



Australian Government
Attorney-General's Department

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**Submission of the Attorney-General's
Department**
**Senate Legal and Constitutional Affairs Legislation
Committee**

Criminal Code Amendment (Protecting Minors Online) Bill 2017

Introduction

1. The Attorney-General's Department welcomes the opportunity to provide the Senate Legal and Constitutional Affairs Legislation Committee with this submission as part of the Committee's inquiry into the Criminal Code Amendment (Protecting Minors Online) Bill 2017.
2. The bill will criminalise the use of a carriage service to do any act in preparation for, or planning to, cause harm to, procure, or engage sexual activity with, a minor.
3. The offence is designed to address the use of internet-based services, such as social media and messaging applications by adult predators who exploit the anonymity of the internet to forge relationships with children to lure them for sexual abuse and other forms of harm.
4. The new offence is designed to capture a broader range of preparatory conduct than existing offences in the *Criminal Code Act 1995* (Criminal Code) that criminalise the use of a carriage service to procure or 'groom' children for sexual activity.¹

Overview of Commonwealth child sex offences

5. The Criminal Code contains a number of offences aimed at protecting children online. For example, under sections 474.26 and 474.27 of the Criminal Code, it is an offence for a person over the age of 18 years (the sender) to use a carriage service to communicate with a person they believe to be under the age of 16 years (the recipient) with the intention of procuring the recipient to engage in sexual activity, or making it easier to procure the recipient to engage in sexual activity, with the sender or another person. There is also an offence of using a telecommunications network with the intention of committing a serious Commonwealth, State or Territory offence or a serious offence against a foreign law (section 474.14).
6. In 2010, Commonwealth child sex offences were expanded to protect children outside Australia from offenders who travel overseas to commit sexual offences or sexual exploitation against children. In addition to a range of other offences, a preparatory offence was included in s272.20 of the Criminal Code to capture the behaviour of people who are preparing for or planning to commit a child sex tourism offence.

Policy intention of the bill

7. The proposed offence captures a broader range of conduct than currently captured by the online child sex offences in the Criminal Code.
8. In particular, sections 474.26, 474.27 and 474.27A target adult offenders who use online anonymity to win the trust of a child as a first step towards the future sexual abuse of *that particular child*:
 - a. Section 474.26 makes it an offence to use a carriage service to procure a person under the age of 16 to engage in sexual activity. The offence applies when the adult sender communicates, using a carriage service, with a recipient who is, or who the sender believes to be, under the age of 16, with the intention of procuring the recipient to engage in sexual activity with the sender, or with another adult, or with another child in the presence of an adult.
 - b. Section 474.27 makes it an offence to use a carriage service to 'groom' a person under the age of 16. The offence applies when an adult sender communicates, using a carriage service, with a

¹ sections 474.26 and 474.27 of the Criminal Code

recipient who is, or who the sender believes to be, under the age of 16, with the intention of making it easier to procure the recipient to engage in sexual activity with the sender, with another adult, or with another child in the presence of an adult.

- c. Section 474.27A makes it an offence to use a carriage service to transmit indecent material to a child. The offence applies when an adult sender uses a carriage service to communicate indecent material to a recipient who is, or who the sender believes to be, under the age of 16.

9. Unlike the existing offences, the proposed offence captures behaviour that does not involve direct communication between the sender and a specific person under the age of 16. This reflects the evolving nature of internet and social media use, where direct messaging or communication between two people no longer represents the scope of online predatory activity. Online communication often involves individuals broadcasting information to a large audience with no particular recipient in mind. The creation of a profile, membership of an online group, or posting to the online world at large, can be a step in the preparation for sexual predation.
10. Noting the nature of modern internet communications, the offence captures preparatory conduct to enhance law enforcement agencies' ability to intervene before a perpetrator contacts a child. For example, the proposed offence is designed to capture the creation of a social media profile by a predatory adult with the intention of using that profile to establish an online relationship with a child, as a preparatory step to harming or engaging in sexual activity with a child. A preparatory act captured by the new offence could also include a person using social media to lie about their age, profession or an event in 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.
11. Preparatory offences in Commonwealth legislation are reserved for a narrow range of serious offences. For example, Commonwealth legislation includes preparatory offences for terrorism, foreign fighter offences, and overseas child sex offences.²
12. Existing preparatory offences criminalise engaging in conduct in preparation for, or planning, to commit a specified offence or conduct that would amount to an offence under the Criminal Code. The proposed offence similarly criminalises conduct preparatory to the commission of other offences.
13. The proposed offence makes it an offence to use a carriage service to prepare or plan to engage in sexual activity with a child. It is an offence at the Commonwealth level to engage in sexual activity with a child using a carriage service³ and to engage in sexual activity with a child outside Australia.⁴ Similarly, it is an offence in each state and territory for an adult to engage in sexual activity with a minor.
14. The proposed offence also makes it an offence to use a carriage service to prepare or plan to procure a minor for sexual activity. It is an offence at the Commonwealth level to procure a child for sexual activity using a carriage service⁵ and to procure a child for sexual activity outside Australia.⁶
15. The Law Council of Australia's submission queries whether the conduct referred to in proposed paragraph 474.25C(a)(i), that is, causing harm to a child, as defined in the Criminal Code, is itself a criminal offence. The

² See sections 101.6, 119.4 and 272.20, of the Criminal Code.

