



FEDERAL MAGISTRATES COURT OF AUSTRALIA

Tuesday 20 November 2012

Chief Federal Magistrate Pascoe, AO CVO

25th LawAsia Annual Conference, Bali

The Problem of Enforcement in Extraterritorial Laws Relating to Sex Tourism

I. Foreword¹

Before starting to deal with my formal paper, I want to stress that the issue here is a very human one – at its heart is the life long damage caused by childhood sexual abuse. To illustrate, I read the following extract which deals with the reaction of one survivor to the recent announcement by the Australian Government of a Royal Commission into child sexual abuse:

My eyes fill with tears as I sit in the office kitchen having my lunch. My hands start shaking and there's a lump in my throat. I go back to my desk to avoid having to explain why I, a mature, well-educated man in a large organisation, am crying over my tuna salad.

It's news time, and the large TV in the kitchen is covering another story about perpetrators of child sex abuse. I'm crying because I'm a survivor. I spend the rest of the day drinking coffee and trying to think clearly so I can work.

There have been several consequences of the regular sexual abuse I suffered between the ages of 9 and 12. One of them is post-traumatic stress disorder, which I experienced as deep anxiety and nightmares.

I toll anti-depressants for years. I tend to be rather silent, and I'm cautious of people. Loud noises make me jump, a condition called startle response, and I have psoriasis, an embarrassing and incurable skin condition that I believe is due to anxiety.

¹ I wish to acknowledge the contribution of my Legal Associate Mr Tristan Baker in preparing this paper.



FEDERAL MAGISTRATES COURT OF AUSTRALIA

A common reaction when I get triggered is dissociation, a feeling of leaving my body. It was my mind's defence when I was a child, and my mind still hides when it encounters reminders of abuse.

Shame and secrecy are some of the cruellest parts of abuse they are based on the child's trust (or fear) of the abuser. I've made more than a decade of regular therapy sessions, and I still see a therapist when I need to.²

No one can possibly believe that the distress of a child in another country is any different or any less than that of an Australian child – indeed the evidence is overwhelming that lives are destroyed where there is no opportunity for any form of redress.

II. Introduction

In the aftermath of the 2005 tsunami that hit Southeast Asia, sex traders preyed upon the orphaned children, kidnapping them and forcing them into the sex trade.³ Unlike traditional forms of slavery, these children cost little to traffickers and are easily replaceable which makes their plight all the more desperate. Given that 80 percent of those who purchase sex acts do so overseas, it is more than likely that a large proportion of these kidnapped children were taken to satisfy the demand of sex tourists.⁴

Individuals can fall victim to sex traffickers for a myriad of reasons – including poverty, gender discrimination, violence, and lack of employment opportunities. Governments in destination countries often lack the ability or will to adequately protect these vulnerable groups. To protect children from sexual exploitation and to curb demand it is necessary for 'sending countries' to have strict extraterritorial laws relating to sex tourism. Such laws focus on deterring the 'buyers' and thus reduce demand in destination countries, making the practice less financially viable.

² Author Unknown, 'The invisible scars that never heal' *Sydney Morning Herald* (online), 19 November 2012 <<http://www.smh.com.au/nsw/the-invisible-scars-that-never-heal-20121119-291b3.html>> last accessed 26 Nov 2012.

³ Kelly Cotter, 'Combating Child Sex Tourism in Southeast Asia' (2009) 37 *Denver Journal of International Law and Policy* 493, 494.

⁴ *Ibid.*



FEDERAL MAGISTRATES COURT OF AUSTRALIA

III. Outlining the Problem of 'Sex Tourism'

Child sex tourism has been defined as 'the commercial sexual exploitation of children by persons who travel from their own country to another usually less developed country to engage in sexual acts with children.'⁵ This degenerate form of tourism has unfortunately increased in popularity as the internet and cheap flights make the practice more accessible.

Weak law enforcement, widespread poverty and large scale social and cultural dislocation in many developing countries make them an attractive location for many would-be child sex offenders.⁶ The influx of Western sex tourists to these developing nations has also created a lucrative industry, assisting in the economic growth of the regions. For example, it has been estimated that the sex industry in Indonesia, Malaysia, Thailand and the Philippines account for 14 percent of these countries' gross domestic product.⁷ Anti-prostitution laws are therefore placed in direct conflict with economic growth objectives and governments in developing regions are often loath to enforce the law.

