

Bond University

Bond Law Review

Volume 37

Issue 1

2025

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Mara Lejins

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‘Come and Live Like This’: An Examination of Australian Legal Perspectives on Child Sex Tourism in Southeast Asia and the Pacific

MARA LEJINS*

Abstract

Australians make up a disturbingly high proportion of child sex tourists in Southeast Asia and the Pacific. This trend stems from several factors: the economic gap between Australia and the Asia-Pacific region, the absence of psychological restraints that might regulate behaviour, and the perceived ineffectiveness of law enforcement of countries favoured by child sex tourists.

Acknowledging its role in child sex tourism and complying with international obligations, Australia has implemented laws targeting its citizens and residents engaged in such activities. These laws remove certain obstacles to enforcement, such as the requirement of double criminality and allowing the prosecution of opportunistic offenders. Additionally, Australia has created laws addressing online involvement in such crimes.

The Australian Federal Police is the primary investigative and enforcement agency of child sex tourism, often collaborating with foreign law enforcement agencies. Moreover, child sex offender registries aim to prevent potential offenders from traveling abroad. Despite these efforts, Australia’s approach could be bolstered.

The Criminal Code should be amended to ensure double jeopardy provisions do not protect offenders from prosecution if they have not completed their sentences or if the offence of which they were convicted did not reference the victim’s age. Introducing a distinct offence for involving individuals under 18 in prostitution outside Australia and expanding the use of

* Columbia University: LLM (Highest Honours). Graduated with Highest Honours (top 2% of graduating class) and the Parker Certificate of Achievement in International and Comparative law. ANU: Bachelor of International Relations/Bachelor of Laws (Hons 2A), Graduate Diploma of Legal Practice. University of New England: Diploma of Modern Languages (French)

assumed online identities to identify and disrupt child sex offenders should also be considered. It is also possible that further technology and regulations, such as artificial intelligence and the work of the eSafety Commissioner, will work to better identify would-be offenders.

I Introduction

*Come and live like this here, like this in Thailand, okay?
Ahha, look, this one is 15 years of age,
okay, brother-in-law...
Look, chick, beautiful. Come here!*

Transcript of call from Thailand of Osman Salman,
a convicted child sex offender, to his brother.¹

In encouraging his brother-in-law to travel to Thailand, Salman identifies the core drivers of child sex tourism ('CST'): access to underage girls and, recorded in other material, the economic power of Australian tourists. These factors drive Australian participation in the CST industry in Southeast Asia and the Pacific. In fact, Australia has the third-highest number of any country of INTERPOL 'Green Notice' alerts about individuals who may commit crimes while traveling overseas. Of these notices, 94% relate to Australian child sex offenders who are travelling.² Australia imposes comprehensive extra-territorial legislation aiming to prosecute those who engage in the uniquely pernicious trade of CST. However, effective management of this problem is not static; Australia must continue to adapt and refine its approach to enforcement.

The first section of this article defines CST, explains the motivations of Australian offenders in Southeast Asia and the Pacific and examines how victims may end up involved in the trade. The second section of this article summarises Australia's international obligations to fight CST and evaluates the legislation enacted to tackle this problem. The final section of this article outlines ways Australia can improve its approach to CST laws. Australia should amend its definition of double jeopardy to ensure offenders cannot escape prosecution if they do not serve their sentence or are convicted of a much less serious offence. Australia must also legislate extra-territorial offences prohibiting Australians from purchasing sex from children aged under 18. Finally, Australia needs to grapple with the enforcement gaps, as well as

¹ *Salman v DPP* (Cth) [2011] NSWCCA 192, [16] ('*Salman*').

² Australian Federal Police, 'AFP Targets Child Sex Offenders Travelling Overseas' (Media Release, 15 September 2024) ('AFP Targets Child Sex Offenders Travelling Overseas') <<https://www.afp.gov.au/news-centre/media-release/afp-targets-child-sex-offenders-travelling-overseas-1>>.

opportunities, created by the growing use of technology to facilitate CST.

II Child Sex Tourism

The expansion of international tourism means that more people than ever experience the joys of international travel, and more countries receive the financial benefit of tourism. However, there is a dark side to this increasing global connectedness and travel: CST. CST is the act of sexual exploitation of children embedded in the context of travel, tourism, or both.³ Recently, CST has been more precisely labelled as the Sexual Exploitation of Children in the Context of Travel and Tourism ('SECTT') as this recognises the criminal nature of child sexual exploitation.⁴

A *Child Sex Tourism of Australians in Southeast Asia and the Pacific*

This section identifies the core features of Australian participation in CST in Southeast Asia and the Pacific. Namely, the fact that Australians tend to be perpetrators, rather than victims, of CST, the motivations behind Australian perpetrators of CST, and the characteristics of the foreign child victims of CST.

1 *Australian Offenders*

Australia is primarily a 'sending' country for CST, meaning Australia is a source of people who travel to another 'receiving' country to engage in CST. In short, Australians travelling overseas for CST is the main concern for law enforcement, rather than foreigners entering Australia for CST.⁵ Australian child sex tourists come from no specific background: they may be married or single, wealthy or budget tourists, from a high socio-economic or disadvantaged background, and male or female (although the vast majority are male).⁶ In this way, the demographics of child sex tourists are not dissimilar to those of other child sex offenders.⁷

³ Ofelia Calcetas-Santos, *Rights of the Child: Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, UN Doc E/CN.4/1996/100 (17 January 1996) 35.

⁴ ECPAT International, *Sexual Exploitation of Children in Travel and Tourism* (Report, 2020).

⁵ Australian Federal Police, *Australian Travelling Child Sex Offenders* (Expert Report, 2015) 1 ('*Australian Travelling Child Sex Offenders*').

⁶ Karen D Breckenridge, 'Justice Beyond Borders: A Comparison of Australian and US Child-Sex Tourism Laws' (2004) 13(2) *Washington International Law Journal* 405, 411-412; End Child Prostitution, 'Child Pornography and Trafficking of Children', *Offenders on the Move: Global Study on Sexual Exploitation of Children in Travel and Tourism 2016* (Report, 2016) 15.

⁷ Kelly Richards, *Misperceptions About Child Sex Offenders* (Report No 429, September 2011) 6.

2 Motivations

Child sex tourists are mostly ‘situational’ or ‘opportunistic’ offenders. That is, while they may not regard themselves as users of prostitutes or as paedophiles, they engage in CST due to the supply of children available for sex, the ability to act anonymously and with impunity by being a tourist, and the absence of social and cultural constraints which may otherwise dampen their inhibitions.⁸ However, there are also offenders with sexual preferences for pre-pubescent children (paedophilia).⁹ Rapid advances in technology, particularly over the internet, mean offenders may research in advance the cities and establishments to visit, and actively procure children before their visit.¹⁰

Core to CST is an economic undercurrent: the child sex tourist typically travels from a developed ‘sending’ country such as Australia, to a typically low-income, ‘receiving’ country. However, recent research shows that the phenomenon can occur anywhere in the world and no country is exempt.¹¹ The motivation for a child sex tourist is often the same as that of a typical tourist: beneficial exchange rates and lower costs of living mean services can be procured for a low price.¹² The choice of destination may also depend on languages, existing connections, preferences and proximity.¹³

Wealth disparity can give rise to a sense of entitlement, and a perception that the foreign tourist has power and status that they may not otherwise experience in Australia.¹⁴ Some perpetrators justify the abuse because they provide the children with monetary compensation, with one Australian offender telling a child’s mother in Thailand: ‘Look, this business is not for free. Feeding her first, then I’ll fuck her. Do you see we are feeding her with all these?’¹⁵

Analysts have also proffered psychological reasons for CST. Some argue CST offenders fetishise ‘exotic’ ethnicities and believe that exploiting them is somehow less morally repugnant as they belong to a hypersexualised or subservient ethnicity.¹⁶ Offenders are also away from their homes and away from the social, moral or cultural constraints that might moderate their behaviour or dampen their inclination to

⁸ End Child Prostitution (n 6) 15, 57-58.