³ Section 474.25A of the Criminal Code.

⁴ Sections 272.8 and 272.9 of the Criminal Code.

⁵ Section 474.26 of the Criminal Code.

⁶ Section 272.14 of the Criminal Code.

reference to ‘harm’ has the same meaning as that set out in the Dictionary in the Schedule of the Criminal Code and includes both physical and harm to a person’s mental health. ‘*Harm to a person’s mental health*’ includes significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger. Offences against the person are generally a matter for states and territories. It is an offence in each state and territory to assault a person, including a person under 16, which captures conduct that would cause physical harm. Similarly, it is an offence in a number of states and territories to cause harm or injury to another person, including causing harm to a person’s mental health.⁷ The common law recognises that actual bodily harm is capable of including psychiatric injury.⁸

Previous bills seeking to criminalise misrepresentation of age to a minor online

16. In 2010, 2013 and 2016, bills were introduced into Parliament that sought to criminalise the misrepresentation of age to a minor online. These bills aimed to protect minors from adults who intentionally lie about their age online so as to gain their trust.⁹
17. The Legal and Constitutional Affairs Legislation Committee conducted inquiries into the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2010 (the 2010 bill) and the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013 (the 2013 bill). Iterations of these bills proposed offences for communicating with a minor using a carriage service with the intention of misrepresenting the sender’s age, and communicating with a minor using a carriage service with the intention of misrepresenting the sender’s age for the purpose of either encouraging a physical meeting, or committing another offence.
18. The Criminal Code Amendment (Protecting Minors Online) Bill 2017 is narrower in its application than the 2010, 2013 and 2016 Bills. Relevantly, the offence includes an intention to cause harm – that is, use of a carriage service to prepare or plan to cause harm, procure or engage in sexual activity with a person under the age of 16. The offence would capture misrepresentation of age online as part of a plan to cause harm. However, the offence is not limited to this type of preparatory conduct.

Key elements of the bill

Scope of conduct captured by the offence

19. The proposed offence captures a broad range of conduct so that, as technologies evolve and methods used by predators to target children online develop, the offence will remain applicable.
20. To establish this offence, the prosecution will need to prove beyond reasonable doubt that:
 - a. the person did an act, and
 - b. the person used a carriage service to do that act, and

⁷ In South Australia, it is an offence to cause harm to another person: “harm” means physical or mental harm (*Criminal Law Consolidation Act 1935* (SA) ss 21, 24); In Victoria, it is an offence to intentionally or recklessly cause injury to another person: “injury” means physical injury or harm to mental health (*Crimes Act 1958* (VIC) ss 18, 15); In the Northern Territory, it is an offence to cause harm to another person: “harm” is physical harm or harm to a person’s mental health (*Criminal Code Act 1983* s186).

⁸ Common law has included psychiatric injury in what may amount to actual bodily harm (see: *McIntyre v the Queen* (2009) 198 A Crim 549; *R v Chan-Fook* [1994] 2 All ER 552; *Lardner* (unreported, NSWCCA, 10 September 1998); *R v Ireland and Burstow* [1998] AC 147; *R v Morrison Ex parte West* (1996) 89 A Crim R 21).

⁹ Senate Legal and Constitutional Affairs Legislation Committee, *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2010*, June 2010, 1

