

Australia's Child Sex Tourism Offences

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Abstract

In April 2010, the Australian Government added and amended child sex tourism offences in the *Criminal Code* (Cth). These offences employ extraterritorial jurisdiction to criminalise a range of sexual activities with children by Australians, where that activity occurs outside Australia. These offences broaden the scope of activity that is criminalised, as well as making definitional changes that affect the onus of proof. This article explores how effective these offences are likely to be in combating child sex tourism committed by Australians. It also discusses the impact on individual liberties and the potential for injustice that the offences involve.

Introduction

On 15 April 2010, a new Division 272 was inserted into the *Criminal Code* (Cth) by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth), adding to and amending Australia's 'child sex tourism offences'. These offences employ extraterritorial jurisdiction to criminalise a range of sexual activities with children by Australians, where those activities occur outside Australia. The new offences broaden the scope of activities that are criminalised, as well as making definitional changes that affect the onus of proof.

Through an examination of the new child sex tourism offence regime, this article determines how effective the offences have been — and are likely to be — in combating child sex tourism offences committed by Australians. The article also explores the impact of these offences on individual liberties and the potential for injustice that prosecution for the offences involves. The ultimate question here is whether Australia's child sex tourism offences strike the right balance between effectiveness and fairness.

Throughout this analysis, it is vital to remain cognisant of the rhetorically, politically and especially emotionally charged context to which the legislature has responded and in which

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much analysis has been conducted.¹ As the Australian Privacy Foundation (2010:2) notes: ‘Because of the strong consensus about the exceptional nature of ‘child sex’ offences, the normal relatively robust and detached assessment of benefits, risks and alternatives to policy options may naturally be in danger of being suspended’.

The topic of child sexual abuse offences is broad. First, a distinction has to be made between Australian domestic child sex offences (as enacted by the states and territories) and the extraterritorial offences that are the subject of this article. Although some offences do not substantively differ in their domestic and extraterritorial forms, the two cannot be analysed alike, as the context in which extraterritorial offences are committed must be considered. Varying cultural perceptions and behaviours create a substantial opportunity for misunderstandings and misapprehensions that do not exist — or do not exist in the same way — for domestic offences. Second, there is undoubtedly some interrelationship between the production (and viewing) of child exploitation material and child sexual offences. The degree of this interrelationship is indeterminate, and has not been examined here.

Although the particular subject of child sex tourism has received significant media attention, it has, unfortunately, been largely neglected in the academic literature (unlike the broader issue of child sexual abuse). It is telling that no submission was made from any academic source either to the consultation process run by the Commonwealth Attorney-General’s Department or to the Senate inquiry into the most recent amendments.

This article first outlines the history of these offences, the impetus for their development, and their rationale in the Australian context. The elements of and defences to individual offences are then explained to highlight the scope of application, as well as various problems of interpretation and clarity. This is followed by an assessment of outcomes and a discussion of successes and advantages, as well as disadvantages and concerns over Australia’s child sex tourism offences. The article concludes that although extraterritorial offences are a vital part of efforts to combat child sex tourism, the current design of Australia’s offences fails to protect sufficiently the rights of individuals and achieve the goal of preventing sexual abuse of children abroad.

Development and rationale

Background

Australia’s initial enactment of extraterritorial child sex offences in the 1990s was a response to growing international concern about the sexual abuse of children (particularly the commercial sexual abuse of children), along with Australia’s growing reputation for playing a substantial role in the problem, particularly in Asia (Brungs 2002:103; Macintosh 2000:615).

International concern over child sex abuse led, inter alia, to the adoption of the *Convention on the Rights of the Child* in 1989, which Australia ratified on 17 December 1990. Article 34 of the Convention calls on States Parties ‘to protect the child from all forms of sexual exploitation and sexual abuse’. Australia also acceded to the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* of 2000, which mandates extraterritorial criminalisation of the commercial sexual exploitation of children (arts 3–4).

¹ Cf Seabrook (2000:xiv): ‘witch-hunt in the pursuit of those who commit offences against children’.

In early 1993, Professor Vitit Muntabhorn, the then United Nations Commission on Human Rights Special Rapporteur of the Program for the Prevention of the Sale of Children, Child Prostitution and Child Pornography, advised that Australia should implement extraterritorial legislation, in line with other countries that were considering such laws (Muntabhorn 1993:[106]). This legislation, he argued, was necessitated by the booming tourism industry in Asia, which was cheap and, therefore, highly accessible for Australians (Muntabhorn 1993:[63]–[64]).

Sex tourism had become an area of domestic public concern, in great part due to the efforts of non-government organisations (NGOs) such as End Child Prostitution in Asian Tourism (ECPAT) (Muntabhorn 1993:[65]). To that end, the Special Rapporteur also recommended cooperation with the mass media in ‘mobilising the community against the perpetrators’ (Muntabhorn 1993:[95]).

In 2008, ECPAT reported that 44 countries had extraterritorial child sex legislation (Ferran, Berardi and Sakulpitakphon 2008:94). In the same year, the Supreme Court of British Columbia, Canada held in *R v Klassen* that the ‘legislation itself forms a part of customary international law under the universal principle in much the same way as the *Crimes Against Humanity and War Crimes Act* does’ (Cullen J at [93]).

History of the offences

In 1994, Australia became the third country in the world to enact extraterritorial child sex tourism offences, which were then placed into Part IIIA of the *Crimes Act 1914* (Cth) by the *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth). These offences criminalised sexual intercourse and various acts of indecency with a child under the age of 16 years outside Australia, as well as the benefiting from or encouraging such an offence. The federal distribution of legislative power in Australia makes the general criminal law a matter of state jurisdiction and, thus, necessitated that the new regime of offences applied exclusively extraterritorially. The alternative approach that has been adopted by many countries is merely to extend certain pre-existing domestic child sex offences into extraterritorial jurisdiction.

The legislation was amended in 2001 to conform with the new *Criminal Code* (Cth) as amended by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* (Cth) sch 10. Later that year, following criticism of the fact that the child sex tourism offences provided no protection to child witnesses (see, eg, David 2000; ECPAT Australia 1999a), a new Part IAD ‘Protection of children in proceedings for sexual offences’ was inserted into the *Crimes Act 1914* (Cth) by the *Measures to Combat Serious and Organised Crime Act 2001* (Cth) sch 3.

In 2006, the constitutionality of the offences was challenged in the High Court of Australia. In *XYZ v Commonwealth* it was submitted that the offences could not be characterised as falling within any Commonwealth power. The High Court held, however, that the offences were supported by the external affairs power in s 51(xxix) of the *Australian Constitution*.

In 2007, the Australian Government introduced the Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007 (Cth) (‘the 2007 Bill’) to amend relevant laws by introducing a range of new offences and moving all the offences into the *Criminal Code* (Cth). The Senate Standing Committee on Legal and Constitutional

Affairs (2007a) held a public inquiry and produced an advisory report supporting the 2007 Bill with some amendments. However, the 2007 Bill lapsed when a federal election was called later that year.

In 2009, the Commonwealth Attorney-General's Department circulated a discussion article on proposed reforms and called for comment. A bill, substantially similar to the 2007 Bill, was introduced in 2010: the Crimes Legislation Amendment (Sexual Offences against Children) Bill 2010 (Cth). The Senate Standing Committee again held public consultations and prepared a favourable report (Senate Legal and Constitutional Affairs Legislation Committee 2010a). The *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) was passed in early 2010, receiving Royal Assent on 14 April 2010.

Rationale

The original offences were designed for the purposes of deterrence and supplementary enforcement. In his second reading speech for the 1994 Bill, the Minister for Justice stated that '[t]he principal aim of this legislation is to provide a real and enforceable deterrent to the sexual abuse of children outside Australia by Australian citizens and residents' (Kerr 1994:72).