⁹ Ibid.

¹⁰ Marianna Brungs, ‘Abolishing Child Sex Tourism: Australia’s Contribution’ (2002) 8(2) *Australian Journal of Human Rights* 101, 103.

¹¹ Anneke Koning and Johan van Wilsem, ‘The Context of Sexual Exploitation of Children by Tourists and Travelers: A Cross-National Comparison of Destination Countries and Non-Destination Countries’ (2022) 33(4) *International Criminal Justice Review* 349.

¹² See, eg, *R v Chen* [2020] VCC 385, where an Australian man paid Filipino children between AUD \$40-120 for each instance of intercourse.

¹³ Koning and van Wilsem (n 11).

¹⁴ End Child Prostitution (n 6) 57.

¹⁵ *Salman* (n 1) [16].

¹⁶ Heather Montgomery, *Modern Babylon? Prostituting Children in Thailand* (Berghahn Books, 2001) 192.

sexually exploit children.¹⁷ This may also increase offenders' sense of impunity: no one knows who they are, they may never see their victims or facilitators again, and the perceived weakness of foreign law enforcement strengthens a belief that they can act on impulses with consequences.¹⁸

3 *Victims in Southeast Asia and the Pacific*

Indonesia (especially Bali) and the Philippines are popular destinations for Australian child sex tourists in Southeast Asia and the Pacific.¹⁹ Countries with high rates of English proficiency, such as the Philippines, are particularly attractive.²⁰

Poverty is the most frequently identified factor increasing the vulnerability of children to involvement in CST.²¹ Poverty can drive CST in a number of ways: children may be obliged to exchange sex for items necessary for survival; children may see CST as their avenue out of destitution; or children may even be sold to traffickers or otherwise exploited by their families to pay debts or otherwise financially benefit.²² The economic imbalance between offenders and victims of CST, the social distance, and the associated attributions about power and status may also increase the perceived permissibility of abuse in the eyes of the offender.²³

Research indicates that working children, especially those in the tourism industry (such as karaoke bars and restaurants), are particularly vulnerable to CST.²⁴ Other risk factors for victims include homelessness, family breakdown, statelessness, lack of education, and

¹⁷ Mathuri D Kosuri and Elizabeth L Jeglic, 'Child Sex Tourism: American Perceptions of Foreign Victims' (2017) 23(2) *Journal of Sexual Aggression* 207, 209.

¹⁸ End Child Prostitution (n 6) 58.

¹⁹ Michael Bachelard, 'Indonesia Now Number One Destination for Australian Child Sex Tourists', *The Sydney Morning Herald* (11 October 2014) <<https://www.smh.com.au/world/indonesia-now-number-one-destination-for-australian-child-sex-tourists-20141010-1142ax.html>>; Samantha Hawley, '250 Convicted Australian Child Sex Offenders Travelled to the Philippines Last Year: AFP' (Radio Segment, ABC Radio, 8 April 2015) <<https://www.abc.net.au/radio/programs/am/250-convicted-australian-child-sex-offenders/6379850>>.

²⁰ Inter-Agency Council Against Trafficking, *Children in the Philippines: Analysis and Recommendations for Governments, Industry, and Civil Society* (Report, 20 May 2020) 55.

²¹ See, eg, ECPAT International, *Regional Overview – The Sexual Exploitation of Children in Southeast Asia* (Report, 2017) 21; Hannabeth Franchino-Olsen, 'Vulnerabilities Relevant for Commercial Sexual Exploitation of Children/Domestic Minor Sex Trafficking: A Systematic Review of Risk Factors' (2019) 22(1) *Trauma, Violence, & Abuse* 99; Raven Washington 'Treating the International Child Sex Tourism as a Crime Against Humanity' (2018) 24(2) *Southwestern Journal of International Law* 367; The Context of Sexual Exploitation of Children by Tourists and Travelers (n 11).

²² König and van Wilsem (n 11); Karen Spurrier and Nicky Assim Alpaslan, 'Adult Survivors' Recollections and Accounts of their Involvement in Child Sex Tourism by Way of Child Prostitution' (2017) 53(3) *Social Work* 388.

²³ Kosuri and Jeglic (n 17).

²⁴ ECPAT International (n 21) 25-26.

natural disasters.²⁵ Moreover, areas with weak governance and weak protections of children, and by extension weak enforcement of laws relating to child sexual abuse, are associated with an increased rate of CST.²⁶

In summary, Australians are more often perpetrators of CST, rather than victims. CST is often opportunistic, driven by the wealth disparity between Australia and its neighbouring countries and its perceived permissibility due to the fetishisation of foreign children and the absence of usual inhibitors. Poverty is one of the major driving factors rendering children vulnerable to CST, in addition to perceived weak governance and approaches to the protection of children.

III Australia's Fight Against Child Sex Tourism

This section explains the rationale behind extra-territorial offences before identifying the reasons for Australia's decision to criminalise CST. The default jurisdictional basis for criminal law is that of territoriality. Namely, states claim jurisdiction over criminal offences that are committed wholly or substantially within their territory.²⁷ However, the Active Nationality principle authorises a state to exercise extra-territorial jurisdiction over its nationals even when the offending has occurred entirely out of the state's territory.²⁸ For example, the Australian CST framework captures offences occurring wholly outside of Australia as long as the offender is an Australian citizen, resident, or a corporation incorporated by or under Australian law which carries on activities principally in Australia.²⁹ The Active Nationality principle differs from the Passive Nationality principle, which grants a state jurisdiction over crimes committed against its citizens, regardless of where the crime occurs.³⁰

It has been argued that the rise of extra-territorial offences based on the nationality principles reflects the increasing interconnectedness and globalisation of the world which has turned crimes from 'local' to transnational phenomena.³¹ Globalisation has also diminished the divide between domestic and international law, and as a result, has

²⁵ Ibid.

²⁶ Koning and van Wilsem (n 11) 352.

²⁷ Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2006) 190; Danielle Ireland-Piper, 'Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?' (2012) 13(1) *Melbourne Journal of International Law* 10.

²⁸ David J Gerber, 'Beyond Balancing: International Law Restraints on the Reach of National Laws' (1984) 10 *Yale Journal of International Law* 185, 189.

²⁹ *Criminal Code 1995* (Cth) s 272.6.

³⁰ Ireland-Piper (n 27) 8.

³¹ Patrick James Keenan, 'The New Deterrence: Crime and Policy in the Age of Globalisation' (2006) 91(2) *Iowa Law Review* 505, 508; Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook, 2002).

profoundly impacted the conception of state sovereignty.³² This shift rationalises the notion of jurisdiction over individuals as opposed to jurisdiction over territory.³³ Even so, given extraterritorial jurisdiction remains an exceptional intrusion on another state's claim to exclusive sovereignty, as well as an expansion of state power, it is important to identify the legal and moral basis of criminalising CST through extra-territorial legislation before analysing the relevant legislation.

A *The Basis for Australia's Criminalisation of CST*

Australia is obliged to act on CST because of its obligations under the *1989 Convention on the Rights of the Child* ('CRC')³⁴ and the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* ('Optional Protocol').³⁵ These agreements have been ratified by Australia and other prominent 'sender' and 'receiver' countries, including the United States, Cambodia, and the Philippines.³⁶ Article 34 of the CRC obliges signatories to take steps to protect children from all forms of child abuse, including the exploitative use of children in prostitution and other unlawful practices.³⁷ The Optional Protocol requires states to criminalise child prostitution whether it occurs domestically or internationally and to co-operate internationally to investigate and punish activities involving CST, such as offering mutual legal assistance and development programs.³⁸

However, the existence of international obligations alone does not entirely explain Australia's willingness to legislate extra-territorial CST offences. Certainly, there are a number of areas, such as offshore processing of asylum seekers, on which Australia has refused to act, despite international pressure.³⁹ Rather, Australia's willingness to act on CST should also be seen as a reflection of the recognised moral harm of CST, as well as Australia's role as a leader in the Asia-Pacific region. Indeed, the rationale for the Active Nationality principle has been

³² Ireland-Piper (n 27) 32.

