



6 May 2013

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Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

and via email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Secretary

***Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013***

1. I refer to the referral of the *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013 (the Bill)* for inquiry and report on 28 February 2013. Thank you for the opportunity to comment and thank you also for the extension of time.
2. For your information, we also received an invitation to make a submission from the Law Council and we have provided a copy of this submission to the Acting Secretary-General, Mr Martyn Hagan.
3. The Society previously made a submission regarding the 2010 Bill. The 2013 Bill was further considered by the Society's Criminal Law Committee and accordingly we provide the following comments for consideration.
4. According to the Explanatory Memorandum, the purpose of the Bill is to make it an offence for a person who is over 18 years of age to misrepresent their age to a person they reasonably believe to be under 18 years of age for the purposes of encouraging a physical meeting, or with the intent of committing an existing offence. The Bill applies to online communications, and is intended to address the situation where adults represent themselves as teenagers or young people in order to encourage a meeting or other illegal activities.
5. We understand the proposed amendments arise from the Carly Ryan case. That case is tragic and saddening. The Society shares Senator Xenophon's concerns about the safety of children online, however for the reasons that follow, the Society is opposed to the establishment of the s 474.40 offences, as drafted.

6. The principal reasons are:

- a) the scope of the proposed offences captures a wide range of conduct of a non-criminal nature which would be outside the purpose and intent of the legislature; and
- b) the proposed offences are unnecessary having regard to the existing offence provisions.

7. Before considering the individual offence and other provisions, we make two preliminary observations.

8. The first is that, despite the express objects of the Bill, the offences are not limited to online chat forums where the identity of the parties to the online conversation is hidden behind the anonymity of the online curtain. As currently drafted, the offences extend to telephone and email communications where the parties may be known to each other.

9. The second is that the offence provisions criminalise conduct falling well short of the making of a misrepresentation. Section 474.40 is extracted below:

*474.40 Misrepresenting age to a person under 18 years of age*

*(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 misrepresenting his or her age; and*
- (c) the sender does this for the purpose of encouraging the recipient to physically meet with the sender (or any other person); and*
- (d) the recipient is someone who is, or who the sender believes to be, under 18 years of age; and*
- (e) the sender is at least 18 years of age.*

*Penalty: Imprisonment for 5 years.*

*(2) 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 misrepresenting his or her age; and*
- (c) the sender does this with the intention of committing an offence, other than an offence under this section; and*

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

*Penalty: Imprisonment for 8 years.*

10. Paragraphs (a) and (b) of each of sub-ss 474.40(1) and (2) provision require only that the person uses the carriage service "with the intention of misrepresenting....age". In other words, a person who uses a carriage service with the intention of misrepresenting his/her age but makes no such representation is guilty of an offence (assuming the other criteria are satisfied).
11. We suggest this is far too wide. If any conduct is to be criminalised in this Bill (which we oppose) it should be based on an actual misrepresentation as to age.

#### ***Subsection 474.40(1)***

12. The Society's principal difficulty with s 474.40(1) is that it criminalises conduct of a non-criminal nature. An example of this could occur where an 18 year old male meets in person someone he believes to be 17. The 17 year old may make comments along the lines that she prefers slightly older males.
13. Later, on the telephone, email or Facebook, the 18 year old may misrepresent his age as slightly older (for example, by two years). He does so in order to impress the 17 year old with a view to encouraging a future meeting.
14. 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 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.
15. We repeat our earlier observation of the width of the communication covered by the provision. It extends to situations where there is an open, non-anonymous communication over the telephone or email between two people who have already met.
16. Capturing conduct of a non-criminal nature is clearly unfair and oppressive. For this reason, at least as drafted, the offence provision is opposed.
17. However, the Society has other concerns with s 474.40. The first is with s 474(1)(d). If the offence is to be created (which we oppose), we suggest it must only be where the sender believes the recipient is under 18 years. Otherwise, the offence will capture more conduct of a non-criminal nature which, again, would be unfair and oppressive.