The laws are secondary and are not intended to operate unless there is an inability or unwillingness to prosecute by authorities in the country in which the offence occurred. Seen this way, the laws also supplement the enforcement of child sex tourism offences abroad (Allen 1998:38).

Over the years, the offences introduced in 1994 became 'outdated' (McMenamin 2009:1) and concerns had been expressed that 'the Commonwealth's response to abuse overseas [had] stagnated' (O'Connor 2010:409). As a response, the new offences introduced in 2010 sought to further 'strengthen the child sex tourism offence regime' (Explanatory Memorandum 2010:2),² by broadening the scope of activity criminalised and increasing penalties. Although the original rationale of deterrence and supplementary enforcement remains unchanged, the new offences attempt to take a more pre-emptive, protective approach that allows for the prosecution of offences well before any risk of harm to a child arises (see, eg, Explanatory Memorandum 2010:39).

Elements and defences

Overview and general matters

Division 272 of the *Criminal Code* (Cth) criminalises sexual intercourse and sexual activity with any child (under 16 years), or with a young person (aged 16 to 18 years) towards whom the accused is in a position of trust or authority. These offences are committed where an accused actively participates in the activity, or causes the child to participate in the activity with another (where 'causes' is defined as meaning 'substantially contributes to': *Criminal Code* (Cth) s 272.2). Aggravated offences apply in situations where a child has a mental impairment or is under the care, supervision or authority of the accused. Persistent sexual abuse (sexual intercourse or activity on three or more occasions) of a child is a separate offence. Division 272 also criminalises procuring or 'grooming' a child to engage in sexual

² See Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Crimes Legislation Amendment (Sexual Offences against Children) Bill 2010 [Provisions] (2010) [1.3].

activity (including intercourse). It is also an offence to benefit from, encourage or prepare for an offence against the Division (with some exceptions). Two specific defences are available: mistaken belief as to the age of the child or young person; or a valid and genuine marriage with the child or young person (see the section on 'Defences' below). In all offences, the accused must be either an Australian citizen or Australian resident at the time of the offence.³

The offences of sexual intercourse with a child, benefiting from an offence and encouraging an offence are substantially the same as offences in former Part IIIA of the *Crimes Act 1914* (Cth). All other offences are new or modified.

Unlike some Australian states and territories, in respect of the available offences or maximum penalties there is no distinction made between very young children (for example, those under 12 years) and older children. However, the age of the child may be taken into account in sentencing (*Criminal Code* (Cth) s 272.30(1)).

'Sexual intercourse' is defined to include 'the penetration, to any extent, of the vagina or anus of a person by any part of the body of another person' or 'by an object' or fellatio or cunnilingus, unless the penetration is 'carried out for a proper medical or hygienic purpose' or 'a proper law enforcement purpose' (*Criminal Code* (Cth) s 272.4).

'Sexual activity' is very broadly defined, and includes sexual intercourse or 'any other activity of a sexual or indecent nature (including an indecent assault) that involves the human body, or bodily actions or functions (whether or not that activity involves physical contact between two people)' (*Criminal Code* (Cth) dictionary, 'sexual activity'). The expression 'sexual or indecent' implies that the activity need not be indecent to be sexual. Although sexual activity includes sexual intercourse by definition, in many offences sexual intercourse is treated separately from all other forms of sexual activity.

To 'engage in sexual activity' it is sufficient merely to be present while another person (including a child) engages in sexual activity. 'Presence' includes presence 'by a means of communication that allows the person to see or hear the other person' (*Criminal Code* (Cth) dictionary, 'engage in sexual activity'). It is not clear whether the child must actually see or hear the sexual activity or if the child need only be able to see or hear. The latter meaning is to be preferred, as it means that the child will still be present if, for example, they deliberately 'shut their eyes'. On the other hand, it is questionable whether a person should be considered to be aurally present if, for example, they are asleep at the time.

It is also not clear to what degree the presence need be contemporaneous with the sexual activity. If contemporaneity were unnecessary, 'sexual activity' could possibly extend to the viewing at a later date of child pornography recorded outside Australia. It would be desirable to clarify the definition of 'presence' on this point.

Specific offences

Sexual intercourse with child outside Australia: s 272.8

The offence in the *Criminal Code* (Cth) s 272.8 criminalises sexual intercourse with a child. It is committed where the accused either personally engages in sexual intercourse with the

³ The extension to permanent residents and not merely citizens raises issues of the personality principle in international law: see Macintosh (2000:616).

child (s 272.8(1)), or engages in conduct that causes the child to engage in sexual intercourse in the accused's presence, and the sexual intercourse occurs outside Australia (s 272.8(2)). The fault element for the sexual intercourse is intention (s 5.6(1)).

Sexual activity (other than sexual intercourse) with child outside Australia: s 272.9

Section 272.9 criminalises all forms of sexual activity (other than sexual intercourse) with a child. It may similarly be committed by the accused either personally engaging in the sexual activity or causing the child to engage in sexual activity with another. However, where the engagement of the child in sexual activity consists only of the child's presence, it is a defence if the accused can prove that he or she did not intend to derive gratification from the presence of the child (s 272.9(5)).

Aggravated offence — child with mental impairment or under care, supervision or authority of accused: s 272.10

An aggravated offence is provided where for either of the two preceding offences (ss 272.8, 272.9):

- (a) a child with a mental impairment was involved;⁴
- (b) the accused 'is in a position of trust or authority' towards the child; or
- (c) the child 'is otherwise under the care, supervision or authority' of the accused. (*Criminal Code* (Cth) s 272.10(1)(b))

A 'position of trust or authority' is one of a limited and exhaustive list of defined relationships (*Criminal Code* (Cth) s 272.3). 'Care, supervision or authority' is not defined, and thereby broadens the scope of the aggravated offence to situations in which the abuse might warrant higher punishment due to the nature of the relationship between the accused and the victim.

The application of absolute liability to the circumstance of the child having a mental impairment means that the general defence of mistake of fact cannot be raised (*Criminal Code* (Cth) s 272.10(4)). A specific defence is provided if the accused can prove that 'at the time he or she committed the underlying offence, he or she believed that the child did not have a mental impairment' (*Criminal Code* (Cth) s 272.10(6)). The belief need not be reasonable, but its reasonableness may be taken into account in determining whether the belief was held (*Criminal Code* (Cth) s 272.10(7)).

If the accused is in a position of trust or authority, or the child is otherwise under the care, supervision or authority of the accused, strict liability applies to this element (*Criminal Code* (Cth) s 272.10(5)) and, thus, the defence of mistake of fact remains available (*Criminal Code* (Cth) s 9.2).

Persistent sexual abuse of child outside Australia: s 272.11

Section 272.11 *Criminal Code* (Cth) targets offenders who seek to maintain a sexual relationship with a child. It consists of an offence of sexual activity or intercourse on three or more separate occasions. The conduct need not be the same on each occasion. While it is not necessary to prove the exact dates, order or circumstances of the individual occasions

⁴ The Australian Institute of Criminology (AIC) also recommended that an aggravation for physical disability be considered: AIC (2010:13).

(*Criminal Code* (Cth) s 272.11(5)), the charge 'must specify with reasonable particularity the period' during which the separate occasions occurred, as well as describing the nature of the separate offences alleged (*Criminal Code* (Cth) s 272.11(6)). If more than three occasions are alleged, the jury must unanimously agree about the same three occasions (*Criminal Code* (Cth) s 272.11(7)). For example, in the case of *Assheton v R* the accused shared a hotel room with two boys (aged 11 and 9 years) for six or seven nights. If it had been shown that he had engaged in sexual activity with them on three or more of the nights, the persistent sexual abuse offence would have been made out and the penalty, therefore, increased.

