

CHAPTER 3

KEY ISSUES

3.1 Most submissions were supportive of the amendments proposed by the Bill.¹ However, the following issues were raised during the committee's inquiry:

- the breadth of the preparatory offence in proposed section 272.17;
- the proposed defences under the Bill; and
- related measures to address the issue of child sex tourism.

3.2 These issues are discussed in further detail below.

Preparatory offences

3.3 As outlined in chapter 2, proposed section 272.17 of the Bill creates offences which aim to capture the behaviour of people who are preparing to commit a child sex offence overseas. The Attorney-General's Department (the Department) explained the need for these proposed offences in its submission as follows:

The existing benefiting and encouraging offences are targeted at child sex 'tour' operators, rather than the individual sex client. The new preparatory offence would fill this gap and apply to a wide range of preparatory behaviour done by a person with the intention of preparing or planning to commit an offence involving sexual conduct with a child overseas.²

3.4 The Department further explained that:

Such conduct could include arranging travel and making a hotel reservation in a well known child sex tourism destination, so long as the conduct could be linked to an intention to commit an offence against the child sex tourism regime. The new offence will also apply to operators with respect to preparatory conduct undertaken with the intention of benefiting from child sex tourism.³

Support for the preparatory offences

3.5 Some submissions were supportive of these proposed preparatory offences. For example, Child Wise supported the new offences proposed by the Bill, including the preparatory offences, commenting that: "These new offences reflect the reality of child sex offending which is often a planned and premeditated crime."⁴ Indeed, Child

1 Child Wise, *Submission 2*; World Vision Australia, *Submission 3*; Australian Institute of Family Studies, *Submission 4*.

2 *Submission 1*, p. 2; see also AFP, answers to questions on notice, received 3 October 2007, p. 3.

3 *Submission 1*, p. 2.

4 *Submission 2*, p. [1].

Wise commended the Australian Government for the development of the Bill.⁵ In particular, Child Wise noted that there have been 'specific cases of Australian child sex offenders planning to sexually abuse children overseas which could not be prosecuted under the existing Australian child sex tourism legal provisions.'⁶

3.6 Similarly, World Vision Australia welcomed the Bill, stating that it 'supports a comprehensive legislative regime which seeks to prevent, prosecute and punish Australians who perpetrate, support or encourage child sex tourism, child sex abuse and child pornography in Australia and overseas.'⁷ World Vision Australia further commented that:

These new provisions will be a significant weapon in the war against child exploitation, which is particularly prevalent in our region. The legislation also has the potential to become model legislation in the Asia region as the region searches for more effective responses to these crimes.⁸

3.7 The Australian Institute of Family Studies also supported the proposed new offences, including the preparatory offences, stating that 'legislation that allows police and law enforcement authorities to actively intervene to prevent harm before it occurs is good for the welfare of vulnerable children and young people.'⁹

Concerns about the preparatory offences

3.8 However, the Law Council of Australia (Law Council) was highly critical of the proposed preparatory offences, describing them as an 'unwarranted and worrying departure from established principles of criminal law.'¹⁰

3.9 The Law Council pointed out that Part 2.4 of the Criminal Code creates 'inchoate' offences that apply to all Commonwealth crimes, include offences relating to attempt (section 11.1), incitement (section 11.4) and conspiracy (section 11.5). The Law Council was concerned that the proposed preparatory offences go much further than these inchoate offences by targeting purely preparatory acts without requiring a connection to any clear intent to commit a substantive criminal offence.¹¹

3.10 The Law Council argued that:

The common law has always been reluctant to attach criminal liability to action that is undertaken in preparation for conduct that, if carried out, may

5 *Submission 2*, p. [1].

6 *Submission 2*, p. [2].

7 *Submission 3*, p. [1].

8 *Submission 3*, p. [2].

9 *Submission 4*, p. 2.

10 *Submission 5*, p. 3.

11 *Submission 5*, pp 4 and 6.

constitute a criminal offence, primarily because a person can plan for conduct and then change his or her mind before the plan is implemented.

