



## No. 156

# Child Sex Tourism

**Fiona David**

*Few issues have gained such universal support as the right of all children to be free from sexual abuse. All countries of the world but two have signed the 1989 Convention on the Rights of the Child (CRC), Article 34 of which stipulates that State Parties have the obligation to protect children from "all forms of sexual exploitation and abuse".*

*Children are most likely to experience sexual exploitation or abuse at the hands of a family member or of someone known to them. There is also evidence, however, that over and above intra-familial sexual abuse, there exists a transnational market for the sexual services of children. The general pattern is that "tourists" from developed countries (including Australia) seek out the sexual services of children in developing countries. Children in these countries may be vulnerable to sexual exploitation due to poverty, social dislocation, family breakdown, and prior experiences of sexual victimisation, and/or homelessness. In some cases, children may actively seek out customers for their sexual services as a means of economic survival. These circumstances do not change the fact that sexual activity with children is universally condemned as an abuse of human rights and is, in many countries, a crime. This paper provides an overview of the Australian Crimes (Child Sex Tourism) Amendment Act 1994 and reviews a number of cases which have been prosecuted since it became law.*

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Director

Today, twenty-four countries around the world have legislation that makes "child sex tourism", and its associated practices, a criminal conduct, even when the act concerned was committed overseas (ECPAT (End Child Prostitution, Pornography and Trafficking) February/March 1999, p. 3) Australia introduced offences relating to "child sex tourism" in 1994. Since this time, a number of cases have proceeded through the courts and resulted in some substantial convictions. This paper reviews the progress of this legislation 5 years down the track, noting the successes and difficulties that have been experienced in relation to the legislation.

### The Legislation

As a State Party to the United Nations *Convention on the Rights of the Child* (CRC), Australia has specific obligations with respect to the human rights of children. Article 34 stipulates that:

State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, State Parties shall, in particular, take all appropriate national, bilateral, and multilateral measures to prevent:

- The inducement or coercion of a child to engage in any unlawful sexual activity.
- The exploitative use of children in prostitution or other unlawful sexual practices.
- The exploitative use of children in pornographic performances and materials.

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In 1994, the Commonwealth Parliament passed the *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth), an Act which introduced a new “Part IIIA – Child Sex Tourism” into the *Crimes Act*. Despite the name of Part IIIA, the legislation covers a wide range of sexual activities with children under the age of 16 committed overseas. As a Member of the House of Representatives noted in 1994, “the bill should more properly be entitled the Crime (Overseas Exploitation of Children) Bill” (cited in Hall 1998, p. 95).

The philosophy underpinning the legislation is that countries are principally responsible for sexual abuse and the exploitation of children committed in that country. Laws with extra-territorial application, such as the Australian child sex tourism offences, are intended to fill the gap when countries are unwilling or unable to take action against known offenders. The rationale is that child-sex offenders should not escape justice simply because they are in a position to return to their home country.

In order to be liable for prosecution under the Act, the offender must have been, at the time of the alleged offence, an Australian citizen or resident; a body corporate incorporated under a law of the Commonwealth, State, or Territory; or a body corporate that carries on its activities principally in Australia (*Crimes Act*, s50AD). The offences do not generally require the presence of a commercial element. However, the legislation does target those who assist, organise, or benefit from “child sex tourism”.

In summary, the legislation makes it an offence to:

- Engage in sexual intercourse with a child under 16, while outside of Australia (*Crimes Act*, s50BA).
- Induce a child to engage in sexual intercourse with a third person outside of

Australia (*Crimes Act*, s 50BB).

- Participate in sexual conduct, such as indecency, involving child under 16 while outside of Australia (*Crimes Act*, s50BC).
- Act or omit to act, whether within Australia or not, with the intention of benefiting from, or encouraging, such an offence. Examples include advertising an offer to assist a person to commit such an offence, or assisting a person to travel outside Australia in order to commit an offence (*Crimes Act*, ss50DA and 50DB).

These offences attract penalties ranging from 12 to 17 years imprisonment.

Defences available to these offences include:

- That the defendant believed at the time of the sexual intercourse or act of indecency that the child was 16 or over (*Crimes Act*, s50CA). In considering the defence, the jury may consider the reasonableness of the alleged belief (*Crimes Act*, s50CD).
- That the defendant and the child were genuinely married (*Crimes Act*, s50CB).

The legislation permits the use of video-link evidence if the witness is outside of Australia and the attendance of the witness would cause unreasonable expense, inconvenience, distress or harm to the witness, or cause the witness to become so intimidated or distressed that their reliability as a witness would be significantly reduced (*Crimes Act*, s50EA).