Sexual intercourse with young person outside Australia — accused in position of trust or authority: s 272.12

Section 272.12 seeks to protect young people between 16 and 18 years of age who are particularly vulnerable to sexual abuse by a person who is in a position of trust or authority towards them. Where the position of trust or authority relationship exists, this offence is identical in operation to the equivalent sexual intercourse offence against a child. A 'position of trust or authority' is defined by an exhaustive list of relationships of which at least one must exist (*Criminal Code* (Cth) s 272.3). It is important to note that, unlike the aggravated offence (s 272.10), there is no widening of scope for other positions of care, supervision or authority.

Sexual activity (other than sexual intercourse) with young person outside Australia — accused in position of trust or authority: s 272.13

Where a relationship of trust or authority exists, all sexual activity with a young person is criminalised. This offence under s 272.13 operates identically to the equivalent offence against a child. The specific defence of 'no intention to derive gratification' applies similarly.

Procuring child to engage in sexual activity outside Australia: s 272.14

The purpose of s 272.14 is to criminalise behaviour that occurs prior to a child or young person being abused. The offence consists of conduct with the intention of procuring a child to engage in sexual activity (including intercourse), whether or not with the accused personally. This means that the offence applies to the actions of Australians who act as agents to seek out children for adult customers, as well as offenders who seek out victims personally. The accused's intention must be for the child to engage in sexual activity outside Australia. It does not matter where the accused's conduct occurs, or where the child is at the time (*Criminal Code* (Cth) s 272.14(1)(d)). Procuring is given a broad definition, including encouraging, enticing, recruiting or inducing (whether by threats, promises or otherwise) the child to engage in sexual activity (*Criminal Code* (Cth) dictionary, 'procure').

The Explanatory Memorandum (2010:31) provides this example: 'A person befriends a child using an internet chat room. The person advises the child that s/he will be visiting the foreign country in which the child resides and arranges to meet the child when s/he arrives in that country, in order to engage in sexual activity with them'.

The definition of the child also extends to a fictitious person whom the accused believes to be a child (*Criminal Code* (Cth) s 272.14(4)). This enables the offence to be committed where a police officer poses as a child (Explanatory Memorandum 2010:34).

‘Grooming’ child to engage in sexual activity outside Australia: s 272.15

Section 272.15 is targeted at so-called ‘grooming’, a term used to describe conduct that occurs as a preliminary step to procurement, thus permitting law enforcement to intervene early, before any procurement occurs. The offence consists of any conduct in relation to a child with the intention of making it easier to procure the child to engage in sexual activity (whether or not with the accused) outside Australia. The offence may also be committed in situations in which a police officer poses as a fictitious child.

The grooming offence does not require any physical contact with the child, and the child need not even be aware that physical contact is contemplated by the accused. The Explanatory Memorandum provides an example where the accused ‘indicates via email and phone conversations with the child that s/he has romantic feelings for the child [and the accused] does so with the intention of procuring the child to engage in sexual activity outside Australia at some future date’ (Explanatory Memorandum 2010:35).

Benefiting from offence against Division 272: s 272.18

Section 272.13 criminalises the activities of third parties who do not, or do not intend to, engage in any sexual activity. In particular, it is designed ‘to specifically target the organisers and promoters of child sex tourism’ (Explanatory Memorandum 2010:37). For example, an Australian accused may be charged with this offence where he or she is paid to organise ‘another person’s travel to a foreign country to engage in sexual activity with a child’ (Explanatory Memorandum 2010:37).

The offence consists of conduct with the intention of benefiting (financially or otherwise) from any offence against the Division, where the conduct is reasonably capable of resulting in any benefit for the accused. The ‘intention of benefitting from an offence’ should be read as a compound phrase, and hence the accused must be aware of another person’s intention to commit a sex tourism offence, and must intend to benefit in some way from the commission of that offence. It does not matter where the conduct is engaged in, or whether the offence intended to be benefitting from is actually committed (*Criminal Code* (Cth) s 272.18(2)).

Encouraging offence against Division 272: s 272.19

Like the ‘benefiting offence’, the ‘encouraging offence’ in s 272.19 *Criminal Code* (Cth) also targets the activities of child sex tour agents, operators and guides, and many benefiting offences will also be encouraging offences. This offence is broader and also applies to assistance provided by those who do not serve to benefit in any way. In particular, s 272.19 can be used to charge people who provide gratuitous advice to others regarding child sex tourism, for example advice that is provided on an internet chat room or discussion board.

The offence consists of conduct done with the intention of encouraging any offence against the Division (except the encouraging offence itself (s 272.19) and the preparing offence (s 272.20)), where the conduct is reasonably capable of encouraging such an offence (*Criminal Code* (Cth) s 272.19(3)). The encouraged offence need not be committed. ‘Encourage’ is defined broadly to include ‘encourage, incite to, or urge, by any means whatever, (including by a written, electronic or other form of communication); or aid, facilitate, or contribute to, in any way whatever’ (*Criminal Code* (Cth) s 272.19(4)).

The encouraging offence is applicable only where a third party encourages an adult to commit an offence; where an adult encourages a child to be involved in an offence, this is more suitably covered by the procuring offence.

Preparing for or planning offence against Division 272: s 272.20

The offence in s 272.20, which targets conduct in preparation for the commission of a sex tourism offence, is specifically designed to involve broader inchoate liability than attempt, which requires more than merely preparatory conduct (*Criminal Code* (Cth) s 11.1(2)). The rationale of the offence is to enable a protective and pre-emptive approach to enforcement:

Offences involved in child sex tourism are of a particularly serious nature and result in devastating consequences for the child victims involved. [...] A focus on prevention, rather than just addressing the conduct after the fact, will go further towards protecting children from such behaviour. (Explanatory Memorandum 2010:11)

The offence is designed to apply to conduct that occurs in Australia, in order that an arrest can be made before the accused leaves Australia. In this way, no risk of harm to any child arises. There is also a substantial benefit in lessening the need to collect evidence outside Australia.

The offence consists of any preliminary act or acts carried out with the intention of preparing for or planning an offence either involving sexual activity (including intercourse) with a child or young person (ss 272.8–272.13), or of benefiting from an offence against the Division (s 272.18). It does not matter where the act occurs, nor whether the prepared for offence is committed (*Criminal Code* (Cth) s 272.20(3)). The act also need not be done in preparation for, or planning of, any specific offence (*Criminal Code* (Cth) s 272.20(3)). The offence can apply before the accused has decided with whom or in what sort of activity he or she intends to engage, and for preparations ‘that are still in formative stages’ (Explanatory Memorandum 2010:41).

It is helpful to examine the example provided in the Explanatory Memorandum (2010:39):

Person A is in Australia and uses the Internet to research and collect information about the child sex tourism industry in a particular destination overseas. Person A contacts child sex tour operators and asks if they can organise the supply of a child under 16 for the purpose of engaging in sexual intercourse in that destination. Person A books flights and accommodation in that destination.

It is not clear in this example whether it is the totality of the acts that is sufficient to be considered preparatory conduct, or whether a charge might be founded by any one act. In either case, it is clear that the charge can be sustained despite the accused having not yet irretrievably set himself or herself down the path to a child sex tourism offence.

Defences

In each offence where the age of the child is an element, there are two complete defences available. First, it is a defence to prove (on the balance of probabilities) that the accused believed that the child or young person was older than 16 or 18 years respectively (*Criminal Code* (Cth) s 272.16). The belief need not be reasonable, but the reasonableness of the belief in the circumstances may be taken into account in determining whether the accused subjectively held the belief (*Criminal Code* (Cth) s 272.16(4)).

Second, a defence exists where the accused can prove that there was between the accused and the child a valid and genuine marriage (*Criminal Code (Cth)* s 272.17). A marriage is valid if it is valid in the place where it was solemnised or where the offence was committed or where the accused resides (*Criminal Code (Cth)* ss 272.17(1)(a), (2)(a)). The defence of marriage does not provide a defence to a third party who is involved in or present during sexual activity between a child and that child's husband or wife.

