



Australian Government
Attorney-General's Department

Criminal Justice Division

07/14328

3 October 2007

Ms Jackie Morris
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Morris

Crimes Legislation Amendment (Child Sex Tourism and Related Measures) Bill 2007

I thank the Senate Legal and Constitutional Affairs Committee for the opportunity to respond to Questions on Notice in relation to its inquiry into the Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007.

I attach the Department's responses to the questions provided to us (**Attachment A**).

The Department has also provided a separate written submission to the Committee in relation to the inquiry.

The action officer for this matter is Jessica Robinson who can be contacted on (02) 6250 6230.

Yours sincerely

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Attachment A

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

ATTORNEY GENERAL'S DEPARTMENT RESPONSE TO QUESTIONS ON NOTICE

1. In relation to the new preparatory offences in proposed section 272.17:

- a. What other legal mechanisms, if any, exist to prevent an individual travelling overseas where he or she is intending to commit child sex offences?**
- b. Has consideration been given strengthening other preventative measures such as laws permitting the surrender or cancellation of an individual's passport? If not, why not?**

The Department, and other agencies, are currently looking at a range of possible measures to prevent and combat child sex offences. Although matters concerning passport cancellation have been reviewed in that context, there is already a strong framework under the *Australian Passports Acts 2005* and no amendments are proposed at this time. The Department of Foreign Affairs and Trade could provide further advice on matters concerning passport cancellation. Broader preventative measures are under constant review as part of the Government's initiatives to combat child sex offences and further preventative measures are likely to come forward in future. Law enforcement agencies have identified the amendments in this Bill as an immediate priority.

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2. How does the Department respond to the suggestion¹ that the preparatory offences in proposed section 272.17 lack the certainty required of a penal provision?

The Department is of the view that proposed section 272.17 contains the certainty required of a penal provision. The relevant considerations are addressed in more detail in questions three and four.

¹ See Parliamentary Library, *Bills Digest*, No.52, 2006-07, p.17.

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3. Why doesn't proposed section 272.17 specifically provide that to be guilty of an offence under subsections (1) or (2) the preparatory acts must be done 'with the intention of engaging in conduct of a kind that would constitute an offence against the respective provisions'?

The general principles of criminal responsibility are set out in Chapter 2 of the *Criminal Code Act 1995* (Cth). Part 2.2 sets out provisions regarding the elements of an offence. Section 4.1 sets out the possible physical elements of an offence: conduct, result or circumstance. Section 5.1 sets out the possible fault elements of an offence: intention, knowledge, recklessness or negligence. Under section 5.6, if the provision does not expressly specify any fault elements, certain fault elements automatically attach to certain physical elements. If the provision does not specify a fault element for a physical element that consists of conduct, intention is the fault element. If the provision does not specify a fault element for a physical element that consists of a circumstance or result, knowledge or recklessness is the fault element (ie proof of either will suffice). Under these principles, the fault element does not need to be specifically spelt out.

For further information on these principles, please refer to the publication 'A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers', February 2004, Chapter 4 (http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_FramingCommonwealthoffences,civilpenaltiesandenforcementpowers-February2004).

Each of the preparatory offences in proposed section 272.17 consists of two physical elements, of conduct and of circumstance. For example, reading in the general principles that apply under Chapter 2 of the Code, subsection 272.17(1) has the following elements.

A person commits an offence if

- the person does any act [*this is the conduct element – the person intends this act*]
- in preparation for, or planning conduct of a kind that would constitute an offence against section 272.7, 272.8, or 272.15 [*this is the circumstance element – the person knows or is reckless as to these circumstances*].

Thus, each of these elements does require proof of fault, in line with the standard fault elements applied by Chapter 2 of the Criminal Code.

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- 4. What is the rationale for proposed paragraph 272.17(3)(b) which provides that an offence is committed under subsections (1) or (2) even if the act 'is not done in preparation for, or planning, specific conduct of a kind that would constitute the offence' under those subsections? Does this provision potentially criminalise acts such as arranging overseas travel without the need to prove any specific intention to commit a criminal offence?**

Under proposed paragraph 272.17(3)(b), it will not be necessary to prove that the individual in question is preparing or planning for specific conduct. For example it will not be necessary to prove that they are planning to engage in sexual intercourse with a particular child at a particular time in a particular place. It will, for example, be enough that the evidence shows that the individual was planning to engage in general conduct such as travelling to Thailand to engage in sexual intercourse with any child at any time.

The provision does not criminalise acts such as arranging overseas travel without the need to prove any specific intention to commit a criminal offence. As stated in the response to question three, 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 constituting preparation or planning to commit a specified child sex tourism offence. Merely travelling will not itself constitute an offence.

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5. How will the provisions regarding fault elements in Part 2.2 of the Criminal Code interact with proposed section 272.17?

Please see the response to question three.

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6. Would a person be guilty of an offence under proposed section 272.17 even if he subsequently resiled from the intention to commit a child sex offence overseas (for example, where he cancelled his airline ticket booking)?

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. 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 (see the answers to questions three and four for a more detailed discussion of these elements).

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.

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7. Given that attempts to commit the existing child sex tourism offences will be criminal acts under section 11.1 of the Criminal Code, why is it necessary to enact proposed section 272.17?

The conduct which would be covered by proposed section 272.17 is distinct from conduct which would be captured under the attempt offence. Conduct captured under section 11.1 of the Criminal Code would involve attempts to commit the actual substantive offence. For example, an attempt to commit an offence against proposed section 272.7 (sexual intercourse with person under 16) may involve the person travelling to Thailand, organising to meet a particular child and meeting up with the child, but the child escaping before any conduct constituting an offence occurred. Proposed section 272.17 is designed to capture conduct at the organising and planning stage, prior to the point where the person has attempted to commit the substantive offence. The proposed provision is based on the rationale that engaging in preparation or planning to carry out a child sex offence overseas merits criminal sanction.

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8. Why is it appropriate for penalties of the same length to apply to the preparatory offences under proposed section 272.17 as are provided for the offences under proposed sections 272.7-272.10 and 272.15?

The same maximum prison term has been provided for the section 272.17 offence as for the sections 272.7-10 and 272.15 offences by reference to the following considerations.

- This is in line with other extension of criminal responsibility offences such as attempt (see subsection 11.1(1) of the Criminal Code), incitement (see subsection 11.4(1)) and conspiracy (see subsection 11.5(1)), which all involve the individual being subject to the same maximum penalty as the substantive offence. For example, in relation to attempt, subsection 11.1(1) states that 'a person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed'.
- This approach is consistent with other like offences under the existing child sex tourism regime, of benefiting from or encouraging an offence against a child sex tourism offence provision. For example, under the existing encouraging offence (proposed section 272.16 of the Bill), a person commits an offence if they engage in conduct with the intention of encouraging the commission of a child sex tourism offence, and are subject to the same penalty as for the substantive offence which they are encouraging.
- The Bill is based on the premise that any kind of involvement in child sex tourism merits the prospect of a significant prison term.