³³ Mark Gibney and Sigrun Skogly, *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2010) 4.

³⁴ *Convention on the Rights of the Child*, signed 22 Aug 1990, 1577 UNTS 3 (entered into force 2 September 1990).

³⁵ *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002).

³⁶ Ibid.

³⁷ *Convention on the Rights of the Child* (n 33) art 34.

³⁸ *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* (n 34) arts 1, 3, 10.

³⁹ Human Rights Watch, *World Report 2024: Rights Trends in Australia* (Report, 11 January 2024) <<https://www.hrw.org/world-report/2024/country-chapters/australia#:~:text=These%20include%20the%20cruel%20treatment,still%20overrepresented%20in%20Australian%20prisons.>>.

described to include preventing nationals 'from enjoying scandalous impunity,' and the state's need to protect its international reputation.⁴⁰

It is not difficult to see how the Australian community would view Australians participating in CST as scandalous or otherwise harming Australia's international reputation given the recognised harms of child sexual abuse. A Victorian survey revealed that Australians regard child sex offences as among the most serious of criminal offences.⁴¹ The high maximum sentence lengths for sexual offences against children in the Australian states echo how seriously the Australian community considers sexual offending against children.⁴² Societal norms which regard harming children as especially heinous are nothing new; even the Bible provides that 'whoever causes one of these little ones who believe in Me to sin, it would be better for him that a millstone were hanged about his neck, and that he were drowned in the depth of the sea'.⁴³ Indeed, the sexual abuse of children is associated with mental illness diagnoses, self-harm, substance abuse, and in some instances can lead to ongoing physical injury or harm.⁴⁴

CST carries additional harms. Children participating in prostitution are at risk of physical beatings, violent sexual assault (in addition to the underlying sexual abuse), social isolation and substance abuse.⁴⁵ It has also been suggested that children in CST situations are less likely to practice safe sex than adult prostitutes: they may not understand the importance of contraception and may be unable to insist upon condom use, due to their vulnerability or the influence of a facilitator or 'pimp'.⁴⁶ This, puts children at increased risk of pregnancy, in addition to sexually transmitted diseases such as HIV/AIDS.⁴⁷

However, it is difficult to measure the Australian community's views towards CST in the absence of surveys or studies on the Australian community on this topic. Indeed, studies on American and Dutch perceptions of child sexual abuse suggest people view child

⁴⁰ Gerald L. Neumann, 'Extraterritoriality and the Interest of the United States in Regulating its Own' (2014) 99(6) *Cornell Law Review* 1444, 1453, 1469.

⁴¹ Sentencing Advisory Council, *Community Attitudes to Offence Seriousness* (Report, May 2012) 46.

⁴² See, eg, *Crimes Act 1900* (NSW) pt 3 div 10; *Criminal Code 1999* (Qld) ch 22; *Crimes Act 1958* (Vic) ss 49A-51H.

⁴³ *Matthew* 18:6; *Mark* 9:42; *Luke* 17:2.

⁴⁴ Australian Institute of Health and Welfare, 'Child Sexual Abuse' (Web Page, 19 July 2024) <www.aihw.gov.au/family-domestic-and-sexual-violence/types-of-violence/child-sexual-abuse%23impacts>.

⁴⁵ Tasha Menaker and Courtney Franklin, 'Commercially Sexually Exploited Girls and Participant Perceptions of Blameworthiness: Examining the Effects of Victimization History and Race Disclosure' (2013) 28(10) *Journal of Interpersonal Violence* 1969.

⁴⁶ See, eg, Charles Hounmenou, 'Issues of Sexually Transmitted Infections and Violence Among Children in Prostitution in West Africa' (2017) 34(5) *Child & Adolescent Social Work Journal* 480; Craig McClure Caitlin Chandler and Susan Bissell, 'Responses to HIV in Sexually Exploited Children or Adolescents Who Sell Sex' (2015) 385(9963) *The Lancet* 97.

⁴⁷ Jay G Silverman, 'Adolescent Female Sex Workers: Invisibility, Violence and HIV' (2011) 96(5) *Archives of Disease in Childhood* 478.

sexual abuse that occurs outside of their home jurisdiction as inherently less serious than child sexual abuse offending that occurs domestically.⁴⁸

Nonetheless, Australia's moral impetus to criminalise CST and implement its CRC obligations is strengthened by Australia's self-identification as a 'Good International Citizen'.⁴⁹ The term Good International Citizen is commonly employed to describe law-abiding and cooperative nations that filter national interest through globalist values and international norms, including by implementing and enforcing treaty obligations.⁵⁰ Gareth Evans, the Foreign Minister during the period in which Australia first introduced its anti-CST legislation, described being a Good International Citizen as being in Australia's key interests, and more than a moral imperative.⁵¹ Mr Evans has stated that Good International Citizenship creates reputational advantage, builds soft power for Australia and encourages reciprocity.⁵² To illustrate, Mr Evans explained that providing assistance in one area, such as assisting after natural disasters or prosecuting its citizens who participate in CST, may encourage the other states to comply with Australia's interests, such as assisting Australia with human trafficking or refugee issues.⁵³

Action on CST can therefore be seen as an extension of Australia's existing pro-active role in resolving security concerns in the Asia-Pacific. This assistance includes permanent policing stations in the region to advise and assist foreign police agencies and posting Australian Federal Police to various Pacific states when they need security support.⁵⁴ This collaboration also reflects the wealth imbalance between Australia and its neighbours. To illustrate, the 2022-23 budget for the Australian Federal Police alone was double the gross domestic product of Tonga for that year.⁵⁵

⁴⁸ Kosuri and Jeglic (n 17) 207; Anneke Koning, 'Public Perceptions of Child Sexual Exploitation Abroad: A Vignette Experiment on the Influence of Social Distance' (2025) 71(1) *Crime & Delinquency* 197.

⁴⁹ Gabriele Abbondanza, 'Australia the 'Good International Citizen'? The Limits of a Traditional Middle Power' (2021) 75(2) *Australian Journal of International Affairs* 178.

⁵⁰ Gareth Evans, 'Australia as a Good International Citizen: Why Should We Care?' (Speech, Opening Dialogue Programme, 25 March 2021); Richard Shapcott, 'Human Rights, Extraterritoriality and the Good International Citizen: A Cosmopolitan Perspective' (2020) 34(2) *International Relations* 246.

⁵¹ Interview with Gareth Evans (Michael Fullilove, Lowy Institute, 17 March 2022).

⁵² Ibid.

⁵³ Ibid.

⁵⁴ See, eg, 'AFP Across the World' *Australian Federal Police* (Web Page, 26 February 2016) <<https://www.afp.gov.au/what-we-do/our-work-overseas/afp-across-world>>; CNBC, 'Australian Police Take Control of Solomon Islands Capital after Days of Unrest, Witnesses Say' *CNBC Asia-Pacific News* (26 November 2021) <<https://www.cnbc.com/2021/11/26/solomon-islands-unrest.html>>.

⁵⁵ Australian Federal Police, *AFP Annual Report 2022/2023* (Report, 2023) 95; International Monetary Fund, *Tonga* (Web Page, 1 January 2024) <<https://www.imf.org/en/Countries/TON>>.

To summarise, Australia's decision to legislate against CST is not just a reflection of its international legal obligations, but also recognition of the moral harms of CST and part of Australia's role as a Good International Citizen in the Asia-Pacific.

B *Australia's Legal Framework*

In 1994, Australia became the third country to enact extraterritorial CST offences through Part IIIA of the *Crimes Act 1914* (Cth).⁵⁶ In 2010, the Australian government overhauled its approach to CST, replacing Part IIIA with new offences contained within Division 272 of the *Criminal Code 1995* (Cth) ('the Code'). These offence provisions capture a wide range of offending and were designed to be more responsive to technological change and to better arm law enforcement with the ability to intervene before contact offending takes place.⁵⁷ This section outlines the current offence provisions in the Code and their relative strengths in addressing CST.