Outcomes and assessments

Effectiveness

Prosecutions

According to available case reports, between 1994 and 2011, more than 30 people have been charged with child sex tourism offences in Australia. Of the charges laid, approximately 70% have led to a successful prosecution.

This number of people charged in Australia for child sex tourism offences is relatively high in international comparison.⁵ On that basis, it may be said that the offences are being put to effective use. On the other hand, there have only been, on average, less than two people charged each year. Although there is little reliable evidence as to the precise scale of the problem of child sex tourism by Australians, there can be no doubt that the number of prosecutions only represents a very small fraction of criminal activities.

Of the cases identified by the authors, approximately 90% of people were charged for an offence where they were personally involved in sexual activity (a direct offence), and only 10% for indirect involvement (such as encouraging or benefiting). Similarly, almost 91% of the successful prosecutions have been for direct offences. This preference for prosecuting direct offences is illustrated by the charges laid following a police intervention referred to as 'Operation Hercules', which uncovered a ring of four men organising child sex tours in Thailand. Three of the four men were Australians, one of whom was charged by Thai authorities. The other two were charged with sexual conduct offences and pornography offences, rather than with encouraging or benefiting offences.⁶

Deterrence

Deterrence was one of the main reasons for the introduction of specific child sex tourism offences. The offences are designed to demonstrate that child sex offenders cannot evade prosecution by moving their activities abroad. In the case of *Lee v R*, Justice Kennedy stressed that 'the purpose of the provision of the Commonwealth legislation under which the applicant was charged', which was 'to provide a real and enforceable deterrent to the sexual abuse of children outside Australia by Australian citizens and residents' (at [2]). Similarly, in *Kaye v R*, Justice McLure held that 'the penalty should reflect the need for general deterrence, reinforced by the practical difficulties of detection because the acts of child molestation occur overseas' (at [66]).

⁵ See Seabrook (2000:94–5) comparing Australia and the United Kingdom. The United States has dramatically increased its prosecution rates since the introduction of the *Protect Act 2003* (USA).

⁶ In *R v David Anthony Hudson*, Hudson was charged with two counts of an act of indecency, and one offence relating to child exploitation material. He was sentenced to 5 years and 7 months' imprisonment. The name of the other Australian man charged was withheld. He was similarly charged with sexual offences and child exploitation material offences, and was sentenced to 8 years' imprisonment.

The deterrent effect is likely to be proportional to both the level of enforcement and community awareness of the offences (see McMenamin 2009:2). The latter aspect is one that has been advanced by a series of education campaigns about the laws including a partnership between the Australian Federal Police (AFP) and Qantas Airways to advertise in their in-flight magazine (AFP 2006:36), as well as numerous information cards and booklets presented to travellers at customs control point, and provided with the issue of a new passport (Department of Foreign Affairs and Trade (Cth) 2010:22).

Supplementary enforcement

The second objective, that of supplementary enforcement, is reflected in the approach taken to the offences by the AFP (2007:26): 'This legislation supplements foreign law enforcement efforts by allowing prosecution of offenders, who have escaped the jurisdiction of foreign law enforcement investigation, including where local law enforcement does not cover these crimes'.

The necessity of extraterritorial legislation in performing this supplementary function was also emphasised by Justice Cullen of the Supreme Court of British Columbia (in relation to equivalent offences in Canada), when he noted in *R v Klassen* that '[t]he reduced opportunity that states with territorial jurisdiction have to identify, investigate or apprehend those who are only transient within their borders inhibits the likelihood of successful investigation or prosecution' (at [95]).

The new offences, by broadening the scope of activity criminalised, are likely to advance the objective of supplementary enforcement, since action can now be taken against a broader scope of activity in Australia. Moreover, some of the new offences enable Australian law enforcement agencies to intervene before any crime has been committed outside the Australian jurisdiction. Thus, those new offences will not be merely supplementary, but in fact the primary means of prosecuting relevant conduct.

International obligations

The Division 272 offences also discharge Australia's international obligations. The consultation paper circulated by the Commonwealth Attorney-General's Department prior to the introduction of the new offences notes the 'extensive consideration of sexual offences internationally over the past decade' (Attorney-General's Department (Cth) 2009:[46]). It further notes that 'Australia's laws are frequently referred to internationally' (Attorney-General's Department (Cth) 2009:[48]). Finally, it observes '[t]hat Australia's laws have been used to guide reform internationally, indicates that Australian practice is at a minimum on par with, and in some cases goes beyond, international practice' (Attorney-General's Department (Cth) 2009:[48]). This notion of international practice appears to be one that has been a substantial driving force for reform.

In the second reading speech for the new offences, the Minister announced that '[t]hese reforms will ensure that Australia's laws remain progressive and represent best practice both domestically and internationally' (O'Connor 2010:412). To that end, the Explanatory Memorandum (2010:1) also states that '[t]his Bill will ensure comprehensive coverage of sexual offences against children, including reflecting best practice approaches domestically and internationally'. This view is shared by Child Wise, the Australian arm of ECPAT. In a response to the consultation article prior to the introduction of the Bill, they praised the

reforms for ensuring that 'Australia will again be the leaders in international best practice in relation to the legislation and policing of child sex tourism' (McMenamin 2009:1).

Critics may argue that is not sufficient to merely be seen to be taking action. The extent to which Australia's approach represents international best practice should not be determined by the scope of criminal liability created on paper, but rather by the vigour with which those criminal activities are pursued: 'the effectiveness of the legislation is dependent on the resources committed to investigations and prosecutions' (House of Representatives Standing Committee on Legal and Constitutional Affairs 1994:[1.3.3]).

Whatever possibility of enhanced capability that is potentially created by broadening the scope of the offences is rendered impotent by the fact that there was no suggestion at the introduction of the new offences that policing resources would be expanded commensurately with the extended scope of activity able to be pursued. It may, thus, be necessary to review the resources allocated to the investigation and enforcement of Australia's child sex tourism offence regime.

Concerns

Despite the severity of sexual offences against children, it is imperative that the need to respond swiftly and effectively to any allegation of child sexual abuse is balanced against the rights of the accused and the presumption of innocence. On the one hand, the sexual abuse of children must be pursued with the utmost diligence and, hence, the new offences seek to 'meet the needs of law enforcement agencies in combating contemporary offending' (O'Connor 2010:409).⁷ On the other hand, any allegation against a person of sexually abusing a child carries a severe stigma, regardless whether or not these allegations are proven or dismissed. The Law Council of Australia (2010:7) emphasised that 'the heinous character of child sex offending and the intense community opprobrium which it attracts demands that the greatest care is taken to avoid the possibility of wrongly accusing a person'.

The serious consequence for individuals falsely accused of child sex offences are best illustrated in the case of Mr Frederick Martens, who was convicted in 2006, but pardoned in 2009. Prior to his pardon, Mr Martens' brother explained that '[t]he horrendous stigma of this terrible crime of paedophilia will live with my brother for years to come, even if he is given an absolute pardon' (Peter Wheatley quoted in Bennis 2008).

The new offences raise a number of concerns and challenges, particularly in relation to the breadth of activity criminalised, reliability of evidence, and obstacles to fair trial. Each of these will be addressed in turn.

Breadth of the offences

The first concern with the new offences is the breadth with which they are defined. A number of the offences capture conduct that may be entirely innocent and unrelated to child sex tourism. Of particular concern here are the 'sexual activity' and preparatory offences: ss 272.9, 272.20 *Criminal Code* (Cth).

⁷ The new offences have been received enthusiastically by law enforcement agencies around Australia: South Australia Police (2010); Victoria Police (2010); ACT Policing (2010); Daley (2010); Hulls (2009); Wright (2009); Lawrie (2009); Henderson (2009).