In short, the criminal law has not traditionally penalised nascent and unrealised private intentions which have only been advanced in a preliminary way, particularly where those intentions have not yet crystallised into a specific criminal intent.¹²

3.11 The Law Council was particularly concerned that the proposed offences 'would risk penalising a person for broad intentions which they may never have acted upon, or worse, risks exposing entirely innocent activity to ruinous prosecution'.¹³

3.12 The Law Council also believed that the proposed offence would actually be:

...very difficult to successfully prosecute because it targets behaviour which is not inherently criminal, but which might be undertaken in broad contemplation of future criminal activity of a generic kind. Establishing the requisite criminal intent to secure conviction in such circumstances may, quite rightly, prove very difficult. Prosecutions which fail because police have intervened prematurely, may do more harm than good to efforts to combat child sex tourism in the longer run.¹⁴

3.13 Similarly, the Parliamentary Library's Bills Digest noted that 'comparable preparatory offences in the counter-terrorism area have been criticised for not providing sufficient certainty when defining criminal behaviour'.¹⁵ The Bills Digest concluded that:

As heinous as the possibly intended crimes are, the mere act of booking a hotel room or an airline ticket without sufficient evidence of clear intention and no further conduct should not constitute a criminal offence. The danger of convicting a person for a never to be fulfilled intention should be considered carefully in criminal law.¹⁶

3.14 In response to a question from the committee on this issue, the Department stated that:

The provision does not criminalise acts such as arranging overseas travel without the need to prove any specific intention to commit a criminal offence. ...[It] will be necessary to prove the fault elements of the offence as well as the physical elements, ie that the person intentionally undertakes an action (eg overseas travel) with knowledge or recklessness as to this

12 *Submission 5*, p. 7.

13 *Submission 5*, p. 8.

14 *Submission 5*, p. 4; see also pp 8-9.

15 Parliamentary Library, "Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007", *Bills Digest No. 52 2007-08*, 18 September 2007, p. 14.

16 p. 17; see also Law Council, *Submission 5*, pp 9-10.

constituting preparation or planning to commit a specified child sex tourism offence. Merely travelling will not itself constitute an offence.¹⁷

3.15 The Department acknowledged that an individual could still be guilty of an offence under proposed section 272.17, even if he or she subsequently resiled from the intention to commit a child sex offence overseas, for example by cancelling his or her airline booking. However, the Department noted that:

The very nature of this offence is that it captures the preparatory stage of organising and planning to travel to commit a child sex offence overseas. This provision is based on the premise that involvement in planning for participation in child sex tourism should attract punishment. For an individual to be found guilty of this offence, there would need to be sufficient evidence that he or she has in fact booked an airline ticket as part of a plan to travel overseas to engage in a child sex offence overseas...

However, the fact that a person subsequently resiles from the act that constitutes preparation or planning would be a factor taken into account in the investigation stage, and in any decision to prosecute. Further, if a matter was prosecuted and the person was subsequently found guilty, the subsequent resiling from the act that constitutes preparation or planning may be a factor that the Court could take into account in sentencing.¹⁸

Need for the offence

3.16 The Law Council also queried the need for the proposed preparatory offence, expressing the view that the existing legislative regime targeting child sex tourism 'is already sufficiently wide in scope and, in fact, already covers preliminary conduct in a manner which allows police to adopt a preventative, early intervention approach'.¹⁹

3.17 Indeed, the committee asked the Department of Foreign Affairs and Trade (DFAT) whether powers might be available under other legislation to prevent individuals from committing child sex offences overseas. DFAT responded that the *Australian Passports Act 2005* empowers the Minister for Foreign Affairs to cancel or refuse to issue an Australian travel document at the request of a competent authority — such as an Australian law enforcement authority. To make such a request, the competent authority must suspect on reasonable grounds that a person would be likely to engage in conduct that might:

- endanger the health or physical safety of other persons (whether in Australia or a foreign country); or

17 Attorney-General's Department, answers to questions on notice, received 4 October 2007, p. 5.

18 Attorney-General's Department, answers to questions on notice, received 4 October 2007, p. 7.

19 *Submission 5*, p. 4; see also pp 7-8.