- c. the person did that act in preparation for doing or planning to do (and intended to do) any of the following:
 - i. causing harm (as defined in the dictionary of the Criminal Code) to a person under 16 years of age,
 - ii. engaging in sexual activity with a person under 16 years of age, or
 - iii. procuring a person under 16 years of age to engage in sexual activity, and
 - d. the person is over 18 years of age.
21. Section 5.6 of the Criminal Code applies automatic fault elements to the physical elements of the offence.
22. The Bill requires the relevant act be done using a carriage service, which provides the relevant connection to the Commonwealth's constitutional power. The presumption that a carriage service is used to engage in this conduct under section 475.1B will apply so that the prosecution is not required to prove the use of a carriage service if it proves that the person engaged in the relevant conduct – that is, the act in preparation for, or planning to, cause harm to or engage in sexual activity with a child, or procure a child for sexual activity. For example, if it is proved that the act in preparation was to establish an online social media profile, the presumption has the effect of not requiring the prosecution to prove that a carriage service was used in the creation of the online profile. The purpose of this presumption is to address problems encountered by law enforcement and prosecution agencies in proving beyond reasonable doubt that a carriage service was used to engage in the relevant criminal conduct, and to minimise the burden on police and prosecutors to provide expert evidence and testimony that goes towards the technical aspects of this element of the offence. This is appropriate given that the element of using a carriage service serves as a jurisdictional element: it does not relate to the substance of the offending conduct, or a person's culpability, but links the offending conduct with the legislative power of the Commonwealth.
23. The reference to 'harm' in the offence has the same meaning as that set out in the Dictionary of the Schedule of the Criminal Code, and covers both physical and mental harm, and is not limited to harms derived from sexual activity (which is captured by paragraphs 474.25C(a)(ii) and (iii)). The intent of the bill is to capture conduct preparatory to a broader range of harm than currently exists and recognises that not all preparatory conduct is linked with an intention to engage in sexual activity with the child. The offence does not capture trivial physical contact or ordinary emotional reactions and allows for judgements to be made about what conduct is acceptable or incidental to social interaction or life in the community.
24. By criminalising acts done in preparation for causing harm to, or engaging in sexual activity with a child, or procuring a child for sexual activity, the proposed offence complements existing state and territory offences for assault and contact offending that would cause harm to a child and existing Commonwealth offences for using a carriage service to procure or groom persons under 16 years of age to engage in sexual activity.
25. The inclusion of paragraph 474.25C(a)(iii) clarifies that the offence will apply when the person prepares or plans to procure a child to engage in sexual activity with another person. The offence applies irrespective of whether the person was preparing or planning to procure the child to engage in sexual activity with him or herself, or with someone else.
26. The Law Council of Australia have noted in their submission that the scope of conduct captured by the current offences in the Criminal Code can be extended by virtue of Part 2.4 of the Criminal Code (Extensions of

criminal liability) and given the example of an attempt to procure or groom a minor. As the Law Council of Australia notes, extensions of criminal liability for attempt require a person's conduct to be more than merely preparatory to the commission of an offence.¹⁰ Extending criminal liability for existing offences of procuring and grooming¹¹ to include attempting to commit those offences would not meet the policy objective of proposed offence: that is, to criminalise acts in preparation for or planning to cause harm to or engage in sexual activity with a child, or procure a child for sexual activity. The proposed offence in the bill targets conduct that occurs before liability for attempt would arise.

Consequential amendments

27. Schedule 2 of the bill makes consequential amendments to the *Crimes Act 1914* and the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to ensure that existing law enforcement powers are available to law enforcement agencies investigating the new offence.
28. Amendments to the Crimes Act will ensure that vulnerable witness protections that apply to Commonwealth child sex offences will apply to criminal proceedings for the proposed offence, including the ability to give evidence by closed-circuit television, video recording, or video link.

TIA Act

29. The Bill makes consequential amendments to categorise the new offence as a 'serious offence' under the TIA Act.
30. As the offence in the bill specifically captures online conduct or conduct using a carriage service, it is appropriate for law enforcement to have access to:
 - a. interception information from real time communications, such as phone calls
 - b. stored communications, such as emails and instant messages, and
 - c. telecommunications data, such as subscriber details or call charge records.
31. Access to these investigative methods will enable law enforcement to effectively and efficiently investigate and prosecute the proposed offence. Such powers are available for other Commonwealth child-sex related offences.
32. The TIA Act generally requires that agencies obtain a warrant prior to intercepting communications.¹² The grant or refusal of these warrants is determined by an independent issuing authority, who is appointed to undertake this function under the TIA Act.
33. The TIA Act prescribes conditions that must be considered by that authority before a law enforcement agency can intercept or access communications for the purposes of investigating the proposed offence. For example, subsection 46(2) of the TIA Act prescribes factors the judicial authority shall have regard to when considering the grant or refusal of the warrant application, including:
 - a. how much the privacy of any person or persons would be likely to be interfered with

¹⁰ Section 11.1 of the Criminal Code.

¹¹ Sections 474.26 and 474.27 of the Criminal Code.

¹² Note there is a limited exemption for this for emergency interception in prescribed situations (see section 7 of the TIA Act).

- b. the gravity of the conduct constituting the offence or offences being investigated, and
 - c. to what extent methods of investigating the offence or offences that do not involve intercepting communications have been used by, or are available to, the agency.
34. The TIA Act also establishes a process of authorisation for access to telecommunications data. The threshold of 'reasonably necessary' does not allow access to data if it is merely helpful or expedient. The TIA Act provides assurance that this information is only accessed for law enforcement and appropriate investigative purposes.
35. The powers afforded to agencies under the TIA Act are key investigative tools for a range of criminal offences, the investigation of which is in the public interest. To ensure the integrity of this regime, access to, and use of, interception material, stored communications and telecommunications data is subject to checks and balances as provided by the TIA Act. These measures ensure that an individual's privacy is not unduly burdened.
36. The TIA Act prescribes additional safeguards, oversight and accountability mechanisms. Central to this is the Commonwealth Ombudsman, who has oversight on law enforcement agencies' use exercise of powers under the TIA Act. The Ombudsman conducts inspections and reports annually to Parliament on the use by agencies of these powers.