The sexual activity offence

The breadth of the sexual activity offence under the *Criminal Code* (Cth) s 272.9 is a concern that was already identified in the development of the new offences (see, eg, Law Council of Australia 2010:7; Civil Liberties Australia 2010:1). The new laws replace the previous 'sexual conduct' offence with a broader 'sexual activity' offence,⁸ in order to bring the child sex tourism offences in line with the other sexual offences in the *Criminal Code* (Cth) (Explanatory Memorandum 2010:19).⁹ However, the explanation that the new offences merely "replicate" domestic offences to apply to overseas contexts' (Explanatory Memorandum 2010:5) does not provide a sound justification. While a broad 'sexual activity' offence might be appropriate in the domestic context, that does not equate to it being appropriate in the extraterritorial context.

The first problem with the sexual activity offence arises from the difficulty of determining what is 'sexual' or not. While the perception of conduct as 'sexual' may be based on common standards in Australia, this cannot be said of the range of countries in which an extraterritorial offence might be committed. Witnesses and alleged victims will often be influenced by different cultural beliefs and norms that will colour their perception and recollection of the conduct. For example, whereas it may be considered normal in Australia for a young child to be assisted with wiping their bottom after going to the toilet, in cultures in which children are expected to be more independent at a younger age, if a local person witnesses an Australian adult assisting a child with their toileting, certain crucial factors such as the duration, method and precise nature of the contact are at risk of being exaggerated in the witness' recollection. This may result either from the witness' surprise at seeing what they have seen, or perhaps their belief that it is unnecessary and quite inappropriate for what they have seen to be happening. Although the question of whether the conduct was 'sexual' is ultimately one for the Australian court, the determination will have to be based on the perceptions of people whose cultural norms may be quite different from Australians'. There is, therefore, a risk that conduct occurring overseas may be classified as 'sexual', which, if it had occurred in Australia, would seem innocent — or vice versa.

The second concern with this offence is the breadth that results from the term 'engage in sexual activity' being defined to include the mere presence of the child. The *Criminal Code* (Cth) dictionary provides that:

Without limiting when a person engages in sexual activity, a person is taken to engage in sexual activity if the person is in the presence of another person (including by a means of communication that allows the person to see or hear the other person) while the other person engages in sexual activity.

As the Law Council of Australia (2010:12) notes, this offence has 'potential to cover a wide range of innocent conduct'. Indeed, any person who engages in sexual activity in the presence of a child is liable to prosecution.

It may seem that the offence would be limited in scope by the necessity to prove the attendant fault element. In federal criminal law, the fault element for engaging in sexual activity is intention (*Criminal Code* (Cth) s 5.6(1); see Explanatory Memorandum 2010:17). However, 'presence of a child' adds a circumstance element for which the fault element is

⁸ See above 'Overview and general matters' for the definition provided in the Code.

⁹ The 'sexual conduct' offence was limited to acts of indecency: *Crimes Act 1914* (Cth) ss 50BC, 50BD (repealed).

recklessness (*Criminal Code* (Cth) s 5.6(2)). These fault elements broaden the scope of the offence considerably. Recklessness with regard to a circumstance will exist where the accused is 'aware of a substantial risk that the circumstance exists or will exist' and 'it is unjustifiable to take the risk' (*Criminal Code* (Cth) s 5.4(1)). Hence, the offence of sexual activity could be committed where the accused engaged in consensual sexual activity while being aware that there was a substantial and unjustifiable risk that a child might catch sight.

The Explanatory Memorandum (2010:20) confirms that liability will arise in a situation in which 'an adult engages in sexual touching with another consenting adult and a child walks in on those adults while they are engaging in that activity'. Unless the adults can establish the defence of 'no intention to derive gratification' in this situation (*Criminal Code* (Cth) ss 272.9(5), 272.13(6)), they would be liable for the offence under s 272.9 (for a child under 16 years) or s 272.13 (for a young person).

A third concern relates to the difficulty of establishing the defence of 'no intention to derive gratification from the presence of the child', for which the accused carries the legal burden of proof. For example, if parents kiss in the presence of their child overseas, it would then be for the parents to show that they did not intend to derive gratification from the presence of their child.¹⁰ The Explanatory Memorandum (2010:20) explains the decision to apply a legal burden to this defence:

A legal burden is appropriate as whether or not the accused derived gratification from something is a matter peculiarly within the accused's knowledge and not readily available to the prosecution. The accused is better placed to adduce evidence that he or she did not intend to derive gratification from the presence of the child during the activity concerned.

The Law Council of Australia (2010:13) argues, however, that this 'is erroneously conflating the imposition of a burden on the accused to establish an exculpatory state of belief (which will often be appropriate) with the imposition of a burden on the accused to establish the absence of the requisite state of intention'.

The preparation offence

The new preparation offence in s 272.20 substantially extends inchoate liability and, unlike liability for attempt, is specifically 'directed at behaviour at the planning, or formulative, stage' (Explanatory Memorandum 2010:40). The purpose of the offence — to enable law enforcement to take a pre-emptive role and prevent potential offenders from committing an offence that actually harms a child — is worthy, but this cannot justify the deviation from established principles of inchoate liability.

The offence is completed when 'an act' has been performed with the intention of committing an offence involving sexual activity with a child or young person, or of benefiting from such an offence. Unlike the encouraging and benefiting offences (*Criminal Code* (Cth) ss 272.18, 272.19), the act in the preparatory offence need not be reasonably capable of actually advancing the accused's preparations. The preparatory offence may consist, for example, of research into sex tourism locations followed by the purchase of a plane ticket to such a location together with the requisite intention. It is then irrelevant whether the accused changes his or her mind, or whether the accused is in a position to commit further preparations for the offence. Donovan, representing the Law Council of

¹⁰ The Law Council of Australia (2010:13) in their submission appears to have taken gratification to mean sexual gratification, although there is nothing in the Act to suggest this interpretation.

Australia, (2010:7) sees this as 'essentially approaching a thought crime' (see also Senate Standing Committee on Legal and Constitutional Affairs 2007b: [1.16]). The Law Council (2010:7) further argues that '[t]he proposed offence represents a worrying trend in legislative reform where the gravity of the subject matter of the Bill is used to justify the introduction of vaguely defined offences which target a wide range of behaviour which is not in itself harmful or criminal'.

A justification for this offence provided by the Explanatory Memorandum (2010:11) is that although preliminary acts undertaken by third parties would be covered by the benefiting or encouraging offences, 'where a person is planning his or her own participation in child sex tourism ... [i]t is not clear that such preparatory activity would be captured by existing offences'. This justification, however, fails to recognise a crucial distinction: the benefiting and encouraging offences target third parties who provide assistance to a potential child sex offender, for whom that assistance may be the full extent of their criminal activity, whereas the preparation offence aims to stop potential offenders before they can begin to carry out their plans. In the former, there is a nexus between intention and conduct, such that the conduct intended by the offender is the conduct undertaken by the offender and the conduct criminalised. Although the encouraged offence or the benefit need not actually eventuate, the encourager or benefiter has completed at least some part of their involvement, that is, they may have committed their last act. It is, therefore, appropriate for criminal liability to arise at this point. The same cannot be said for offenders preparing to commit an offence. The preparer has never committed what would have been their last act, if the necessary intention for the preparatory offence can be proved.

Earlier proposals to introduce a similar offence with 2007 Bill were equally criticised, with the Australian Democrats noting that 'no anecdotal or statistical evidence is offered to justify the creation of the preparatory offences' (Senate Standing Committee on Legal and Constitutional Affairs 2007b:[1.15]).

The extension of inchoate liability under the new child sex offences is unlikely to have a substantial effect on the ability of law enforcement to stop potential offenders. Experiences elsewhere have shown that it is difficult to prove (beyond reasonable doubt) the accused's intention in the preparatory stages of a child sex tourism offence. A 2007 report noted that: 'Experience has taught that proving the accused's intent prior to starting a trip presents a significant challenge to prosecutors' (G8 2007:2).

