



Law Council
OF AUSTRALIA

Criminal Code Amendment (Protecting Minors Online) Bill 2017

Senate Legal and Constitutional Affairs Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors - one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its National Criminal Law Committee and the Law Society of South Australia in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to comment on the Criminal Code Amendment (Protecting Minors Online) Bill 2017 (**the Bill**).
2. The Law Council supports protecting Australian children from sexual abuse and supports appropriate measures to ensure that the internet is not used to perpetrate crimes against children.
3. However, the Law Council has a number of concerns with the Bill. These include:
 - The necessity of the Bill in light of existing offences in the *Criminal Code Act 1995* (Cth) (**Criminal Code**) and the extensions of criminal liability in Part 2.4 of the Criminal Code;
 - The preparatory nature of the offence;
 - The breadth of the 'causing harm' element in proposed paragraph 474.25C(a)(i); and
 - Given the wide scope of the offence, the ability of law enforcement agencies to obtain a telecommunications warrant to investigate a person in relation to the proposed offence.
4. As a consequence of these concerns the Law Council recommends that the Bill not be passed.

Preliminary Comments

5. The Law Council notes that the Bill is the fourth attempt to criminalise an adult misrepresenting their age to a minor for specified purposes.
6. In February 2010, Senator Xenophon introduced the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2010 (**the 2010 Bill**). That Bill proposed three new offences:
 - using a carriage service to transmit a communication to another person with the intention of misrepresenting the sender's age in circumstances where the recipient is someone who is, or who the sender believes to be, under 18 years of age and where the sender at least 18 years of age;
 - doing the above, but with the intention of making it easier for the sender to physically meet the recipient; and
 - doing the above, but with the intention to commit an offence.
7. The Senate Legal and Constitutional Affairs Legislation Committee reported on this Bill on 30 June 2010, with the recommendation that the Senate not pass the Bill.¹ This Bill ultimately lapsed.
8. In February 2013, Senator Xenophon introduced the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013 (**the February 2013 Bill**). This Bill was in substantially the same terms as the 2010 Bill, with the main difference being there was no proposed offence of simply misrepresentation of age. Instead, the Bill proposed two offences:
 - using a carriage service to transmit a communication to another person with the intention of misrepresenting the sender's age for the purpose of encouraging the recipient to physically meet with the sender (or another person), in circumstances where the recipient is someone who is, or who the sender believes to be, under 18 years of age and where the sender at least 18 years of age; and
 - using a carriage service to transmit a communication to another person with the intention of misrepresenting the sender's age and with the intention of committing an offence, in circumstances where the recipient is someone who is, or who the sender believes to be, under 18 years of age and where the sender at least 18 years of age.
9. The Senate Legal and Constitutional Affairs Committee reported on the February 2013 Bill in June 2013, with the recommendation that the Bill not be passed.² Ultimately, the Bill lapsed. It is noted that both the 2010 Bill and the February 2013 Bill did not require the recipient to in fact be under 18; belief on the part of the sender that the recipient is under 18 was sufficient.
10. In December 2013, Senator Xenophon introduced an amended Bill, the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013 (**the December 2013 Bill**). The December 2013 Bill provided that the recipient of the communication had to be under 16 years of age, as opposed to under 18 years of age in the February 2013 Bill.

¹ Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2010*, (June 2010), 11.

² Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013*, (June 2013), 9.

11. The Senate Legal and Constitutional Affairs Committee reported on the December 2013 Bill in August 2015, with the recommendation that further consultation be conducted on the Bill prior to its consideration by the Senate.³ The December 2013 Bill ultimately lapsed.
12. The Law Council, and some of the Law Council's Constituent Bodies, provided submissions opposing the proposed offences contained in previous Bills. This position has not changed despite the Bill currently under consideration being framed in quite different terms as compared to the previous ones. In the Law Council's view, the manner in which the proposed offence in the Bill is currently drafted only exacerbates its concerns with respect to the Bill.
13. Against that background, and noting that all of the previous Bills did not receive a favourable recommendation, the following comments are made in relation to the Bill.

