

Parliamentary Joint Select Committee on Gambling Reform
ANSWERS TO QUESTIONS ON NOTICE
FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS
PORTFOLIO

Inquiry into the prevention and treatment of problem gambling

Date: 14 May 2012

Question No: 5

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Topic: Bankruptcy and gambling

Senator Nick Xenophon asked:

Is it a fact that if a person declares bankruptcy because of gambling, they could be liable for prosecution under the Bankruptcy Act (from a legal product)?

Answer:

Under section 271 of the *Bankruptcy Act 1966*, an individual is guilty of an offence if they have become a bankrupt after the commencement of the Act, and:

- (a) increased the extent of his or her insolvency; or
- (b) lost any of his or her property;
by gambling, or by speculations that were rash and hazardous having regard to the individual's financial position at the time.

On 1 May 2012, Insolvency and Trustee Service Australia ('ITSA'), the Commonwealth Agency responsible for administering this Act, released a policy statement that provides further information on referrals under section 271 of this Act. The statement is at **Attachment A**.

A soft copy of this statement can be found at this link:

[http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/about+us-%3Eitsa+practices+&+policies-%3EIGPS+Documents/\\$FILE/Referral%20of%20Offences%20for%20Rash%20and%20Hazardous%20Gambling%20under%20Section%20271.pdf](http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/about+us-%3Eitsa+practices+&+policies-%3EIGPS+Documents/$FILE/Referral%20of%20Offences%20for%20Rash%20and%20Hazardous%20Gambling%20under%20Section%20271.pdf)

Please list all other Branches/Agencies/Departments Consulted:

1. Public Law Branch, FaHCSIA
2. Bankruptcy Policy Section, Attorney-General's Department
3. Social Policy Division, The Treasury



Last update: 1 May 2012

REFERRAL OF OFFENCES UNDER SECTION 271 OF THE BANKRUPTCY ACT 1966 (RASH AND HAZARDOUS GAMBLING)

Policy Statement

Purpose

1. The purpose of this statement is to explain how the Insolvency and Trustee Service Australia (ITSA) makes a decision whether or not to refer for prosecution a possible offence under section 271 of the *Bankruptcy Act 1966* (rash and hazardous gambling¹ leading to insolvency).
2. This policy does not represent a rigid set of rules designed to apply to all situations regardless of the individual circumstances. Instead, it is intended to provide ITSA Officers and ITSA's stakeholders with flexible Guidelines, which allow them to approach each case on its merits.
3. This policy deals only with decisions by ITSA on the referral of possible offences and does not deal at all with any decisions made by the Commonwealth Director of Public Prosecutions (CDPP) on whether or not to prosecute.

Guidelines

4. ITSA will not refer a case for prosecution where it appears that the debtor could be classified as having been a 'problem gambler' and had not engaged in any associated criminal activity to finance their gambling habit.
5. ITSA will consider referring a case to the CDPP only where it involves:
 - clear criminality;
 - complex offences; or
 - on-going allegations of repeat offending despite warnings to the contrary.
6. This policy reflects the principle that the public interest is not generally served by prosecuting minor incursions or by prosecuting persons who are suffering from a particular vulnerability or disadvantage.

The purpose of section 271 is to punish "...conduct which a person can be expected to anticipate seriously risks insolvency..." and that the character of the gambling was "reckless" and "without due consideration or regard for consequences". ITSA does not regard cases involving 'problem gambling' only as having these characteristics.

7. An example of a case involving 'clear criminality' would be where the person gambled with the intention of depriving creditors of access to their money and property.

For example, there may be evidence that, upon realising that insolvency is inevitable, the person liquidated their assets and gambled with the proceeds deliberately to prevent creditors being paid.

¹ Note that section 271 also applies to speculations – that conduct is not considered in this policy statement which is limited to offences related to gambling.



8. An example of a case involving 'complex offences' would be where the gambling is accompanied by other offences, such as obtaining money by deception or concealing assets from the Trustee.
9. An example of a case involving prior warnings is likely to arise where a person has previously been bankrupt; there was evidence of a possible offence under section 271; and a warning letter was issued. If the person subsequently becomes bankrupt again and there is evidence of an offence under section 271, that offence may be considered for investigation and referral for prosecution.
10. It should be noted that the mere raising by an alleged offender of a defence that they have a "gambling problem" in order to avoid prosecution will not necessarily oblige ITSA to refrain from referring the allegation to the CDPP for determination. Supportive evidence confirming the debtor / bankrupt suffers from such a "problem" will be required.
11. Furthermore, should relevant long-term offending and / repeat allegations be alleged, ITSA would expect to see evidence of self-help having been undertaken by the debtor / bankrupt, otherwise the matter would proceed to investigation with prosecution action being recommended.

Referral process

12. ITSA's Enforcement Unit has primary responsibility for investigating and referring alleged bankruptcy and related offences to the CDPP. ITSA considers gambling offences under section 271 to be unique offences and consequently takes a very rigorous approach to selecting and referring cases to the CDPP under this section.
13. To ensure a high level of scrutiny and consideration within ITSA, every potential referral is examined by the national head of ITSA's Enforcement Unit and no referral proceeds without his or her endorsement.
14. Any questions about how this policy is applied in a particular case can be directed to the National Manager, Regulation & Enforcement on 1300 364 785/fraud.enquiries@itsa.gov.au