18. 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 23.
19. Offence provisions are only meant to capture conduct which is criminal in nature. It is no answer to this to suggest that the s 474.40(1) offence makes criminal any misrepresentation as to age because that ignores the purpose for which the offence was 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).
20. Importantly, it would also mean that the Bill fails the human rights implications test. The Explanatory Memorandum sought to counter the impact on the citizens' human rights by arguing importance of the right of children not to be unlawfully exploited. In the examples provided above, it could not be said that children are being exploited for an unlawful or any purpose.
21. In addition, the Society is of the view that s 470.40(1) is unnecessary. The Code already contains grooming offences which more appropriately criminalise conduct of a criminal nature (eg, ss 474.26 and 474.27).
22. Whilst the Society opposes the Bill, we proffer further comment below on the certain provisions of the Bill in the event Parliament intends to introduce it. We want to make clear, however, that our comments in this regard should not be interpreted as support for the Bill.

***Subsection 474.40(2)***

23. The Society makes the same comment with respect to s 474.40(2) concerning the importance of limiting criminal liability to cases where the sender believes the recipient is under 18 rather than is under 18: s 474.40(2)(d).
24. The Society otherwise is of the view that existing offence provisions capture the proposed impugned conduct. For example, unlawful sexual behaviour online is already criminalised.

***Subsection 474.41(3)***

25. The Society opposes s 474.41(3) (and therefore s 474.41(4)) on two bases. Firstly, in line with our suggestion that the actual age of the recipient is irrelevant, there will never be a need to prove the recipient's age.
26. Secondly, assuming age must be proved, whether evidence is admissible is a matter for the presiding judicial officer. Evidence is admissible if it is relevant to a fact in issue. Our concern with s 474.41(3) is that it could be interpreted to make admissible that which would not otherwise be.
27. We suggest that it confuses the issue. If age cannot be proven by a birth certificate then the existing rules of evidence will operate to allow evidence relevant to proving age, whatever that may be.

***Subsection 474.41(6)***

28. The Society opposes s 474.41(6) on the basis it is unnecessary. It seems that it may only operate where the recipient misrepresents their age as under 18. Typically the fictitious person scenario will occur in the case of a law enforcement officer in the course of duty. Paragraph (d) of sub-ss 474.40(1) and (2) captures conduct where the sender believes the recipient is under 18. This conduct will be captured regardless whether the recipient honestly represents their age or is a law enforcement officer misrepresenting their age in the course of duty. In other words, whether the recipient represents him/herself to be real or fictitious is irrelevant because liability still attaches under both of sub-ss 474.40(1) and (2) by virtue of paragraph (d).

***Subsection 474.42(2)***

29. The Society opposes s 474.42(2). It is unfair, apt to prejudice an accused person and unnecessary.
30. The accused bears the evidential burden with respect to the statutory defence in s 474.42(1) (ie, that he/she believed the recipient was under 18). A subjective belief is sufficient to avoid criminal liability. That being so there is no need for a provision which could be interpreted to mean that the belief must be objectively reasonable.
31. The jury, as the finders of fact, will assess the statutory defence in the same way it will assess other evidence (subject, of course, to the different evidential burden). Any version of events it considers reasonable is more likely to be accepted. With respect to s 474.42(1), the accused bears the evidential burden. That usually means that the accused needs to establish the belief was reasonable. However, whether the belief was reasonable must always be judged from the perspective of the person who is said to have that belief.

32. The jury should not consider whether they would have believed the recipient was 18 or over if they were in the same position as the accused. Rather, they must assess whether it was reasonable for the accused, attendant with his faculties and maturity, to have believed.

33. Subsection s 474.42(2) is unnecessary because the jury would take that into account in any event. The unfairness and potential prejudice is in the very existence of this provision because it will inevitably lead to a direction in terms of it.

Thank you for the opportunity to consider this matter.

Yours sincerely

John White  
**PRESIDENT**