- constitute an indictable offence against a law of the Commonwealth.²⁰

3.18 DFAT further advised the committee that:

These legislative provisions and the associated implementation arrangements provided by the Australian Passport Office have been used successfully on a number of occasions to prevent or restrict international travel of child sex offenders since coming into force on 1 July 2005. The effectiveness of the arrangements is further increasing as law enforcement agencies become more familiar with the powers provided under the Acts to prevent travel by child sex offenders.²¹

3.19 However, the Australian Federal Police (AFP) advised the committee that it had experienced difficulties in using these powers to prevent individuals committing child sex offences overseas. Those difficulties related to cases where individuals had applied to the Administrative Appeals Tribunal (AAT) for review of a ministerial decision to cancel their passport:

If an individual appeals the cancellation of their passport - in effect seeks its reinstatement – the AAT requires the AFP to provide evidence that the individual has consistently demonstrated behaviour which raises a reasonable suspicion that the person is likely to engage in harmful conduct offshore, that is, child sex offences. Provision of such evidence can be a challenging task for the AFP as it involves regularly undertaking complex risk assessments of, for example, intention to/ pattern of engaging in a position of trust to gain access to children overseas.²²

3.20 The AFP further explained that it is unclear whether passport cancellations or refusals operate permanently or only for a period of time:

...a competent authority may need to revisit the reasons for making its original passport cancellation/refusal request if a person lodges an application for another passport during the open-ended period of cancellation (potentially their lifetime). In the majority of such cases, the AFP usually will not have additional information to provide to the Minister about a person's domestic behaviour since passport cancellation occurred. The competent authority would then have to rely only on the original grounds for refusing a passport.²³

20 Minister for Foreign Affairs and Trade, answers to questions on notice, received 3 October 2007, p. 1. Note also that foreign travel documents are covered under similar provisions in the *Foreign Passports (Law Enforcement and Security) Act 2005*.

21 Minister for Foreign Affairs and Trade, answers to questions on notice, received 3 October 2007, p. 1.

22 AFP, answers to questions on notice, received 3 October 2007, p. 4.

23 AFP, answers to questions on notice, received 3 October 2007, p. 5.

Penalties for the preparatory offences

3.21 The Law Council suggested that the maximum penalties for the proposed preparatory offences should be decreased. Under the Bill, the proposed preparatory offences would attract maximum penalties of 15 years and 17 years imprisonment – the same as the maximum penalties for the substantive offences for which it is an offence to prepare to commit.²⁴ The Law Council argued that:

If a person is successfully prosecuted under clause 272.17 with purchasing an airline ticket in preparation for traveling [sic] abroad to engage in sexual intercourse with a child, it will not be possible to definitively assert that, but for the intervention of police, the person would certainly have committed the substantive offence. The possibility will remain that the defendant may not have further advanced his or her plans, formed a more specific intention and acted to realize that intention.

The maximum penalty should be reduced to reflect this.²⁵

3.22 In response to a question from the committee on this issue, the Department explained that providing for the same maximum penalty is consistent with other like offences under the existing child sex tourism regime, such as the offences of benefiting from, or encouraging, an offence against a child sex tourism offence provision.²⁶ These offences are subject to a maximum penalty of 17 years imprisonment. The Department also noted that: 'The Bill is based on the premise that any kind of involvement in child sex tourism merits the prospect of a significant prison term.'²⁷

Defences

3.23 The Law Council also raised a number of issues in relation to the defences contained in the Bill. As outlined in Chapter 2, the Bill proposes to relocate existing defences based on belief about age (section 50CA) and on valid and genuine marriage (section 50CB) from the Crimes Act to sections 272.13 and 272.14 of the Criminal Code. The Law Council acknowledged that the defences have not been introduced or substantively changed by the Bill, but suggested that the committee consider whether these defences remain 'adequate and appropriate'.²⁸

Defence based on age

3.24 First, the Law Council suggested that the committee consider whether a further defence should be included to cover circumstances where the alleged sexual

24 *Submission 5*, p. 18.

25 *Submission 5*, pp 10-11.

26 Attorney-General's Department, answers to questions on notice, received 4 October 2007, p. 9.

27 Attorney-General's Department, answers to questions on notice, received 4 October 2007, p. 9.

28 *Submission 5*, p. 4.

activity is consensual and the alleged perpetrator is no more than two years older than the alleged victim. The Law Council noted that a number of Australian jurisdictions provide a defence to a charge of unlawful sexual conduct with a minor, if the alleged perpetrator is no more than a specified number of years older than the alleged victim and the alleged sexual activity is consensual.²⁹ The Law Council argued that this proposed defence:

...would not be inconsistent with the object of the Bill and would help distinguish between sexual behaviour involving an adult sexual predator and a young person under 16 years and sexual behaviour between two young persons.³⁰

3.25 In this context, the committee notes that the new grooming and procuring offences in proposed sections 272.11 and 272.12 are modelled on existing offences in sections 474.26 and 474.27 of the Criminal Code which relate to use of a carriage service to groom or procure a person under 16 years of age for sexual activity. However, these existing Criminal Code offences require the offender to be at least 18 years of age, whereas the proposed new offences do not have such an age limit. This makes the proposed new grooming and procuring offences consistent with the other existing Crimes Act child sex tourism offences since those offences do not require that the offender be at least 18.