As a rough indication of the number of children entangled in this industry it has been suggested that 30 percent of all prostitutes found in Cambodia are between the ages of 12 and 17. Studies have also shown that one-third of Thailand's prostitutes are under the age of 18.⁸

The lack of action taken against sex tourists in destination countries only fuels the problem, helping many sex tourists rationalise their behaviour as not being wrong. An illustration of this process can be found in the comments of one retired school teacher from the US state of Florida, who believed or at least preferred to believe that he was helping young girls.

According to this teacher:

⁵ Definition from ECPAT International, as cited in Amy Fraley, 'Child Sex Tourism Legislation Under the PROTECT Act: Does it Really Protect?' (2005) 79 *St John's Law Review* 445, 449.

⁶ Tim MacIntosh, 'Exploring the Boundaries: the Impact of the Child Sex Tourism Legislation' (2004) 74 *The Australian Law Journal* 613, 614.

⁷ Cotter, above n 3, 497.

⁸ Abigail Schwartz, 'Sex Trafficking in Cambodia' (2004) 17 *Columbia Journal of Asian Law* 372, 380.



FEDERAL MAGISTRATES COURT OF AUSTRALIA

*If [the girls] don't have sex with me, they may not have enough food. If someone has a problem with me doing this, let UNICEF feed them. I've never paid more than \$20 to these young women, and that allows them to eat for a week.*⁹

The impact of this sexual abuse has disastrous consequences for the children involved, whether they consented to such conduct or not. The children suffer physical, psychological, social and sometimes life threatening illnesses. UNICEF has noted such abuse 'saps [the children's] energy and undermines their confidence in the future.'¹⁰

One only has to speak to survivors, often both physically and psychologically damaged, to understand the destructive consequences of child abuse. I give two examples. Srey is a Cambodian girl now nine years old. She has had some 15 operations to try to repair the physical consequences of multiple rape that occurred when she was the age of three by a group of foreign sex tourists.

Peera is a young man of 15 who is unable to control his anger. He was taken in from the streets of Phnom Penh by a Western male who purported to offer him a better life. Peera was handcuffed wrists to ankles often for long periods of time for the amusement of the man and his guests. He endured this abuse for three years before getting away. Most NGOs gave up on Peera because of his anger and anti-social behaviour.

Sex tourism clearly presents a real danger to children and without the support of governments within the destination countries it is up to sending countries to curb the demand.

IV. Extraterritorial Laws

Ordinarily territorial sovereignty restricts a state's jurisdiction over persons to its territorial limits.¹¹ However, recently the egregious nature of child sexual offences has been used as impetus for enacting extraterritorial laws criminalising sexual conduct committed against

⁹ Quoted in Kathy Steinman, 'Sex Tourism and the Child: Latin America's and the United State's Failure to Prosecute Sex Tourists' (2002) 13 *Hastings Women's Law Journal* 53, 61.

¹⁰ UNICEF, *Poverty Reduction Starts with Children* (25 May 2012) UNICEF <http://www.unicef.org/why/why_poverty.html> last accessed 9 October 2012.

¹¹ Jeremy Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation* (2005) 4.



FEDERAL MAGISTRATES COURT OF AUSTRALIA

minors abroad. In this way extraterritoriality can be seen as a jurisdictional element that allows for the prosecution of nationals (and sometimes residents) for crimes committed outside of one's country.¹²

Such laws are in accord with the requirement of Article 3 of the *Optional Protocol on the Sale of Children* to ensure that domestic legislation allows for the prosecution of its nationals for crimes of child sexual exploitation; regardless of whether committed domestically or internationally.¹³

This paper assesses the effectiveness and desirability of extraterritorial sex tourism laws enacted in Australia, Japan, South Korea and Singapore. These four countries have been selected both because of the model status of their laws and because they remain significant sending countries. However, before an assessment of the effects of extraterritorial laws can be undertaken it is necessary to have criteria by which to measure them. This paper has adopted a modified version of the criteria proposed by the academic Amy Fraley:¹⁴

- ❖ Whether the age of consent conforms with the CRC;
- ❖ Whether there is a double criminality requirement;
- ❖ Whether there are provisions built into the statute to provide for special testifying conditions for child witnesses;
- ❖ Whether the incarceration period and/or fines serve as an adequate deterrent to sex tourists; and
- ❖ Whether the state has applied the statutes in any uniform and coherent way.