1 *Offence Provisions*

Division 272 of the Code captures 20 offences related to CST.⁵⁸ This section summarises these provisions. The offences include when a person engages in sexual intercourse or sexual activity with a person aged under 16 outside of Australia, or causes a person aged under 16 outside of Australia to engage in sexual intercourse or activity.⁵⁹ The age element in both offences involves strict liability. That is, it is sufficient to show that the victim was aged under 16 years, rather than that the defendant knew the child was aged under 16 years.⁶⁰

Sexual activity includes any activity, other than sexual intercourse, of a sexual or indecent nature that involves the human body, or bodily actions or functions (whether or not that activity involves physical contact between people).⁶¹ This has been found to include oral sex, masturbation, and insertion of sex toys.⁶² These offences can be made out even when the offender is in Australia. For example, these provisions have been enlivened in cases where offenders sent instructions as to the sexual intercourse they would like carried out on

⁵⁶ James McNicol and Andreas Schloenhardt, 'Australia's Child Sex Tourism Offences' (2012) 23(2) *Current Issues in Criminal Justice* 369, 370; *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth).

⁵⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 4 February 2010 (Brendan O'Connor).

⁵⁸ *Criminal Code* (n 29) ss 272.8(1)-(2), 272.9 (1)-(2), 272.10(1), 272.11(1)(a)-(d), 272.12(1)-(2), 272.13(1)-(2), 272.14(1), 272.15(1), 272.15A(1), 272.18(1), 272.19(1), 272.20(1)-(2).

⁵⁹ *Ibid* ss 272.8, 272.9.

⁶⁰ *Ibid* ss 272.9.(4), 272.9(4).

⁶¹ *Ibid* Dictionary.

⁶² *R v Kunsevitsky* [2020] VSC 41 [211].

children in the Philippines and then watched the sexual intercourse via video link.⁶³

It is also an offence to procure or groom a child located outside of Australia for the purposes of engaging in sexual intercourse or activity with that child.⁶⁴ However, these offences do not only apply where the child is aged under 16 but also apply in circumstances where an offender believes the child to be aged under 16 years. In this way, these offences replicate the domestic online grooming and online procuring offences.⁶⁵

To clarify, the procure and groom offence could be made out even if the offender was speaking to an adult, such as a law enforcement officer, who was pretending to be under 16 years of age, so long as it can be proved that the defendant believed the person was aged under 16 years.⁶⁶ However, it is a defence to all these CST offences if the defendant proves that, at the relevant time, they believed the child was aged at least 16 years or that there was a valid and genuine marriage between the defendant and the child.⁶⁷

The Code further includes offences relating to sexual activity or intercourse with children aged between 16 and 18, albeit with lesser sentences.⁶⁸ These offences must be committed by a person in a position of trust or authority in relation to the young person.⁶⁹

The Code additionally contains offences for those who aid, facilitate or encourage CST offences, such as commercial operators.⁷⁰ It is an offence to either benefit from an offence provided for in Division 272 or engage in conduct with the intention of encouraging an offence provided for in that Division.⁷¹ These provisions are deliberately broad: there is no requirement for the ‘benefit’ obtained to be financial.⁷² The Code also prohibits preparing or planning an offence provided for in Division 272.⁷³ The policy intention behind this provision is to empower police to intervene prior to abuse taking place, or even before

⁶³ See, eg, *R v Schulz; Ex parte DPP (Cth)* [2023] QCA 150; *Doig v R* [2023] NSWCCA 76; *Baden v R* [2020] NSWCCA 23.

⁶⁴ *Criminal Code* (n 29) ss 272.14, 272.15, 272.15A.

⁶⁵ *Ibid* ss 474.26(1), 474.27(1).

⁶⁶ The Code provides that these ‘procure or groom’ offences can be made out even if the child is a fictitious person represented to the defendant as a real person. See *Criminal Code* (n 29) ss 272.14(4), 272.15(4), 272.15A(4).

⁶⁷ *Ibid* ss 272.16(1), 272.17(1).

⁶⁸ *Ibid* s 272.12.

⁶⁹ *Ibid* s 272.12(1)(c).

⁷⁰ *Ibid* div 272 subdiv C.

⁷¹ *Ibid* ss 272.18, 272.19.

⁷² Explanatory Memorandum, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010* (Cth) 38.

⁷³ *Criminal Code* (n 29) s 272.20.

the offender leaves Australia, so long as there is sufficient evidence of their intent.⁷⁴

2 *Strengths of the Australian Approach*

The strength of the current Australian legislation is that it removes unnecessary barriers to prosecution and is responsive to some technological change.

First, Australia does not impose any requirements of ‘double criminality’ to prosecute these offences. Double criminality means that the extra-territorial offence must also be an offence in the jurisdiction where it occurred in order to be prosecuted.⁷⁵ Excluding double criminality facilitates successful prosecutions as it sidesteps jurisdictional disparities in the age of consent. While the CRC defines a child as a person under 18 years of age,⁷⁶ there is no consensus on the age of consent for children amongst signatories. For instance, the age of consent in China is 14 years of age,⁷⁷ and in Thailand it is 15 years of age.⁷⁸

Conversely, the Code specifically protects defendants from double jeopardy. That is, a person cannot be convicted of a CST offence if they have been convicted or acquitted of that conduct in another country.⁷⁹ This matter is discussed further at section IV below.

Second, none of the Australian offences require the offender to have left Australia for the specific purpose of engaging in CST. This means opportunistic offenders can be captured by the provisions and avoids a weighty evidential burden of proving why a defendant left the country. This issue arose in the sentence appeal case of *R v ONA*.⁸⁰ The offender argued that his sentence should be mitigated because he did not leave Australia for the purpose of engaging in the abuse, rather he travelled to Liberia for business and only formed the intent to engage in the offending while there. However, the court referred to the Second Reading Speech by the Minister for Justice introducing the relevant laws and held that the laws were introduced to deter sexual abuse of children outside Australia by Australians regardless of the purpose of the travel.⁸¹

⁷⁴ Explanatory Memorandum, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010* (Cth) 11.

⁷⁵ Geoffrey R. Watson, ‘Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction,’ (1992) 17(1) *Yale Journal of International Law* 41, 43.

⁷⁶ *Convention on the Rights of the Child* (n 33) art 1.

⁷⁷ *Criminal Law of the People’s Republic of China* (China), Second Session of the Fifth National People’s Congress, 1 July 1979, art 236.

⁷⁸ *Criminal Code of Thailand* (Thailand) s 277.

⁷⁹ *Criminal Code* (n 29) s 272.29.

⁸⁰ *R v ONA* [2009] VSCA 146.

⁸¹ *Ibid* [54] (Ashley and Neave JJA and Mandie AJA).

Finally, the inclusion of the words ‘cause to engage’ in sexual activity or sexual intercourse means the CST offences also capture offenders who engage in ‘virtual’ sex tourism.⁸² That is, they use livestream webcams to either engage in sexual activity with the child online or direct the victims to engage in sexual activity with others. The offender usually transmits money for this service, often under the guise of innocent payment descriptions such as ‘accommodation’, or ‘school’.⁸³

The inclusion of the words ‘cause to engage’ is important as evidence indicates that Australians contribute significantly to the problem of virtual sex tourism. For instance, in 2018 the Philippine National Police provided the Australian Federal Police with a list of 118 people who had been arrested there for facilitating the sexual abuse of children online.⁸⁴ These names were passed onto the Australian Transaction Reports and Analysis Centre (‘AUSTRAC’). AUSTRAC were then able to identify that 256 Australian-based people had sent 2,714 payments totalling AUD \$1.32 million to these known live-streaming facilitators.⁸⁵

C Implementation of the Laws

This section outlines how these laws are enforced by the Australian Federal Police, often in coordination with foreign agencies, and how child sex offender registries prevent offending.

