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Extraterritoriality and the Sexual Conduct of Australians Overseas

Abstract
In April 2010, the Australian Parliament inserted Division 272 into the *Criminal Code* (Cth).[1] The division is entitled 'Child sex offences outside Australia' and contains various offences relating to sexual intercourse or sexual activity, even where that activity takes place overseas. The title of its predecessor (Part IIIA of the *Crimes Act 1914*) was 'Child Sex Tourism'. However, the scope of the offences under both Part IIIA and Division 272 extends to conduct that takes place overseas with no territorial nexus to Australia other that the Australian citizenship or residency of the offender. For example, an Australian citizen who is a resident of an overseas jurisdiction is caught by the offence provisions even where that citizen makes no attempt to re-enter Australia. Child sex tourism remains one of the concerns underlying the legislation. Yet the title of Division 272 acknowledges a broader agenda than the former title.

[1] See the *Criminal Legislation Amendment (Sexual Offences Against Children) Act 201* (Cth).

Keywords
Australian extraterritoriality, sexual conduct overseas

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EXTRATERRITORIALITY AND THE SEXUAL CONDUCT OF AUSTRALIANS OVERSEAS

DANIELLE IRELAND-PIPER*

In April 2010, the Australian Parliament inserted Division 272 into the *Criminal Code* (Cth).[1] The division is entitled 'Child sex offences outside Australia' and contains various offences relating to sexual intercourse or sexual activity, even where that activity takes place overseas. The title of its predecessor (Part IIIA of the *Crimes Act 1914*) was 'Child Sex Tourism'. However, the scope of the offences under both Part IIIA and Division 272 extends to conduct that takes place overseas with no territorial nexus to Australia other that the Australian citizenship or residency of the offender. For example, an Australian citizen who is a resident of an overseas jurisdiction is caught by the offence provisions even where that citizen makes no attempt to re-enter Australia. Child sex tourism remains one of the concerns underlying the legislation. Yet the title of Division 272 acknowledges a broader agenda than the former title.

This article is divided into two parts. Part 1 contains a critical analysis of Division 272 as a response to child sex tourism. Part 2 explores the expansion of the legislative framework beyond child sex tourism to other kinds of sexual conduct overseas, and what this means in the context of the principles of extraterritoriality under international law.

Part one – Division 272 as a response to child sex tourism

What is child sex tourism?

One commentator defines CST as the commercial sexual exploitation of children by people who travel from their own developed 'sending' country to another, often less developed 'destination' country, to engage in sexual acts with minors.[2] Major sending countries include Australia, the United States, Japan,

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1 See the *Criminal Legislation Amendment (Sexual Offences Against Children) Act 201* (Cth).

2 Marianna Brungs, 'Abolishing Child Sex Tourism: Australia's Contribution', (2002) 8(2) *Australian Journal of Human Rights* 101.

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France, Germany and the United Kingdom.[3] Destination countries include Thailand, Cambodia, the Philippines, India and various nations in the African and South American regions.[4] However, the term can be misleading when considering that some offenders engage in sexual activity with children when travelling overseas on an opportunistic basis rather than as part of an organised sex tour.

Who are the offenders?

> There is no single profile of the child sex tourist.[5]

Child sex 'tourists' are predominately male,[6] and range from wealthy professionals partaking in organised sex tours, to tourists, military personnel or business people engaging in sex with children on an opportunistic basis.[7] O'Connell argues that many child sex 'tourists' are not paedophiles in the strict diagnostic sense.[8] Rather, they are often people who are acting outside of their normal social restraints in the belief they are anonymous and will not be held accountable.[9] Others perceive children as less likely to carry HIV, thereby creating a demand for prostituted children as a form of safer sex.[10] Ironically, due to their physiological underdevelopment, younger children are actually more vulnerable to HIV infection.[11]

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3 Naomi Svensson, 'Extraterritorial Accountability: An assessment of the effectiveness of child sex tourism laws' (2006) 28 *Loyola of Los Angeles International and Comparative Law Review* 641, 641.

4 Ibid.

5 Karen D Breckenridge, 'Justice Beyond Borders: A comparison of Australian and US child sex tourism laws' (2004) *Pacific Rim Law & Policy Journal Association* 13 405, citing ECPAT International, 2004.

6 Ibid.

7 Svensson, above n 3, 2; and Brungs, above n 2, (online version, page number not available) citing Hodgson 1994.

8 Breckenridge, above n 5, 412. See also Brungs, above n 2, (online version, page number not available) citing O'Connell 1996.

9 Brungs, above n 2, 103 citing Hodgson 1994.

10 Ibid 103.

11 Ibid 103 citing O'Grady 1992.

Who are the victims?

Victims are both male and female children, usually poor and often homeless.[12] One commentator suggests that because of the subordinate status of women in some societies there are more female child prostitutes than male for reasons other than sexual preference. Breckenridge cites reports that the education of boys is often prioritised over girls, reducing opportunities and heightening the risk of involvement in prostitution for girls.[13] In some cases, the child enters the industry willingly.[14] In others, the child is sold into prostitution (either knowingly or unknowingly) by their families to pay off debt.[15] Whether by deception or voluntarily, poverty is undoubtedly the predominant force in children entering prostitution.[16]

There is no universal agreement on the number of children who participate in the child sex industry.[17] Estimates vary widely between commentators. However, there were reports in 2008 of more than two million children engaged in commercial sexual exploitation.[18] In 2002, UNICEF believed there to be up to one million prostituted children under the age of 18 years in Asia alone.[19] This is concerning given that CST has '*devastating, lifelong physical and psychological effects on child victims*'.[20] Non-Governmental Organisations report that children involved in child prostitution are often physically beaten, and are at increased risk of contracting sexually transmitted diseases, such as HIV.[21] Physiologically, due to immature organs, children can be permanently injured if forced to endure a high volume of sexual activity at a young age, and may work in pain and with active infections.[22]

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12 Daniel Edelson, 'The prosecution of persons who sexually exploit children in countries other than their own: a model for amending existing legislation' (2001) 25 *Fordam International Law Journal* 483, 485.

13 Brungs, above n 2, 102 citing Muntarbhorn 1991, [34].

14 Breckenridge, above n 5, 410.

15 Ibid.

16 Ibid 410-411.

17 Karen Fredette, 'International Legislative Efforts to Combat Child Sex Tourism: Evaluating the Council of Europe Convention on Commercial Child Sexual Exploitation' (2009) 32 *Boston College International & Comparative Law Review* 1, 2.

