

Criminal Code Amendment (Protecting Minors Online) Bill 2017

Submission to Senate Standing Committees Legal
and Constitutional Affairs Legislation Committee

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

¹ www.lawyersalliance.com.au.

Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the issues raised by the terms of reference of the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Criminal Code Amendment (Protecting Minors Online) Bill 2017 (the Bill).
2. The Bill considers one of the most serious crimes under Australian law: sexual offences against children. These offences have the potential to cause serious harm to children, often giving rise to lifelong injuries.
3. It is essential that adequate protections exist in law to prevent this crime from occurring, protect children from potential criminals and adequately punish those who seek to commit sexual offences against children.
4. However, the ALA is of the opinion that the Bill currently being considered is not sufficiently targeted to prevent harm to children. It could criminalise activities which have no potential to cause harm and, in doing so, destroy the lives of people who pose no risk by labelling them as child abusers. There is also no evidence that criminalising preparatory acts will increase protections for children, nor indeed any suggestion in the Explanatory Memorandum that such evidence exists.

Specific comments on the Bill

5. The proposed offence is:

'474.25C A person (the **first person**) commits an offence if:

 - (a) the first person does any act in preparation for doing, or planning to do, any of the following:
 - (i) causing harm to a person under 16 years of age;
 - (ii) engaging in sexual activity with a person under 16 years of age;
 - (iii) procuring a person under 16 years of age to engage in sexual activity; and
 - (b) the first person is at least 18 years of age; and



(c) the act is done using a carriage service.

Penalty: Imprisonment for 10 years.

Example: A person misrepresents their age online as part of a plan to cause harm to another person under 16 years of age.²

6. This Bill would add to existing provisions in the *Criminal Code Act 1995* (Cth) (Criminal Code), which prohibit using a carriage service to ‘procure’³ or ‘groom’⁴ a child under 16 years. These offences are themselves preparatory in nature. No harm need befall any child before the penalties (up to 15 years in prison for procurement and 12 years in prison for grooming) apply. As it is the use of the carriage service that constitutes the criminal conduct in procurement and grooming offences, the child does not even have to receive the communication, or indeed be a child, as the sender only needs to believe the recipient is under 16 years.
7. These procurement and grooming provisions constitute a significant expansion of the traditional scope of criminal law, which would usually impose criminal penalties only after harm to people or property had occurred. This expansion is appropriate, given the risks faced by children and the significant damage that sexual abuse can cause. In the case of child sexual abuse, law enforcement officials need, and have, tools at their disposal to keep children safe. Ultimately, these provisions strike the right balance between keeping children safe and ensuring that only individuals who pose a genuine risk are caught by the legislation.
8. It is unclear exactly what the provision proposed in the Bill would add to the existing offences under the Criminal Code in terms of protecting children. The term ‘harm’ in proposed s474.25C(a)(i) is unduly broad. It could include any kind of ‘harm’ as defined by the Dictionary of the Criminal Code, not only harm of a sexual nature.
9. Doing ‘any act in preparation for doing, or planning do to,’ any of the listed acts, is also extremely broad. It could potentially include connecting a mobile phone or internet service or purchasing a computer, if the requisite intention existed.

² Criminal Code Amendment (Protecting Minors Online) Bill 2017, Sch1.

³ S474.26.

⁴ S474.27.



10. Criminalising such acts with no further evidence that offences against ss474.26 or 474.27 have been committed would be excessive, and unlikely to protect children in practice. It would, however, be likely to leave people liable to arrest or prosecution for activities that did not and would not pose any genuine risk to children.
11. The offences found in ss474.26 and 474.27 are adequate to protect children from harm. It is not appropriate to extend criminal liability to such an early point in the criminal process. We believe the Bill should not be passed.

Preparatory acts and criminal law

12. Preparatory acts for crimes against children are already criminalised, as discussed above. It is thus unclear what the proposed provisions would add in terms of protecting children from harm. The need for this amendment has not been elucidated in the Explanatory Memorandum or second reading speech. Both documents merely refer to the ability of the Bill to prevent procurement or grooming, without clarifying how the preparatory offences would assist in this prevention.⁵
13. As noted by the Law Council of Australia (LCA) in a 2010 submission to this Committee, a preparing and planning offence 'unnecessarily extends established principles of criminal responsibility'.⁶ The LCA went on:

'The 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

⁵ See Explanatory Memorandum, Criminal Code Amendment (Protecting Minors Online) Bill 2017 (Cth) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5857_ems_b581a351-3fa0-4520-a20c-7e54a4fc253b%22> and Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 2017 (Hon Michael Keenan MP) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2F7cca2e10-1f9f-4c32-8a4a-59267d7d13e5%2F0033;query=Id%3A%22chamber%2Fhansardr%2F7cca2e10-1f9f-4c32-8a4a-59267d7d13e5%2F0033%22>>.

⁶ The submission concerned preparatory acts for child sex tourism: Law Council of Australia, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010* (March 2010), available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2008-10/criminacodeamendment/index, 7.

behaviour which is not in itself harmful or criminal. These offences necessarily and inappropriately rely entirely on police and prosecutorial discretion for their reasonable and proportionate enforcement.⁷

14. While these comments were made in relation to a different Bill, the concerns they express are relevant to the current proposals. The offence proposed imposes liability too early in the criminal process, at a point where an individual contemplating a crime might still change his or her mind.
15. Rather than criminalising such individuals, we should allow them the space to make the choice to refrain from causing harm. Procurement and grooming offences already exist to prevent individuals who continue to plan to cause harm (but have not already) from doing so. The risk to children remains the same.
16. The strong public reaction to child sexual abuse, which may be a motivating factor behind this Bill, is also an important reason for ensuring that child sex offences do not extend criminal liability beyond what is necessary to keep children safe. Being accused of child sex offences, whether a successful prosecution follows or not, can have serious ramifications for individuals. It can affect relationships, jobs and families, casting a shadow over a person that it is difficult or impossible to shed. If a prosecution is successful, long prison sentences are available, causing irreversible damage to an individual's life prospects. These impacts should only be possible where a genuine threat exists. It is not clear what threat, not already considered by the Criminal Code, this proposed offence addresses.

Recommendation

The ALA makes the following recommendation:

- This Bill should not be passed in any format.

⁷ *Ibid.*