1 Australian Federal Police

The Australian Federal Police (‘AFP’) is the main enforcement agency for CST.⁸⁶ The AFP has several liaison officers in Southeast Asia and the Pacific who work together with aid organisations to address CST. This work includes members of the AFP’s Transnational Sexual Exploitation and Trafficking Team. Assistance between enforcement agencies often takes place under a Mutual Legal Assistance Treaty (‘MLAT’). Australia has MLATs with many countries, including Indonesia, Vietnam, Thailand, the Philippines and Malaysia.⁸⁷

MLAT assistance can include foreign agencies interviewing victims overseas⁸⁸ and passing on information about Australians engaging in

⁸² *Criminal Code* (n 29) ss 272.8(2), 272.9(2).

⁸³ Rick Brown et al, *Australians Who View Live Streaming of Child Sexual Abuse: An analysis of Financial Transactions* (Report No 589, February 2020) 3; *Doig v R* (n 60).

⁸⁴ Brown et al (n 80) 5, 10.

⁸⁵ *Ibid* 6.

⁸⁶ Australian Federal Police (n 5).

⁸⁷ Attorney-General’s Department, ‘Bilateral Treaties on Mutual Assistance in Criminal Matters’ *Australian Government - Attorney-General’s Department* (Web Page, November 2019) <<https://www.ag.gov.au/sites/default/files/2020-03/bilateral-treaties-on-mutual-assistance-in-criminal-matters.pdf>>.

⁸⁸ See, eg, *DPP v Merrill* [2017] VSCA 189 [17].

child sex abuse overseas.⁸⁹ The AFP has also benefitted from ‘tip-offs’ from third countries who surveil forums used by child sex offenders, such as from the United States National Centre for Missing and Exploited Children.⁹⁰ Australia also has Memorandums of Understanding in relation to child sexual abuse with the Philippines and Fiji, which obliges those countries to provide prompt and confidential assistance.⁹¹

The benefits offered under MLATs and Explanatory Memorandums are not available to the accused. This can be problematic when the Code places evidential burdens on the accused to prove legislative defences. For example, it is a defence to the sexual intercourse or activity offences if the defendant can prove that they believed the child was aged 16 or older at the time of the offence.⁹² Similarly, the offences are not made out if the child was actually 16 or older.⁹³ To rebut evidence on the child’s age, the defendant may wish to obtain schooling records, statements from family members and friends of the child, or photographs of the child from around the time of the offending. However, these would be difficult to obtain in the absence of assistance from the child, the child’s family, or foreign law enforcement.

There are several ‘receiving’ states with which Australia does not have MLATs. This poses problems for the collection of evidence. For example, Australia does not have a MLAT with Cambodia. In a high-profile CST case, Australian police were prevented from collecting evidence in Cambodia – they were not permitted to search property to look for incriminating photographs or videos.⁹⁴ Cambodian police also took no active part in the investigation due to inadequate resources and lack of training.⁹⁵

2 Child Sex Offence Registry

Child sex offender registries serve important preventative functions for CST. Every Australian State and Territory has laws which require almost every convicted child sex offender to become a Registered Offender (‘RO’).⁹⁶ ROs are banned from travelling outside Australia

⁸⁹ See, eg, *R v Kapociunas (No 4)* [2015] ACTSC 422.

⁹⁰ See, eg, *R v Harrison; Ex parte DPP (Cth)* [2021] QCA 279 [26].

⁹¹ *Memorandum of Understanding*, Fiji and Australia, signed 18 December 1998; *Memorandum of Understanding for Joint Action to Combat Child Sexual Abuse and Other Serious Crimes*, Philippines and Australia, signed 11 October 1997.

⁹² *Criminal Code* (n 29) s 272.16(1).

⁹³ *Ibid* ss 272.8(1)(b); 272.9(1)(b); 272.13(1)(c)(i); 272.14(1)(c)(i); 272.15(1)(c)(i).

⁹⁴ Jeremy Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation* (Zed Books, 2000) 84.

⁹⁵ *Ibid*.

⁹⁶ *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A; *Crimes (Child Sex Offenders) Act 2005* (ACT) s 8; *Sex Offenders Registration Act 2004* (Vic) s 6; *Community Protection (Offender Reporting) Act 2004* (WA) s 6; *Child Sex Offenders Registration Act 2006* (SA) s 6; *Child Protection (Offender Reporting and Offender Prohibition Order) Act*

without approval from a relevant authority and face a term of imprisonment of up to five years if they travel without approval.⁹⁷ Previously, ROs were only required to report their intended travel but the laws were changed when authorities found significant levels of travel. For example, in 2016 over 770 ROs left the country and more than 37% did so without permission.⁹⁸ Further, the passports of ROs can be cancelled or new passport applications refused on the request of a competent authority, such as the courts, police, or the relevant sex offender registry.⁹⁹

The AFP is informed when an RO's travel plans are approved. AFP records indicate that the most popular travel destinations for ROs are in Southeast Asia and the Pacific: Indonesia, New Zealand, Thailand, and Singapore.¹⁰⁰ When an RO's travel plan has been approved, the AFP will notify the relevant foreign jurisdiction of the pending travel. The AFP may even issue an INTERPOL Green Notice, a mechanism to warn foreign law enforcement agencies about serious offenders, if an RO is traveling to a country identified as a potential target for CST.¹⁰¹ It is ultimately the decision of the foreign jurisdiction to determine what steps to take, including potentially denying entry to the RO. For example, approximately 71 ROs were refused entry into Indonesia in 2014-15 alone.¹⁰² Nonetheless, the AFP remains concerned that some ROs may be using these countries as transit hubs for travel to other Asian or Pacific Island countries to avoid detection of CST activities.¹⁰³

To recap, Australia has legislated a number of CST offences. The strengths of these offences include the absence of double criminality provisions, and the ability to prosecute online offending. These offences are enforced through the AFP's cooperation with foreign law enforcement agencies and MLATs. Australia also prevents the travel of convicted child sex offenders through its prohibition on ROs travelling without approval.

IV Areas For Improvement

In contrast to other countries, Australia's legal framework seems to address many of the concerns and loopholes that prevent successful prosecutions of CST matters. Nonetheless, there are three important areas for improvement.

2004 (Qld) s 5; *Child Protection (Offender Reporting And Registration) Act 2004* (NSW); *Community Protection (Offender Reporting) Act 2005* (Tas) s 6.

⁹⁷ *Criminal Code* (n 29) s 271A.1.

⁹⁸ Explanatory Memorandum, *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017* (Cth).

⁹⁹ *Australian Passports Act 2005* (Cth) ss 12(1)-(2).

¹⁰⁰ *End Child Prostitution* (n 6) 79.

¹⁰¹ AFP Targets Child Sex Offenders Travelling Overseas (n 2).

¹⁰² *Australian Federal Police* (n 5) 4.

¹⁰³ *Ibid* 2.

A Double Jeopardy

First, Australia's double jeopardy laws, while designed to protect individuals from repeated prosecutions for the same conduct, reveal significant gaps when applied to CST offences, particularly when considering international legal variations and enforcement challenges. Double jeopardy is a legal principle that is not always used with a single or consistent meaning. As identified by McHugh, Hayne and Callinan JJ in *Pearce v R*:¹⁰⁴

Sometimes [double jeopardy] is used to refer to the pleas in bar of autrefois acquit and autrefois convict; sometimes it is used to encompass what is said to be a wider principle that no one should be 'punished again for the same matter.'

While uses of the term are eclectic, the underlying principle is that double jeopardy ought to prevent the state, with all its resources and power, from harassing and subjecting citizens through repeated attempts at conviction after a person has already been convicted or sentenced.¹⁰⁵ Double jeopardy is distinct from double punishment: double punishment refers to excessive or duplicative sentencing while double jeopardy protects against multiple trials for the same offence.