18 Ibid.

19 Brungs, above n 2, 101.

20 Breckenridge, above n 5.

21 Breckenridge, above n 5.

22 Brungs, above n 2, 104.

What are the International Legal Frameworks?

The issue of CST - or perhaps more aptly, 'the commercialised sexual exploitation of children' - is recognised internationally in the 1989 *Convention on the Rights of the Child* (CRC) and the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* (Optional Protocol). All countries of the world but two have signed the CRC, making it one of the most universally ratified of all United Nations Conventions.[23]

Specifically, Article 34 of the CRC obliges signatories to take all appropriate measures so as to prevent, among other things, the exploitative use of children in prostitution or other unlawful sexual practices. Article 1 of the Optional Protocol imposes the more specific obligation of criminalising child prostitution, and Article 3 requires that this be so whether or not the acts occur domestically or transnationally. Given the lack of central authority to enforce these international obligations, practical effectiveness is dependent on implementation through domestic legal frameworks.[24] This is particularly so given the reluctance of some state parties to implement and enforce CST laws. Tourism is an important source of income for poorer areas in the Asia Pacific region, and CST is '*unsurprisingly lucrative*'[25] and therefore, some would say, an '*economic reality.*'[26]

Australia's legislative framework

Australia is party to both the CRC and the Optional Protocol. Division 272 represents Australia's legislative response to these international instruments. In Australia, responsibility for laws on child sexual exploitation is shared between the Commonwealth, State and Territory Governments. The States and Territories bear responsibility for conduct occurring domestically, while the Commonwealth is responsible for child sex offences committed across or outside of Australian borders.[27] The child sex offences were first introduced in the *Crimes Act* in 1994 under the Keating Government. Since that time, there

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23 Fiona David, *Child Sex Tourism*, Australian Institute of Criminology, trends and issues in crime and criminal justice, June 2000 at 1 citing Adam Graycar, Director. Note, as at 2 June 2010, the United Nations Treaty Collection listed 193 parties to the CRC. – not sure about reference format here.

24 Brungs, above n 2, 107.

25 Fredette, above n 17, 9.

26 Breckenridge, above n 5, 1.

27 The Senate, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 [Provisions]*, Legal and Constitutional Affairs Legislation Committee, Commonwealth of Australia, March 2010.

have been various amendments, including those in the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (*the Amending Act*). The Amending Act repealed Part IIIA of the *Crimes Act*. It then inserted a new Division *272 – Child sex offences outside Australia* into the *Criminal Code*.

Division 272 contains several new offences which go beyond child sex tourism, and regulate other kinds of sexual offences overseas. While this is controversial for reasons that will be discussed in Part 2, it at least acknowledges that not all prosecutions under the old Part IIIA were typical tourism cases either. For example, the prosecution in *R v ONA*[28] under the former Part IIIA was not a classic 'tourism' case. In that case, the appellant (ONA) pleaded guilty to two Commonwealth sexual offences committed on a person under 16 years of age while outside Australia. The first was committing an act of indecency with a person under 16 while outside Australia, and the second was the offence of engaging in sexual intercourse with a person under 16 outside Australia.

The first offence took place in Liberia and the second in Thailand. ONA, around 56 years of age at the time, had commenced a relationship with the mother of the victim in Liberia. The victim was between five and seven years of age at the time of the offence. In Liberia, ONA indecently assaulted the victim. ONA, the mother and the victim then travelled to Thailand, where ONA filmed himself attempting to have sexual intercourse with the victim. The victim complained to her mother, who in turn reported the incident to the police and the footage was discovered.

There were several grounds of appeal. However, most interestingly, ONA argued that he ought to have received a lighter sentence because he did not travel overseas with the specific purpose of engaging in commercial CST, and this made his conduct less grievous than if it had been premeditated. Ashley JA found that while premeditation may be a circumstance of aggravation, it did not follow that its absence ought to warrant a lighter sentence. At [11] Ashley JA noted:

> A person might go overseas for a purpose of engaging in child sex yet desist after one instance of offending conduct. Another person, whilst overseas, might engage in opportunistic child sex with different features of aggravation – as in the present case, where a particular breach of trust was involved.

In any event, Ashley JA found that the absence of premeditation had been taken into account by the trial Judge and that the sentence imposed was not '*in any*

[28] [2009] VSCA 146.

aspect manifestly excessive'.[29] Neave JA came to similar conclusions and noted the purpose of the legislation as espoused in the second reading speech was to '*provide a real and enforceable deterrent to the sexual abuse of children outside Australia by Australian citizens'*[30] and was therefore not limited to premeditated commercial ventures. While this decision goes well beyond the previous 'tourism' paradigm, it is consistent with the more aptly named Division 272.

The April 2010 Amendments: Division 272

The offences in Division 272 apply to Australian citizens, residents and to corporations incorporated by or under Australian law or which carry on activities principally in Australia.[31] This is consistent with the demand made by some commentators that CST legislation apply to both nationals and residents.[32] However, some will argue that this does not go far enough, and that the offences should extend to persons passing through Australia, who have committed an offence overseas. This is the case in some European jurisdictions.[33] In order to maintain some jurisdictional connection, Australia would surely require the offence to be *entering* Australia having engaged in sexual intercourse for example, rather than the sexual act itself.

Modified offences: sexual intercourse and sexual activity (other than sexual intercourse)

Section 272.8 applies to conduct outside Australia, and makes it an offence for a person to engage in sexual intercourse with a child or to *cause* a child to engage in sexual intercourse in that person's presence. Section 272.9 has similar scope in relation to other sexual activity, but creates an additional defence where although a child is present, it can be shown that the defendant did not intend to derive gratification.

These provisions depart from the former Part IIIA in several ways. Firstly, the maximum penalty is increased from 17 years to 20 years for the sexual intercourse offence and from 12 years to 15 years for the sexual activity offence. There are also changes in terminology. For example, the word 'causing' is used instead of 'inducing'. According to the Senate Committee on Legal and

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29 *R v ONA* [2009] VSCA 146, [13] (Ashley CJ).

30 Ibid [49] (Neave JA).

31 See s 272.6.

32 Svensson, above n 3, 6 citing *ECPAT Europe Law Enforcement Group, Extraterritorial Legislation as a Tool to Combat Sexual Exploitation of Children, Executive Summary* (1999), 2.

33 Fredette, above n 17, 18-19; and Svensson, above n 3, 6 citing Jeremy Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation* (2000) 101.