Necessity of the proposed offence

14. In light of existing offences in the Criminal Code, the Law Council considers that the proposed offence is unnecessary.
15. Subsection 474.26(1) of the Criminal Code makes it an offence for a person to transmit a communication to another person with the intention of procuring the recipient to engage in sexual activity with the sender. Subsection 474.27(1) of the Criminal Code makes it an offence for a person to transmit a communication to another person with the intention of making it easier to procure the recipient to engage in sexual activity with the sender.
16. Proposed section 474.25C would make it an offence to use a carriage service provider to prepare or plan to cause harm, procure, or engage in sexual activity with a person under the age of 16 years. The Explanatory Memorandum to the Bill states that:

...a preparatory act may include a person using social media to lie about their age, profession or an event in an attempt to lure a child to a meeting for the purposes of causing a child harm or procuring or engaging in sexual activity with a child.⁴

17. However, it is suggested that such conduct may be captured by the offences in section 474.26 and 474.27 of the Criminal Code. As the Attorney-General's Department noted in its submission in relation to the February 2013 Bill:

[The] existing online grooming and procurement offences in the Criminal Code... would cover circumstances in which an adult misrepresented their age in an online communication with a child for the purpose of encouraging a physical meeting with that child with the intention of engaging, or making it easier to engage, in sexual activity during the physical meeting.⁵

18. Further, in considering the range of conduct captured by the current offences in the Criminal Code vis-à-vis the range of conduct captured by proposed section 474.25C, it must be borne in mind that the scope of conduct captured by the current offences can be extended by virtue of Part 2.4 of the Criminal Code (Extensions of criminal liability).

³ Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013*, (August 2015), 10.

⁴ Criminal Code Amendment (Protecting Minors Online) Bill 2017, Explanatory Memorandum, 10.

⁵ Commonwealth Attorney-General's Department, *Submission on the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013* (2013), 4.

Thus, a person may lawfully be investigated for, and charged with, attempting to procure a minor (section 474.26) or attempting to make it easier to procure a minor (section 474.27).

19. Of course, 'attempt' requires the person to engage in conduct that is more than merely preparatory to the commission of the offence⁶ and the proposed offence will criminalise conduct that is merely preparatory. The Law Council's concerns with preparatory offences are set out below.
20. The Law Council notes that the Australian Federal Police, in its evidence to the Committee in relation to the December 2013 Bill, took the view that the current provisions were operationally effective, saying:

From an operational perspective...in a situation where you have someone who is 60 chatting to a 13-year-old, it is a very real possibility that the police would have a reasonable suspicion that there is malintent there, that there is an underlying sexual purpose. That would then trigger us to use our investigative powers for the substantive grooming offence. There will be an opportunity for us to intervene and seek evidence of that offence, and that in itself would have a disruptive effect. We do not have to wait until just in the nick of time. That is why we have the procuring offence; it allows you to intervene before the actual act happens. The grooming offence allows you to intervene at the stage preparatory to that.⁷

21. The Law Council considers that there is nothing to indicate that circumstances have changed such that the AFP would no longer be able to 'intervene before the actual act happens.'
22. It is further noted that the Committee's view in relation to the February 2013 Bill was that:

...it is clear that existing offences in the Criminal Code already criminalise online communications with children where there is evidence of intention to cause harm to children. Accordingly, the committee considers that the new offences proposed in the Bill are not necessary.⁸

23. This concern also formed the basis of the Committee's recommendations in relation to the 2010 Bill and the December 2013 Bill.⁹

The breadth of the offence

24. The Law Council also opposes the Bill on the basis of wide scope of proposed section 474.25C. The Law Council notes that the proposed offence is much broader in scope than the ones proposed in previous Bills. The focus of the previous Bills was upon

⁶ *Criminal Code Act 1995* (Cth), s 11.1(2).

⁷ Mrs Elsa Sengstock, Australian Federal Police, *Senate Legal and Constitutional Affairs Committee Hansard* (3 March 2014), 18.

⁸ Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013*, (June 2013), 8.

⁹ Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2010*, (June 2010), 10; Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013*, (August 2015), 10.

misrepresentation of age, whereas the Bill would criminalise a broader range of conduct than merely misrepresentation of age.