### Overview of Prosecutions

The first prosecution under the new Part IIIA was a classic example of “child sex tourism”. The facts of *Regina v Anthony Richard Carr* (unreported judgement of His Honour Judge Saunders, District Court of New South

Wales, Criminal Jurisdiction, 26 April 1996) were that the defendant had taken a sexually explicit video of a child, estimated to be around 5 years old, while holidaying in the Philippines. The defendant was charged and convicted for several offences involving sexual activity with children, under Part IIIA of the *Crimes Act 1914* (Cth) and the *Crimes Act* (NSW). The defendant was sentenced to a cumulative sentence of 7 years, which involved a 2-year term for the offence committed while overseas. His Honour Judge Saunders noted the comments of the then Minister for Justice in the second reading speech of the Bill:

The principal aim of this legislation is to provide a real and forceful deterrent to the sexual abuse of children outside Australia by Australian citizens and residents. It is unfortunate that a minority of Australian citizens and residents are now known internationally as major offenders in several Asian countries. They exploit the vulnerability of children in foreign countries where laws against child sexual abuse may not be as strict or as consistently enforced as in Australia (transcript p.7).

Prosecutions have not always involved offences committed against children in developing countries. The legislation clearly extends to intra-familial sexual abuse of children committed whilst overseas. This is appropriate, given that most sexual abuse of children occurs within the family or immediate social network. The defendant in *The Queen v Andrew Justin Harman* (unreported decision of His Honour Judge Ross, Melbourne County Court, 8 December 1997) was successfully prosecuted for sexual offences committed while staying with relatives in the United States. The defendant cooperated with the prosecution, pleaded guilty, and was sentenced to a total effective sentence of 2 years and 6 months, with a minimum term of 12 months. Prior to the

child sex tourism legislation, a prosecution in these circumstances would not have been possible without first extraditing the offender to the United States, a costly and complicated process.

Prosecutions have been successful where evidence is collected solely in Australia, without the need to refer to overseas or child witnesses. In *The Queen v Jesse Spencer Pearce* (unreported decision of Their Honours Pincus JA, Shepherdson and White JJ, Queensland Court of Appeal, 8 August 1997), the defendant was successfully prosecuted for 2 offences under the child sex tourism provisions, on the basis of photographs in his possession and the defendant's own admission. In this case, the defendant attempted to sexually assault a young boy in Australia. The police searched the defendant's house and found photographs of the defendant engaged in an indecent act with an Asian female aged between 11 and 14 years and sexually explicit photographs of Asian boys. The defendant admitted to police that the photographs with the girl were taken on a recent trip to Thailand and that he had paid the girl about \$10. He also admitted to engaging in an indecent act with an Asian boy for which he paid about \$5 on another trip to Thailand. He told police that he purchased the other indecent photographs at a club in Thailand and smuggled them into Australia. The defendant was charged with committing acts of indecency on a person under the age of 16 outside Australia, and with a number of offences under Queensland law for possessing the photographs. In May 1997, he pleaded guilty to all charges and was sentenced to 8 years.

The successful prosecution in Pearce can be contrasted to the difficulties experienced in the prosecution of Holloway, a matter in which evidence had to be sought from overseas and witnesses had to be brought from

Cambodia to Australia. Holloway was an Australian diplomat, so the matter received considerable media attention. As no evidence was available in Australia, the prosecution located the children concerned and brought them from Cambodia to Australia. The prosecution did not use video-link evidence, as the facilities were not available at that time in the relevant court room. The initial court hearing took place over 8 days and the children were cross-examined at length by counsel for the accused. Significantly, the children were cross-examined about their "sexual reputation" and prior sexual experiences. This line of questioning was permitted as Part IIIA does not specifically preclude questions about "sexual reputation". As a result, the common law still applies to child sex tourism prosecutions and child complainants can be cross-examined about their prior sexual history.

The Magistrate reviewed the evidence provided by the children, and decided that while there was *prima facie* evidence of a crime having been committed, the children's evidence was such that a jury properly instructed would not convict the defendant. The children gave evidence that was contradictory to the previous statements they had made to the Australian Federal Police, and the children introduced new issues that had not been raised previously. The case was dismissed on the basis of a lack of evidence (Muntarbhorn 1998, pp. 21-22 and ECPAT Australia November/December 1998, p. 2).

As noted by Muntarbhorn (1998, pp. 21-22), the rights of all defendants to a fair trial must be protected. Under the existing adversarial system, this requires that witnesses meet certain standards of credibility and are subject to cross-examination by the defendant, or his or her counsel.

