

CHAPTER 2

KEY ISSUES

2.1 The majority of submissions received by the committee identified specific concerns with the Bill. The key concerns identified by submitters were:

- duplication of existing offences in the *Criminal Code Act 1995* (Cth) (Criminal Code); and
- the Bill's formulation of offences in proposed new section 474.40.¹

Duplication of existing offences in the Criminal Code

2.2 The Criminal Code contains a number of offences, which criminalise online communications with children where there is evidence of intention to cause harm to a child: for example, section 474.26 (the offence of procurement), section 474.27 (the offence of grooming), and section 474.14 (the offence of using a telecommunications network with intention to commit a serious offence).

2.3 Subsection 474.26(1) provides:

(1) A person (the **sender**) commits an offence if:

(a) the sender uses a carriage service to transmit a communication to another person (the **recipient**); and

(b) the sender does this with the intention of procuring the recipient to engage in sexual activity with the sender; and

(c) the recipient is someone who is, or who the sender believes to be, under 16 years of age; and

(d) the sender is at least 18 years of age.

Penalty: Imprisonment for 15 years.

2.4 Subsection 474.27(1) provides:

(1) A person (the **sender**) commits an offence if:

(a) the sender uses a carriage service to transmit a communication to another person (the **recipient**); and

(b) the sender does this with the intention of making it easier to procure the recipient to engage in sexual activity with the sender; and

1 See: Attorney-General's Department (AGD), *Submission 1*, pp 3-5; National Children's and Youth Law Centre, *Submission 4*, pp 2-3; Law Society of South Australia, *Submission 5*, p. 2; ACT Government, *Submission 6*, pp 1-2; Law Council of Australia, *Submission 8*, p. 1; Law Society of Western Australia, *Submission 9*, p. 1.

- (c) the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
- (d) the sender is at least 18 years of age.

Penalty: Imprisonment for 12 years.

2.5 A number of submitters referred to these existing offences in the Criminal Code, and stated that these provisions already capture the behaviour sought to be covered by the new offences proposed in the Bill.² As the Attorney-General's Department (Department) explained:

[T]he existing online grooming and procurement offences in the Criminal Code apply where an adult has communicated with a child online with the intention of procuring or making it easier to procure the child to engage in sexual activity. This 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.³

2.6 The Law Society of South Australia agreed:

[T]he Society is of the view that s 474.40(1) is unnecessary. The Criminal Code already contains grooming offences which more appropriately criminalise conduct of a criminal nature (eg. ss 474.26 and 474.27).⁴

Bill's formulation of offences in proposed new section 474.40

2.7 The formulation of the offences in proposed new section 474.40 were of most concern to submitters, who argued that the scope of the proposed provision is too wide and the proposed offences are flawed.

Scope of the proposed provision

2.8 Submitters commented on two separate aspects of each proposed offence: paragraphs 474.40(1)(b) and 474.40(2)(b), which contain a fault element (that is, the requirement of an intention to misrepresent one's age); and paragraphs 474.40(1)(d) and 474.40(2)(d), which require that the recipient of a communication is, or is believed by the sender to be, under 18 years of age.

2 See, for example: ACT Government, *Submission 6*, p. 2; Law Society of Western Australia, *Submission 9*, p. 1.

3 *Submission 1*, p. 4. Also see p. 5 (in relation to section 474.14 of the *Criminal Code Act 1995* (Cth) (Criminal Code) and proposed new subsection 474.40(2)).

4 *Submission 5*, p. 4.

