

# **ADDITIONAL COMMENTS OF DISSENT BY THE AUSTRALIAN DEMOCRATS**

1.1 The Australian Democrats are committed to protecting children from the threat of sexual abuse.

1.2 We strongly support the strengthening of Australia's criminal laws to allow law enforcement agencies to more effectively investigate, prosecute and prevent child sex tourism offences.

1.3 The Democrats acknowledge that a significant objective of the Bill is the relocation to the *Criminal Code Act 1995* of existing child sex tourism offences contained in Part IIIA of the *Crimes Act*.

1.4 The Democrats regard the consolidation of the offences as a positive development.

1.5 The Democrats also acknowledge that the Bill introduces new offences in relation to:

- (a) the possession, production and distribution of child pornography by Australian citizens or residents while overseas (Division 273);
- (b) the procuring and grooming of children to engage in sexual conduct overseas (proposed Division 272, sections 272.11 and 272.12); and
- (c) planning or preparing to commit offences against proposed Division 272 (proposed Division 272, section 272.17).

1.6 The Democrats support the introduction of the offences outlined in subparagraphs (a) and (b) above.

1.7 However, we disagree with the Committee's view with respect to the preparatory offences contained in section 272.17 of the Bill.

## **Proposed preparatory offences**

### *Adequacy of existing laws*

1.8 The Democrats do not consider that the Chair's report properly reflects the weight of evidence submitted to the Committee's inquiry in relation to the proposed preparatory offences.

1.9 While we acknowledge that several agencies made submissions to the Committee's inquiry that generally supported the creation of preparatory offences, the Democrats consider that such support is based on the mistaken belief that Australia's existing criminal laws are inadequate to allow for the protection of children and the prevention of sexual abuse.

1.10 Evidence was provided to the Committee by the Law Council that the existing legislative provisions have already allowed police to adopt an interventionist approach and, in fact:

...essentially allow police to intervene and charge a person in any circumstances where he or she has interacted with another with the intention of assisting, facilitating, encouraging and arranging for...the commission of a sexual offence against a child overseas.<sup>1</sup>

1.11 The Chair's report also highlights (at page 15) evidence from DFAT that provisions under the *Australian Passports Act 2005* have been used successfully to prevent or restrict international travel of child sex offenders, and that the effectiveness of these arrangements is increasing.

1.12 The Democrats are not convinced that evidence provided to the Committee by the AFP in relation to difficulties experienced in exercising the powers under the *Australian Passports Act 2005* is demonstrative of a clear need for additional preventative powers.

1.13 In the AFP's answers to the Committee's questions on notice, it stated that the AFP has utilised the powers under the Act on 11 occasions (one refusal to issue a passport and ten cancellations), but cited only one instance in which the Administrative Appeals Tribunal overturned the Minister's decision to cancel a passport.<sup>2</sup>

1.14 The Democrats also consider that the Bill's Explanatory Memorandum and the Attorney-General's second reading speech fail to adequately address the issue of the need for the expansion of Australia's criminal laws in this manner.

1.15 Apart from reference that new measures contained in the Bill 'fill gaps in the current legislative regime'<sup>3</sup>, no anecdotal or statistical evidence is offered to justify the creation of preparatory offences.

#### *Nature of the preparatory offences*

1.16 The Democrats are concerned that proposed section 272.17 as presently drafted stands to criminalise a thought process rather than any act deserved of criminal sanction.

1.17 The Attorney-General's Department asserted in its response to the Committee's question on notice that it 'will be necessary to prove the fault elements of the [substantive] offence' in order to be convicted of the preparatory offence under section 272.17.

1.18 However, there is nothing in proposed section 272.17 that substantiates this response. Indeed, according to the Law Council:

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<sup>1</sup> *Submission 5*, p. 7.

<sup>2</sup> AFP, answers to questions on notice, received 3 October 2007, pp 4 and 5.

<sup>3</sup> *House of Representatives Hansard*, 13 September 2007, p. 5.

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...the proposed new offence in clause 272.17 goes much further than existing inchoate offences by criminalising preliminary acts which, although undertaken in contemplation of criminal conduct of some kind, can not be connected with any clear intent to commit a specific criminal act.<sup>4</sup>

1.19 Even if the Department's interpretation is correct, the very clear view to the contrary of Australia's peak legal body suggests that the section is prone to significant ambiguity.

1.20 The Democrats are concerned that Government's approach to the Bill reflects a worrying trend whereby the gravity of the subject matter of a Bill somehow justifies the use of legislative provisions which fall below the usual standard of law making.

1.21 This is reflected in Committee's view that the Bill should be passed with proposed section 272.17 intact, despite 'the concerns raised about the breadth of the proposed preparatory offences in section 272.17', based on the 'heinous nature of the crimes concerned'.

1.22 The Democrats consider that this view fails to recognise that the consequences for the liberty and reputation of a person charged with such offences also carry such weight that Parliament should carefully consider the threshold level of conduct which is captured by the laws. The Law Council put it as follows:

While the importance of protecting children from child sex tourism cannot be overstated, the moral repugnance with which the community regards these offences means that allegations of offending conduct will have devastating consequences for accused persons, regardless of whether any charges laid proceed to prosecution and conviction. For this reason, the components of criminal liability for child sex tourism offences must be clearly and specifically outlined in the amending legislation and the rights of the accused adequately protected.<sup>5</sup>

1.23 Parliament would set a dangerous precedent should it condone the passing of such laws.

1.24 Accordingly, the Democrats consider that the preparatory offences outlined in proposed section 272.17 should not proceed.

## **Recommendation 1**

**1.25 The Australian Democrats recommend that section 272.17 dealing with preparatory offences be deleted.**

**Senator Natasha Stott Despoja  
Australian Democrats**

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<sup>4</sup> Submission 5, p. 6.

<sup>5</sup> Submission 5, p. 4.