In the following sections it should be kept in mind that the clandestine nature of sex tourism makes the gathering of accurate statistical information complicated.¹⁵ In many cases

¹² Farley, above n 5, 462.

¹³ *Optional Protocol on the sale of children, child prostitution and child pornography*, opened for signature 25 May 2000, 2117 UNTS 227 (entered into force 18 January 2002). See also Art 34 of the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

¹⁴ Fraley, above n 5, 461-462.

¹⁵ Child Wise Tourism (ed), *2007 ASEAN Child-Sex Tourism Review* (Outcome Paper, ASEAN Regional Taskforce Meeting, Hanoi, Vietnam, 2007) 8. Available at <<http://www.childwise.net/Resources/online-publications.html>> last accessed 10 October 2012.



FEDERAL MAGISTRATES COURT OF AUSTRALIA

undertaking research in the area can be dangerous to both the researchers and the subjects alike.

V. The Australian Approach

(a) The Law

In Australia the Commonwealth Parliament has the authority to enact extraterritorial laws under its external affairs power.¹⁶ The Australian sex tourism laws were amended in 2010¹⁷ in an attempt to take a more pre-emptive, proactive approach which would allow preventative prosecutions. It was argued that these reforms would eliminate any risk of harm to a child before it arose.¹⁸ Following these amendments Australia's sex tourism laws are now contained in Division 272 of the *Criminal Code 1995* (Cth).

Division 272 criminalises sexual intercourse¹⁹ and sexual activity²⁰ with any 'child' under the age of 16. For intercourse or activities involving a 'young person', defined as a person between the ages of 16 and 18, the prosecutor is required to establish the additional element – the accused was in a position of trust and authority – before the conduct will be criminal.²¹

These offences are committed either when the accused actively participates in the act or where they cause the child to participate in the activity with another.

The Commonwealth *Criminal Code* further provides comprehensive provisions dealing with aggravated offences;²² persistent sexual abuse;²³ procuring²⁴ or 'grooming'²⁵ a child; and benefiting from²⁶, encouraging,²⁷ preparing or planning²⁸ to commit an offence against Division 272.

¹⁶ *Australian Constitution*, s 51(xxix). See also *XYZ v Commonwealth* (2006) 227 CLR 532.

¹⁷ See *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth).

¹⁸ Explanatory Memorandum, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010* (Cth) 39.

¹⁹ *Criminal Code* (Cth) s 272.8.

²⁰ *Criminal Code* (Cth) s 272.9.

²¹ *Criminal Code* (Cth) ss 272.12 and 272.13.

²² *Criminal Code* (Cth) s 272.10.

²³ *Criminal Code* (Cth) s 272.11.

²⁴ *Criminal Code* (Cth) s 272.14.

²⁵ *Criminal Code* (Cth) s 272.15.

²⁶ *Criminal Code* (Cth) s 272.18.



FEDERAL MAGISTRATES COURT OF AUSTRALIA

The offences apply to both Australian citizens and persons who reside in Australia at the time the offence was committed.

The term 'sexual activity' was deliberately chosen because of its broad nature and includes sexual intercourse or:

[A]ny other activity of a sexual or indecent nature (including indecent assault) that involves the human body, or bodily actions or functions (whether or not that activity involves physical contact between the two people).²⁹

Furthermore, to 'engage in sexual activity' includes being present while another person (including a child) engages in sexual activity. 'Presence' includes presence 'by a means of communications that allows the person to see or hear the other person.'³⁰

(b) Application of Division 272 (and its predecessor)

The Australian sex tourism provisions overcome many of the traditional problems associated with extraterritorial laws. The new offences of procuring and grooming in particular remove the need for the complicated task of gathering evidence from overseas.³¹

In terms of coverage, Australia's sex tourism laws clearly meet the first of the four criteria recommended above and also discharge Australia's international obligations. They have also become a standard 'used to guide reform internationally' and so becoming international best practice.³²

Despite this, between the first enactment of sex tourism laws in 1994 and 2011, only thirty people have been charged with child sex tourist related offences in Australia.³³

²⁷ *Criminal Code* (Cth) s 272.19.

²⁸ *Criminal Code* (Cth) s 272.20.

²⁹ *Criminal Code* (Cth) dictionary, 'sexual activity'.

³⁰ *Criminal Code* (Cth) dictionary, 'engage in sexual activity'.

³¹ Jim McNicol and Andreas Schloenhardt, *Australia's Child Sex Tourism Offences* (Research Paper, The University of Queensland, 2011) 20.