Intention to misrepresent one's age

2.9 The Department explained that, because only an intention to misrepresent and not an actual misrepresentation of age is required, the proposed offence is too broad. Accordingly, an actual misrepresentation of age would be preferable to limit the application of the proposed provision.⁵

Recipient is, or is believed to be, under 18 years of age

2.10 In relation to paragraph (d) of the proposed offences, the Law Society of South Australia argued that the offences must only be made out where the sender believes the recipient is under 18 years of age because otherwise non-criminal conduct would also be captured:

By this we refer to criminal liability being created by establishing only that the recipient is under 18. Clearly in this case the gravamen of the criminality would be missing where the sender believed that the recipient was 18 or over. An example may be where a female recipient represents her age to be 21. The sender, to encourage a meeting or the continuation of a relationship, may consider that the recipient would lose interest if she was aware he was younger than her. His age could be 19, but he misrepresents it as 23. The fact the recipient is 17 can never be to the point because the sender at all times believed, on reasonable grounds, that she was [21].⁶

2.11 Further:

Offence provisions are only meant to capture conduct which is criminal in nature. It is no answer to this to suggest that the [proposed offences make] criminal any misrepresentation as to age because that ignores the purpose for which the [offences are proposed to be] created (to protect children from online predators who take advantage of a misrepresentation as to age to set up a meeting with a view to commit an offence).⁷

2.12 The Department informed the committee that the element of belief on the part of the sender is not consistent with existing offences in the Criminal Code which are directed toward online communications with children. In particular, the Department explained that the procurement and grooming offences capture communications with persons under 16 years of age, taking into account the legal age of consent throughout Australia (between 16 and 17 years):

It is a long-held Commonwealth policy that an age limit of 16 years strikes the appropriate balance between the need to protect vulnerable persons from sexual exploitation and the need to allow for the sexual autonomy of young people.⁸

5 *Submission 1*, p. 3. Also see: Law Society of South Australia, *Submission 5*, p. 3.

6 *Submission 5*, p. 4.

7 *Submission 5*, p. 4.

8 *Submission 1*, p. 4. Also see: Law Society of Western Australia, *Submission 9*, p. 1.

2.13 The Department indicated that the proposed new offences would criminalise a misrepresentation of age to a person under 18 years of age, even if consensual sexual activity between the sender of the communication and its recipient would not otherwise be a crime:

For example, a 19 year old saying he or she is 18 years old in order to enter into a relationship with a 17 year old would be an offence under the Bill, even though a 19 year old may legally engage in consensual sexual activities with a 17 year old in all Australian jurisdictions.⁹

Proposed new subsection 474.40(1) – intention to encourage a physical meeting

2.14 Submitters also raised concerns in relation to a particular aspect of the proposed offence in new subsection 474.40(1): the intention to encourage the recipient to physically meet with the sender or any other person. In essence, these concerns were: the offence is not consistent with current Commonwealth criminal law policy; and there is no clear nexus between the non-criminal conduct captured by the proposed offence and the criminal conduct which is the subject of the offence.

Inconsistency with current Commonwealth criminal law policy

2.15 The Department advised:

Under Commonwealth law, it is highly unusual for lying to be made a criminal offence without an additional element that results in the behaviour being considered sufficiently abhorrent to justify criminal sanctions.¹⁰

2.16 The Department explained that lying for the sole purpose of encouraging a physical meeting with a child does not attract such an additional element and, if criminalised, would represent a departure from Commonwealth criminal law policy.¹¹

No clear nexus between non-criminal and criminal conduct

2.17 The ACT Government and the Law Society of South Australia commented on the lack of nexus between the non-criminal conduct captured by the proposed offence (encouraging a physical meeting with a child) and the criminal conduct which might result from that meeting. The Law Society of South Australia submitted that its principal difficulty with proposed new subsection 474.40(1) is that it criminalises conduct of a non-criminal nature:

Part of the problem with the offence provision is that it seeks to criminalise behaviour which is not inherently criminal. The intent is to criminalise a

9 *Submission 1*, p. 4. Also see: ACT Government, *Submission 6*, p. 2; NSW Council for Civil Liberties, *Submission 2*, p. 2.

10 *Submission 1*, pp 4-5.