Constitutional Affairs (*the Senate Committee*), this substitution of words is to distinguish this offence from the new procuring offence and to make clear that the relevant provisions were aimed at activities causing *actual* sexual intercourse.[34]

Arguably, conduct which might have been characterised as merely 'inducing' sexual offences with a child is now covered by section 272.19, which prohibits 'encouraging' offences against the Division. Section 272.9 also refers to 'sexual activity', instead of references to specific variations of behaviour under the former provisions. The Amending Act inserted a definition of 'sexual activity' into the Dictionary of the *Criminal Code*. It is defined as sexual intercourse or any other activity of a sexual or indecent nature and includes an indecent assault. This is a simpler, more workable definition than that under the former provisions. It is also broader in that the definition explicitly states that sexual activity need not necessarily require physical contact between people.

However, perhaps the most significant change is the inclusion of offences of this nature against a 'young person'. The offences must be committed by a person in a position of trust or authority over the young person. A young person is defined to mean a person of at least 16 years, but less than 18 years of age.[35] These offences contain a lower maximum penalty of 10 and 7 years imprisonment respectively, rather than the 20 and 15 year terms for the offences against persons less than 16 years.[36] Previously, Australia only criminalised offences against persons less than 16 years, consistent with the domestic age of consent.

This is an interesting development given the age of consent is one of the most contentious elements in child sex legislative regimes internationally. Although the CRC defines a child as a person under 18 years of age,[37] there is rarely any international consistency between jurisdictions as to the legal age of a child. One commentator reported that in 2009, the age of consent in legislation with

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[34] The Senate, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 [Provisions]*, Legal and Constitutional Affairs Legislation Committee, Commonwealth of Australia, March 2010 at 6.

[35] See s 272.12 and s 272.13.

[36] See s 272.12 and s 272.13.

[37] Article 1 of the *Convention on the Rights of the Child* reads: *For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.*

extraterritorial reach varied from 13 to 18 years.[38] For example, one commentator cites a proposal in Sri Lanka to lower the age of consent to 13 years.[39] This, in itself, is really only an issue for countries such as Sweden and the United Kingdom (UK), which require (or at one stage required) 'double criminality' in order to enliven the extraterritorial component of domestic legislation against CST.[40] A requirement of 'double criminality' means if it is not an offence in the jurisdiction where the conduct occurred, it cannot be prosecuted under that other country's law. Svensson gives the example of a UK citizen escaping prosecution for sexually assaulting children in Nepal, because Nepal did not have equivalent legislation in place.[41] Australia does not require double criminality in order to prosecute CST offences, and the 2010 amendments have not altered this position. This is a more pragmatic approach and closes a legal loophole.

It has been argued that given the near universal ratification of the CRC, the definition of child as less than 18 years has customary international law status and therefore, should be universally adopted by all signatories.[42] However, the CRC specifically permits its members to set divergent age protections.[43] In 2006, the absence of protection for children between the ages of 16 to 18 years was identified as a *'major shortcoming'* in the Australian legislative regime.[44] It was argued that '*Australia should extend the application of its ET (sic) legislation to protect children under the age of 18 from commercial exploitation*'.[45] The 2010 Amendments have done this to a limited extent. However, only persons who are in a position of trust and authority over the young person will be caught by the legislation. Nonetheless, the decision to include some offences against persons aged between 16 and 18 years brings Australia in closer conformity with the CRC and may serve to protect a wider range of potential victims, thereby going some way to addressing the concerns of critics.

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38 Fredette, above n 17, 21 citing Sara Austin, 'Commercial Sexual Exploitation of Children: How Extra-Territorial Legislation Can Help', Violence Against Women: From Silence to Empowerment 39 (Don Brandt ed, 2003).

39 Fredette, above n 17, citing www.tamilnet.com September 16, 2005.

40 Edelson, above n 12, 5-7.

41 Svensson, above n 3, 646.

42 Ibid 656.

43 Fredette, above n 17, 22 citing Article 1 of the CRC.

44 Svensson, above n 3, 6.

45 Svensson, above n 3.

The new offences

Persistent sexual abuse of a child outside Australia

Section 272.11 creates a new offence of persistent sexual abuse, carrying a maximum penalty of 25 years imprisonment. The section is enlivened where a person engages in sexual intercourse or sexual activity with a child (or causes the child to do so in that person's presence) on three or more separate occasions. The provision is not time limited, and the conduct need not be the same on each occasion. Further, it is not necessary to prove the exact dates or circumstances of the occasions on which the conduct occurred. This may raise concerns for defendants where evidence is vague or circumstantial, as can happen when dealing with young witnesses and overseas evidence.

This issue is well illustrated in *R v Martens*.[46] This case concerned an application made by Martens, the accused, to the Queensland Court of Appeal to quash a conviction under the *Crimes Act 1914* and grant a pardon on the basis of problems with evidence given by a child witness. While the Court declined to issue a pardon, the application was successful in that the conviction was quashed and the term of imprisonment set aside. Mr Martens had been convicted of child sex offences, relating to conduct alleged to have taken place in Papua New Guinea with a 14 year old girl. After hearing new evidence as to inconsistencies in the alleged victim's evidence, the Court noted that although the new evidence did not necessarily establish Mr Marten's innocence,[47] the conviction was unreasonable and could no longer be supported by the evidence and therefore should be set aside.[48]

The Court did touch on the difficulties in dealing with child witnesses and noted that 'an unsophisticated girl of 14, speaking about the event two years later'[49] might make mistakes in giving evidence. However, the Court was of the view that the problems with the child's evidence in the case went beyond simple inconsistencies. Evidence was also available which arguably indicated that the alleged victim made the allegations up. Either way, this case is dissatisfying. One can only conclude that either the justice system failed 'an unsophisticated girl of 14' or that extensive public resources were used to prosecute false claims against Mr Martens, manufactured for the purpose of some unknown end, serving to undermine other legitimate claims. Child

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46 (2009) 262 ALR 106.

47 *R v Martens* (2009) 262 ALR 106, 148 (Chesterman J).

48 Ibid 149.

49 Ibid 145.

witnesses are often perceived as unreliable and inaccurate,[50] and the circumstances of this case do not assist in altering this perception.

However, there are some safeguards to protect a defendant charged with an offence under 272.11. For example, the Judge(s) or Jury must be satisfied beyond reasonable double about the material facts of all three occasions,[51] and where the trial is before a Jury and there are more than 3 occasions alleged, all jury members must be satisfied beyond reasonable doubt about the material facts of the same three occasions.[52] Further, a Judge is specifically required to warn all members of a Jury of these requirements.[53]

Aggravated offence

Section 272.10 introduces an aggravated offence where the child victim has a mental impairment or is under the care, supervision, or authority of the defendant. The maximum penalty for an offence against this section is 25 years imprisonment. This is far greater than any previous maximum penalty for child sex offences committed overseas under an Australian legislative regime.

