

The Senate

Standing Committee on
Legal and Constitutional Affairs

Crimes Legislation Amendment (Child Sex
Tourism Offences and Related Measures)
Bill 2007 [Provisions]

October 2007

© Commonwealth of Australia

ISBN: 978-0-642-71877-8

This document was printed by the Senate Printing Unit, Department of the Senate,
Parliament House, Canberra.

MEMBERS OF THE COMMITTEE

Members

Senator Guy Barnett, **Chair**, LP, TAS

Senator Patricia Crossin, **Deputy Chair**, ALP, NT

Senator Andrew Bartlett, AD, QLD

Senator Marise Payne, LP, NSW

Senator Stephen Parry, LP, TAS

Senator Linda Kirk, ALP, SA

Senator Joe Ludwig, ALP, QLD

Senator Russell Trood, LP, QLD

Participating Member for this inquiry

Senator Natasha Stott Despoja, AD, SA

Secretariat

Ms Jackie Morris

Ms Sophie Power

Ms Judith Wuest

Secretary

Principal Research Officer

Executive Assistant

Suite S1. 61

Parliament House

CANBERRA ACT 2600

Telephone: (02) 6277 3560

Fax: (02) 6277 5794

Email: legcon.sen@aph.gov.au

TABLE OF CONTENTS

MEMBERSHIP OF COMMITTEE	iii
ABBREVIATIONS	vii
RECOMMENDATIONS	ix
CHAPTER 1	1
INTRODUCTION	
Purpose of the Bill	1
Background	1
Conduct of the inquiry	1
Acknowledgement	2
Note on references	2
CHAPTER 2	3
OVERVIEW OF THE BILL	
New child sex tourism offences	3
Other provisions	6
CHAPTER 3	11
KEY ISSUES	
Preparatory offences	11
Defences	16
Related measures	18
Committee view	20
ADDITIONAL COMMENTS OF DISSENT BY THE AUSTRALIAN DEMOCRATS	23
APPENDIX 1	27
SUBMISSIONS RECEIVED	

ABBREVIATIONS

AAT	Administrative Appeals Tribunal
AFP	Australian Federal Police
Bill	Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007
Criminal Code	<i>Criminal Code Act 1995</i>
Crimes Act	<i>Crimes Act 1914</i>
the Department	Attorney-General's Department
DFAT	Department of Foreign Affairs and Trade
EM	Explanatory Memorandum
Law Council	Law Council of Australia

RECOMMENDATIONS

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.

CHAPTER 1

INTRODUCTION

Purpose of the Bill

1.1 On 20 September 2007 the Senate referred the provisions of the Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007 (the Bill) to the Standing Committee on Legal and Constitutional Affairs, for inquiry and report by 10 October 2007.

1.2 The Bill relocates existing child sex tourism offences from Part IIIA of the *Crimes Act 1914* (Crimes Act) to the *Criminal Code Act 1995* (Criminal Code) as well as creating new 'grooming', procuring and preparatory offences. In addition, the Bill will make it an offence for Australian citizens and residents to possess, produce or distribute child pornography while overseas.

Background

1.3 The existing offences relating to child sex tourism, in Part IIIA of the Crimes Act, were enacted in 1994. The Attorney-General noted in his second reading speech that since the introduction of these provisions, 'there have been more than 20 prosecutions against these provisions with approximately 15 convictions.'¹ The Attorney-General went on to explain the rationale for the Bill:

New measures contained in the bill fill gaps in the current legislative regime and will enhance Australia's existing child sex tourism regime by creating new grooming, procuring and preparatory offences. These offences are essentially preventative in nature. Their purpose is to give law enforcement agencies and prosecutors the mandate to take action before any child is harmed.²

Conduct of the inquiry

1.4 The committee advertised the inquiry in *The Australian* newspaper on 26 September 2007. Details of the inquiry, the Bill and associated documents were placed on the committee's website. The committee also wrote to 86 organisations and individuals.

1.5 The committee received 6 submissions, which are listed at Appendix 1. The committee did not hold a public hearing for this inquiry but clarified a number of issues with the Attorney-General's Department (the Department), the Department of

1 *House of Representatives Hansard*, 13 September 2007, p. 4.