³² Australian Government, Attorney-General's Department, 'Proposed Reforms to Commonwealth Child Sex-Related Offences' (Consultation Article, September 2009) [48].

³³ McNicol, above n 31, 12.



FEDERAL MAGISTRATES COURT OF AUSTRALIA

Approximately 70 percent of the subsequent prosecutions have been successful.³⁴ Although this number is comparatively high when compared with other jurisdictions, it still only averages out to less than two prosecutions a year.

McNicol has rightly observed that the deterrent effect of child sex tourism laws is likely to be proportional to the level of enforcement and community awareness of the offences.³⁵ With a rate of less than two prosecutions a year it might be considered unlikely that the Australian extraterritorial laws will achieve their desired deterrent effect.

The case of *R v Wicks*³⁶ supports this assessment. In that case the offender, Wicks, travelled to Thailand for the sole purpose of having sex with young boys. In the accused's words it was a trip 'to let my hair down for 10 days'.³⁷ In this case it was revealed that the accused was aware that his sexual activity with young boys was illegal, however, this did not prevent him going. Instead he continued to view his sexual activity with the victims as a financial transaction, describing it as 'they sold it, I bought it'.³⁸

Perhaps with a prosecution rate as low as Australia's, Wicks simply thought that he would not be caught and/or prosecuted?

VI. The Japanese Approach

It is thought that Japanese men make up the largest number of child sex tourist perpetrators in many Asian countries.³⁹ A 2006 investigation into child sex tourism in Cambodia found that there are many sex services available exclusively to Japanese and Korean businessmen in that country.⁴⁰ The social acceptance of prostitution in Japan and the tolerance for

³⁴ Ibid.

³⁵ Ibid, 13.

³⁶ [2005] NSWCCA 409.

³⁷ Ibid, [14].

³⁸ Ibid.

³⁹ Naomi Svensson, 'Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Laws' (2006) 28 *Loyola of Los Angeles International and Comparative Law Review* 641, 651.

⁴⁰ Fredrick Matthews, 'Who are Sex Tourists in Cambodia?' (Research Report for Child Wise, December 2006) 35. Available from <<http://www.childwise.net/Resources/online-publications.html>> last accessed 10 October 2012.



FEDERAL MAGISTRATES COURT OF AUSTRALIA

promiscuous male sexuality in Japanese corporate culture have both been cited as reasons for this.⁴¹

The popularity of manga cartoons featuring detailed images of child sexual abuse and the practice of *enjo kosai*⁴² may also go some way to explaining Japan's over representation in the field of child sex tourism.⁴³

(a) The Law

To combat the image of Japan being a primary sending country, the Japanese Parliament enacted anti-sex tourist legislation in 1999. Article 10 of the *Law on Punishing Acts related to Child Prostitution and Child Pornography, and for Protecting Children* now provides extraterritorial jurisdiction to sexual offences relating to children. This Act does not include a double criminality requirement however it only applies to nationals. Therefore, Article 10 makes no provision for the prosecution of habitual residents living in Japan.⁴⁴

Under Article 2 a child is defined 'for the purposes of child protection and child pornography, as anyone under eighteen years old'.

The Act on *Child Prostitution* also sets out provisions for protecting child witnesses in the prosecutorial process. Under this law those involved in the trial 'shall' give consideration to the rights and characteristics of the child and take care not to harm their reputation or dignity.⁴⁵

In addition to the above crimes, Article 13(3) of the *Travel Agency Law* creates a somewhat convoluted prohibition on organising 'sex tours'. Under the *Travel Agency Law* travel agents are prohibited from getting involved in their tourists' conduct and receiving services which

⁴¹ ECPAT International, 'Japan' (Report, Global Monitoring: status of action against commercial sexual exploitation of children, ECPAT International, 2011) 9. Available from <http://ecpat.net/EI/Pdf/A4A_II/A4A2011_EAP_Japan_FINAL.pdf> last accessed 10 October 2012.

⁴² This practice is also known as 'compensated dating' where the partner, usually a school girl, in 'compensated' for rendering sexual acts to the patron. This practice is gaining increasing popularity in both Japan and South Korea and many young school girls are using it as a means for keeping up with fashion and technological trends.

⁴³ ECPAT, above n 41, 8-9.

⁴⁴ Ibid, 29.

⁴⁵ Ibid, 30.