The introduction of an aggravated offence will partially address criticisms of the previous Part IIIA, that significant aggravating circumstances may be ignored in sentencing.[54] It should serve to provide a tangible structure for sentencing in cases like *R v ONA*,[55] where the perpetrator was in a relationship with the victim's mother and therefore, was in a position of supervision or authority over the child. Under Part IIIA, ONA received a sentence of six years imprisonment.[56] Under the new aggravated offences, this would attract at maximum penalty of 25 years imprisonment. We can only speculate whether or not this would have had a tangible difference in sentencing. However, it is perhaps reasonable to conclude that statutory prescription of aggravating circumstances will assist Courts in the sentencing process.

Despite the introduction of this aggravated offence, other concerns as to sentencing in CST cases remain unresolved. For example, there is no reference to offenders who knowingly expose children to sexually transmitted diseases. Brungs[57] cites the case of *R v Jesse Spencer Pearce*,[58] who having being diagnosed

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50 David, F. Citing Human Rights and Equal Opportunity Commission 1997.
51 See s 272.11(7)(b).
52 See s 272.11(7)(c).
53 See s 272.11(8).
54 Brungs, above n 2, 110.
55 [2009] VSCA 146.
56 *R v ONA* [2009] VSCA 146 at [19].
57 Brungs, above n 2, 110.

as HIV positive, repeatedly and knowingly exposed children overseas to a serious illness. It did not appear on appeal that this was taken into account in sentencing; whereas arguably it ought to have increased his culpability. This is concerning given that Australian state offences relating to the knowing spread of HIV are inconsistent in their application extra-territorially.[59]

A further flaw may be that while multiple offences in relation to a particular child are recognised in the persistent abuse offence in s272.11, the new legislative regime fails to create an aggravating offence for offences involving multiple children. Arguably, this would be addressed through separate prosecutions for each child, but the legislation should provide more guidance on the matter. In *Lee v R* (2000),[60] there were at least 14 children involved in the offences. Lee was convicted at trial of engaging in sexual intercourse with a child under 16 years outside Australia and eight counts of committing an act of indecency on an unknown person outside Australia, as well as other child pornography related offences. The acts of indecency were evidenced in photographs taken by Lee, in which several of the victims '*showed obvious signs of distress*'.[61] As noted above, although noting that there had been commercial exploitation, the Appeal Court appeared to regard the absence of brutality or prior relevant convictions as warranting a lower sentence. In this case, a total effective sentence of 14 years was reduced to 11 years. Given the number of children involved, some commentators might argue that the reduction in sentence was too lenient.

The *Lee* case also illustrates another area of uncertainty in that the absence of consent and the presence of brutality are not dealt with in Division 272. While Courts may consider these factors as part of the general principles of sentencing, there is still no compulsion or direction on how to do so.[62] In *Lee*,[63] the Appeal Court appeared to regard the absence of brutality as an indicator of consent, and therefore as a factor in warranting a lower sentence. This would seem to be counterintuitive; given the general rationale for regulating sex with children is the limited capacity of a child to give consent.

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58 Unreported, Queensland Court of Appeal, Pincus JA, Shepherdson & White JJ, CA212/97, 8 August 1997.

59 For example, the relevant offence in the Queensland *Criminal Code Act 1899* does not apply to conduct that occurs wholly outside of Queensland. See s 12.

60 112 A Crim R 168.

61 *Lee v R* (2000) 112 A Crim R 168, 170.

62 See Brungs, above n 2, 110-111.

63 *Lee v R* (2000) 112 A Crim R 168.

Grooming or procuring

Section 272.14 creates an offence of procuring a child to engage in sexual activity outside Australia. The Commonwealth asserts that the purpose of the offence is to remedy gaps in the current law, which do not criminalise behaviour leading up to actual sexual activity with a child.[64] The section does not require the sexual activity actually to take place; the person need only have the intention of procuring the child for that purpose.[65] The maximum penalty for an offence against this section is 15 years imprisonment. The following provision, section 272.15, makes it an offence to groom a child to engage in sexual activity outside Australia. The term 'grooming' generally refers to behaviour aimed at making it easier for an offender to procure a child for sexual purposes.[66] The maximum penalty for an offence under this section is 12 years imprisonment.

Notably, under both the procurement and grooming offences, the offender need only *believe* that the child is under 16 years old and it is irrelevant that the child is a fictitious person represented as a real person.[67] This would appear to be an attempt to cater for undercover operations by police and other law enforcement officials who might pose as potential victims.

Offences directed at commercial operators and the preliminary conduct of perpetrators

The Committee describes the offences contained in Subdivision C of Division 272 as being directed at commercial operators and the preliminary conduct engaged in by child sex clients.[68] The subdivision creates three new offences.

Under section 272.18, it is an offence to engage in conduct with the intention of benefiting from an offence against Division 272. The conduct must be reasonably capable of resulting in the person benefiting from the offence.[69] Interestingly, the offence applies whether the conduct takes place within or

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64 The Senate, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 [Provisions]*, Legal and Constitutional Affairs Legislation Committee, Commonwealth of Australia, March 2010 at 8.

65 See s 272.12(b).

66 The Senate, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 [Provisions]*, Legal and Constitutional Affairs Legislation Committee, Commonwealth of Australia, March 2010 at 9.

67 See s 272.14(1)(c)(ii), s 272.14(4) and s 272.15(1)(c)(ii) and s 272.15(4).

68 The Senate, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 [Provisions]*, Legal and Constitutional Affairs Legislation Committee, Commonwealth of Australia, March 2010 at 9.

69 See s 272.18(1).

outside Australia, and whether or not the offence is actually committed or whether the person intends to benefit financially.[70] This would suggest that a non-financial benefit would suffice.