The Australian double jeopardy provision for CST offences has a low threshold; it only requires a conviction or acquittal for an offence relating to the underlying conduct to insulate the defendant from further prosecutions.¹⁰⁶ This contrasts with more restrictive approaches internationally. For example, Germany, Switzerland, Sweden, and the Netherlands require a foreign sentence to be completed, remitted, or statute-barred before the principle of double jeopardy applies.¹⁰⁷ In the United States, even a served sentence in another country will offer no protection from subsequent prosecution.¹⁰⁸

Australia's approach is problematic in the context of CST in two key ways. First, it protects offenders who have been able to flee the relevant jurisdiction before completing their sentence. For instance, if an offender were convicted of a child sex abuse offence in a foreign jurisdiction, appealed, were released on bail pending the appeal, and subsequently fled to Australia, Australia would not be able to prosecute that offender. The Code's broad double jeopardy protections could also insulate offenders who are convicted in absentia from being prosecuted in Australia.

¹⁰⁴ *Pearce v The Queen* (1998) 194 CLR 610 [9].

¹⁰⁵ *Green v United States* 355 US 184 (1957) [5] (Black J).

¹⁰⁶ *Criminal Code* (n 29) s 272.29.

¹⁰⁷ *Swiss Criminal Code of 21 December 1937* (Switzerland) arts 3–4; *German Code of Criminal Procedure (Strafprozeßordnung – StPO)* (Germany) s 153c; *Brottsbalken 1962* (Sweden) ch 2, s 9; *Wetboek van Strafrecht* (Netherlands) s 68(2).

¹⁰⁸ *United States v Lanza* 260 US 377 (1922).

This could leave Australia in an awkward position where the only means to ensure punishment of these offenders is to extradite its own nationals. Aside from the practical costs and time involved in extradition proceedings, Australia will not extradite a person if there are grounds for believing the person would be in danger of being subjected to torture or there is a real risk that the death penalty will be carried out.¹⁰⁹ There are a number of countries where the death penalty is available for those who commit sexual offences against children, including countries to which Australian nationals often travel such as China, India and Egypt, which could prevent such an extradition taking place.¹¹⁰

Second, variations between legal systems, including differing ages of consent, mean a defendant could be protected from further prosecution by a conviction or acquittal for a significantly different offence so long as it was based on the same conduct. For instance, if an Australian had sex with a 15-year-old in Indonesia, they could be prosecuted in Indonesia for engaging in sex outside of marriage.¹¹¹ This offence is punishable by a maximum sentence of one year imprisonment.

Indeed, there is some merit to the argument that the double jeopardy provisions should be watered down merely to ensure that Australia is able to retain the option of prosecuting CST offenders should Australia be dissatisfied with the sentence or conviction imposed in the foreign jurisdiction, or if Australia is otherwise unsatisfied with the trial that led to an acquittal. It could be argued that this backstop is important given many CST ‘receiver’ countries are perceived to have high levels of public corruption which could facilitate acquittals or lead to light sentences for Australian nationals participating in CST.¹¹² For example, it has been alleged that an Australian charged by the Thai Police in early 2020 was able to avoid investigation, manipulate charges, and ultimately receive bail after arrest due to bribes to high-ranking officials.¹¹³ The Australian ultimately failed to attend his trial.¹¹⁴

An approach which waters down or removes double jeopardy would be consistent with the American conception of double jeopardy under the Separate Sovereigns doctrine. This doctrine permits American

¹⁰⁹ *Extradition Act 1988* (Cth) s 15B(3).

¹¹⁰ *Criminal Law of the People's Republic of China* (n 74) art 235; *Bharatiya Nyaya Sanhita* (India) § 65(2); § 70(2); *Criminal Code 1937* (Egypt) art 290.

¹¹¹ *Criminal Code* (Indonesia) art 411.

¹¹² See, eg, Transparency International, *Corruption Perceptions Index* (Report, January 2024) which states that Cambodia has an Index score of 22 (with a score of 100 representing ‘not at all corrupt’), Papua New Guinea has a score of 29, the Philippines has a score of 34, and Thailand has a score of 35.

¹¹³ Fergus Hunter, ‘Australian Man Flees Child Sexual Abuse Charges in Thailand, Denies Guilt’ *The Sydney Morning Herald* (Online, 18 January 2021) <<https://www.smh.com.au/national/australian-man-flees-child-sexual-abuse-charges-in-thailand-denies-guilt-20210105-p56rtz.html>>.

¹¹⁴ *Ibid.*

Federal, State and foreign governments to individually prosecute a defendant for the same offence on the basis that sovereignties have their own laws and therefore have separate offences.¹¹⁵ It may pose an effective deterrent to would-be CST offenders. Even if they perceived that they would not be severely punished due to the leniency of foreign jurisdictions, the ongoing threat of Australian prosecution could serve as a deterrent. Following this approach also recognises that foreign prosecutors and Australian prosecutors may have different interests in prosecuting CST. Foreign prosecutors, in prosecuting offences in their jurisdiction, are motivated by territoriality as the defendant offended the peace of their community by breaching the laws of their society.

In contrast, extra-territorial offences recognise a separate harm. They seek to punish the national for having harmed Australia's reputation and having betrayed the values of Australia when visiting another country. Following the Separate Sovereigns doctrine could therefore be consistent with the somewhat recent movement in Australia away from perceiving citizenship as a legal right towards a return to older conceptions of citizenship as a series of mutual bonds and obligations between the state and its subjects.¹¹⁶ This conception of citizenship is illustrated in Australia's 2015 introduction of legislation which permits stripping of Australian citizenship to dual citizens who have committed certain extra-territorial terrorism offences.¹¹⁷ The purpose provision included in the relevant Act states:¹¹⁸

This Act is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.

However, removing double jeopardy entirely is wading into dangerous territory. While many may not sympathise with CST offenders, it would be inconsistent to entirely remove double jeopardy provisions for foreign offending while retaining such a protection in Australia's respective States' and Territories' Crimes Acts and Criminal Codes.¹¹⁹ Moreover, it is not difficult to see how adopting this attitude could offend our allies by inferring that their justice systems are

¹¹⁵ Legal Information Institute, *Separate Sovereigns Doctrine* (Web Page, June 2024) <https://www.law.cornell.edu/wex/separate_sovereigns_doctrine>.

¹¹⁶ For a view of older conceptions of citizenship, see Lord Coke's judgment in *Calvin's Case* (1608) 77 ER 382.

¹¹⁷ *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth).

¹¹⁸ *Ibid* s 4.

¹¹⁹ *Criminal Procedure Act 1986* (NSW) s 156; *Criminal Procedure Act 2009* (Vic) s 220; *Criminal Code Act 1899* (Qld) s 602; *Criminal Code Act 1924* (Tas) s 358; *Criminal Procedure Act 1921* (SA) s 130; *Criminal Code Act 1902* (WA) s 17; *Criminal Code Act 1983* (NT) s 346; *Crimes Act 1900* (ACT) s 283.

somehow inadequate, while also eroding a core protection against executive harassment.

On balance, Australia would be best guided to refine its double jeopardy provision for CST offences, as opposed to eliminating it entirely. First, the provision should require that if the defendant was convicted, a sentence must have been served or remitted before the defendant is insulated from subsequent prosecution. Second, only conviction for, or acquittal of, a child sexual abuse offence should protect offenders from a subsequent CST prosecution in Australia. Namely, offenders should not be immune from prosecution in Australia if they were convicted or acquitted of offences which do not recognise the harm caused by sexual abuse of children, such as engaging in prostitution or public indecency. To avoid onerous sentences, s 16A of the *Crimes Act 1914* (Cth) should be amended to direct the court to consider sentences served in other jurisdictions when determining the sentence for the offender. These measures would strengthen the enforcement of CST while also preserving the important role of double jeopardy in preventing harassment.

B *Changing the Age of Consent*

Australia has addressed criticism that its previous focus on children under 16 was inadequate in preventing exploitation, by amending its laws to criminalise certain acts involving children aged 16 to 18.¹²⁰ However, there are calls for Australia to increase the age for all CST provisions to 18, consistent with the definition of a child in the CRC.¹²¹ Doing so would be somewhat hypocritical for the Australian government because the domestic age for consent in Australia is either 16 or 17.¹²² In short, children overseas would be presumed to have been unable to consent when aged 16 or 17, when Australian children have no such protection.