Defence based on marriage

3.26 The Law Council also suggested that the committee consider whether the defence of valid and genuine marriage (under proposed section 272.14) is a necessary and appropriate defence, in view of the aims of the legislation and the position under Australian domestic law. In particular, the Law Council noted that the majority of Australian states appear to make no provision for marriage as a defence to charges of engaging in sexual activity with a person below the age of consent.³¹

3.27 The Law Council also pointed out that this defence is at odds with recent amendments to the Crimes Act introduced by the *Crimes Amendment (Bail and Sentencing) Act 2006*. Under these amendments, subsection 16A(2A) of the Crimes Act now provides that:

However, the court must not take into account under subsection (1) or (2) any form of customary law or cultural practice as a reason for:

- (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
- (b) aggravating the seriousness of the criminal behaviour to which the offence relates.

29 *Submission 5*, p. 12.

30 *Submission 5*, p. 12.

31 *Submission 5*, p. 13.

3.28 The Law Council concluded that:

...the defence in clause 272.14 may detract from the primary purpose of the Bill, namely to protect children from being forced or encouraged to engage in sexual activity before they have reached the requisite level of maturity and are above the age of consent. The defence could result in a double standard of protection for child victims of sexual abuse overseas, determined by marital status.³²

Requirement for sexual activity to be consensual

3.29 Finally, the Law Council suggested that the listed defences should only be available in circumstances where the alleged sexual activity was consensual.³³ The Law Council was concerned that, without this:

...a belief that the person was over 16 or the existence of a valid and genuine marriage could absolve a defendant of criminal liability for engaging in non-consensual sexual activity with a person under 16.³⁴

3.30 In this context, the Law Council pointed to section 55 of the *Crimes Act 1900 (ACT)*. This section provides a defence to an offence of engaging in sexual intercourse with a person under the age of 16 years, where the defendant believed on reasonable grounds that the person was of or above the age of 16 years³⁵ and that person consented to the sexual intercourse.³⁶

Related measures

3.31 Some submissions suggested related measures to address the issue of child sex tourism, including an education campaign against child sex tourism, and resourcing for enforcement of the regime proposed by the Bill.

Education campaign

3.32 Child Wise recommended 'that the crime of child sex tourism should be widely advertised in the Australian community for maximum deterrent effect.'³⁷ Indeed, Child Wise explained that it had developed an education campaign against child sex tourism, which has been endorsed by ten ASEAN Governments and is currently being rolled out throughout South East Asia. Child Wise noted that it was in negotiations with the Australian Government for implementation of the education

32 *Submission 5*, p. 13.

33 *Submission 5*, pp 4 and 13-14.

34 *Submission 5*, p. 14.

35 or the person was of or above 10 years and the defendant was not more than two years older.

36 *Submission 5*, p. 14.

37 *Submission 2*, p. [2].

program within Australia.³⁸ Child Wise provided a summary of research which it submitted confirmed that 'if people know of the crime of child sex tourism and know how to respond they will report cases to the AFP.'³⁹ Child Wise noted the particular importance of public awareness in preventing child sex tourism:

While Child Wise believes that the Australian Federal Police (AFP) are doing an excellent job in protecting children from sexual abuse overseas from travelling sex offenders, we believe that much more can be achieved if the Australian Government supports an accompanying Australian education campaign to encourage Australians to speak up about travelling sex offenders before they leave the country. ...Often people in Australia know that someone is planning an overseas child sex offence, therefore Australians need to be informed about the law, the new provisions and how to report concerns to the AFP.⁴⁰

3.33 World Vision Australia also expressed support for the Child Wise campaign and the provision of:

...comprehensive information and education about the prevention of child sex tourism and child sex offences for the Australian community, tourists, the tourism industry, and communities within our region to ensure that suspicious activity is reported, offences are prevented and victims supported.⁴¹