The terms of section 272.19 are similar, but instead proscribe conduct performed with the intention of '*encouraging*' an offence against the Division. The maximum penalty for both offences is 20 years. The repealed Part IIIA contained an offence of 'inducing' a child under 16 years to be involved in sexual conduct. Sections 272.18 and 272.19 appear to replace this section and are arguably broader in scope. For example, under Part IIIA, the term 'induce' was defined as being by threats, promises or otherwise. The term 'encourage' in Division 272 is given wider ambit and means to:

> a) encourage, incite to, or urge, by any means whatever (including by a written, electronic or other form of communication); or
>
> b) aid, facilitate, or contribute to, in any way whatever.[71]

This enactment of this section may have been to provide clearer guidance to the Courts in cases such as *Kaye v R*.[72] It is now clear that the absence of profit will not exempt an offender from the reach of the legislative regime. That decision was an appeal by Mr Kaye of his sentence on the basis of his advanced age, lack of prior record and other factors.[73] Mr Kaye was convicted under Part IIIA for offering to assist a person to engage in committing an act of indecency on a person under the age of 16 years outside Australia. Mr Kaye operated a travel service for persons wishing to travel to Thailand. He was discovered to have offered to arrange for a client to engage in sexual activity with persons less than 16 years of age. He received a sentence of 6 years out of a possible maximum penalty of 17 years. The Court upheld the sentence on the basis that adequate regard has been had for Mr Kaye's age and lack of prior record etc. In response to arguments that the lack of profit sought by Mr Kaye made the offence less severe, the Court responded as follows:

> In the present case, although the applicant did not profit from the offence, his status as the operator of a travel business providing accommodation and contacts in Thailand to persons interested meant

[70] See s 272.18(2).
[71] See s 272.19(4).
[72] [2004] WASCA 227.
[73] *Kaye v R* [2004] WASCA 227, [3].

> that the likelihood of acts of indecency against children under 16 being committed as a result of his efforts was increased.[74]

The third offence in Subdivision C, section 272.20, prohibits preparation or planning of an offence relating to sexual intercourse or other sexual activity with a child. The Committee, citing the Explanatory Memorandum, explains that this offence is intended to cover persons who plan their own participation in CST but who do not actually operate a commercial sex tour.[75] The Committee asserts this provision will allow law enforcement agencies to intervene prior to actual abuse taking place, as long as there is sufficient evidence of a person's intent to travel overseas to abuse children sexually. This will obviously be of little effect against opportunistic offenders who do not plan their sexual activities with children, but nonetheless inchoate offences '*do expand the arsenal against CST*'.[76]

Inchoate offences such as this are likely to be welcomed by child advocacy groups and NGO's, particularly if it has a deterrent effect, or if a child is spared the actualisation of offending conduct. The maximum penalty for an offence under this provision is 10 years imprisonment. Again, as with the substantive offences of sexual intercourse and activity with a child, this provision provides for a mirror offence against a 'young person'. The term is not defined in the provision, so assumedly, the definition used in sections 272.11 and 272.12 would apply. That is, the conduct will also constitute an offence where the person is between 16 and 18 years of age. In this circumstance, the maximum penalty is 5 years imprisonment.

Increased penalties

As noted above, the penalties for all child sex offences committed outside Australia have generally increased with the introduction of Division 272. The maximum penalty for a child sex offence outside Australia has increased from 17 years to 20 years, and to 25 years in the case of the aggravated offence[77] and the persistent sexual abuse offence.[78] While an increase in penalty is likely to be

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[74] Ibid [54].

[75] The Senate, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 [Provisions]*, Legal and Constitutional Affairs Legislation Committee, Commonwealth of Australia, March 2010 at 10.

[76] Fredette, above n 17, 29 citing Kathy Steinman, 'Sex Tourism and the Child: Latin America's and the United States' Failure to Prosecute Sex Tourists' (2002) 13 *Hastings Women's Law Journal* 53, 72.

[77] See s 272.10.

[78] See s 272.11.

welcome by child welfare advocates, the way in which the increased penalties will manifest in actual sentencing remains to be seen.

Overall, the expanded scope of the offences under Division 272 is likely to be welcomed by child protection and advocacy groups. However, as noted above, the legislation fails to provide guidance on various matters, including consent, the involvement of multiple children and the presence or otherwise of brutality. The legislation also does not really address the practical problems of child witnesses and how Courts and Jurors should deal with their evidence. Nonetheless, the legislation is one of the more comprehensive responses to CST in the world, and prosecutions under the new Division 272 will be watched with interest.

Part two – Division 272 as an exercise of extraterritorial jurisdiction

It was said of the Division's past incarnation (Part IIIA) that the child sex tourism regime 'conjoins important international legal concepts such as the extended jurisdictional bases for liability ... with traditional common law criminal offences and defences'.[79] Arguably, if the scope of Division 272 was limited to regulating persons in Australia organising and planning for either themselves or others, to attend child sex tours overseas, there may not be an issue of extraterritoriality at all. However, the legislation goes further than, and this is an assertion of extraterritorial reality. This Part 2 will first provide a brief overview of what is meant by the term 'extraterritorial' jurisdiction, and then discuss the position on extraterritoriality under international law and under Australian constitutional law. It will then conclude with an analysis of the political and economic factors at play and a discussion of the arguments for and against the extraterritorial reach of Division 272.

What does an exercise of extraterritorial jurisdiction look like?

The term 'extraterritoriality' is generally understood to refer to the exercises of jurisdiction by a nation state over conduct occurring outside its borders.[80] Under International Law, nation states derive authority to exercise jurisdiction from three principles: Nationality; Territoriality; and Universality.

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[79] Tim Macintosh, 'Exploring the Boundaries: The Impact of The Child Sex Tourism Legislation' *The Australian Law* Journal, Vol 74, 617.

[80] Deborah Senz and Hilary Charlesworth, 'Building Blocks: Australia's Response to Foreign Extraterritorial Legislation' (2001) 2(1) *Melbourne Journal of International Law* 69, 3.

Put simply, the Nationality principle can provide a basis for jurisdiction where a state's citizen or corporation is either a victim (passive nationality) or a perpetrator (active nationality). The Territoriality principle may be invoked where conduct either takes place within a nation's borders (subjective territoriality), or the effects of the conduct are felt within the borders (objective territoriality). And the Universality principle is reserved for conduct considered to constitute an international crime, such as piracy, genocide and crimes against humanity. Some international jurisprudence also recognises an 'effects principle' which dictates that a state can assert jurisdiction over foreign conduct which has certain effects within that state. The Nationality and the 'effects principle' can give rise to exercises of extraterritorial jurisdiction, because the subject conduct may well have occurred outside the territory of the regulating state.[81]

Although controversial, the notion of extraterritorial jurisdiction is not a novel concept in the international arena. While in the past, extraterritoriality has generally been limited to crimes against humanity and other crimes for which universal jurisdiction are well established, this is changing. As noted by the International Court of Justice:[82]

> ... a gradual movement towards bases of jurisdiction other than territoriality can be discerned. This slow but steady shifting to a more extensive application of extraterritorial jurisdiction by States reflects the emergence of values which enjoy an ever-increasing recognition in international society. One such value is the importance of the punishment of the perpetrators of international crimes. In this respect it is necessary to point out once again that this development ... has led to ... the recognition of other, non-territorially based grounds of national jurisdiction.

