



CDPP

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Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
Parliament House
CANBERRA

By email: legcon.sen@aph.gov.au

Dear Sir/Madam

Family Law Amendment (Financial Agreements and Other Measures) Bill 2015

The CDPP prosecutes offences against Commonwealth law. This submission relates to the criminal provision in the Bill.

The Bill contains two new Commonwealth offences - proposed section 65YA and proposed section 65ZAA. The two new offences relate to retention of a child in relation to whom there is a parenting order in place, or pending, overseas either by a party to that parenting order or on behalf of or at the request of, a party to that parenting order. The intention of the legislation, as explained in the draft Explanatory Memorandum, is to extend existing criminal offences of child abduction to include wrongful retentions. As also noted in the draft Explanatory Memorandum, wrongful retentions are situations where a child is lawfully removed from Australia for a period but at the end of that period the parent does not return the child to Australia as required.

Section 65YA offence

It is noted that the proposed section 65YA covers a variety of potential fact situations. For instance, the section would operate where the child was taken overseas by a party to the proceedings in which the parenting order was made and retained overseas either by that party or by another person on behalf of or at the request of that party. It would also cover the situation where the child was taken overseas by a person on behalf of a party to the proceedings in which the parenting order was made and retained overseas either by that person, the party themselves or another person. There is a degree of flexibility in the offence provision as drafted to cover a variety of potential factual situations.

Similarly with the form of the order which is breached by the retention of the child overseas. A number of potential forms of permission including a written consent, an order of a court made under Part VII or an order of a court under a law of a State or Territory, both at the time of or after the parenting order was made, are

referred to. Again, this provides a degree of flexibility to cover a variety of factual situations which may arise in this area.

Given the multiplicity of factual situations that the section 65YA offence could cover, it is necessary to analyse the elements based on different factual situations.

Where the defendant who has retained the child overseas is a person in whose favour the parenting order has been made, the elements would be as follows:

- (a) D retained a child, namely ABC, outside Australia otherwise and in accordance with a written consent [OR court order] (conduct).

Fault element: intention (section 5.6(1) Criminal Code);

- (b) when a parenting order to which Subdivision E of Division 6 of Part VII of the Family Law Act applies was in force in relation to ABC (circumstance).

Fault element: recklessness (section 5.6(2) Criminal Code);

- (c) ABC had been taken [OR sent] from Australia to a place outside Australia by D [OR on behalf of D] with the consent in writing of each person in whose favour the parenting order was made, OR [in accordance with an order of a court made under Part VII of the Family Law Act at the time the parenting order was made OR after the parenting order was made] OR [in accordance with an order of a court made under a law of a State at the time the parenting order was made OR after the parenting order was made] (circumstance).

Fault element: recklessness (section 5.6(2) Criminal Code);

- (d) D was a party to the proceedings in which the parenting order was made.

Fault element: recklessness (section 5.6(2) Criminal Code).

Where the defendant (i.e. the person retaining the child overseas) is not one of the parties in whose favour the parenting order was made, but is acting on behalf of or at the request of such a party, the elements of the offence would be as follows:

- (a) D retained a child, namely ABC, outside Australia otherwise than in accordance with a written consent [or court order] (conduct).

Fault element: intention (section 5.6(1) Criminal Code);

- (b) when a parenting order to which Subdivision E of Division 6 of Part VII of the Family Law Act applies was in force in relation to the ABC (circumstance).

Fault element: recklessness (section 5.6(2) Criminal Code);

- (c) ABC had been taken [OR sent] from Australia to a place outside Australia by XYZ [OR on behalf of XYZ] with the consent in writing of each person in whose favour the parenting order was made, OR [in

accordance with an order of the court made under Part VII of the Family Law Act at the time the parenting order was made OR after the parenting order was made] OR [in accordance with an order of a court made under a law of a State at the time the parenting order was made OR after the parenting order was made] (circumstance).

Fault element: recklessness (section 5.6(2) Criminal Code).

- (d) D is retaining the child on behalf of [OR at the request of] XYZ, a party to the proceedings in which the parenting order was made (circumstance).