FEDERAL MAGISTRATES COURT OF AUSTRALIA

violate the local law or ordinance of their destinations.⁴⁶ It would appear that this law only applies where the destination country has laws against engaging in sexual conduct with children.

(b) Enforcement

Despite the Japanese Government commenting that it must now punish that which it previously regarded as legal there appears to be little action.⁴⁷ A Committee on the Rights of the Child report on Japan found that there were no prosecutions under this law in 2009.⁴⁸ A report undertaken by ECPAT International found that between 1999 and 2008 there were only 4 arrests and no convictions under Article 10.⁴⁹ This is despite the fact that research indicates that Japanese nationals continue to engage in sex tourism throughout Asia at an unmitigated rate.⁵⁰

The past 13 years have therefore proved Japan's extraterritorial law reforms to be a toothless tiger.

VII. The South Korean Approach

Like Japan, South Korea remains a significant contributor to the problem of child sex tourism. This again is partly to do with the acceptability of prostitution in South Korean society. As an example, a 2004 study found that twenty percent of Korean men between the ages of 20 and 64 visited prostitutes on average 4.5 times every month.⁵¹

The problem has been especially significant for the small island nation of Kiribati. In 2006 the problem of South Korean fisherman sexually abusing Kiribati children became so severe that

⁴⁶ Ibid, 29.

⁴⁷ Fraley, above n 5, 471.

⁴⁸ Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention: Third periodic report of States parties due in 2006: Japan* (22 April 2008) <<http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-JPN3.doc>> last accessed 17 October 2012.

⁴⁹ Catherine Beaulieu, 'Extraterritorial Laws: Why they are not really working and how they can be strengthened' (Report, ECPAT International Compendium of Articles, ECPAT International, September 2008) 10.

⁵⁰ US Department of State, *Trafficking in Persons Report 2012* (June 2012) <<http://www.state.gov/documents/organization/192596.pdf>> last accessed 17 October 2012.

⁵¹ ECPAT International, 'South Korea' (Report, Global Monitoring: status of action against commercial sexual exploitation of children, ECPAT International, 2011) 8. Available from <http://www.ecpat.net/EI/Pdf/A4A_II/A4A_V2_EAP_SKOREA.pdf> last accessed 17 October 2012.



FEDERAL MAGISTRATES COURT OF AUSTRALIA

the Government was forced to shut its ports to Korean ships for a year.⁵² This drastic measure was seen as the only measure available to prevent the spread of HIV/AIDs among the Island's inhabitants.

South Korea, however, differs from other sending countries in that it also remains a significant destination country for many Japanese men looking for child prostitutes.⁵³

(a) The Law

The Criminal Code of the Republic of Korea provides for extraterritorial jurisdiction over South Korean nationals seeking to sexually exploit children overseas. The Criminal Code does not apply to permanent residents of South Korea.⁵⁴

The *Act on the Protection of Juveniles from Sexual Exploitation* further provides under Article 21 that:

*The State shall, when criminally prosecuting nationals who commit sex offences against children or juveniles outside the territory of the Republic of Korea pursuant to Article 3 of the Criminal Act, **make efforts to quickly obtain criminal information from foreign countries concerned and publish them.***⁵⁵

A 'child' or 'juvenile' is defined as 'persons under 19 years of age'.⁵⁶ The term 'sex offences' is defined broadly⁵⁷ to include rape and molestation,⁵⁸ production and distribution of child pornography,⁵⁹ child sex trafficking,⁶⁰ purchasing a child for sex,⁶¹ coercing a child to have sex,⁶² and conducting a business that arranges child prostitution.⁶³

⁵² Ibid, 11.

⁵³ Ibid.

⁵⁴ Ibid, 25.

⁵⁵ Emphasis Added.

⁵⁶ *Act on the Protection of Juveniles from Sexual Exploitation* (Republic of Korea, Act No 10391, 23 Jul 2010 rev ed) Art 2(1).

⁵⁷ *Act on the Protection of Juveniles from Sexual Exploitation* (Republic of Korea, Act No 10391, 23 Jul 2010 rev ed) Art 2(2)

⁵⁸ *Act on the Protection of Juveniles from Sexual Exploitation* (Republic of Korea, Act No 10391, 23 Jul 2010 rev ed) Art 7.

⁵⁹ *Act on the Protection of Juveniles from Sexual Exploitation* (Republic of Korea, Act No 10391, 23 Jul 2010 rev ed) Art 8, excluding Art 8(4).