The decision of the Permanent Court of International Justice in the *Lotus* case[83] also discussed the development of extraterritorial jurisdiction. The decision in *Lotus* recognized a presumption in favour of exercises of extraterritoriality:[84]

> … Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect **a wide measure of discretion which is only limited**

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[81] David J Gerbert, Beyond Balancing: International Law Restraints on the Reach of National Laws, *Yale Journal of International Law*, Vol 10:185, 1984, p190.

[82] Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*) 14/02/2002 at 73.

[83] The S S Lotus (France v Turkey), 1927 PCIJ, ser A, No 10 (Judgment of Sept 7).

[84] Gerbert, above n 81, 196.

> **to certain cases by prohibitive rules**; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[85]

However, although international law does recognise the conceptual legitimacy of exercises of extraterritorial jurisdiction, the nature and extent of the 'prohibitive rules' are less clear, and that is what complicates analysis of legislative frameworks such as Division 272.

Why do nation states exercise extraterritorial jurisdiction?

Exercises of extraterritorial jurisdiction are hardly surprising given the internationalization of institutions, peoples, finance, and inevitably, criminal activity. Literature attributes this to the process of globalization - the 'phenomenon of our times'.[86] Cheap travel, advances in technology and telecommunications and the anonymity of the internet have created opportunities for the rapid expansion of transnational crimes such as child sex tourism, terrorism, and human rights abuse.[87] As one commentator notes, while crimes have traditionally been 'local phenomena', globalisation has changed this in ways that have yet to be fully explored and understood.[88]

Further, the fundamental changes to the way the international community operates as a result of our interconnectedness has diminished the divide between domestic and international law. This in turn has challenged traditional foundations of international law – such as state sovereignty and jurisdiction.[89] Commentators may not agree on the desirability of the fact, but none would disagree that globalisation has had a profound impact on the traditional conception of state sovereignty. As Rubenstein asserts, a nation state is not necessarily able to control the legal destiny of all persons within its borders. Equally, states and companies outside a territory can nonetheless influence conduct inside that territory.[90]

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85 The S S Lotus (France v Turkey), 1927 P C I J, ser A, No 10 (Judgment of Sept 7) at 19 (emphasis added).

86 Spencer Zifcak, *Globalisation and the Rule of Law* (Routledge Press, 2005) 1.

87 US Department of Justice, *Transnational Organized Crime*, November 15, 2007 at http://www.ojp.usdoj.gov/nij/topics/crime/transnational-organized-crime/welcome.htm .

88 Patrick James Keenan, 'The New Deterrence: Crime and Policy in the Age of Globalisation' (2005-2006) 91 *Iowa Law Review* 505, 508.

89 Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook, 2002).

90 Ibid 296, 297.

Therefore, the intersection between international and domestic laws in the prosecution of transnational crimes has, and will continue to, result in increased reliance by nation states on extraterritorial jurisdiction. Gibney and Skogly argue that in a globalised world, the notion of jurisdiction over individuals, companies, or particular actions, makes more sense than the traditional parameters of physical control of territory.[91] They note that one or more foreign states may directly or indirectly be in a position to influence the enjoyment of basic human rights by individuals without having territorial control over the place where those individuals reside.[92]

Some treaties even impose a positive obligation on states to legislate extraterritorially. For example, the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography requires parties to criminalise child prostitution whether or not the acts occur domestically or transnationally.[93]

From another perspective, Conangelo asserts that rather than being a restraint on state power, the incorporation of international law into national law can actually serve to expand the power of the nation state by providing a constitutional justification to legislate extraterritorially.[94] By way of example, he cites the extraterritorial scope of anti-terrorism in the United States. He also refers more generally to the international legal doctrine of universal jurisdiction being used to 'overcome any potential constitutional obstacles to the extraterritorial application of U.S. law...'[95]

International law has also played a part in providing constitutional justification for assertions of extraterritoriality in Australia. In particular, the offences in the former Part IIIA survived constitutional challenge in XYZ v Commonwealth.[96] The decision concerned an Australian citizen (XYZ) who was committed to stand trial on three charges, each alleged to have been committed in Thailand. The charges included engaging and attempting to engage in sexual intercourse with a child under 16 years of age, contrary to provisions in the then Part IIIA of the *Crimes Act 1914*.

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91 Mark Gibney, Sigrun Skogly, *Universal Human Rights and Extraterritorial Obligations*, (University of Pennsylvania Press, 2010) 4.

92 Ibid.

93 See Articles 1 and 3 of *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*.

94 Anthony Colangelo, 'Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law' (2007) 48 *Harvard International Law Journal* 121, 122.

95 Ibid 123.

96 (2006) 227 CLR 532.

XYZ challenged the validity of the provisions on the basis that the Commonwealth of Australia (the Commonwealth) did not have the authority to assert extraterritorial jurisdiction. In essence, the issue before the High Court was whether s 51(29) of the Constitution of Australia, the external affairs power, permitted the Commonwealth to assert extraterritorial jurisdiction over the conduct of its citizens or residents overseas. The Court concluded that given the conduct proscribed by the extraterritorial components of the relevant child sex offences occurs outside Australia, it was conduct within the scope of the external affairs power.[97] In arriving at his individual decision, the Chief Justice noted that the territorial principle of legislative jurisdiction is not the only source of jurisdiction recognised by international law.[98] He found that the principle of national sovereignty, according the law of nations, grants Australia a right to 'regulate, by legislation, the conduct outside Australia of Australian citizens or residents'.[99] According to his Honour, and consistent with the principle that international law may guide the interpretation of international law,[100] this was relevant to determining the scope of the external affairs power, and consequently, the validity of the legislation.

Notably, Gleeson CJ seemed to attribute weight to the fact that the legislation still required a tangible nexus, ie the perpetrator must be either a citizen or resident of Australia, and that this was required by the 'comity of nations'.[101] This is interesting in light of nations whose ET scope also extends beyond citizens and residents, to perpetrators merely passing through their territory.[102]

In any event, regardless of the international and constitutional legal principles governing extraterritoriality, there are inevitably political and economic factors at play in assertions of jurisdiction by nation states.