Preparatory nature

25. The Law Council has previously opposed the introduction of preparatory offences in the context of terrorism¹⁰ and child sex tourism. There has been no explanation why the existing extensions of criminal liability in the Criminal Code, such as attempt, cannot be used in the circumstances.¹¹ There is the potential that the proposed offences may not effectively deal with the serious issues crimes of terrorism and child sex tourism. The issue is how these serious crimes are dealt with by the law in an effective manner.

26. The proposed offence is framed quite broadly and the offence may be triggered before any criminal intent has crystallised into an attempt to cause harm, procure, or engage in sexual activity with a person under 16 years of age. Indeed, this seems to be the intent of the Bill:

*...the offence targets preparatory conduct where the offender has not proceeded far enough for the conduct to be captured by the existing offences...*¹²

27. Further, actual communication with a person under 16 years of age is not required under the proposed offence. The offence may be proved even where a recipient child is not communicated with or even identified; all that is required is proof conduct that was engaged in for the purpose of causing harm or procuring or engaging in sexual activity with a person under 16. The 'person under 16' need not be a specific individual and indeed the defence of 'mistake of age' has no application to the proposed offence.¹³

28. Offences that seek to impose criminal sanctions for actions performed before a person has formed a definite plan to commit a specific criminal act represent a departure from common forms of criminal liability. As Chief Justice Spigelman noted in the context of preparatory terrorism offences:

*Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier state than is usually the case for other kinds of criminal conduct...*¹⁴

29. The Attorney-General's Department's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (**the Guide**) states that:

¹⁰ See, e.g. Law Council of Australia, *Anti-Terrorism Reform Project* (2013).

¹¹ Law Council of Australia, *Submission on the Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007* (October 2007).

¹² Criminal Code Amendment (Protecting Minors Online) Bill 2017, Explanatory Memorandum, 10.

¹³ *Ibid.*, 11.

¹⁴ *Lodhi v The Queen* [2006] NSWCCA 121 at [66], cited with approval by Bongiorno JA in *R v Kent* [2009] VSC 375.

*The extension of criminal responsibility provisions in the Criminal Code have been carefully formulated. Consequently, these provisions should be relied upon unless there is a sound justification to depart from them.*¹⁵

30. The Guide goes on to provide that:

*Where an offence covers preparatory conduct, consideration should be given to disapplying some or all of Part 2.4 of the Criminal Code.*¹⁶

31. The Law Council notes that the Bill does not disapply Part 2.4 of the Criminal Code. Accordingly, in theory, a person may be charged with attempting (i.e. engaging in conduct which is more than merely preparatory) to engage in preparatory conduct or attempting to plan to do one of the things set out in subsection 474.25C(a). This represents an extraordinary extension of criminal liability and there is a real risk that benign or otherwise unobjectionable conduct may be caught by the proposed offence.

32. Further, it is noted that misrepresenting one's age *in person* in order to engage in sexual activity with a person under 16 is not an offence. Thus, an 18 year old who misrepresents his or her age as 17 to a 15 year old during a face-to-face conversation would not be captured by the offence, even if they did so with the intent of causing harm or engaging in sexual activity; however, if the 18 year old did so over the phone, the conduct may fall within the scope of the offence.

Causing harm

33. Proposed paragraph 474.25C(a)(i) would make it an offence to do any act in preparation for, or planning to cause harm to a person under 16 years of age. 'Harm' is defined in the Criminal Code as:

*Physical harm or harm to a person's mental health, whether temporary or permanent. However, it does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.*¹⁷

34. 'Physical harm' is defined as including

*Unconsciousness, pain, disfigurement, infection with a disease and any physical contact with a person that the person might reasonably object to in the circumstances (whether or not the person was aware of it at the time).*¹⁸

35. 'Harm to a person's mental health' is defined as including

*Significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.*¹⁹

36. Inchoate liability (such as the extensions of criminal responsibility in part 2.4 of the Criminal Code) and indeed the preparatory offences currently in the Criminal Code are

¹⁵ Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011), 35.