Given the concern of the CRC is to ensure that children are protected from sexual based harm, an alternative response could be to strengthen the provisions relating to children aged 16 and 17. Currently, it is only an offence to engage in sexual activity with children of these ages if the defendant is in a position of trust or authority over the child.¹²³ However, the Australian government could create extra-territorial offences for the purchase of sexual intercourse or sexual activity with a child. This

¹²⁰ Naomi Svensson, 'Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Laws' (2006) 28(3) *Loyola of Los Angeles International & Comparative Law Review* 641, 646.

¹²¹ ECPAT, *Australia – Country Monitoring Report (Report, 2012)* 51.

¹²² *Crimes Act 1900* (ACT) s 67; *Crimes Act 1900* (NSW) s 61HE; *Criminal Code Act 1983* (NT) s 192; *Criminal Code Act 1899* (Qld) s 348; *Criminal Code Consolidation Act 1935* (SA) s 46; *Criminal Code Act 1924* (Tas) sch 1, s2A; *Crimes Act 1958* (Vic) s 36; *Criminal Code Act Compilation Act 1913* (WA) s 319(2).

¹²³ *Criminal Code Act* (n 29) s 272.13.

would be consistent with domestic legislation because all States and Territories prohibit engaging in prostitution with a child aged under 18 years.¹²⁴ This is also consistent with the Optional Protocol's call for the elimination of child prostitution.

C Addressing Technological Change

Australia, like many other countries, also needs to update its investigative capabilities to address the exponential increase in virtual CST. Virtual CST presents a unique difficulty as the internet allows for anonymity among offenders using hidden streams with often very little record of the abuse.

These problems were illuminated in the case of *Commonwealth Director of Public Prosecutions v Rivo*.¹²⁵ The defendant arranged for underage Filipino children to engage in sex shows livestreamed to him through webcam. The court was unable to view the material that was transmitted on livestream between the victims and the defendant. Fortunately, the defendant's messages before and after the video calls were able to give the court insight into the nature of the videos and what was depicted. Regardless, it is not difficult to imagine that offenders may exploit this evidentiary gap by relying on video calls to facilitate or perpetrate offending. Similarly, there is a risk that offenders are turning to self-deleting and encrypted chat applications to destroy or conceal evidence of their communications with victims or facilitators.¹²⁶

Addressing these challenges is a priority for investigators and prosecutors. Australia should continue to partner with local law enforcement and non-governmental organisations to identify and arrest offenders through tip-offs and online investigations in both Australia and other countries, like the Philippines. The Philippine Internet Crimes Against Children Center (PICACC) is made up of experts and police from the Philippines, Australia, the UK, the Netherlands, and the US, and has been successful in disrupting virtual CST. Since its inauguration in 2015, the organisation has conducted 228 operations, rescued 661 victims and arrested 135 facilitators.¹²⁷ Arrests of Filipino facilitators can assist the identification of Australian suspects as payments made

¹²⁴ *Crimes Act 1900* (NSW) div 15; *Sex Industry Act 2019* (NT) ss 12(2), 13(2), 14(2); *Sex Work Act 1992* (ACT) s 20(3); *Sex Work Decriminalisation Act 2022* (Vic) s 42; *Sex Industry Offences Act 2005* (Tas) s 9; *Criminal Code Act 1899* (Qld) s 229FA.

¹²⁵ [2021] VCC 1799.

¹²⁶ Ben Goggin, 'Wickr, Amazon's Encrypted Chat App, has a Child Sex Abuse Problem — And Little is Being Done to Stop It' *NBC News* (Online, 11 June 2022) <<https://www.nbcnews.com/tech/tech-news/wickr-amazon-aws-child-messaging-app-sex-abuse-problem-rcna20674>>. See also *R v Richmond-Jones* [2024] NSWDC 391 where the encrypted application Telegram was used by the offender.

¹²⁷ Australian Centre to Counter Child Exploitation, 'International Cooperation Leads to 92 Children Removed from Harm in 2023' (Media Release, 9 December 2023).

from Australia to these facilitators can be traced, or otherwise lead to links to locate the offenders.¹²⁸

For instance, a Queensland Police Taskforce arrested an Australian national in 2016, and discovered that he had engaged in online CST via a facilitator named ‘Vilma.’¹²⁹ Vilma had used her own children to live-stream abuse to online offenders in Western countries. Through a tip-off from the Queensland Police, the Philippines National Police executed a search warrant at Vilma’s home and located material implicating other Australians in online CST. As a result, two other Australians were convicted of online CST offences, while a German citizen was also convicted in Germany for associated offences.¹³⁰

However, PICACChas been described as ‘oppressively small’ given the amount of work to be done and it would benefit from further contributions from Australia.¹³¹ Moreover, efforts to end virtual CST would also benefit from further research on how offenders locate victims, gather and share information, and how different kinds of offending feed into and fuel each other. Research could also shed light on the payment channels preferred by offenders, which would allow investigators to better ‘follow the money’ and disrupt online financial transactions destined for CST intermediaries.¹³²

Australia could also further invest in their use of Assumed Online Identities (‘AOI’) to identify and disrupt perpetrators. AOIs involve the police either creating an online persona, or assuming the identity of an existing person, for the purposes of identifying and disrupting criminal behaviour, evidence gathering, and preventing further criminal activity. These personas could include potential victims or facilitators to identify the child sex tourist, or fake offenders so that the facilitator can be identified, and the children can be removed from harm. While police organisations are understandably reticent to share their operational practices in this area, this practice already occurs domestically in Australia in both the AFP¹³³ and most State police forces.¹³⁴

¹²⁸ Brown et al (n 80) 5.

¹²⁹ Inter-Agency Council Against Trafficking (n 20) 40.

¹³⁰ Ibid; *Baden v R* [2020] NSWCCA 23; *Doig v R* (n 60).

¹³¹ Stephanie March, ‘Marie is Accused of Terrible Crimes against Her Own Kids. In the Philippines, It’s Becoming More Common’ *ABC News* (Online, 1 March 2023) <<https://www.abc.net.au/news/2023-03-02/foreign-correspondent-philippines-children/102028918>>.

¹³² End Child Prostitution (n 6) 117-118.

¹³³ See, eg, *CDPP v Edwards* [2013] VCC 381, [4]; *CDPP v Munn* [2021] VCC 1038, [42].

¹³⁴ Victoria: *R v Gajjar* (2008) 192 A Crim R 76. In New South Wales the Strike Force Trawler is used as part of the Child Exploitation Internet Unit. See, ‘Man Charged with Alleged Online Procurement of Child - Strike Force Trawler’ *NSW Police* (Online, 13 April 2023) <https://www.police.nsw.gov.au/news/news_article?sq_content_src=%2BdXJsPWh0dHBzJTnBJTJGJTJGZWJpenByZC5wb2xpY2UubnN3Lmdvdi5hdSUyRm1lZGlhJTJGMTA2MjE4Lmh0bWwmYWxsPTE%3D>. The Queensland Police have Task Force Argos. See, eg, Elle Archibald-Binge, ‘“Gut-Wrenching”: How Paedophiles Are Using Social Media to Target Children’ *ABC News* (online, 30 September 2021) <<https://www.abc.net.au/news/2021-09-30/argos-task-force-tracking-paedophiles-using->

The evidence obtained through domestic AOI investigations is protected from exclusion on the grounds of illegality through the issuance of a Controlled Operations Certificate (a 'Certificate').¹³⁵ A Certificate effectively declares that the operation is not unlawful if conducted in accordance with the Certificate.¹³⁶ This does not necessarily mean a trial judge will not exclude the evidence for another reason as the judge retains a discretion to limit or exclude evidence that is prejudicial to the accused, or otherwise improperly obtained.