2 *House of Representatives Hansard*, 13 September 2007, p. 4

Foreign Affairs and Trade (DFAT) and the Australian Federal Police (AFP) through written questions.

Acknowledgement

1.6 The committee thanks those organisations and individuals who made submissions.

Note on references

1.7 References in this report are to individual submissions as received by the committee, not to a bound volume.

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter briefly outlines the main provisions of the Bill.

New child sex tourism offences

2.2 The Bill proposes to create the following new child sex tourism offences:

- offences to capture the 'grooming' and procuring of a child for the purposes of child sex overseas (proposed sections 272.11 and 272.12);
- preparatory offences to capture the behaviour of people who are preparing to commit a child sex tourism offence (proposed section 272.17); and
- offences to make it illegal for Australians to possess, control, produce, distribute or obtain child pornography while overseas (Division 273).

2.3 These proposed new offences are discussed in further detail below.

'Grooming' and procuring offences

2.4 The Bill proposes new offences relating to 'grooming' and procuring persons under 16 years of age. The Explanatory Memorandum (EM) states that these proposed provisions address a gap in the existing legislation, and that:

The object of the new grooming and procuring offences is to capture people who groom or procure a person under 16 with the intention that the person under 16 will engage in, or submit to sexual activity. These offences will capture the 'grooming' of a young person in a foreign country.¹

2.5 The EM further explains that these proposed offences are modelled on existing offences in sections 474.26 and 474.27 of the Criminal Code, which deal with the use of a carriage service to procure or groom a person under 16 for sexual activity. However, the new offences are not limited to conduct involving the use of a carriage service.²

2.6 Proposed section 272.11 creates offences of engaging in conduct to procure persons under 16 for sexual activity outside Australia. The EM gives an example of a situation where a defendant tries to procure a person under 16 to engage in sexual intercourse outside Australia, for example, by offering that person money.³

1 p. 4.

2 pp 12-14.

3 p. 12.

2.7 The definitions of 'procure' and 'sexual activity' are broad and are currently contained in subsection 474.28(11) of the Criminal Code. The Bill would move these definitions into the Dictionary of the Criminal Code. The maximum penalty for these offences is 15 years imprisonment.

2.8 Proposed section 272.12 sets out offences for the 'grooming' of persons under 16 with the intention of making it easier to procure them for sexual activity outside Australia. The EM explains that 'grooming' can include 'a range of conduct that makes it easier to procure a person for sexual activity including through building trust with a person under 16 and taking steps to desensitise the person to the thought of engaging in sexual activity with adults'.⁴ The maximum penalty for these offences is 12 years imprisonment.

2.9 Both the grooming and procuring offences are designed to capture a range of conduct, and the EM gives several examples of relevant conduct that might be covered.⁵ The offences are also designed to capture conduct which takes place in a range of geographical circumstances – including, for example, where the defendant is in Australia and the person under 16 is overseas, provided the sexual activity is intended to occur outside Australia.⁶

2.10 In these offences, absolute liability applies to the fact that the person is under 16. This mirrors the use of absolute liability in the existing offences of using a carriage service to procure or groom a child for sexual activity in sections 474.26 and 474.27 of the Criminal Code.⁷ Absolute liability also applies with respect to the location of the conduct, and the EM states that:

The application of absolute liability is appropriate because the issue of whether the person intended to engage in the conduct in Australia or overseas is not central to their culpability. It is appropriate to penalise a person for such conduct irrespective of their knowledge or intention as to where the conduct occurs.⁸

2.11 Proposed subsection 272.13(2) provides a defence for these offences based on belief about age. The defence applies if, at the time of the conduct, the defendant believed that the person, who was under 16, was actually 16 or over.⁹ In addition, proposed subsection 272.14(2) provides for a defence where there was a valid and genuine marriage between the defendant and the person who was under 16. However this defence does not apply to the offences under proposed subsections 272.11(2) and 272.12(2) which involve a third person outside the marital relationship.

4 p. 14.

5 at pp 12-15.

6 See further EM, pp 13-15.

7 See further EM, pp 14-15.

8 p. 15.