11 *Submission 1*, p. 5.

preparatory step in the process of committing a crime. However, in attempting to do so, it will capture many situations it does not intend to.¹²

2.18 The Department's submission likewise explained that the broad application of proposed new subsection 474.40(1) 'would capture conduct that is innocent and not warranting of criminal sanctions'.¹³

2.19 The ACT Government expressed similar concerns:

While it is appropriate in some circumstances to criminalise activity which is not illegal but is a step toward the commission of a particular offence, there must be a sufficient connection between the legal and illegal activity to warrant a legislative response.¹⁴

2.20 In its submission, the ACT Government noted specific examples of legislative provisions which criminalise lawful conduct, subject to an intention to carry out, or for the purpose of carrying out, unlawful conduct (for example, section 272.20 of the Criminal Code). It was noted however that 'the non-illegal activity in the proposed new offence at section 474.40(1) is not connected in any way to any illegal activity'.¹⁵

Support for proposed new subsection 474.40(1)

2.21 On the other hand, two submitters – the Carly Ryan Foundation and Ms Susan McLean, a cyber-safety expert – argued that it is important to provide law enforcement agencies with the ability to investigate and prosecute alleged offenders prior to the commission of any procurement or grooming offence (that is, in the preparatory stages of the offence). The Carly Ryan Foundation submitted:

[N]o adult could have a legitimate reason for establishing false profiles with fake names, age and photos to contact and meet a child that is not known to them for legitimate purposes.

...

This online behaviour is a specific method used by those individuals with criminal intent. We wish to empower our law enforcement officers to act in order to prevent children suffering. Currently, the police have no ability to intervene before a crime is committed...This proposed law is the gap between our law enforcement agencies and the ability to make a difference before it's too late.¹⁶

12 *Submission 5*, p. 3.

13 *Submission 1*, p. 4. Also see: Law Society of Western Australia, *Submission 9*, p. 1.

14 *Submission 6*, p. 1.

15 *Submission 6*, p. 2. Section 272.20 of the Criminal Code criminalises acts committed with the intention of preparing for, or planning of, certain offences within Division 272—Child sex offences outside Australia.

16 *Submission 7*, p. 4. Also see: Ms Susan McLean, *Submission 3*, p. 9.

2.22 The Department acknowledged that the offence proposed in new subsection 474.40(1) might allow law enforcement agencies to intervene during the preparatory stages of an offence; however, the scope of the proposed offence may prevent the capture of actual criminal activity.¹⁷

Proposed new subsection 474.40(2) – intention of committing an offence

2.23 In relation to the new offence proposed in subsection 474.40(2), the Law Society of South Australia,¹⁸ the ACT Government¹⁹ and the Department expressed concerns regarding the construction of the provision. The Department particularly questioned the meaning of the term 'offence' in paragraph 474.40(2)(c) and the fact that it is not clear whether the term 'offence' means a Commonwealth, state or territory offence or a serious or other offence. Without clarification, it is possible that this provision could apply to an intention to commit any offence, with the result that a person charged with an offence under new subsection 474.40(2) could face a greater penalty than the offence he or she had intended to commit. Further, it is not clear what fault element would apply to this element of the proposed offence.²⁰

Committee view

2.24 The committee endorses the Bill's broad objective of enhancing the safety of children online; however, 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.

2.25 Further, the committee notes that the majority of submitters highlighted issues in relation to the formulation of the new offences in proposed new section 474.40. The committee agrees that, as a general principle, criminal offences must be precisely defined, and should avoid capturing non-criminal conduct unless there is a clear nexus between that conduct and the criminal conduct which is the subject of the offence. The committee agrees that the proposed offences, while potentially criminalising a broader range of conduct than that already covered in the Criminal Code, capture conduct that goes beyond reasonable and accepted limits of criminal responsibility.

2.26 The committee notes the proposed amendments to the Bill (9185), which have been circulated by Senator Xenophon. One effect of these amendments is to reduce the age stipulated in the Bill from 18 years of age to 16 years of age, consistent with Commonwealth criminal law policy. While the committee considers that this may address one of the concerns identified in submissions, it does not resolve the

17 *Submission 1*, p. 4.

18 *Submission 5*, p. 4.

19 *Submission 6*, p. 2.

20 *Submission 1*, p. 5.

committee's primary concerns that the Bill is not necessary and is too broad in its capture.

2.27 Therefore, the committee concludes that the Senate should not pass the Bill.

Recommendation 1

2.28 The committee recommends that the Senate not pass the Bill.

Senator Trish Crossin

Chair