Enforcement issues

3.34 World Vision Australia also emphasised the importance of ensuring appropriate resources are available for the enforcement and prosecution of the new provisions, particularly given that there have been 'relatively few prosecutions under the current child sex tourism offences over the last few years'. World Vision Australia further suggested that there should be greater investment in training, capacity building and support for local law enforcement agencies in our region.⁴²

3.35 The AFP advised the committee that, since 1995, 158 investigations have been conducted in relation to child sex tourism offences resulting in 28 people being charged and 19 convictions.⁴³ In response to a question concerning what difficulties the AFP had experienced in enforcing the existing child sex tourism offences, the AFP pointed to three key issues:

38 *Submission 2*, pp [3-4].

39 *Submission 2a*, p. [5].

40 *Submission 2a*, pp [4-5].

41 *Submission 3*, p. [3].

42 *Submission 3*, p. [2].

43 AFP, answers to questions on notice, received 3 October 2007, p. 1.

- a gap in the offence structure because the focus of the benefiting and encouragement offences is on 'child sex tour' operators rather than the individuals committing the sexual abuse;
- the practice of victim compensation⁴⁴ in some countries which can result in the withdrawal of complaints or statements by victims, making any further investigation or prosecution very difficult; and
- a change in the nature of child sex abuse by Australians overseas since the offences were introduced.⁴⁵

3.36 The AFP noted that:

The Bill has been developed in consultation with the AFP to address these issues, to the extent that these issues are capable of being addressed by Commonwealth legislation.⁴⁶

3.37 In particular, the AFP explained that:

The addition of offences relating to acts in preparation (procuring/grooming a victim) reflects the growing trend showing a move away from the 'sex tourist' towards spending extended periods of time offshore, often engaged in a position of trust within a local community, to gain ongoing access to children in remote, foreign environments.⁴⁷

Other issues

3.38 World Vision Australia also noted the importance of other measures to address child sex tourism, including adequate support for victims of these crimes and meeting commitments to reduce poverty in our region.⁴⁸

Committee view

3.39 There is clearly a need for strong and effective laws to address the problem of child sex tourism by Australians. The committee therefore welcomes the evidence of the Department and the AFP that the Bill will fill some gaps in the current legislative regime. The committee notes the concerns raised about the breadth of the proposed preparatory offences in section 272.17. However, the committee considers that the heinous nature of the crimes concerned justifies casting these preparatory offences in terms that are broad enough to provide law enforcement officers with effective powers to intervene before children are harmed.

44 The practice of victim compensation involves an alleged offender paying compensation to the victim's family.

45 AFP, answers to questions on notice, received 3 October 2007, p. 3.

46 AFP, answers to questions on notice, received 3 October 2007, p. 3.

47 AFP, answers to questions on notice, received 3 October 2007, p. 6.

48 *Submission 3*, pp [2-3].

3.40 The committee acknowledges the suggestions made by the Law Council in relation to the proposed defences available to the child sex tourism offences under the regime. The committee notes that the defences in the Bill are not new and are merely being transferred from the Crimes Act to the Criminal Code. Nevertheless, it seems incongruous, given the purpose of the legislation, that a belief about the age of the child, or the existence of a valid and genuine marriage with the child, should provide a defence where Australians engage in non-consensual sexual activity with a child overseas. The committee therefore recommends that the Bill be amended so that the defences based on belief about age and valid and genuine marriage are only available where the relevant sexual activity is consensual.

3.41 Finally, the committee accepts the evidence given by Child Wise that the successful enforcement of the new child sex tourism offences will be heavily reliant on the provision of information by Australians who are aware that someone is planning an overseas child sex offence. As a result, the committee recommends that the government implement an Australian education campaign against child sex tourism along the lines proposed by Child Wise.

Recommendation 1

3.42 The committee recommends that the defences based on belief about age, in proposed subsection 272.13(1), and valid and genuine marriage, in proposed subsection 272.14(1), be amended by adding a requirement that the sexual intercourse or act of indecency is consensual.

Recommendation 2

3.43 The committee recommends that the Australian Government implement an Australian education campaign against child sex tourism along the lines proposed by Child Wise.

Recommendation 3

3.44 Subject to the preceding recommendations, the committee recommends that the Bill be passed.

**Senator Guy Barnett
Chair**