9 EM, p. 16. This defence is based on sections 50CA and 50CD of the current Crimes Act.

Preparatory offences

2.12 Proposed section 217.17 creates offences which aim to capture the behaviour of people who are preparing to commit a child sex offence under proposed Division 272. The EM explains that these proposed offences would capture a wide range of preparatory behaviour. The EM gives the example of a person who:

...books an airline ticket and accommodation to travel outside Australia with the intention of planning to engage in sexual intercourse with a person who is under 16 while outside Australia.¹⁰

2.13 The EM explains that 'the inclusion of an offence of this kind will enable the person to be arrested prior to a person under 16 being harmed.' The EM further states that the offence of engaging in preparatory acts applies both inside and outside Australia, and addresses a gap in the coverage of the existing child sex tourism offences. In particular, the EM states that 'there is nothing in the current offence provisions which clearly prohibits any preliminary steps being taken by a person who wishes to participate in a child sex tour.'¹¹

2.14 The proposed preparatory offences would attract maximum penalties of 15 years and 17 years imprisonment, which are also the maximum penalties for the offences for which it is an offence to prepare to commit.¹²

Offences involving child pornography or child abuse material overseas

2.15 Proposed Division 273 would make it an offence for Australians¹³ to possess, control, produce, distribute or obtain child pornography or child abuse material while overseas. The EM explains that these proposed offences are designed to:

...deal with circumstances where the foreign country does not have specific laws to deal with this behaviour or is unwilling or unable to prosecute. This addresses a gap in the current legislation highlighted by recent investigations.¹⁴

2.16 The EM further states that many of the provisions in proposed Division 273 mirror existing carriage service child pornography and child abuse material offences in Part 10.6 (Telecommunications Services) of the Criminal Code.¹⁵

10 p. 18.

11 p. 18.

12 EM, p. 18.

13 This includes Australian citizens, Australian residents, and any body corporate that is incorporated in Australia, or carries on activities principally in Australia: proposed section 273.2.

14 p. 21.

15 p. 21.

2.17 The proposed offences are set out in proposed sections 273.5 and 273.6 and carry maximum penalties of 10 years imprisonment. Absolute liability applies to the circumstance that the conduct occurs outside Australia (proposed subsections 273.5(2) and 273.6(2)). On the use of absolute liability, the EM states that:

The application of absolute liability is appropriate because the issue of whether the person intended to engage in the conduct in Australia or overseas is not central to their culpability. It is appropriate to penalise a person for such conduct irrespective of their knowledge or intention as to where the conduct occurs.¹⁶

2.18 Proposed section 273.7 provides a number of defences to the offences in Division 273, such as where the conduct was engaged in for the purposes of:

- law enforcement, intelligence or security officers performing their duties (subsection 273.7(4)); or
- assisting the Australian Communications and Media Authority to detect prohibited content (subsection 273.7(5)).

2.19 Subsections 273.7(1) and 273.7(2) provide a defence where the conduct is of 'public benefit' in that it is conduct necessary for, or of assistance in:

- enforcing a law;
- monitoring compliance with or investigating contravention of laws;
- the administration of justice; or
- conducting scientific, medical or educational research.

Other provisions

2.20 The Bill also proposes to:

- repeal Part IIIA of the Crimes Act and move relevant child sex tourism offences to the Criminal Code;
- improve existing 'grooming' offences in the Criminal Code;
- provide a regime for the forfeiture of child pornography and child abuse material; and
- amend the definition of 'serious organised crime' in the *Australian Crime Commission Act 2002*.

2.21 These measures are outlined in further detail below.

Moving offences to the Criminal Code

2.22 In addition to the proposed new offences outlined above, the Bill proposes to repeal Part IIIA of the Crimes Act, which deals with child sex tourism. The Bill proposes to move these provisions into the Criminal Code with 'some updating of the language and structure of the offences'.¹⁷ The EM states that 'this is in accordance with the general transfer of criminal offences from the Crimes Act to the Criminal Code and the modernisation of the drafting of offences as this is done'.¹⁸

2.23 The Bill does propose some substantive changes to these offences, including an increase in the maximum penalty from 12 to 15 years imprisonment for sexual conduct offences involving a person under 16 and for the offence of inducing a person under 16 to be involved in sexual conduct.¹⁹ The EM explains that:

The penalty for sexual conduct with a child has been increased [to] 15 years imprisonment to reflect the seriousness of the offence and to ensure consistency with penalties for existing offences of a similar kind or seriousness. For example, the maximum penalty for using a carriage service for procuring a child for sexual activity in section 474.26 of the Criminal Code is 15 years imprisonment.²⁰

2.24 Other proposed changes include:

- the defendant would carry an evidential burden rather than a legal burden under the defence based on belief about age;²¹ and
- the defence based on valid and genuine marriage will no longer be available where a person outside the marital relationship is directly involved.²²

2.25 Proposed Divisions 272 and 273 of Schedule 1 of the Bill both contain a subdivision D that would allow the use of video evidence in relation to child sex offences committed outside Australia under those divisions. The EM states that these provisions are the same as existing provisions contained in Division 5 of Part IIIA of the Crimes Act with only some minor drafting and referencing changes.²³

17 EM, p. 3. See also p. 7 of the EM for a comparative table of the existing Crimes Act provisions and the equivalent proposed Criminal Code provisions.

18 p. 3.

19 See proposed sections 272.9 and 272.10, compared to current sections 50BC and 50BD of the Crimes Act.

20 p. 11; see also pp 11-12.

21 Proposed section 272.13: see further EM, p. 16.

22 Proposed section 272.14; see further EM, p. 16.

23 See proposed subdivision D in Divisions 272 and 273. It is noted that the section numbering in the EM for proposed subdivisions D and E of Division 272 appears to be inconsistent with the numbering contained in the Bill.

Broadening existing 'grooming' provisions

2.26 Items 10 and 11 of Schedule 1 of the Bill propose to broaden the operation of the offences of using a carriage service to groom persons under 16 for sexual activity. More specifically, these items would amend the existing 'grooming' offence in section 474.27 of the Criminal Code by removing the requirement that a communication must include indecent material.

2.27 These offences currently require, among other matters, that a person uses a carriage service to transmit a communication to a second person and that the communication includes indecent material.²⁴ The EM explains that:

The requirement that the communication include material that is indecent limits the type of communications that are captured by the grooming offences. Grooming activity may involve the transmission of indecent material – such as pornography – but is just as likely to include communications that are designed to build trust with the perpetrator or invoke romantic feelings in the person under 16 years of age.²⁵

Forfeiture provisions

2.28 Item 2 of Schedule 1 of the Bill proposes to amend the Crimes Act to provide for the forfeiture of child abuse and child pornography material (or equipment that contains such material) that is used in the commission of a Commonwealth child sex offence. Currently, such material can only be forfeited after following the full process under the *Proceeds of Crime Act 2002*. The EM states that:

Such material is clearly inappropriate to return to the owner, so the proposed amendments create a streamlined process for forfeiture by order of a court either immediately after a conviction or following a separate hearing.²⁶

Australian Crime Commission definition of 'serious organised crime'

2.29 The Bill amends the definition of 'serious organised crime' in the *Australian Crime Commission Act 2002* to include offences relating to child pornography and the use of carriage services to procure or groom persons under 16 for sexual activity. This reflects regulations made in December 2006.²⁷ The Bill would incorporate these offences in the definition in the principal Act. The EM explains that this would 'ensure

24 Subsection 474.27(5) states that indecent means 'indecent according to the standards of ordinary people'.

25 p. 27.

26 p. 5

27 *Australian Crime Commission Amendment Regulations 2006 (No 4)*.

that the changes already made by regulations are subjected to full Parliamentary scrutiny and become apparent on the face of the Act.²⁸

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**

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.¹

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.²

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'³, 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:

¹ *Submission 5*, p. 7.

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

³ *House of Representatives Hansard*, 13 September 2007, p. 5.

...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.⁴

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.⁵

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**

⁴ Submission 5, p. 6.

⁵ Submission 5, p. 4.

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submittor
1	Attorney-General's Department
2	Child Wise
2a	Child Wise
3	World Vision Australia
4	Australian Institute of Family Studies
5	Law Council of Australia
6	Commonwealth Director of Public Prosecutions

ADDITIONAL INFORMATION

1. Answers to questions on notice received from Department of Foreign Affairs and Trade
2. Answers to questions on notice received from Australian Federal Police
3. Answers to questions on notice received from Attorney-General's Department, Criminal Justice Division
4. Amended answer to question eight received from Attorney-General's Department, Criminal Justice Division