Political and economic factors at play

Gibney and Skogly argue that states have an obligation to protect human rights violations by persons or corporations over which they have control.[103] Conversely, Senz and Charlesworth argue that exercises of extraterritorial

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97 Ibid 547.

98 Ibid 536 (Gleeson CJ).

99 Ibid 540 (Gleeson CJ).

100 Ibid 536 (Gleeson CJ), citing *R v Jameson [1896]* 2 QB 425, 430.

101 Ibid 538 (Gleeson CJ).

102 Fredette, above n 17, 18-19; and Svensson, above n 3, 6 citing Jeremy Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation* (2000) 101.

103 Gibney and Skogly, above n 91, 6.

jurisdiction impinge on the sovereignty of the country in which the criminalised conduct takes place.[104] They also argue it is an underhand means of promoting foreign policy objectives.[105] This latter argument has been made in relation to Australia's assertion of jurisdiction in *R v Moti*.[106]

In that case, Mr Moti was deported from the Solomon Islands and on arrival in Australia, was prosecuted under the former Part IIIA, having been charged with seven counts of unlawful sexual intercourse with a child several years earlier in Vanuatu. The charges referred to a time when Mr Moti was a resident of Vanuatu. He argued the prosecution was an abuse of process and applied for a stay of the indictment presented against him. Among other things, he argued that his deportation was a disguised extradition and an unlawful removal; and that the investigation was politically motivated. The prosecution was further complicated by Australia having no coercive powers to compel witnesses from overseas countries to give evidence, so the prosecutions relied heavily on the willingness of witnesses. This included payment of witness living expenses.

In deciding the application for the stay, Mullins J held there was no basis for the disguised extradition ground because the decision to deport was one for the Solomon Islands as a sovereign nation. Mullins J concluded that it was not for Courts to express an opinion on the decisions made by sovereign governments.[107] The Court then went on to reject all other grounds, except one. The application was granted on the basis that payments made to the witnesses who lived in Vanuatu brought the administration of justice into disrepute.[108] The Crown had argued that payments constituted necessary living expenses. Mullins J found that while there may have been some justification for humanitarian support for the family of the complainant,[109] the payments were of an amount that exceeded merely subsistence support.[110] Regard was also had to the timing of the payments - having commenced after a threat by the complainant and her family members to withdraw as witnesses.[111]

Ultimately, the Court concluded that the payments were so serious an abuse of process as to render any order other than a stay of proceedings inappropriate.[112]

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104 Senz and Charlesworth, 'above n 80, 2.
105 Ibid.
106 (2009) 235 FLR 320.
107 *R v Moti* (2009) 235 FLR 320, 333.
108 Ibid 347.
109 Ibid 344-345.
110 Ibid 345.
111 Ibid 345.
112 Ibid 346.

However, that decision has since been reversed on appeal,[113] and, at the time of writing, the Commonwealth Director of Public Prosecutions had committed to resume the prosecution.[114] The Moti case has been a high profile one, Mr Moti having at one stage been appointed Attorney-General of the Solomon Islands. Not surprisingly then, the case has been the subject of media attention and speculation as to the potential political motives of the Australian Government in pursuing the case. Purcell questions whether the exercise of extraterritorial jurisdiction in the Moti case was really about Australia's foreign policy objectives.[115] Purcell asks: [116]

> Why is the Australian Government running so hard in the Julian Moti affair? Is there a political dimension to this matter? The Commissioner for the AFP has stated that the AFP commenced investigation into this matter in 2005. It was in 2005 that Julian Moti was first asked to be Attorney General. He declined that first offer but accepted the 2006 offer. Why has the AFP sought new witnesses and reinterviewed the complainant. Does the Australian Government want to see a regime change in the Solomons?

Purcell concludes his commentary with a further question: [117]

> ... was the Crimes (Child Sex Tourism) Act passed with the intention of enabling the Australian prosecution authorities to launch a prosecution against a person who resided inVanuatu and the Solomons and who happened to take out Australian citizenship but had not lived in Australia since student days and is currently living in the Solomons, to be tried in Australia for offences allegedly committed when he was a citizen of Vanuatu?

It is these kinds of assertions of extraterritorial jurisdiction that give rise to controversy and may indicate political factors at play in the design and enforcement of the offences in Division 272.

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113 [2010] QCA 178.

114 Jamie Walker, *Child-sex case against Julian Moti revived*, The Australian, July 2010 (http://www.theaustralian.com.au/news/nation/child-sex-case-against-julian-moti-revived/story-e6frg6nf-1225892983108).

115 F J Purnell SC, CLA member, *The Julian Moti Affair and double jeopardy*, Civil Liberties Australia (See: http://www.cla.asn.au/Articles/Moti%20Affair%20-%20Purnell061024.pdf. *Note article appeared originally in the Canberra Times, Thursday 25 October 2006).*

116 Ibid.

117 Ibid.

Extraterritoriality might also encounter opposition where conduct is criminalised inconsistently. For example, given the legal age of consent to sexual intercourse in Australia, the applicability of Division 272 to persons aged between 16 and 18 years would be grossly unsatisfactory, but for its being expressly limited to persons in a position of trust and authority. Nonetheless, despite this saving grace, it illustrates the potential for exercises of extraterritorial jurisdiction to create a two tier system of legal obligations for Australians travelling or living overseas. Further, the assertion of extraterritorial jurisdiction over residents (as opposed to citizens) is also controversial, given their citizenship of another jurisdiction and the often limited rights of residents to vote and participate in the election of their legislature.[118]

There are also political and economic arguments made in favour of criminal offences, such as child sex offences, having extraterritorial reach. The economic divide between developed nations such as Australia and poorer destination countries such as Thailand and Cambodia is obvious. This may serve as a source of political pressure on countries like Australia to regulate the behavior of their citizens overseas for the simple reason that the country in which they are in cannot or will not do so.