⁶⁰ *Act on the Protection of Juveniles from Sexual Exploitation* (Republic of Korea, Act No 10391, 23 Jul 2010 rev ed) Art 9.



FEDERAL MAGISTRATES COURT OF AUSTRALIA

South Korean law also makes provisions for the protection of child victims in trials allowing them to give video testimony.⁶⁴

(b) Enforcement

Although the South Korean extraterritorial laws are far reaching and broad in scope an ECPAT International survey was unable to confirm that *any* South Korean nationals had been prosecuted under it.⁶⁵

Again it appears that the failure of the laws to protect children lie with the lack of will to prosecute and not in the drafting of the law.

VIII. The Singaporean Approach

According to a study conducted by the John Hopkins University, Singaporeans rate among the most frequent sex tourists in Thailand.⁶⁶ However, unlike South Korea and Japan, Singapore has had some success in closing down sex tourism operations. Singapore also remains the only ASEAN Member State to expressly mention child sex tourism.⁶⁷

(a) The Law

The *Penal Code (Amendment) Act 2007* created extraterritorial laws which criminalised commercial sex with a minor below the age of 18 outside of Singapore. Section 376C of the *Penal Code 1872* (Singapore) now states:

⁶¹ *Act on the Protection of Juveniles from Sexual Exploitation* (Republic of Korea, Act No 10391, 23 Jul 2010 rev ed) Art 10.

⁶² *Act on the Protection of Juveniles from Sexual Exploitation* (Republic of Korea, Act No 10391, 23 Jul 2010 rev ed) Art 11.

⁶³ *Act on the Protection of Juveniles from Sexual Exploitation* (Republic of Korea, Act No 10391, 23 Jul 2010 rev ed) Art 12.

⁶⁴ ECPAT International, above n 51, 27.

⁶⁵ *Ibid*, 25.

⁶⁶ ECPAT International, 'Singapore' (Report, Global Monitoring: status of action against commercial sexual exploitation of children, ECPAT International, 2011) 8. Available from <http://www.ecpat.net/A4A_2005/PDF/EAP/A4A2011_EAP_Singapore_FINAL.pdf> last accessed 18 October 2012.

⁶⁷ Afrooz Johnson, 'International Child Sex Tourism: Enhancing the Legal Response in South East Asia' (2011) 19 *International Journal of Children's Rights* 55, 62.



FEDERAL MAGISTRATES COURT OF AUSTRALIA
Any person, being a citizen or a permanent resident of Singapore, who does, outside of Singapore, any act that would, if done in Singapore, constitute an offence under Section 376B [concerning commercial sex with a minor], shall be guilty of an offence.

Under the new provisions it is also an offence to communicate with another person for the purpose of obtaining commercial sex with a minor⁶⁸ and to contribute to the sexual exploitation of children in tourism.⁶⁹ Grooming a child for the purpose of committing a sexual act on them is criminalised where the perpetrator is older than 21 and the child is under 16 years of age.⁷⁰ These offences are punishable by up to 10 years imprisonment or a fine, or both.

However, neither the *Penal Code* nor the accompanying Explanatory Statement defines 'commercial sex'. The Singaporean legislation therefore, unlike the Australian legislation, risks narrowly identifying child sex tourists by making 'commercial' a necessary element of the offence.⁷¹

(b) Enforcement

The very suggestion of enacting extraterritorial anti-sex tourism laws in Singapore has seemed to have a positive effect. It was reported in 2006 that the mere mention of proposed amendments to the *Penal Code* had resulted in a 15 percent drop in ticket sales to Batam from Singapore.⁷² Restaurants in the red light district of the popular destination among Singaporean sex tourists also reported that their profit margin had dipped by nearly 50 percent.⁷³

Apart from this initial success, the Singaporean Government has appeared slow in taking up the challenge of enforcing the new extraterritorial laws. Before April this year the Singaporean Government was yet to investigate, prosecute or convict any national or

⁶⁸ *Penal Code 1872* (Singapore) s 376B.

⁶⁹ *Penal Code 1872* (Singapore) s 376D.

⁷⁰ *Penal Code 1872* (Singapore) s 376E.

⁷¹ Johnson, above n 66, 63.

⁷² Child Wise Tourism, above n 15, 30.