Under the adversarial system, however, the trial process is notoriously traumatic for many victims of crime, and particularly for those who have experienced sexual abuse. Adults often find the trial process confusing, alienating, invasive, and personally damaging. The issues are even more pronounced for child witnesses, who may have little or no understanding of what they are going through or why. Child witnesses who have experienced sexual abuse are particularly vulnerable to re-victimisation at the hands of the court, as they may be required to recount the experience to near complete strangers, in a forum that offers them little support, privacy, or flexibility (see generally Cook et al. 1999).

It is well documented that child witnesses who have been sexually abused are likely to retract their allegations for a number of reasons, including fear of retribution, intimidation, and the desire for privacy. Similarly, child witnesses who have been sexually abused may give inconsistent accounts of the abuse. Again, the reasons for this are complex and varied and can include confusion or loss of memory (Freckelton 1997, pp. 247-83). Child witnesses may also be perceived as unreliable and inaccurate witnesses, prone to fantasy and exaggeration (Human Rights and Equal Opportunity Commission (HREOC) and Australian Law Reform Commission (ALRC) 1997, p. 37).

Clearly, the difficulties associated with child witnesses in sexual assault trials are not limited to prosecutions under the child sex tourism legislation. The ALRC and the HREOC have recommended a number of significant changes to make the entire court process more sensitive to the needs of children. These include:

- The use of specialised teams to interview child witnesses, including health care workers and counsellors alongside lawyers and the police.
- A presumption in favour of closed-circuit television for child witnesses and a presumption against children appearing live in court.
- When setting hearing dates, courts should give priority to matters involving child witnesses.
- Children should be presumed to be competent witnesses and judges should be prohibited from warning a jury that child witnesses are an unreliable class of witness.
- The use of age-appropriate language and the provision of age-appropriate literature and waiting rooms for child witnesses.
- Giving courts the power to use a “child interpreter” to facilitate the giving of evidence by a child where the court is satisfied that the child is unable to understand the questions, or where it is difficult to understand the child’s speech.
- The development of guidelines to prevent harassment or intimidation of child witnesses by counsel (HREOC and ALRC 1997, pp. 38-43).

Many of these recommendations have been implemented in Western Australia but are yet to be implemented in other jurisdictions. The implementation of these recommendations would have considerable benefits for child witnesses in all criminal prosecutions, including under the child sex tourism legislation.

The fourth successful prosecution under the child sex tourism legislation tested the limits of the legislation. *Harry Ernst Ruppert* (unreported judgement of the County Court in Victoria, 19 August 1998) was charged over a series of sexually

explicit letters he wrote to adults in Ghana, encouraging them to have sex with children. Ruppert, 55, pleaded guilty to 3 counts of doing acts with the intention of encouraging others outside of Australia to have sexual intercourse with a child under the age of 16 years. The letters urged local adults to train female children between the ages of 4 and 10 years to engage in sexual acts with adults. The judge sentenced Ruppert to a 6-month suspended sentence, with a \$500 good behaviour bond—it is the most lenient sentence handed down under the legislation. In sentencing, the judge stated that he had “doubts that Parliament intended to proscribe an Australian resident from encouraging sexual behaviour between residents of another country”. This comment seems out of step with the purpose of the legislation. In the second reading speech of the Bill, the then Minister for Justice noted that:

The Bill also focused on the activities of those who promote, organise and profit from child sex tourism. Provided they operate from Australia, or have *a relevant link with Australia*, they, too, will be able to be prosecuted for their contribution to the abuse of foreign children ... (emphasis added, cited in Hall 1998, p. 90).

It is arguable that in *Ruppert*, the relevant link was that the defendant was Australian. It was irrelevant whether the people he was encouraging to have sex with were children from Australia or Ghana. In either case, the defendant was encouraging the sexual abuse of children overseas.

To date, there have been no successful prosecutions of organisers of child sex tours. The one case that has involved such a prosecution was *Raymond John Jones* (unreported judgement of the Melbourne Magistrates Court, 11 May 1998). In this case, the defendant placed an advertisement in a Melbourne newspaper looking for investors in a business in the Philippines. The witness

responded to the advertisement and met with the defendant to discuss the prospect of investing in his business. The accused showed the witness a photo album with photographs of Filipino women and children in various stages of undress. The defendant stated he could organise for the witness to meet women and girls for sex and he described how he had sex with a 15-year-old girl. The witness reported the events to the police. The Australian Federal Police conducted an investigation and arrested the defendant, but the defendant was acquitted due to insufficient evidence.