¹⁶ *Ibid.*

¹⁷ *Criminal Code Act 1995* (Cth), Dictionary.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

tied to a substantive offence. A person cannot be charged with attempting to do something that is not itself a crime, for example, and in relation to preparatory terrorism offences, such as doing an act in preparation for, or planning, a terrorist act,²⁰ the commission of a terrorist act is itself a criminal offence.²¹

37. However, this is not the case in relation to proposed paragraph 474.25C(a)(i): causing harm (as defined in the Criminal Code) to a person under 16 is not itself a criminal offence. Of course, insofar as 'harm' includes 'physical harm', there are a number of state and territory offences of personal violence to which a connection could be drawn. However, with one exception relating to causing harm from unlawful manufacturing of drugs,²² the substantive offences in the Criminal Code that criminalise 'causing harm'²³ do not relate to causing harm to a person under 16 and, in any event, there is no general offence of causing harm to the mental health of a person under 16 in any jurisdiction in Australia.
38. Thus, the effect of paragraph 474.25C(a)(i) would be to criminalise conduct which does not, of itself, constitute a criminal offence.

Investigation and prosecution

Telecommunications warrants

39. Item 3 of Schedule 2 of the Bill would amend the *Telecommunications (Interception and Access) Act 1979* (Cth) (**TIA Act**) to provide that the proposed offence is a 'serious offence' for the purposes of the TIA Act. The consequence of this would be that law enforcement agencies could apply for a telecommunications service warrant where, *inter alia*, the information obtained under the warrant would be likely to assist in connection with the investigation by the agency of the proposed offence.²⁴
40. In the Law Council's view, the wide scope of the proposed offence and the relatively low threshold for issuing the warrant ('likely to assist the investigation') may result in unwarranted intrusions on privacy, particularly as the Law Council considers the proposed offence to be unnecessary in light of existing provisions in the Criminal Code.

Other concerns

41. As the Law Council previously noted in the context of preparatory terrorism offences:

*[this] extension of criminal responsibility to cover preparatory acts requires prosecutorial and law enforcement authorities to exercise a considerable degree of discretion when determining whether an otherwise innocuous act should be subject to charge and prosecution...*²⁵

²⁰ *Ibid.*, s 101.6(1).

²¹ *Ibid.*, s 101.1(1).

²² *Ibid.*, s 310.3.

²³ See, e.g. *Ibid.*, s 71.6 (Intentionally causing harm to a UN or associated person); s 71.7 (Recklessly causing harm to a UN or associated person); s 80.1(1)(c) (Causing harm to the Sovereign, Governor-General or Prime Minister); s 147.1 (Causing harm to a Commonwealth public official).

²⁴ *Telecommunications (Interception and Access) Act 1979* (Cth), s 46(1)(d).

²⁵ Law Council of Australia, *Anti-Terrorism Reform Project* (2013), 44.

42. The Law Council then stated that:

[some] may argue that little harm is done by the creation of broad-based terrorism offences, as ultimately prosecutorial authorities are unlikely to lay terrorism charges without evidence of the existence of the most serious and dangerous plans. However an unacceptable element of arbitrariness and unpredictability arises when the determination of whether or not a person is charged...is left to the broad discretion of prosecutorial authorities. This is particularly problematic given the fact that such a determination has profound implications...²⁶

43. It is suggested that the same concerns apply in relation to the Bill.

44. Indeed, there may be great difficulty in establishing intent to commit a future act (such as 'harm' to a person under 16) where the actions relied upon to prove such an intent are themselves benign, innocuous or equivocal. Given this difficulty, there is a risk that investigations or prosecutions may focus upon the character of the accused rather than the character of the actions the accused has undertaken.

45. Further, while it may be argued that the exercise of prosecutorial discretion will prevent trivial or innocuous conduct from being prosecuted, the Law Council considers that investigative or prosecutorial discretion should not be held up as a cure for defects in the scope of substantive offences. Rather, the substantive offence should be appropriately framed in the first instance to ensure that it is effective in dealing with unlawful conduct.

²⁶ Ibid.