Fault element: recklessness (section 5.6(2) Criminal Code).

Section 65ZAA offence

The offence in proposed section 65ZAA would apply where the child was retained overseas in circumstances where proceedings for the making of a parenting order were pending. Again, the offence is designed to cover a variety of potential factual situations and the elements of an offence depend on the relevant factual situation.

Where the defendant is a party to pending proceedings in relation to a parenting order and has taken the child overseas and retained the child overseas in breach of a written consent or court order, the element of the offence would be:

- (a) D retained a child, namely ABC, outside Australia otherwise than in accordance with a written consent [OR court order] (conduct).

Fault element: intention (section 5.6(1) Criminal Code).

- (b) when Part VII Family Law Act proceedings for the making in relation to ABC, of a parenting order to which Subdivision E of Division 6 of Part VII of the Family Law Act applies were pending (circumstance).

Fault element: recklessness (section 5.6(2) Criminal Code).

- (c) ABC had been taken from Australia to a place outside Australia by D, a party to the Part VII proceedings [OR sent from Australia to a place outside Australia on behalf of D, a party to Part VII proceedings] with the consent in writing of each other party to the Part VII proceedings [OR in accordance with an order of a court made under Part VII of the Family Law Act after the institution of the Part VII proceedings] OR [in accordance with an order of a court made under a law of a State after the institution of the Part VII proceedings]. (circumstance).

Fault element: recklessness (section 5.6(2) Criminal Code).

- (d) D was a party to the Part VII proceedings (circumstance).

Fault element: recklessness (section 5.6(2) Criminal Code).

In circumstances where the defendant is not a party to the pending proceedings but who retains the child overseas in breach of a written consent or a court order and does so on behalf of or at the request of a party to the pending proceedings, the elements of the offence would be as follows:

- (a) D retained a child, namely ABC, outside Australia otherwise than in accordance with a written consent [OR court order] (intention).

Fault element: intention (section 5.6(1) Criminal Code).

- (b) when Part VII Family Law Act proceedings for the making, in relation to ABC, of a parenting order to which Subdivision E of Division 6 of Part VII of the Family Law Act were pending (circumstance).

Fault element: recklessness (section 5.6(2) Criminal Code).

- (c) ABC had been taken from Australia to a place outside Australia by XYZ, a party to the said Part VII proceedings [OR sent from Australia to a place outside Australia on behalf of XYZ, a party to the Part VII proceedings] with the consent in writing of each other party to the Part VII proceedings [OR in accordance with an order of a court made under Part VII of the Family Law Act after the institution of the Part VII proceedings] OR [in accordance with an order of a court made under a law of a State after the institution of the Part VII proceedings] (circumstance).

Fault element: recklessness (section 5.6(2) Criminal Code).

- (d) D retained ABC on behalf of [OR at the request of] XYZ, a party to the pending Part VII proceedings (circumstance).

Fault element: recklessness (section 5.6(2) Criminal Code).

Extended Geographical Jurisdiction

It is noted that the two proposed offences have extended geographical jurisdiction category D as provided by the Criminal Code. That is achieved through proposed section 56ZE of the Bill. Extended geographical jurisdiction category D provides that the offence applies whether or not the conduct constituting the alleged offence occurs in Australia. It would normally be the case that all or most of the conduct relating to the retention of a child overseas would occur outside Australia.

It is noted that, by virtue of section 16.1 of the Criminal Code, in situations where extended geographical jurisdiction category D applies and the conduct constituting the alleged offence occurs wholly in a foreign country and, at the time of the alleged offence, the person alleged to have committed the offence is not an Australian citizen, the Attorney-General's written consent is required. It may be the case that the person retaining the child overseas (e.g. a grandparent or other relative of the child) on behalf of, or at the request of, a party to proceedings in which a parenting order is made, is not an Australian citizen. The Attorney-General's consent would be required in these circumstances.

Conclusion

The CDPP notes that these offences potentially operate in a number of circumstances and appear operable and sufficient to cover those circumstances.

Yours faithfully

David Adsett
Deputy Director