A further negative aspect of the preparatory offence arises collaterally through the fact that it is an offence to intentionally benefit from the commission of a preparatory offence. This may discourage tourism operators (who, for example, benefit from booking flights for potential offenders) from making any probing enquiries if their suspicions are aroused — the greater their knowledge, the greater the risk that they could be charged with intentionally benefiting. This is highly unfortunate, since tourism operators can be an important source of information for law enforcement.

Seen in context, the preparatory offence under s 272.20 represents an undesirable and unnecessary extension of criminal liability. The procuring and grooming offences in ss 272.14 and 272.15 strike a more reasonable balance between the need, on the one hand, to avoid criminalising a person's actions before they commit to them, and, on the other, the desire to take a pre-emptive and protective approach. These offences do not apply until the accused has made some contact with a child, and, thus, has acted in some way on his or her

thought, yet intervention is still possible before he or she leaves Australia or meets the child in person.

Prosecutorial discretion

Given the breadth of Australia's new child sex tourism offences, prosecutorial discretion is the most important mechanism to prevent over-criminalisation and limit the use of the offences to the immediate problem. Senator Crossin, chairing the Senate Legal and Constitutional Affairs Legislation Committee (2010b:3), approved of this approach by noting: 'So isn't it better [...] to have a bill like this that might be fairly broad and catch-all and leave it up to the people pursuing prosecution of an offence to sift out those that are genuine from those that might not be?'

The Australian Privacy Foundation (Clarke 2010:3), on the other hand, argues that the offences '[put] members of the public in a position of jeopardy whereby they are, prima facie, committing an offence [...] and then becoming dependent upon investigators and prosecutors seeing through the complexity and perceiving it to be really not that bad after all'.

Relying on prosecutorial discretion creates uncertainty in the criminal law. Prosecutorial discretion is necessitated by the new offences not merely where mitigating circumstances exist, but in relation to conduct that the majority of people would neither refrain from doing nor consider criminal. The risk of charges being laid for innocent conduct is high. This risk is magnified by the fact that the relevant evidence will often be shaped and informed by the foreign cultural perceptions of the victim or witnesses.

Prosecutorial discretion must also be informed by the severe consequences that false allegations of child sex abuse entail. In the case of Mr John Holloway, for example, where the charges against the accused were eventually dismissed for lack of evidence,¹¹ Seabrook (2000:84) records that as a result of the immense media attention his case received, he 'was publicly humiliated and his career has been irreparably damaged' (see also Baker 1996; Baker and Skehan 1996).

Evidentiary challenges

There are many challenges faced in the prosecution of the extraterritorial offences. The greatest difficulty arises from the necessity of obtaining and relying on evidence collected overseas. By and large, the child sex tourism offences seek to evade these problems altogether. Evidence for the new offences of procuring, grooming, and preparing may be primarily collected in Australia, thus removing the need for evidence collected abroad.

The case of John Arthur Lee is illustrative of the ability to prosecute without adducing foreign evidence. Mr Lee took photographs of his sexual abuse of seventeen young girls in Cambodia, which he displayed to a workmate upon his return to Australia. Mr Lee was charged with extraterritorial child sex offences. His conviction was based on the photographs alone, with testimony from a paediatric expert as to the age of the children (who could not be identified), from a fingerprint specialist that two fingers that appeared in

¹¹ John Scott Holloway, Australia's former ambassador to Cambodia and the Philippines, was charged under s 50BA of the *Crimes Act 1914* (Cth) with having sexual intercourse with two 14-year-old Khmer boys in Phnom Penh. The charges were laid in April 1996 and were dismissed in the Australian Capital Territory Magistrates' Court in November 1996 after a ruling that the oral testimony provided by the two boys in question, who gave evidence via video link and interpreter, was unreliable. There was, therefore, insufficient evidence to commit the matter to trial. See Murdoch (1996).

the images were those of Mr Lee, and from a forensic pathologist that the skin of the person in the photos was Mr Lee's (*Lee v R*; see also ECPAT Australia 1999b).

One of the key challenges in the collection of evidence outside Australia is the need to cooperate with the local law enforcement agencies. This cooperation is assisted by the creation of mutual assistance treaties and memoranda of understanding, which enable Australian law enforcement agencies to investigate and collect evidence abroad. The AFP also have liaison officers in many of the chief child sex tourism destinations where they work closely with local law enforcement agencies on a range of criminal offences.

There are several important child sex tourism destinations with which Australia does not have a mutual assistance treaty. Cambodia is one such place, and, thus, in the case of Mr Holloway, Australian 'police were prevented from collecting evidence in Cambodia, such as searching property to look for incriminating photographs or videos' (Seabrook 2000:84). Furthermore, the Cambodian police 'took no active part in [the investigation] because of inadequate resources and lack of training' (Seabrook 2000:84).

There are also substantial problems with obtaining testimony of witnesses and, especially, victims. Following the dismissal of the Holloway case on the finding that the child witnesses were unreliable, there was a push to enact more child-friendly testimony procedures. These procedures were inserted into Part IAD of the *Crimes Act 1914* (Cth) by the *Measures to Combat Serious and Organised Crime Act 2001* (Cth) sch 3. The child sex tourism offences now also provide for a specific regime of video link evidence (*Criminal Code* (Cth) ss 272.21–272.26).

These measures do not address all the concerns associated with the testimony given by children, especially if they are in places outside Australia. For example, it has been argued that the fact that the witnesses in the case of Mr Holloway were considered to be unreliable was the result of a number of factors: the failure of the court to take into account the boys' cultural dislocation; their unfamiliarity with an adversarial justice system; suggestions that the boys were being paid to testify; and the suggestion that they were prostitutes. Federal Agent Mr Terry Allen of the AFP similarly believed that 'the Australian legislation [...] has no mechanism for recognising the culture, education, status and level of sophistication of child witnesses from other countries' (Allen 1998:38).

The AFP has also faced criticism in its dealings with prosecution witnesses. In the trial of Mr Julian Moti — the former Attorney-General of Solomon Islands, who was charged under Australia's child sex tourism laws with having sexual intercourse in 1997 with a 13-year-old girl in Vanuatu — the AFP brought witnesses to Australia, and provided for their living expenses while they waited to testify. Mr Moti sought a permanent stay of the indictment against him, alleging that the payments made to the witnesses constituted an abuse of process. In granting his application for a stay, Justice Mullins criticised the actions of the AFP (*R v Moti* (2009)). Although the stay was removed on appeal (*R v Moti* (2010)) and the indictment brought again, the case nevertheless demonstrates a further example of how a perception (at least) may arise in the context of sex tourism offences that the evidence is less reliable than that provided in the prosecution of a domestic offence.

Another crucial problem of evidence attaches to the necessity to prove the age of a victim. This problem particularly arises in cases where the evidence of the sexual activity involves mere photographs of the accused engaging in that activity, such as in the cases of *Lee v R* and that of *Walker v R*. A range of evidence is admissible to determine a child's age,

including their appearance, medical or scientific opinion, and any official medical record (*Criminal Code (Cth)* s 272.27(2)). This responds to the difficulty that a victim might be homeless and have no official records of birth.

In this context, there is also a risk that the admissibility of a child's appearance may lead to a wrongful conviction. It may be very difficult for an Australian jury to estimate the age of a child where the difference in ethnicity between the jury and the child may mean that the jury is wholly unfamiliar with the rate of development and change in physical appearance of a child of that race.

These evidentiary challenges not only detract from the deterrent effect and create the potential for wrongful convictions, but also unavoidably result in exceedingly expensive prosecutions. As early as 1994, the Australian Federal Police Association (1994:1) estimated that a prosecution for child sex tourism could cost A\$90,000; a figure that would be substantially higher today. Each of these concerns is magnified by the extension of the scope of activity criminalised by the offences introduced in 2010.