⁷³ *Ibid.*



FEDERAL MAGISTRATES COURT OF AUSTRALIA

permanent resident for child sex tourism.⁷⁴ However, in April this year the Singaporean Attorney-General's Chambers released a press statement noting that on Monday 16 April 2012 44 persons had been charged with having commercial sex with an underage person.⁷⁵ Hopefully, these arrests signal a positive development in Singapore's approach to enforcing their extraterritorial laws.

IX. The Will to Succeed

It has been opined, with regards to extraterritorial laws, that if the legislation is a first indispensable step, the real challenge lies in implementation.⁷⁶ The evidence gleaned from the countries examined in this paper appears to bear testament to this statement. Australia, Japan, South Korea and Singapore all now have broad extraterritorial powers to hold nationals (and in some cases residents) to account for their actions overseas. Although there are some minor differences and deficiencies in some of the laws, all four countries adequately meet the first four criteria recommended by Fraley. Their failure, then, rests in the fifth criterion requiring enforcement of the law in a uniform and coherent manner.

Given the linguistic, cultural and territorial barriers prosecutors face, it is not suggested that implementing extraterritorial legislation is an easy task.⁷⁷ I will make two brief observations below which may help ease this burden and also ensure that anti-sex tourist laws are enforced.

Non-Government organisations play a crucial role in providing resources for enforcement against sex tourism which is often underutilised.⁷⁸ Agencies such as the International Justice Mission and ECPAT International are often involved in investigating, conducting research and working with local authorities to stop illegal abuses such as sexual abuse towards children.⁷⁹ These agencies can offer invaluable and inexpensive information to interested state parties

⁷⁴ US Department of State, *Trafficking in Persons Report 2011* (June 2011)

<<http://www.state.gov/documents/organization/164457.pdf>> last accessed 19 October 2012.

⁷⁵ Attorney-General's Chambers, Singapore, 'Cases under Section 376B Penal Code' (Press Release, 18 April 2012) available from <[http://app.agc.gov.sg/DATA/0/Docs/NewsFiles/AGC Press Release 18 April 2012.pdf](http://app.agc.gov.sg/DATA/0/Docs/NewsFiles/AGC%20Press%20Release%2018%20April%202012.pdf)> last accessed 3 October 2012.

⁷⁶ Svensson, above n 39, 659.

⁷⁷ Ibid, 650.

⁷⁸ Cotter, above n 3, 509.

⁷⁹ For information on the work of these two agencies see: <<http://www.ijm.org/who-we-are>> and <http://www.ecpat.net/EI/Ecpat_vision.asp> last accessed 19 October 2012.



FEDERAL MAGISTRATES COURT OF AUSTRALIA

which may help ease both the monetary and practical impediments imposed on domestic prosecutorial agencies.

Another possible reform is to require prosecutors to give reasons for their decision to decline to prosecute a child-sex tourism case. This approach was recommended by ECPAT International in their 2008 report.⁸⁰ Giving reasons for declining to exercise their discretion would provide greater transparency in the decision process, forcing prosecutors to justify their decision. A requirement to publish reasons may also put pressure on prosecutorial offices to not decline to prosecute merely because the case is difficult or likely to be expensive.

X. Conclusion

The child-sex tourism industry, like any industry, is demand based. In order to stop it, it is necessary to deter its consumers. In the fight against such behaviour it has often been said that Australia's extraterritorial sex tourism legislation goes beyond international practice and sets the benchmark.⁸¹ While the provisions in the Australian legislation may provide for broad criminal culpability it is suggested that this should not be the test for international best practice. Rather, best practice should be assessed by the level of vigour with which those criminal activities are pursued.⁸²

Although practices can be changed to help make the prosecutorial process easier the effectiveness of anti-sex tourism laws to protect ultimately hinges on political will. At present it would seem that political motivation is tepid at best.

To not hold nationals accountable for child sexual abuse committed overseas is to abandon children to a world where, as one sex tourist put it, 'buying sex with a twelve year-old is quicker than changing money.'⁸³

⁸⁰ ECPAT International, above n 49, 12.

⁸¹ Australian Government, above n 32.

⁸² McNicol, above n 31, 14.

⁸³ Schwartz, above n 8, 407.



FEDERAL MAGISTRATES COURT OF AUSTRALIA

To put it another way, I was asked by a 15 year old girl trafficked to a brothel and subsequently blinded because she tried, many times, to run away “who will give me justice?”

If lawyers refuse to engage, the answer may well be no-one.