The AFP should train and assist local police in the use of AOIs so they can identify both foreign would-be offenders and domestic facilitators. As mentioned earlier in this article, Australian online grooming and procuring offences merely require the defendant to believe that they are speaking to a child aged under 16. To this end, offences can be committed by a defendant speaking to an AOI operated by police. Use of AOIs for online CST offences cuts two ways: offenders are identified and arrested, and other would-be users may be deterred from fear that the children they are talking to online are in fact police officers.

However, the effectiveness of foreign AOIs depends on the laws of the foreign jurisdiction, such as whether police have powers to conduct this type of covert operation. Certainly, it is not clear whether a Certificate could be given to a foreign law enforcement agency to ensure the admissibility of the AOI conversations. In the absence of a Certificate, the court would have to be satisfied that, if the evidence was obtained improperly or in contravention of an Australian law, the

social-media/100501610>. See also, Tony Krone, *Queensland Police Stings in Online Chat Rooms* (Report, 2005) <<https://www.ojp.gov/ncjrs/virtual-library/abstracts/queensland-police-stings-online-chat-rooms>>. The Northern Territory also appears to use AOIs as an investigatory technique as part of their specialised Joint Anti Child Exploitation Team. See 'Operation May - Online Predators Revealed - Northern Territory and Queensland' *NT Police, Fire & Emergency Services* <<https://pfes.nt.gov.au/newsroom/2021/operation-may-online-predators-revealed-northern-territory-and-queensland>>. Western Australian police also appear to have their own unit. See, eg, Emily Cosenza, 'Moment Pedophile Busted in Hotel Room' *The West Australian* (27 April 2022) <<https://thewest.com.au/news/moment-pedophile-jonathon-david-henke-busted-by-police-in-hotel-room-c-6596392>>. Similarly, South Australian police appear to follow this practice although no specific task force is apparent. See, eg, 'Moment "Heinous" Paedophile Is Caught in Hotel Room Waiting for Eight-Year-Old Girl', *7NEWS* (Online, 27 April 2022) <<https://7news.com.au/news/sa/moment-heinous-paedophile-is-caught-in-hotel-room-waiting-for-eight-year-old-girl-c-6594871>>. Nothing appears to be available referring to this practice in Tasmania.

¹³⁵ *Crimes Amendment (Controlled Operations) Act 1996* (Cth) inserting Part 1AB in the *Crimes Act 1914* (Cth).

¹³⁶ *Crimes Act 1914* (Cth) ss 15HA, 15HA(2)(c); *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 16; *Police Powers and Responsibilities Act 2000* (Qld) s 230(6); *Criminal Law (Undercover Operations) Act 1995* (SA) s 4.

desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in that way.¹³⁷

The power of AOIs in combatting virtual CST is demonstrated by the ‘Sweetie’ experiment undertaken by the Dutch non-governmental organisation Terre des Hommes.¹³⁸ ‘Sweetie’ was the AOI of a 10-year-old Filipino girl used to catch child sex offenders and, notably, the experiment involved a realistic computer-generated child that could speak to the offender over video. Over 10 weeks, Terre Des Hommes encountered 20,000 offenders from 71 countries, including 1,000 who were willing to pay to abuse the girl online.¹³⁹ At least one Australian was convicted for transmitting indecent material to Sweetie.¹⁴⁰

A later version of Sweetie, Sweetie 2.0, is a hybrid chatbot – while it formulates answers, human operators can take over and answer questions that could not be answered by the bot.¹⁴¹ Australia should investigate the potential of artificial intelligence powered AOIs to disrupt CST, although this would likely require consideration of how they would fit into Australia’s legal framework for covert investigations. The Code would also need to be amended so that offences can be committed with a virtual victim.¹⁴² There may also naturally be ethical concerns about deploying artificial intelligence in such a manner.

The investigation and enforcement of online CST offences could also be bolstered by recent efforts of the eSafety Commissioner to hold technology companies accountable for the use of their platforms in online child abuse. In June 2024, the Commissioner introduced a new mandatory standard which requires a designated internet service to detect and remove child sexual abuse material on their services, and potentially report the material to law enforcement or an appropriate organisation.¹⁴³ This standard commenced on 16 December 2024.¹⁴⁴ The eSafety Commissioner also issued notices in July 2024 to a number of tech giants (including Apple, Google and Meta) mandating that they report to the regulator every six months about measures they have in place to tackle online child sexual abuse.¹⁴⁵ This is largely in response

¹³⁷ The relevant Acts are: *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence (National Uniform Legislation) Act 2011* (NT) s 138.

¹³⁸ Simone Van Der Hof et al, *Sweetie 2.0: Using Artificial Intelligence to Fight Webcam Child Sex Tourism* (Asser Press, 2017) vii–viii.

¹³⁹ Ibid 100.

¹⁴⁰ Angus Crawford, ‘Webcam Sex with Fake Girl Sweetie Leads to Sentence’ *BBC News* (Online, 21 October 2014) <<https://www.bbc.com/news/technology-29688996>>.

¹⁴¹ Simone Van Der Hof et al (n 136) 115.

¹⁴² Current provisions require the communications to be received by ‘a person’. See *Criminal Code* (n 29) ss 474.26, 474.27.

¹⁴³ *Online Safety (Designated Internet Services— Class 1A and Class 1B Material) Industry Standard 2024* (Cth) s 20

¹⁴⁴ Ibid s 2.

¹⁴⁵ eSafety Commissioner, ‘Tech Giants to Face Uncomfortable Truths as eSafety Compels Them to Lift their Game Tackling Child Abuse’ (Online Media Release, 24 July 2024)

to concerns that these organisations had no measures to proactively detect child abuse material on online cloud services nor to detect the live-streaming of child sexual abuse in video chats.¹⁴⁶ These reforms could plainly facilitate the enforcement of CST offences by both disrupting virtual CST and identifying would-be offenders. However, as it is very much the early stage of these reforms, their impact remains to be seen.

V Conclusion

As both a core ‘sending’ country and a regional power, Australia has a responsibility to address the scourge of CST in Southeast Asia and the Pacific. The first section of this paper outlined the impetus for Australia criminalising CST. In addition to being a moral ill, Australia has international legal obligations and acting on CST is consistent with its regional leadership and reciprocity with its neighbours. Australia has so far embraced that duty, implementing a wide-ranging legislative framework, which is enforced largely through the AFP collaborating with foreign law enforcement agencies and foreign governments. Child sex offender registries also form an important role in hindering the travel of convicted child sex offenders.

However, there is more that can be done. The legislation must be strengthened. Australia's double jeopardy laws, while designed to prevent repeated prosecutions for the same offence, present significant challenges when applied to CST offences. The Australian approach, which provides broad protection from further prosecution based on prior convictions or acquittals, contrasts with more restrictive international models. There are potential loopholes, such as protecting offenders who flee before their sentence, and protecting offenders who are convicted in absentia, or are convicted or acquitted of far less serious offences. A balanced approach, refining the current provisions, would allow for better enforcement of CST laws while preserving the core protection against excessive state power. This could include requiring offenders to serve their sentence before being shielded from prosecution, and restricting protections to those convicted or acquitted of child sexual abuse offences only (as opposed to general indecency or prostitution offences).

The Australian Parliament should also introduce extra-territorial criminal offences prohibiting engaging in prostitution with children aged under 18. This change would align with Australia's domestic prosecution laws and respond to calls to eliminate child prostitution. Finally, Australia must enhance its investigative capabilities and adapt

<<https://www.esafety.gov.au/newsroom/media-releases/tech-giants-to-face-uncomfortable-truths-as-esafety-compels-them-to-lift-their-game-tackling-child-abuse>>.

¹⁴⁶ Ibid.

to the complexities posed by digital anonymity in virtual CST. Australia should consider further expansion of AOIs to address this offending, including by training foreign police in the practice, and improving financial tracking methods. It is also possible that further technology and regulations, such as artificial intelligence and the work of the eSafety Commissioner, will work to better identify would-be offenders.