Ensuring a fair trial

The extraterritorial child sex offences have a concerning potential to lead to an unfair trial. First, as discussed above, there are problems with the reliability of evidence, which can affect the defence just as much as the prosecution. Second, the cost of providing a defence to the charges is likely to be significant, if not prohibitive (see House of Representatives Standing Committee on Legal and Constitutional Affairs 1994).

The greatest concern of an unfair trial derives from the significant increase in the power imbalance between the prosecution and the defence. The accused is at a considerable disadvantage in the prosecution of an extraterritorial offence. The challenges faced by the prosecution in obtaining evidence for trial are substantially higher for an accused attempting to provide a defence. Whereas the prosecution may have access to evidence gathered through AFP liaison officers, mutual assistance treaties, memoranda of understanding, and other government channels at the disposal to Australian law enforcement, none of these mechanisms are available to an accused.

The recent pardon and quashing of the conviction of Frederick Martens is an unfortunate example of the consequences of this imbalance. Mr Martens was convicted in 2006 of one count of having sexual intercourse with a person under 16 years while outside Australia. It was alleged that he had had sexual intercourse with a 14-year-old girl in Port Moresby, Papua New Guinea, where Mr Martens worked as a pilot. His appeal in 2007 was dismissed (*R v Martens (No 1)*). Mr Martens had insisted at trial that civil aviation records from Papua New Guinea would exonerate him by showing that he had not been in Port Moresby at the relevant time. A condition of Mr Martens' bail prevented him from leaving Australia, and, therefore, he insisted that the AFP and the Commonwealth Director of Public Prosecutions obtain these records. The prosecution informed Mr Martens that the records did not exist. Following the unsuccessful appeal, Mr Martens' wife obtained the records, which founded a successful petition for a reference to the Queensland Court of Appeal for pardon. At the reference hearing, the prosecution argued that the records were not new evidence, and should have been tendered in Mr Martens' defence at trial. Holding that the records warranted that Mr Martens receive a pardon, in *R v Martens (No 2)* Justice Chesterman (with whom Justices Muir and Fraser agreed on this point) noted that:

[i]t was, in any event, eminently reasonable for [Mr Martens] to rely upon the resources of the Director of Public Prosecutions and the [AFP] to obtain the records. They undertook the task and informed [Mr Martens] that the records did not exist.

The records have always existed and have now been produced. It is a poor reflection upon the two organisations that one should have failed to find them, and denied their existence, and the other object to their use in the reference on the ground that the petitioner should have obtained them earlier. (at [169]–[170])

Miscellaneous issues

The relevance of consent

Lack of consent is not an element in any of the child sex tourism offences and is not usually an element of any sexual offence against children.¹² The legislation takes this approach because ‘[i]nherent in the setting of an age of consent is the idea that persons under a certain age do not have the capacity to consent to sexual activity’ (Attorney-General’s Department 2010:2). Brungs (2002:103) argues that despite this, ‘consent by the child has been raised as a mitigating factor’ when sentencing offenders. She criticises this approach on the basis that ‘[t]he ability of an impoverished, prostituted child to consent to exploitation is, at the very least, questionable’ (Brungs 2002:103).

Three observations can be made in this context. First, consent is not specifically excluded from consideration by the legislation, and almost certainly falls within the legitimate consideration of ‘the nature and circumstances of the offence’ (*Crimes Act 1914* (Cth) s 16A(2)(a)), and possibly also ‘any injury, loss or damage resulting from the offence’ (*Crimes Act 1914* (Cth) s 16A(2)(e)). Second, and in extension to the first point, the case of *Lee v R* appears to consider the lack of brutality, rather than merely the existence of consent, to be the mitigating factor (at [24]–[25] per Wallwork J; cf Brungs 2002:103). Indeed, in the case of *R v Wicks* it was considered that ‘the children were made even more vulnerable because of the exigencies of the society in which they live’ (at [16]) and, therefore, the accused’s acceptance of their offers of sex was more, rather than less, serious. Finally, the question of a child’s consent cannot be examined from an Australian cultural framework, but must take into account the social, cultural and economic realities of the country in which the offence occurs.

A second issue relating to consent is the consequence of consent not featuring as an element of the defences of belief of age. The Law Council of Australia raised the concern in its submissions that an Australian who had non-consensual sexual activity with a child abroad could escape all liability for that activity if the defendant could prove that he or she believed the child to be over 16 years. The only liability that would arise would be liability for a non-age-specific sexual offence (rape, for example) in the country where the activity occurred. This is, however, consistent with the scope of the legislation, which is limited to sexual offences against children specifically. The Attorney-General’s Department also noted that the inclusion of consent as an element of the defence ‘would often lead to the cross-examination of a child victim on the issue of consent [...] confusing the issues at trial and causing possible trauma to the child’ (Attorney-General’s Department 2010:2).

¹² Consent is not an element of any Australian state or territory child sex offence, nor is it an element of any defence thereto (except in Victoria and the Australian Capital Territory).

Lack of a dual criminality requirement

Similar to child sex tourism offences elsewhere, the Australian offences do not require the conduct to be criminal offences in the country in which it occurs.¹³ The benefit of not requiring dual criminality is that it prevents potential offenders from taking advantage of the fact that some countries have weaker child protection laws than others. Seabrook argues that whereas a dual criminality requirement ‘suggests a country gives priority to protection of its nationals’ (Seabrook 2000:114), removing the requirement will ‘unambiguously prioritise the protection of children over the interests of nationals’ (Seabrook 2000:115).

The lack of a dual criminality requirement is, however, at odds with the supplementary enforcement rationale of the offences. Civil Liberties Australia (2010:2), an NGO, argues that ‘a Bill like this should only provide a backup [...] not attempt to globally enforce Australian rules’. For example, an Australian engaging in legal sexual intercourse with a 15-year-old in Italy, where the age of consent is 14, would nevertheless be liable to prosecution in Australia for a child sex tourism offence. It seems unlikely, however, that such a case would result in a prosecution.

Conclusion

Extraterritorial offences are an essential part of global efforts to prevent and punish the sexual abuse of children. Australia’s legislation meets international obligations in this regard by providing an exceedingly comprehensive regime. The sexual abuse of children is a matter of serious concern to many Australians, and this is reflected in the rhetoric that has surrounded the introduction of new offences.

It is unfortunate, however, that it seems that impassioned outrage, rather than concerned consideration, has conditioned the design of the offences. The pattern of prosecutions thus far, and the evidentiary challenges, suggest that the new offences alone are unlikely to be any more effective at deterring and prosecuting offending of this sort. It is significant that despite the broadening of the scope and coverage of the offences, the recent amendments were not accompanied by an increase in funding to the relevant law enforcement agencies. The capacity of law enforcement to pursue a crime type — particularly one with as many investigative complexities as extraterritorial sexual offences — must inevitably be dependent on the availability of resources.

The new offences create not only significant challenges for law enforcement agencies, but also undesirable consequences for accused persons. The breadth of the new offences will likely result in convictions being difficult to obtain, while concurrently attaching an initial criminal characterisation to a range of wholly innocent activities. This, in turn, causes an undesirable over-reliance on prosecutorial discretion.

The extraterritorial aspect of the offences also creates concerns pertaining to fair trial. Combined with the breadth of the offences, this magnifies the risk of a wrongful conviction. Even wrongfully laid charges can have dire consequences for the reputation of the accused person, given the opprobrium that the Australian community attaches to those believed to

¹³ See, for example, *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, opened for signature 25 October 2007, CETS No 201 (entered into force 1 July 2010), which mandates the creation of extraterritorial child sex offence legislation (art 18) and prohibits a dual criminality requirement (art 25, para 4).

have sexually abused a child. The child sex tourism offences, thus, fail to strike the right balance between the rights of the individual and the need to prevent the abuse of children.