The facts in *Ruppert* and *Jones* suggest that child sex tour “operators” are more likely to be individuals looking for other individuals with similar sexual interests, with profit as a secondary motive, than organised commercial ventures. This is in line with the findings of the 1995 the Parliamentary Joint Committee of the National Crime Authority, which noted that:

Most sexual offences against children are committed by their relatives and neighbours who are not paedophiles in the strict sense of the term and who do not operate in any organised or networked way .... There is no evidence to suggest that organised paedophile groups have ever resembled what are traditionally thought of as “organised crime” groups in size, aims, structures, methods, longevity and so forth .... There is no evidence of any current organised promotion or arrangement of tours by Australian paedophiles to overseas destinations known to be attractive to them. However, informal networking among paedophiles may assist some tourists going overseas to commit paedophile offences (cited in Hall 1998, pp. 95-96).

By contrast, the recent case of *Steel* was a relatively straightforward prosecution. In December 1998, Bruce Clyde Steel was sentenced to a maximum of 6.5 years in Newcastle. Steel pleaded

guilty to 15 counts of child abuse from 1976 to 1997 in New South Wales and India. Steel had written a detailed account of the incidents and turned himself into the police.

The most recent decision is *Lee* (Perth District Court, 28 May 1999), in which the defendant was convicted of having sexual intercourse with a child outside of Australia and 8 counts of committing indecent acts on children under 16 while outside Australia. Lee was sentenced to 12 years imprisonment, with a minimum of 6 years. According to ECPAT Australia, this is the heaviest sentence ever imposed anywhere in the world for extra-territorial child sex offences (ECPAT Australia May/June 1999, p. 1).

The initial arrest was made following Lee bragging to workmates about his activities with children in Cambodia, including showing them photographs of himself engaging in sexual activities with children. As the Australian Federal Police were unable to locate the children involved in Cambodia, these photos formed a major part of the evidence. The photos did not show Lee's face, but they did show his fingers and parts of his leg. Forensic pathologists were called to give expert evidence in the trial, and they matched the fingers in the photograph with Lee's fingerprints.

ECPAT Australia have noted that Lee's case was "remarkable and unique":

[It] is the first child sex tourism prosecution relying on forensic evidence. It also demonstrated the lengths that authorities will go in order to prosecute Australians involved in child sex tourism .... Finally the success of this case shows the importance of community education as Lee's "workmate" went to the police after viewing the obscene photographs.

## Conclusion

It is not known whether the child sex tourism legislation has any real deterrent effect on Australians determined to have sex with children overseas. It may be that these people are simply more careful in their activities as a result of the laws. The success of the child sex tourism legislation is, however, demonstrated by the fact that there have been several successful prosecutions for sexual offences committed against children overseas that would previously have been beyond the reach of Australian law. Rather than being a "paper tiger" as predicted, the legislation has resulted in a number of substantial convictions for offences committed by Australians overseas. The surrounding media publicity of these prosecutions can only have raised public awareness of the fact that child sex tourism will not be tolerated by Australian authorities. Significantly, two cases that have made it to trial are the result of a third party making a complaint to the police, following the discovery of the offensive activity of the defendant.

There remain several practical limitations to conducting prosecutions under child sex tourism legislation. These include:

- The difficulties of obtaining evidence from overseas, including the cost and the difficulties in locating witnesses, and the need to use interpreters during preparation and the trial process itself.
- The difficulties of dealing with witnesses who are children, particularly children who have been sexually abused or exploited.

The *Holloway* case has also highlighted the anomalous situation whereby witnesses in child sex tourism prosecutions can be questioned about their "sexual

reputation" or prior sexual history. This situation will remain until the Federal legislation is brought into line with State and Territory sexual offences legislation.

Clearly, the ultimate barrier to the success of the child sex tourism legislation is the low level of reporting of sexual offences by child victims (or their parents). There are many reasons why children do not report sexual offences, including the sensitive and intrusive nature of the offence, coercion by the offender, lack of witnesses to support allegations, fear of retribution, and the victim's fear of the consequences for themselves, their family, and perhaps even the perpetrator (Gallagher, Hickey and Ash 1997, p. 3).

In developing countries, these factors may be compounded by poverty (including the need to survive economically via the provision of sexual services), lack of basic infrastructure, and/or a lack of transparency in the criminal justice system. In these circumstances, the provision of economic and technical assistance to developing countries is a legitimate component of a crime prevention strategy, alongside the more traditional strategies of education about child rights, child protection and sex, and sexuality.

**Since this paper was written, a case was finalised in the Victorian County Court on 31 May 2000. The offender was sentenced under the Crimes Act (Child Sex Tourism) to three and a half years in gaol.**

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