretariat.

13 O'Grady, Ron 1992, *The Child and the Tourist*, ECPAT, Pace Publishing, New Zealand.
Presented by ECPAT, no date, and held in the Committee Secretariat.

14 Asia Watch Women's Rights Project 1993, *A Modern Form of Slavery*, Human Rights Watch.
Presented by ACFOA, 25 May 1994.

14 Selection of information.
Presented by the Attorney-General's Department.

15 (i) First World Congress on Family Law and Children's Rights, 'Final communique' and 'Interim report of progress'.
Presented by Mr Stuart Fowler, 17 May 1994.

(ii) Press clippings.
Presented by Mr Stuart Fowler, 17 May 1994.

16 Copy of media release.
Presented by Ms Margie Cook, 20 May 1994.

17	*Swami Adkandananda Saraswati (1990)* 47 A Crim R 1. **Presented by Dr Jill Hunter, Ms Dorne Boniface and Dr Sandra Egger with submission number 24.**
18 (i)	Hall, Michael C., 'Tourism prostitution: the control and health implications of sex tourism in South-East Asia and Australia', *forthcoming in Tourism and Gender*, eds. Kinnaird, V.H. & Hall, D.R., Belhaven Press, London, 1994. **Presented by Dr C. Michael Hall, 27 May 1994.**
18 (ii)	Hall, Michael C. 1992, 'Sex tourism in South-East Asia', *Tourism and the Less Developed Countries*, ed. Harrison, D.,Belhaven Press, London, & Halsted Press, New York. **Presented by Dr C. Michael Hall, 27 May 1994.**
18 (iii)	Hall, Michael C., 'Tourism prostitution: the control and health implications of sex tourism in South-East Asia and Australia', *Health and the International Tourist*, eds. Clift, S. & Page, S., Routledge, London, 1994. **Presented by Dr C. Michael Hall, 27 May 1994.**

Appendix 4

United Nations Convention on the Rights of the Child

Article 19 of the Convention provides that:

> '1. State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
>
> 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programs to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.'

Article 34 of the Convention provides that:

> 'State Parties undertake to protect the child from all forms of sexual exploitation and 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.'

EXPRESSION OF CONCERN

by

ALAN CADMAN, MP

On balance, I find that the proposition in Recommendation 18(b) may allow otherwise sound prosecutions to fail. The obnoxious character of this trade leads me to conclude that defence based on belief about age must be proved on the balance of probabilities.

My learned colleagues have failed to convince me that there needs to be consistency between laws which apply to individuals committing an offence within Australia and committing the same offence in a foreign country.

Poverty will lead people to do practically anything to survive. Australian citizens and residents should not play any part in the abuse and sexual exploitation of children under the age of 16 anywhere in the world.