The AFP has argued for some time that extraterritorial legislation is 'only part of the answer' (Allen 1998:37), and that the more effective way to combat the sexual abuse of children is to enhance domestic law enforcement capabilities in the destination countries for this activity. The offences should only operate as fall-back provisions if and when other efforts fail.

Despite the widespread support and praise Australia's new child sex tourism offences have gained, the offences will not significantly advance Australia's ability to prevent the abuse of children by Australians abroad, but may instead diminish fairness to individuals and undermine fundamental principles of justice.

Cases

Assheton v R (2002) 132 A Crim R 237

Kaye v R [2004] WASCA 227

Lee v R (2000) 112 A Crim R 168

R v David Anthony Hudson (Unreported, Supreme Court of NSW, 1999)

R v Klassen (2008) BCSC 1762

R v Martens (No 1) [2010] 1 Qd R 564

R v Martens (No 2) (2009) 235 FLR 371

R v Moti (2009) 235 FLR 320

R v Moti (2010) 240 FLR 218 371

R v Wicks [2005] NSWCCA 409

Walker v R [2008] NTCCA 7

XYZ v Commonwealth (2006) 227 CLR 532

Legislation

Australian Constitution

Crimes Act 1914 (Cth)

Crimes (Child Sex Tourism) Amendment Act 1994 (Cth)

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

Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010 (Cth)

Crimes Legislation Amendment (Sexual Offences against Children) Bill 2010 (Cth)

Criminal Code (Cth)

Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001 (Cth)

Measures to Combat Serious and Organised Crime Act 2001 (Cth)

Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub L No 108-21, 117 Stat 650 (2003) ('*Protect Act 2003 (USA)*')

Conventions

Convention on the Rights of the Child opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, opened for signature 25 October 2007, CETS No 201 (entered into force 1 July 2010)

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002)

References

Allen T (1998) 'Preventing Child Sexual Abuse in the Pacific: An Australian Federal Police Perspective', Article presented at The First Pacific Regional Conference on Preventing the Commercial Sexual Exploitation of Pacific Children, Suva, 2–3 June 1998

Attorney-General's Department (Cth) (2009) 'Proposed Reforms to Commonwealth Child Sex-Related Offences', Consultation Article, September 2009

Attorney-General's Department (Cth) (2010) Response to Questions on Notice provided to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 [Provisions]*, 11 March 2010

Australian Capital Territory (ACT) Policing (2010) Submission No 3 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 [Provisions]*, 19 February 2010

Australian Federal Police (AFP) 2006, *Annual Report 2005-2006*

Australian Federal Police (AFP) 2007, *Annual Report 2006-2007*

Australian Federal Police Association (1994) Submission No 16 to House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes (Child Sex Tourism) Amendment Bill 1994*, 18 May 1994

Australian Institute of Criminology (AIC) (2010) Submission No 4 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 [Provisions]*, February 2010

Australian Privacy Foundation (2010) Submission No 5 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 [Provisions]*, 23 February 2010, 2

- Baker M (1996) "My once brilliant career" - Paedophilia charge unproven but the damage is done', *The Age* (Melbourne), 16 November 1996, 21
- Baker M and Skehan C (1996) 'Treated like a leper, says Holloway', *The Sydney Morning Herald* (Sydney), 16 November 1996, 5
- Benns M (2008) 'Sex offender had an alibi: family', *The Sydney Morning Herald* (online) 13 July 2008 <<http://www.smh.com.au/articles/2008/07/12/1215658196534.html>>
- Brungs M (2002) 'Abolishing Child Sex Tourism: Australia's Contribution', *Australian Journal of Human Rights* 8(2), 101
- Civil Liberties Australia (2010) Submission No 1 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 [Provisions]*, 19 February 2010
- Clarke R (Australian Privacy Foundation) (2010) Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 9 March 2010
- Daley M (Minister for Police, NSW) (2010) Letter to Brendan O'Connor (Minister for Home Affairs, Cth), 15 January 2010
- David F (2000) 'Child Sex Tourism', *Trends and Issues in Crime and Criminal Justice* No 156, Australian Institute of Criminology
- Department of Foreign Affairs and Trade (Cth) (2010) *Travel Smart: Hints for Australian Travellers*, Australian Government
- Donovan H (Law Council of Australia) (2010) Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 9 March 2010
- End Child Prostitution in Asian Tourism (ECPAT) Australia (1999a) 'The need for child friendly (child sex tourism) procedures' *ECPAT Australia Bulletin* 51, 3
- End Child Prostitution in Asian Tourism (ECPAT) Australia (1999b), 'Toughest sentence yet for WA child sex tourist' (1999) *ECPAT Australia Bulletin* 52, 1
- Explanatory Memorandum (2010), Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 (Cth)
- Ferran L, Berardi G and Sakulpitakphon P (2008) *Protecting Children from Sexual Exploitation in Tourism: An ECPAT Training Resource Kit*, ECPAT International, Thailand
- G8 (2007) 'G8 Experience in the Implementation of Extraterritorial Jurisdiction for Sex Crimes Against Children', Paper prepared for the meeting of G8 Justice and Home Affairs Ministers, Munich, 23–25 May 2007 <<http://www.linkbc.ca/torc/downs1/Extraterritorial%20Jurisdiction.pdf>>
- Henderson P (Minister for Police, Fire and Emergency Services, NT) (2009) Letter to Brendan O'Connor (Minister for Home Affairs, Cth), 6 October 2009
- House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia (1994), *Crimes (Child Sex Tourism) Amendment Bill 1994*
- Hulls R (Attorney-General, Victoria on behalf of Bob Cameron, Minister for Police and Emergency Services, Victoria) (2009) Letter to Brendan O'Connor (Minister for Home Affairs, Cth), 22 December 2009

Kerr D, Minister for Justice (1994), Commonwealth, *Parliamentary Debates*, House of Representatives, 3 May 1994, 72–4

Law Council of Australia (2010) Submission No 8 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 [Provisions]*, March 2010

Lawrie D (Minister for Justice and Attorney-General, NT) (2009) Letter to Brendan O'Connor (Minister for Home Affairs, Cth), 20 November 2009

Macintosh T (2000) 'Exploring the Boundaries: The Impact of the Child Sex Tourism Legislation', *Australian Law Journal* 74, 613

McMenamin B (CEO Child Wise) (2009) Letter to Brendan O'Connor (Minister for Home Affairs, Cth), 25 September 2009

Muntabhorn V (1993) *Sale of Children: Report submitted by Special Rapporteur appointed in accordance with the Commission on Human Rights resolution 1992/76*, UN Doc E/CN.4/1993/67/Add.1, 9 February 1993

Murdoch L (1996) 'Envoy cleared of child-sex charge', *The Age* (Melbourne), 14 November 1996, 1

O'Connor B, Minister for Home Affairs (Cth) (2010) Commonwealth, *Parliamentary Debates*, House of Representatives, 4 February 2010, 408–10

Seabrook J (2000) *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation*, ECPAT Europe Law Enforcement Group

Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia (2010a) *Crimes Legislation Amendment (Sexual Offences against Children) Bill 2010 [Provisions]*

Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia (2010b) *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2010*, Official Committee Hansard, Canberra, 9 March 2010

Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia (2007a) *Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007 [Provisions]*

Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia (2007b) 'Additional comments of dissent by the Australian Democrats', *Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007 [Provisions]*

South Australia Police (2010) Submission No 7 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 [Provisions]*, 18 February 2010

Victoria Police (2010) Submission No 2 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 [Provisions]*, 19 February 2010

Wright M (Minister for Police, South Australia) (2009) Letter to Brendan O'Connor (Minister for Home Affairs, Cth), 5 November 2009