This line of reasoning is supported by what one commentator terms the *'mechanics of substitution'*. In his 2005 discussion, Keenan argues 'substitution' can occur where effective regulation of criminal activity in one venue (such as Australia) leads those engaged in such activity merely substituting one venue for another (such as Cambodia or Thailand).[119] Keenan argues increased accessibility to cheap international travel and wealth disparities between the developing and developed world[120] have facilitated the displacement or substitution of child sex offences to destinations less willing or able to prosecute. This means, ironically, that law enforcement successes in some countries can morph into *'social disasters'* for others.[121]

For example, although Cambodia has laws that would permit the prosecution of child sex offences, it is still reeling from the aftermath of the Khmer Rouge regime, during which it lost its trained attorneys and judges.[122] Further, law enforcement officials in poorer countries are often paid very little, and this can

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[118] Macintosh, above n 79, 616.
[119] Keenan, above n 88, 514.
[120] Ibid.
[121] Ibid 508.
[122] Svensson, above n 3, 3.

make them more susceptible to bribery from perpetrators.[123] It is far easier to arrest sex workers than wealthy foreign tourists. This is apparent in 2008 reports of police in Cambodia arresting sex workers under a human trafficking law:[124]

> More than 500 women were arrested for soliciting sex in the first nine months of 2008, according to anti-trafficking organisation Afesip, with many of them forced into rehabilitation centres. Rights groups say the new law makes women easier prey for traffickers, and could increase rates of sexually-transmitted infections as prostitutes stop carrying condoms out of fear they will be used as evidence against them. They also allege that detainees are regularly abused at the two rehabilitation centres controlled by Cambodia's ministry of social affairs, Prey Speu and Koh Kor. [125]

Therefore, supporters of the extraterritorial dimension of Division 272 would argue that the 'sovereignty' arguments against extraterritoriality presuppose an equal playing field between developed and developing nations. In doing so, the complex issues behind the supply and demand for prostituted children may be overlooked.[126] It is true that children may actively seek out paying customers in return for sexual services as a means of economic survival, but as Graycar points out, this does not change the fact that sexual activity with children is almost universally condemned as an abuse of human rights.[127]

Child prostitutes do not have the same bargaining power as wealthy adults from developed nations, and they are often trafficked, sold, abducted [128] or forced into prostitution by extreme poverty. [129] One commentator cites the following comment from a retired American

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[123] Fredette above n 17, 15 citing Jeremy Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation* (2000) 89.

[124] Agence France Presse, *Cambodia faces problems enforced new sex trafficking law* (2008) Le Viêt Nam, aujourd'hui <http://blog.vietnam-aujourdhui.info/post/2008/12/29/Cambodia-faces-problems-enforced-new-sex-trafficking-law> (last accessed June 2010).

[125] Ibid.

[126] Brungs, above n 2, 103.

[127] Graycar, A in David, F *Child Sex Tourism*, Trends and Issues in crime and criminal justice, Australian Institute of Criminology, June 2000 at 1.

[128] Brungs, above n 2, 104.

[129] Ibid.

schoolteacher, a poignant illustration of the economic disparity in bargaining power:[130]

> On this trip, I've had sex with a 14 year-old girl in Mexico and a 15 year old in Columbia. I'm helping them financially. If they don't have sex with me, they may not have enough food. If someone has a problem with me doing this, let UNICEF feed them. I've never paid more than $20 to these young women and that allows them to eat for a week.

The issue is further complicated by the lucrative nature of the business and the economic realities at play. Low education levels and illiteracy limits other alternative employment opportunities for children.[131] Tourism, including CST, brings foreign dollars into developing countries.[132] This can result in destination countries being unwilling to implement and/or enforce laws against CST.[133] Ironically, some commentators argue that this short term injection of currency actually has disastrous effects long term:

> ... it turns out to be a drain on the resources of the country, not a gain; and when you add the social costs, it becomes disastrous. Tourists are not going to pay for the care of sex workers with AIDS.[134]

The argument that the disparity between 'source' and 'destination' countries points to political and economic dimensions in the design and enforcement of Division 272 is supported by the pattern of prosecution in Australia. Most cases concerning child sexual offences overseas relate to conduct in countries like Thailand and Cambodia. Rarely do the Courts see these types of cases arising out of conduct by Australians in the United States or the United Kingdom. In any event, for better or worse, Division 272 does have an extraterritorial component, and undeniably the intersection between international and domestic laws in the prosecution of transnational crimes has, and will continue to, result in increased reliance by nation states on exercises of extraterritorial jurisdiction. Child sex offences committed overseas are no exception, and the list is likely to continue to expand. As Macintosh noted in his 2000 article:[135]

> It is also possible to envisage a more extended role for the Commonwealth legislature in giving further effect to the Convention on the Rights of the Child and other instruments which the Executive has

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130 Edelson, above n 12, 1.

131 Brungs, above n 2, 102.

132 Ibid 102.

133 Ibid 102-103.

134 Breckenridge, above n 5, 437 citing Jeremy Seabrook, *Travels in the Skin Trade: Tourism and the Sex Industry* (2001) 150-1.

135 Macintosh, above n 79, 617-618.

> entered into in the area of criminal law; an area traditionally the domain of individual states.

Concluding thoughts

Whether the ideals in the new Division 272 will translate into a practical reduction in CST remains to be seen. This kind of success is largely dependent on the cooperation and willingness of destination countries.[136] Arguably, there are aggravating factors absent from the new Division 272 such as the involvement of more than one child, the absence of consent or the presence of brutality in the offending conduct. There is no clear guidance given on prosecutorial discretion, which leaves the regime open to allegations of serving a political agenda. It is possible that authorities are simply reacting to the political realities in destination countries and this, of course, may have a disproportionate impact on Australians in the Asian region, as against Australians in countries like the United Kingdom. Nonetheless, the CST regime in Division 272 is one of the more comprehensive of its kind in the world.

The extraterritorial component of Division 272 is also part of a larger transformation. Justice systems are morphing from the domestic to the transnational, and the lines between domestic and international law are blurring more than ever before. Laws with ET reach, such as Australia's CST regime, are arguably a necessary reality of the economic disparity between nations. The range of offences for which ET jurisdiction can be exercised is likely to expand over the next 10 years. However, it is possible that not all exercises of extraterritoriality will be necessary or justified. Given the unpalatable nature of the conduct in question, it is likely that public opinion would support the assertion of jurisdiction over child sex offenders overseas. But is there really any substantive legal difference between enforcing child sex offences overseas and, for example, Australia asserting criminal jurisdiction over Australian citizens consuming marijuana in Amsterdam? Would this assertion of extraterritorial jurisdiction sit as well with the electorate? How would the Netherlands respond to Australia regulating conduct taking place on its territory? Would Australia always need to show double criminality in its assertions of jurisdiction?

The issue raised more questions than answers and paints an interesting portrait of the future of the relationship between domestic and international law. For better or worse, it is an inevitable consequence of the global village in which we live: extraterritoriality is the new frontier.

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[136] For example, see Svensson, above n 3, 1.